BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	))))	R.11-05-005

JOINT COMMENTS OF CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION AND SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY ON ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING COMMENTS ON COMPLIANCE AND ENFORCEMENT ISSUES IN THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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In accordance with the *Administrative Law Judge's Ruling Requesting Comments on Compliance and Enforcement Issues in the Renewables Portfolio Standard Program* ("ALJ Ruling"), dated September 27, 2013, and the California Public Utilities Commission ("Commission") Rules of Practice and Procedure, the California Municipal Utilities Association ("CMUA") and the Southern California Public Power Authority ("SCPPA") (collectively "Joint Commenters") respectfully submit these comments on behalf of their members.

I. INTRODUCTION

CMUA is a statewide organization of local public agencies in California that provide electricity and water service to California consumers. CMUA membership includes publicly owned electric utilities ("POUs") that operate electric distribution and transmission systems. In total, CMUA members provide approximately 25 percent of the electricity load in California.

Throughout this Rulemaking, POUs and organizations representing POUs have actively participated in order to provide record evidence and improve the decision-making process of the

Commission, in the spirit of collaboration outlined and contemplated in the Commission's Order Instituting Rulemaking.[1]

Public Utilities Code section 399.30(n)[2] provides that the Commission "has no authority or jurisdiction to enforce the requirements of [SB1X-2] on a local publicly owned utility."[3] The local governing boards that govern their respective POUs have the jurisdictional responsibility to enforce SB1X-2 on POUs. However, section 399.30(m)(1) provides:

> (m)(1) Upon a determination by the Energy Commission that a local publicly owned electric utility has failed to comply with this article, the Energy Commission shall refer the failure to comply with this article to the State Air Resources Board, which may impose penalties to enforce this article consistent with Part 6 (commencing with Section 38580) of Division 25.5 of the Health and Safety Code. **Any penalties imposed shall be comparable to those adopted by the commission for noncompliance by retail sellers.**[4]

Because of this statutory provision, the penalty structure adopted by the Commission may indirectly impact the penalties that may be imposed on POUs, and therefore, the Joint Commenters will actively participate in this process.

While the Joint Commenters do not address every question in the ALJ Ruling, a non-response should not be construed as an affirmative or negative answer to the question posed. The Joint Commenters reserve the right to reply to comments responding to all questions raised in the ALJ Ruling.

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[1] *See* Order Instituting Rulemaking Regarding Implementation and Administration of the Renewables Portfolio Standard Program, dated May 10, 2011, at 19.
[2] Unless otherwise noted, all statutory references are to the California Public Utilities Code.
[3] Cal. Pub. Util. Code § 399.30(n).
[4] (emphasis added)

II. RESPONSES TO SPECIFIC QUESTIONS RAISED IN THE ALJ RULING

A. Section 3.2 – Waiver of Portfolio Quantity Requirement

Question 3	*The statute provides that the Commission "shall waive enforcement of this section if it finds that the retail seller has demonstrated any of [the listed] conditions. . ." (emphasis added.)* • *Does the Commission have discretion to waive enforcement of the procurement quantity requirement (PQR) for any conditions that are not listed in Section 399.15(b)(5)? Why or why not?* • *If the Commission does have such discretion, for what additional conditions may it exercise its discretion to waive enforcement of the PQR? Please provide rationales that address both legal and practical implementation perspectives.*

While not commenting on the Commission's jurisdiction, the Joint Commenters encourage the Commission to closely analyze the extent to which waiving enforcement under discrete and justified conditions will contribute to a more robust and successful RPS program. If the Commission determines that it does have the discretion to waive enforcement for conditions beyond those listed in section 399.15(b)(5), "change in law" should be included as a condition that would merit a waiver of jurisdiction. If actions by the Legislature, Commission, or Energy Commission, retroactively cause a renewable resource or renewable energy contract (or the associated Electricity Products) to lose RPS eligibility or to be downgraded from a higher portfolio content category to a lower category, any noncompliance that results from the reliance on the associated Electricity Products should be a circumstance justifying a waiver of enforcement.

