BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	Rulemaking 11-05-005 (Filed May 5, 2011)

REPLY COMMENTS OF THE ALLIANCE FOR RETAIL ENERGY MARKETS ON COMPLIANCE AND ENFORCEMENT ISSUES IN THE RENEWABLES PORTFOLIO STANDARD PROGRAM

Andrew B. Brown
Ellison, Schneider & Harris, L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
Telephone: (916) 447-2166
Facsimile: (916) 447-3512
Email: abb@eslawfirm.com

Attorneys for the Alliance for Retail Energy Markets

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Table of Contents

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Pursuant to the September 27, 2013 *Administrative Law Judge's Ruling Requesting Comments on Compliance and Enforcement Issues in the Renewables Portfolio Standard Program* ("ALJ Ruling") and the October 18, 2013 *Administrative Law Judge's Ruling Granting Request for Extension of Time to File Comments and Reply Comments on Administrative Law Judge's Ruling Seeking Comments on Compliance and Enforcement Issues*, the Alliance for Retail Energy Markets ("AReM")[1] provides the following reply to various opening comments on the ALJ Ruling and recommendations for compliance and enforcement elements of the renewables portfolio standard ("RPS") program as administered by the California Public Utilities Commission ("Commission" or "CPUC").

I. Introduction

In its opening comments, AReM provided a comprehensive set of recommendations for enforcement and compliance with respect to (i) RPS Interim and Compliance Reports, (ii) The Procurement Verification process, (iii) the Procurement Quantity Requirement ("PQR") and

[1] AReM is a California mutual benefit corporation formed by electric service providers that are active in California's direct access market. The positions taken in this filing represent the views of AReM but not necessarily those of individual members or affiliates of its members with respect to the issues addressed herein.

Portfolio Balance Requirement ("PBR") Waiver Process, and (iv) Penalty Amounts. AReM notes that many of its recommendations and its responses to the questions posed in the ALJ Ruling on various elements of RPS enforcement and compliance are similar to those submitted by other parties. In these reply comments, AReM replies to opening comments that suggested alternative approaches, and why, in AReM's opinion, those alternatives will prove to be counterproductive, unnecessarily burdensome or costly, and/or unworkable.

II. Reply Comments

A. RPS Interim and Compliance Reports

AReM's recommendations with respect to the RPS Interim and Compliance Reports, as stated in its opening comments, are as follows:

- Interim Reports and Compliance Reports should continue to be afforded confidentiality protections[2];
- Reports should continue to be submitted to Energy Division;
- Reports should be served, not filed;
- Compliance verification for interim reports is limited to confirming that required information has been provided; and
- Energy Division should provide an initial verification determination regarding the eligibility and the portfolio content category ("PCC") classification of any procurement for which retail sellers have submitted supporting documentation in their interim report. [3]

AReM notes that several parties (Union of Concerned Scientists/Large Scale Solar Alliance/Sierra Club ("UCS et al"),[4] Southern California Edison Company ("SCE"),[5] and Green

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[2] As used herein, "interim reports" are those submitted in the years of a compliance period that preceed the final year of the compliance period. The "compliance report" is the report submitted by a retail seller by August 1 of the year following the final year of the compliance period and is the report upon which the retail seller's RPS compliance for that compliance period is determined

[3] See AReM opening comments, p. 2.

[4] UCS et al comments, pp. 1-2.

[5] It should be noted that SCE only recommends that "CEC-verified annual compliance report[s] for the last year of a compliance period should be formally filed if the retail seller is requesting a waiver of a

Power Institute ("GPI")[6]) all recommend that compliance reports should be formally filed, and that comments by third parties on compliance reports should be permitted. There is simply no precedent for a recommendation that third parties should be allowed to influence the Commission's determination of compliance. Indeed, none of the California energy agencies provide for such third party comments; for instance, third parties do not comment on the compliance reports submitted to the Commission or the California Independent System Operator ("CAISO") with respect to Resource Adequacy ("RA"), nor to the California Energy Commission ("CEC") to whom load forecasts must be submitted, nor to the California Air Resources Board ("CARB") to whom greenhouse gas emission reduction compliance reports must be submitted. Even current RPS compliance reporting, while served on parties in the RPS docket, is not formally filed. Introducing formal filing, and providing third parties the ability to comment on the compliance reports will simply serve no useful purpose and should be avoided.

AReM also notes that its views that third parties should not be allowed to comment on compliance reports also applies to requests for waivers that a party may seek, until such time as a proposed decision is publically available, as discussed in AReM's opening comments.[7]

Therefore, AReM reiterates its recommendations outlined above with respect to RPS Interim and Compliance Reports, as summarized above, with the additional following element:

- Third party comments on Interim and Compliance Reports should not be permitted.

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procurement quantity requirement, a reduction in a portfolio balance requirement, or if the Commission is otherwise instituting an enforcement process." (*See* SCE comments, pp. 19-20.)

[6] GPI comments, p. 3.

[7] AReM comments, pp. 8, 16, and 19.

B. Procurement Verification Process

AReM's recommendations with respect to the Procurement Verification Process, as stated in its opening comments, are as follows:

- Upon submission of compliance reports, Energy Division will make an initial compliance determination based on RPS compliance reports and any associated supporting documentation provided by the retail seller;
- For retail seller's found to be in compliance, this is the end of the verification process;
- For any retail seller found to be out of compliance, the retail seller will meet and confer with Energy Division regarding the non-compliance determination and attempt to resolve any discrepancies;
- If the discrepancies are resolved as a result of the meet and confer, that is the end of the verification process;
- If discrepancies are not resolved in the meet and confer with Energy Division, the retail seller will be assessed a penalty in accordance with the penalty requirements, unless the retail seller has initiated a waiver request, in which the determination as to the imposition of any penalties will not be made until the completion of the waiver process.[8]

AReM's recommended approach does not conflict with recommendations and comments on procurement verification submitted by other parties in opening comments. Therefore, AReM has no reply with respect to this element of its proposals, and recommends that the Commission adopt these recommendations to serve as the Procurement Verification Process protocols.

C. PQR and PBR Waiver Process

AReM's recommendations with respect to the PQR and PBR waiver process, as stated in its opening comments, are as follows:

- Retail sellers requesting a waiver of the PQR, a reduction of the PBR, or both will submit the waiver request to Energy Division[9];
- The retail seller should specify in its waiver request whether it is seeking a waiver of the procurement obligation, or some other remedy to resolve the shortfall, such as the ability to make up the shortfall in a future compliance period or other monetary sanction;

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[8] See AReM opening comments, p. 2.

[9] Unless otherwise stated, references herein to waiver requests include PQR waiver requests and/or PBR reduction requests.

- The waiver request will be submitted in one of two timeframes: (1) after the end of a compliance period up through the date the retail seller submits its RPS compliance report on August 1st, or (2) after the California Energy Commission ("CEC") and/or the CPUC have made a procurement verification determination that there is a shortfall for which the retail seller believes a waiver request is warranted;
- The retail seller will meet and confer with Energy Division in an effort to reach agreement on the waiver request, and any terms and conditions that Energy Division would seek in order to grant the waiver request;
- Energy Division will make an initial determination on the waiver request based on the information provided in the request, the RPS compliance report, and any associated supporting documentation provided by the retail seller, and will provide that initial determination to the retail seller;
- A short hearing will be held before an assigned ALJ in the RPS proceeding to review the Energy Division's initial recommendation and any relevant information presented by the retail seller;
- The hearing can be waived upon stipulation by Energy Division and the retail seller seeking the waiver that there is no dispute with respect to Energy Division's initial determination;
- An assigned ALJ in the RPS proceeding will issue a proposed decision on the retail seller's waiver request; and
- The proposed decision will be subject to a comment period in accordance with Rule 14 of the Commission's Rules of Practice and Procedure and will be adopted by the Commission in accordance with Rule 15 of the Rules of Practice and Procedure.
- The waiver request will be kept confidential up until the point of the ALJ issuance of a proposed decision. However, the proposed decision and adopted decision will maintain confidentiality protections in accordance with the existing confidentiality rules established in D.06-06-066 and D.08-04-023. [10]

While many parties' opening comments contain many of the same elements recommended by AReM, there were some notable differences to which AReM offers the following reply.