B. Section 3.3 – Reduction of Procurement Content Requirement

Question 3:	*Section 399.16(c) sets out minimum and maximum procurement percentages for resources defined in Section 399.16(b)(1) ("Category 1" resources) and Section 399.16(b)(3) ("Category 3" resources). Does the Commission's discretion to grant a reduction apply exclusively to obligations under Category 1 resources? Why or why not?*

Section 399.16(e) creates an optional compliance mechanism that permits a retail seller to apply to the Commission for a reduction in the procurement content requirements of section 399.15(c). The proper interpretation of this subdivision was initially discussed in the *Proposed Decision Setting Compliance Rules for the Renewables Portfolio Standard Program* ("April 2012 PD"), issued on April 24, 2012. The April 2012 PD proposed the following interpretation of section 399.16(e):

> As an initial matter, we note that this section addresses "reduction" of a quantitative portfolio content requirement. Although it would have been possible for the legislative language to authorize the Commission to "change" or "alter" a quantitative portfolio content requirement, it did not do so. Therefore, this section allows the Commission to lower the requirement of a minimum level of procurement meeting the criteria of Section 399.16(b)(1), with the limitation on certain reductions expressed in the last sentence of the section. It does not authorize the Commission to *increase* the limit on procurement meeting the criteria of Section 399.16(b)(3).[5]

On May 14, 2012, CMUA filed comments on the April 2012 PD that provided a legal basis for rejecting this interpretation and allowing the Commission to increase allowable Category 3 procurement. In response, the Commission adopted Decision 12-06-038, which removed the language limiting the applicability of section 399.16(e) to Category 1, choosing instead to defer this issue until a later decision. The ALJ Ruling raises this issue again. The Joint Commenters reiterate CMUA's earlier arguments below.

[5] PD at 74.

1. The Statutory Language Permits an Increase in Category 3 Procurement.

The interpretation expressed in the April 2012 PD hinged on the use of the word "reduction." This is an inaccurate reading of section 399.16(e), which uses the terms "reduction" and "reduce" in a very broad sense, providing: "[t]he commission may reduce a procurement content requirement of subdivision (c). . . ." The clear intent and meaning of this phrase is to allow the Commission to lessen the burden of the procurement content requirements set forth in section 399.16(c).

Interpreting the term "reduction" as strictly limited to ***lowering*** the percentage obligations found in section 399.16(c) is in conflict with the structure of the entirety of the balancing requirements contemplated in section 399.16. There is no percentage obligation associated with Category 2,[6] so applying this language to this category of electricity products would be meaningless. Section 399.16(c)(2) provides a maximum level of procurement for Category 3,[7] so a reduction in this numerical amount would serve to penalize retail sellers. This would lead to the irrational conclusion that this alternate compliance mechanism was intended to provide the Commission with the authority to make the requirements of SBX1-2 more burdensome, and therefore, more costly.

Such an interpretation also conflicts with the third sentence of section 399.16(e), which provides: "The Commission shall not, under any circumstance, reduce the obligation specified in paragraph (1) of subdivision (c) below 65 percent for any compliance obligation after December

[6] Cal. Pub. Util. Code § 399.16(c)(3) ("Any renewable energy resources contracts executed on or after June 1, 2010, not subject to the limitations of paragraph (1) or (2), shall meet the product content requirements of paragraph (2) of subdivision (b).").

[7] *Id.* § 399.16(c)(2) ("Not more than 25 percent for the compliance period ending December 31, 2013, 15 percent for the compliance period ending December 31, 2016, and 10 percent thereafter of the eligible renewable energy resource electricity products associated with contracts executed after June 1, 2010, shall meet the product content requirements of paragraph (3) of subdivision (b).").

31, 2016." In this case, the Legislature very clearly intended to impose a limit specific to only Category 1. Rather than referring generally to the procurement content requirements of subdivision (c), the statute specifically references the portion of subdivision (c) that provides the Category 1 requirements: paragraph (1).[8] This demonstrates that the Legislature knew how to limit section 399.16(e) to Category 1, and had the Legislature intended section 399.16(e) to be restricted to lowering Category 1 obligations, it would have been written as follows:

> A retail seller may apply to the Commission for a reduction of a procurement content ~~requirement~~obligation specified in paragraph (1) of subdivision (c). The Commission may reduce a procurement content ~~requirement~~obligation specified in paragraph (1) of subdivision (c) to the extent the retail seller demonstrates that it cannot comply with that subdivision because of conditions beyond the control of the retail seller as provided in paragraph (5) of subdivision (b) of Section 399.15. The [Commission] shall not, under any circumstance, reduce the obligation specified in paragraph (1) of subdivision (c) below 65 percent for any compliance obligation after December 31, 2016.