First, Pacific Gas and Electric Company ("PG&E")[11] and SCE[12] each suggest that waiver requests should not be permitted until the entire verification process is complete, which is different from AReM's recommendation that there should be two separate time frames in which

[10] See AReM Opening Comments, p. 3.

[11] PG&E comments, p. 11.

[12] SCE comments, p. 8.

waiver requests can be filed. The first waiver request time frame recommended by AReM is one that begins after the end of the compliance period and ends on the day that compliance reports are due. A request for a waiver in this time frame would, by definition, be a request for waiver of a shortfall that the load serving entity ("LSE") is aware of at the time the compliance report is made. The second time frame begins after the verification process is complete. In this instance, the shortfall for which the LSE would be seeking a waiver is a shortfall that the LSE knew existed only after the verification process is complete. AReM acknowledges that there is a certain efficiency that is gained by having the waiver process wait until the verification process is complete. However, the time lapse between the end of the compliance period and the completion of the verification process can be several years. An LSE that knows it will seek a waiver for the compliance report shortall should not have to wait that long to submit the waiver request and learn its fate. For this reason, AReM recommends that the Commission adopt the two time frames recommended above.

Second, the Los Angeles Department of Water and Power ("LADWP")[13] would allow LSEs to seek waivers at any time. LADWP offers no rationale as to why this should be permitted. However, as noted in its opening comments (and in the opening comments of others), permitting waiver requests before the end of the compliance period will reduce incentives to achieve compliance, and provide the LSE who gets an early waiver an unfair competitive advantage. For these reasons, AReM urges the Commission to limit the time frame for submissions of waiver requests to the two time frames recommended above.

[13] LADWP comments, p. 5.

Third, UCS et al[14] and San Diego Gas and Electric Company ("SDG&E")[15] both suggest that the PBR and the PQR must be met individually, indicating that an entity who cannot meet the minimum PCC 1 procurement obligation must nevertheless meet the full PQR. These parties appear to base this position on statutory interpretation.[16] However, the statute can also be interpreted such that an inability to comply with the PBR that is ultimately excused should also excuse a PQR shortfall, as PQR and PBR waivers are both permitted pursuant to conditions enumerated in Section 399.15(b)(5). Such an interpretation is advisable as a means to ensure that LSEs are not forced into costly over-procurement. If an LSE is unable to meet the PBR, and believes that the shortfall will ultimately be afforded a waiver, that LSE should not be put in the position of having to over-procure PCC 2 and/or 3 products just to meet the overall PQR, when such procurement is otherwise inconsistent with the statute which limits procurement from those categories.

Finally, 3 Phases Renewables, ConEdison Solutions, EDF Industrial Power Services, and Tiger Natural Gas (collectively the "Joint Parties"), "recommend that the Commission expressly recognize an additional, general condition for waiver of the PQR: the inability to meet the PQR despite having made 'commercially reasonable efforts' to do so."[17] AReM is concerned that a waiver category as recommended by the Joint Parties is one that can be widely interpreted and likely difficult to apply equitably over time. While AReM supports the Commission entertaining additional waiver options not explicitly provided for in statute, the granting of waivers based on

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[14] UCS et al comments, p. 7.

[15] SDG&E comments, p. 16.

[16] For example, it could be argued that Section 399.15(b)(2)(B)'s requirement to meet the PQR and Section 399.16(c)'s requirement to meet the PBR are separate and distinct obligations.