The Legislature deliberately used different statutory language than what is provided above. The clear meaning of the statutory language is that the Commission is empowered to reduce the burden of section 399.16(c). Pursuant to this clear meaning, the Commission has the authority to increase the allowable procurement of Category 3 electricity products.

2. The Intent of SBX1-2 Supports an Interpretation of Section 399.16(e) that Permits an Increase of Category 3 Procurement.

There is a clear and well-established rule of statutory construction, which provides that courts:

> must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general

[8] *Id.* § 399.16(c)(1) ("Not less than 50 percent for the compliance period ending December 31, 2013, 65 percent for the compliance period ending December 31, 2016, and 75 percent thereafter of the eligible renewable energy resource electricity products associated with contracts executed after June 1, 2010, shall meet the product content requirements of paragraph (1) of subdivision (b).").

purpose of the statute, and avoid an interpretation that would lead to absurd consequences.[9]

In determining the Legislature's intent in adopting section 399.16(e), it is important to look at the context of that section. Key to understanding section 399.16(e) is its relationship to section 399.15(b)(5), which gives the Commission the authority to waive enforcement of the RPS requirements if a retail seller demonstrates that one of various conditions prevented it from complying and was beyond the retail seller's control. These conditions include: (1) inadequate transmission capacity; (2) permitting, interconnection, or other problems resulting in delay; (3) lack of adequate supply of eligible RPS resources; or (4) unanticipated curtailment by a balancing authority. This optional compliance mechanism allows the Commission to ***completely excuse*** a retail seller from its compliance obligations if it met one of these requirements. Section 399.16(e) is directly related to this limitation because relief under section 399.16(e) is available to a retail seller to the extent that one of the conditions in section 399.15(b)(5) prevented the retail seller from complying with the section 399.16(c) procurement content requirements.

It is in this context that the purpose of section 399.16(e) is clear. Section 399.16(e) serves as an intermediate optional compliance mechanism for a utility that meets one of the conditions in section 399.15(b)(5) but where the utility wishes to comply to the full extent possible, rather than simply seeking a full exemption. Unlike section 399.15(b)(5), section 399.16(e) still requires the utility to fully comply with the procurement quantity requirements of SBX1-2. Accordingly, any significant limitation on a utility's ability to rely on section 399.16(e) would only result in the utility fully relying on section 399.15(b)(5) and, therefore, being excused from any enforcement for noncompliance.

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[9] *See* Torres v. Parkhouse Tire Serv., Inc., 26 Cal. 4th 995, 1003 (2001).

Therefore, this is not a matter of the Commission allowing an increase in Category 3 procurement at the expense of the other two categories. Instead, it is a matter of increasing Category 3 procurement rather than fully waiving enforcement of the compliance requirements. The result of applying the more narrow interpretation could very well mean less procurement of renewable energy, a result clearly at odds with the intent of SBX1-2. The Commission should interpret section 399.16(e) to confirm its clear discretion to increase a retail seller's permissible procurement of Category 3 electricity products.

C. Section 3.6.1 – Penalty Amount

Question 2:	*Should the penalty amount for failure to meet RPS procurement requirements be kept at $50/MWh for each MWh (i.e., REC) that the retail seller is below its PQR for the compliance period? Please provide rationales that address both legal and practical implementation perspectives.*

The Commission should completely change the calculation of the RPS penalty amount. The $50/MWh penalty was promulgated under a fundamentally different statutory scheme and at a different stage in the development of the renewable power industry. The market for renewable power has changed dramatically since the penalty was originally adopted in 2003. A $50/MWh penalty is substantially more costly than a reasonable net premium cost of a Category 1 electricity product in the current market. While the amount of the penalty should be set at a level that incentivizes compliance, it should not be set so high as to be unreasonably punitive. Further, as technology advances, the price of renewable energy products should continue to fall, making the $50/MWh penalty increasingly unreasonable.