[17] Joint Parties' comments, p. 6.

grounds not explicitly provided for in statute should only be considered by the Commission if the conditions associated with granting the waiver do not result in providing a competitive advantage to the LSE.

Therefore, AReM urges the Commission to adopt AReM's waiver recommendations outlined at the start of this Section C.

D. Penalty Amounts

AReM's recommendations with respect penalty amounts, as stated in its opening comments, are as follows:

- A fixed, upfront penalty amount of $50 should be used;
- Double penalties should not be imposed, even if the shortfall for which the penalty is being assessed is a shortfall that impacts both the PQR and the PBR.[18]

There are several areas where AReM notes some divergence in other parties' opening comments from the recommendations outlined above.

First, several parties (PG&E[19] and LADWP[20]) suggest that there should be a separate enforcement process involving an Order to Show Cause before penalties can be imposed. AReM believes that such a process is unnecessary. If an LSE has a shortfall for which it has not secured a waiver, the imposition of the penalty should be automatic. In other words, the waiver process should be the venue in which alternatives to the penalty should be vetted and determined because

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[18] See AReM Opening Comments, pp. 3-4. It must be noted that AReM's opening comments included an additional bullet point recommending that penalty caps should be eliminated. That bullet point should have been removed from the final comments, but was inadvertently included from a prior draft. AReM's position regarding penalty caps was addressed on pages 28-29 of its opening comments, which recommends that penalty caps should be set at an appropriate level to encourage retail sellers to meet their RPS procurement targets while also proportionally adjusting the penalty cap to account for the size of the retail seller.

[19] PG&E comments, pp. 7-8.

[20] LADWP comments, pp. 11-14.

it is in that process that all the factors that contributed to the shortfall will be assessed against the statutory requirements for a waiver. Once the waiver process is complete, and the LSE has not reached agreement with Energy Division staff and/or the Commission on appropriate remedial steps (per the outline provided in Section C above), then there should be no further deliberation as to whether or not a penalty is warranted.

Second, California Municipal Utilities Association/Southern California Public Power Authority ("CMUA/SCPPA")[21] and Noble Americas Energy Solutions LLC ("Noble")[22] both suggest that the penalty regime should be re-evaluated, although both endorse the idea the penalties should be fixed and known in advance. CMUA/SCPPA also propose that penalty amounts should reflect the relative cost of the different PCC products (i.e., PCC 1 shortfalls should be penalized at a higher amount than PCC 2 or PCC 3 shortfalls). AReM does not oppose this position, necessarily, but cautions the Commission against adoption of an overly complex penalty structure, as additional complexity to an already complex RPS program may hinder the development of the renewable resources market.

There are also divergent views on the need for and level of any penalty cap.[23] AReM believes that the Commission has before it a good body of evidence and rationale to determine the appropriate level of penalties, whether there should be a cap, and, if so, what it should be.

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[21] CMUA/SCPPA comments, pp. 8-10.

[22] Noble comments, pp. 18-20.

[23] For example, PG&E, SDG&E and Noble all recommend that the current $25 million penalty cap be retained. (*See* PG&E comments, pp. 23-25; SDG&E comments, pp. 14-15; and Noble comments, pp. 20-21.) AReM, Bear Valley Electric Service ("BVES"), PacifiCorp, Shell Energy North America (US), L.P. ("Shell"), Marin Energy Authority ("MEA"), and the City and County of San Francisco ("San Francisco") all recommend that any penalty cap should be reasonably tailored to the size of the LSE. (*See* AReM comments, p. 28; BVES comments, pp. 10-11; PacifiCorp comments, pp. 12-13; Shell comments, pp. 11-12; MEA comments, p. 6; and San Francisco comments, pp. 2-3.) SCE recommends a $10 million penalty cap. (SCE comments, p. 15.) LADWP recommends evaluating a penalty cap on a case-by-case basis. (LADWP comments, p. 15.)

AReM urges the Commission to not delay in setting forth the rules that will govern the application of penalties as the renewable energy market will function much more efficiently with certainty in this regard.

Proposed penalty alternatives were also raised in opening comments, especially with respect to whether there need to be separate penalty amounts for each of the PCCs,[24] whether the current $50/MWh penalty should be eliminated or replaced,[25] and how much discretion the Commission should have in assessing penalties.[26] AReM continues to see little merit in establishing different penalty levels for the different PCCs, since shortfalls are likely to occur only in PCC 1.

In addition, SCE's recommendation[27] that an LSE should be allowed to avoid a penalty by offering to undertake new rate-based investment is wholly without merit, as such decisions require an entirely different application and review process. Moreover, SCE's suggestion that it should be given special consideration in the application of penalties because its shareholders bear the brunt of such penalties while competitive retail suppliers can impose these costs on their customers is completely without merit, and reveals SCE's limited understanding of the nature of competition. Competitive retail sellers are no more able to impose penalties for failure to comply with regulations than is SCE, and should they try to do so, their customers would find another supplier, a choice that SCE's customers do not have.

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[24] As raised by CMUA/SCPPA. (*See* CMUA/SCPPA comments, pp. 8-10.)

[25] As raised by SCE and CMUA/SCPPA. (*See* SCE comments, pp. 10-16; CMUA/SCPPA comments, pp. 8-10.)

[26] As raised by LADWP. (*See* LADWP comments, pp. 13-14.)

[27] SCE comments, pp. 13-14.

E. Other Issues

1. Prior Deficits

PG&E[28] and SDG&E[29] recommend that any waiver process adopted by the Commission should apply to any deficits from 2010 and earlier years. AReM strongly disagrees with this approach, as it contradicts the requirements specified in D.12-06-038. D.12-06-038 requires that prior deficits must be satisfied by December 31, 2013. D.12-06-038 provided additional flexibility to satisfy pre-2011 deficits, and the Commission should not provide further leniency or flexibility to postpone, waive, or reduce such deficits at this time.

2. RPS Citation Program

The Green Power Institute ("GPI")[30] and CMUA/SCPPA[31] recommend that the RPS citation program should be reevaluated to reflect the additional complexities of the new RPS program. This position is opposed by AReM, PG&E, SCE, SDG&E, and Shell Energy North America (US), L.P. ("Shell"),[32] who recommend retention of the existing citation program. No legitimate rationale has been presented to modify the existing citation program, particularly as the existing program is tailored to ministerial acts that continue under the new 33% RPS regime. Accordingly, the Commission should not revise the RPS citation program established in Resolution E-4257.

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[28] PG&E comments, p. 18.

[29] SDG&E comments, p. 11.

[30] GPI comments, p. 11.

[31] CMUA/SCPPA comments, p. 13.

[32] *See* AReM comments, pp. 32-34; PG&E comments, pp. 29-30; SCE comments, p. 21; SDG&E comments, pp. 17-18; Shell comments, p. 14.

III. Conclusion

AReM appreciates this opportunity to provide reply comments in this matter.

Dated: November 12, 2013

Respectfully submitted,

/s/

Andrew B. Brown
Ellison, Schneider & Harris, L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
Telephone: (916) 447-2166
Facsimile: (916) 447-3512
Email: abb@eslawfirm.com

Attorneys for the Alliance for Retail Energy Markets

VERIFICATION

I am the attorney for the Alliance for Retail Energy Markets ("AReM") and am authorized to make this verification on its behalf. AReM is absent from the County of Sacramento, California, where I have my office, and I make this verification for that reason. The statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information and belief, and as to those matters I believe them to be true.

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

Executed on November 12, 2013 at Sacramento, California.

/s/

Andrew B. Brown
Ellison, Schneider & Harris, L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
Telephone: (916) 447-2166
Facsimile: (916) 447-3512
Email: abb@eslawfirm.com

Attorneys for the Alliance for Retail Energy Markets