More importantly, however, the $50/MWh penalty does not reflect the most significant change to the RPS requirements: the establishment of different portfolio content categories. If two retail sellers were short of their RPS obligations by the same amount, but Retail Seller A had

fully met its Category 1 procurement content requirement, while Retail Seller B had not, the existing penalty structure would fine them equal amounts. This result would occur in spite of the fact that Retail Seller A (that met its Category 1 obligation) would have incurred significantly higher costs due to the substantial price differences between the three portfolio content categories. The Commission's penalty amount should be structured in a way that recognizes and reflects this price difference.

Question 3:	*If the Commission should set a different dollars-per-REC penalty amount, please provide a sample calculation and comparison of the proposed new amount to the $50/REC figure.*

The Joint Commenters do not propose a penalty amount calculation in these comments. Instead, the following principles should guide the Commission as it evaluates the numerous party proposals and as it ultimately develops its own calculation.

1. The Penalty Amount Should Reflect the Relative Cost of the Different Portfolio Content Categories.

As described above, one of the most significant changes that SB1X-2 made to the RPS requirements was the creation of the three different portfolio content categories. As the market for these electricity products has developed, it has become clear that there is a substantial price difference between the three categories. SB1X-2 established a strong preference for Category 1 procurement by setting a minimum procurement amount that gradually increases in each of the first three compliance periods. This preference, along with other factors, has resulted in higher prices for Category 1 electricity products.

Therefore, in order for the RPS penalty amount to fairly reflect the retail seller's actual shortfall, the penalty amount must reflect whether the retail seller's RPS procurement shortfall was associated with a failure to meet the Category 1 procurement requirements or whether the shortfall could have been covered with Category 2 or 3 electricity products. The penalty for a

shortfall in Category 1 should be greater by an amount proportionate to the approximate difference in market price between the categories.

As described below, the Commission should not adopt separate penalties for the PQR and PBR. Constructing a penalty system that penalized both types of procurement would be unnecessarily complex and would risk double penalties.

2. The Penalty Amount Should Reflect the Culpability of the Retail Seller

The Commission should consider the retail seller's prior actions and the circumstances surrounding the non-compliance when determining the penalty amount, regardless of whether it is determined on a case-by-case basis or as a predetermined penalty. The Commission should assess harsher penalties for retail sellers with a history of non-compliance and for retail sellers that did not attempt in good faith to comply with the RPS requirements. Conversely, the Commission should impose lesser penalties on first-time offenders and retail sellers that made reasonable efforts to comply. The factors considered by the Commission should include, but not be limited to, the following: (1) the number and severity of prior violations; (2) extenuating circumstances; (3) and reasonable efforts to comply, such as the conditions specified in section 399.15(b)(5)(B)(i)-(iv).

3. The Penalty Amount Should Reflect the Size of the Entity

There are significant economies of scale involved in the development and procurement of renewable generation. Small retail sellers face greater difficulty both in negotiating long-term contracts and in constructing more cost-effective, utility-scale projects. Smaller retail sellers also face greater administrative challenges considering the complex regulatory structure of the RPS program and the project permitting process. These unique challenges should be taken into account by the Commission when establishing a penalty amount for RPS violations.

D. Section 3.6.2 – Penalty Cap

Question 2:	*Should the amount of the penalty cap be changed? Why or why not? Please provide rationales that address both legal and practical implementation perspectives.*

As with the $50/MWh penalty amount, the $25 million annual cap is clearly no longer appropriate for the current RPS program. Under SB1X-2, the ultimate RPS target has grown from 20% to 33%, and also includes the addition of minimum procurement amounts of higher cost Category 1 procurement. For the three large IOUs, $25 million would only account for a small percentage of their current annual RPS expenditures. Maintaining this cap would diminish the financial incentive to comply. Conversely, some of the smallest retail sellers have annual RPS expenditures far less than $25 million per year, making the cap disproportionately punitive. Maintaining the existing cap would provide no protection to those utilities.

Question 3:	*If the Commission should set a different penalty cap, please provide a sample calculation and comparison of the proposed new cap to the $25 million/year figure.*

Similar to the penalty amount calculation, the Commission should consider the following principles when developing the RPS penalty cap.

1. <u>The RPS Penalty Cap Should Reflect the Cost of Full Compliance Plus a Reasonable Penalty Amount.</u>

The penalty cap should bear a reasonable relationship to the expected RPS program costs and should not be set at an arbitrary level merely for simplicity and clarity. Toward this end, the cap should be set at a level that approximates the cost of the full compliance for the retail seller plus a reasonable and appropriate penalty margin, set high enough to incentivize compliance without unduly penalizing the retail seller. While it is not practical for the penalty cap to reflect the precise cost of full compliance, the Commission should rely on publicly available

information to approximate the cost of compliance and to periodically update the measurement based on changed market conditions.

2. The RPS Penalty Cap Should Adequately Reflect the Relative Size and Unique Structure of the Various Retail Sellers.

The Commission's penalty cap will be applicable to a broad spectrum of retail sellers that vary greatly by size and structure. For example, the mandate applies to both IOUs and Community Choice Aggregators ("CCA"). Within the universe of IOUs, the smallest IOUs have annual retail sales that are only a fraction of a large IOU's annual retail sales. On the other hand, CCAs are public agencies without shareholders to absorb any penalty amounts, and generally serve smaller retail load than the IOUs. Because the RPS program applies to a variety of different sized entities, a single dollar amount cap is clearly inappropriate. The Commission's approach to developing a penalty cap should seek to provide the same approximate limitation relative to the size and structure of the retail seller.

E. Section 3.6.3 – Penalties for Shortfalls in Procurement Quantity Requirement and Portfolio Balance Requirement

Question 1:	*Should the dollars-per-REC penalty amount be the same for failure to comply with either the PQR or the PBR? Why or why not?*

The Commission should not develop two separate penalty structures for PQR and PBR violations. A dual penalty structure would create complicated compliance scenarios where a retail seller may procure less than its full Category 1 procurement requirement, but then make up this shortfall with additional Category 2 procurement in an effort to reduce the potential penalty amount. These types of scenarios are out of step with the clear intent of SB1X-2 to encourage Category 1 procurement. It also is unnecessarily complicated and risks double counting penalties.

F. Section 3.7 – Alternative Compliance Mechanisms

Question 2:	*If the Commission does have the authority to use an alternative compliance mechanism, should the Commission do so? Why or why not? Please provide rationales that address both legal and practical implementation perspectives.*

The Joint Commenters do not provide any recommendation as to whether the Commission has the authority to or should adopt an alternative compliance mechanism at this time. However, the Joint Commenters suggest that further consideration of this topic be given in future workshops or rulings. The current RPS program is extremely complex and for many RPS-obligated entities (particularly the smaller entities) the administrative burden of managing the many requirements is severe. A straightforward and simple compliance option may be a reasonable solution for some of these entities. At a minimum, it is a discussion that the Commission should encourage.

G. Section 3.8 – RPS Citation Program

Question 1:	*Is the citation program established by Res. E-4257 an appropriate basis for a new citation program? Why or why not?.*

The prior RPS Citation Program must be completely reevaluated before it can be applied to the current RPS program. While the Joint Commenters recognize the need for clear and straightforward penalties for infractions, there are relevant factors that should be considered. In light of the amount and complexity of information that must be reported to the Commission, the RPS Citation Program should reflect these complexities and the overall magnitude of the infractions. The Commission should incorporate the following factors into its program: (1) the severity of the infraction (*e.g.*, a retail seller should be fined a different amount for submitting a nearly complete report than it should for not submitting any report); (2) the number and severity of prior infractions; and (3) the size and structure of the retail seller.

III. CONCLUSION

The Joint Commenters appreciate the opportunity to provide these comments to the Commission in this proceeding.

Dated: October 25, 2013

Respectfully submitted,

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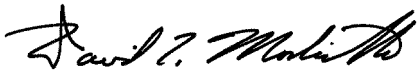
VERIFICATION

I am an officer of the California Municipal Utilities Association, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 25, 2013 at Sacramento, California.



Dave Modisette
Executive Director
California Municipal Utilities Association

VERIFICATION

I am an officer of the Southern California Public Power Authority, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 25, 2013 at Sacramento, California.

/s/ Tanya DeRivi
Director of Regulatory Affairs
Southern California Public Power Authority