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 JOINT PARTIES ON COMPLIANCE AND ENFORCEMENT ISSUES

Gregory S. G. Klatt
DOUGLASS & LIDDELL, APC
21700 Oxnard Street, Suite 1030
Woodland Hills, California 92367
Telephone: (818) 961-3002
Email: klatt@energyattorney.com

Attorneys for the Joint Parties

November 12, 2013

TABLE OF CONTENTS

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 (Filed May 5, 2011)

REPLY COMMENTS OF THE JOINT PARTIES ON COMPLIANCE AND ENFORCEMENT ISSUES

In accordance with the September 27, 2013 Administrative Law Judge's Ruling Requesting Comments on Compliance and Enforcement Issues in the Renewables Portfolio Standard Program ("ALJ Ruling"), 3 Phases Renewables, Consolidated Edison Solutions, EDF Industrial Power Services, and Tiger Natural Gas (hereinafter collectively referred to as the "Joint Parties") hereby submit these reply comments.[1]

I. INTRODUCTION

The Joint Parties are electric service providers ("ESPs") that have relatively small customer loads or have not yet entered the California direct access market. As such, the Joint Parties face circumstances and difficulties related to compliance with the Renewables Portfolio Standard ("RPS") that may be particular to them and other retail sellers with small loads, including new market entrants, and it is from that perspective that the Joint Parties reply herein to the opening comments of the Green Power Institute ("GPI") and the jointly filed opening

[1] The ALJ Ruling provided that opening comments may be filed on or before October 21, 2013. In a subsequent ruling, the due date for opening comments was extended to October 25, 2013.

comments of the Union of Concerned Scientists ("UCS"), the Large Scale Solar Association ("LSA") and the Sierra Club.

II. REPLIES TO COMMENTS IN RESPONSE TO ALJ RULING QUESTIONS

For ease of reference, the Joint Parties' reply comments are organized under the same section headings and numbering system used in the ALJ Ruling.

3.1. Compliance Reports for Final Year of Compliance Period

The Green Power Institute and UCS/LSA/Sierra Club recommend the Commission require retail sellers to formally file their compliance reports and allow parties to comment on the filed reports. Contrary to what these parties suggest, however, doing so would not result in any increase in either "transparency" or ease of access for stakeholders or the general public.

Under the Commission's current practice, retail sellers submit their RPS compliance reports to the Energy Division and simultaneously serve a copy on the service list for the then-current RPS proceeding. Consequently, both the Energy Division staff who are responsible for verifying RPS compliance and every party on the service list of the RPS proceeding receives a copy of each report. If any party desires to file formal comments on a particular report or set of reports, that party need only file a motion requesting permission to do so. (Indeed, GPI has already availed itself of this option on several occasions.[2]) Since the reports are part of the Commission's official files, a party that wants to file comments need only request that a report be given official notice in order for it to be made part of the formal record of the RPS proceeding.

In addition to the above, the Energy Division posts every RPS compliance report on the Commission's website, where they are readily accessible by not only other Commission staff but

[2] GPI Opening Comments at 4.

also the general public. All that is required to access the reports is three "clicks" of the mouse button. Moreover, the Energy Division posts summary data on the progress of the utilities toward meeting their RPS obligations and increasing the renewable content of their energy mix on the same webpage as the reports. Without doubt, it is easier for members of the general public, who may not be familiar with the Commission's docket system, to locate the reports and other RPS data in this way as opposed to using the Commission's electronic docket system.

In short, requiring retail sellers to formally file their RPS compliance reports would not result in the RPS compliance process being more "transparent" or make it easier for stakeholders and members of the general public to access the reports and other compliance data. It would, however, materially increase the administrative burden and costs borne by RPS-obligated retail sellers. Accordingly, the Joint Parties urge the Commission to maintain the current submission/service/posting procedures without change.

3.2. Waiver of Portfolio Quantity Requirement

UCS/LSA/Sierra Club assert that the Commission may not waive a retail seller's Procurement Quantity Requirement ("PWR") for any reason other than the conditions listed in Public Utilities Code § 399.15(b)(5).[3] However, the arguments they advance in support of their position reveal a basic misunderstanding as to the Legislature's intent and are completely without merit.

UCS/LSA/Sierra Club assert that the language in § 399.15(b)(5) was "heavily negotiated" and "clearly spells out each of the conditions that would ***permit*** the Commission to waive compliance." [4] They fail, however, to provide any information from the legislative history to support its position that the Legislature intended for the listed conditions to be a "complete" list

[3] UCS/LSA/Sierra Club Opening Comments at 2.
[4] *Id.* at 2-3. (Emphasis added)

of the conditions under which the Commission may waive the PQR. That being the case, the Commission's inquiry as to legislative intent is limited to the statutory language itself.

For purposes of that inquiry, the key language of § 399.15(b)(5) is:

> The commission ***shall*** waive enforcement of this section if it finds that the retail seller has demonstrated any of the following conditions are beyond the control of the retail seller and will prevent compliance. (Emphasis added)

Even the most cursory reading of this language reveals that even UCS/LSA/Sierra Club's basic understanding of the intent behind § 399.15(b)(5) is erroneous, in that they wrongly characterize the conditions listed after the aforesaid language are being ***permissive*** grounds for a waiver. The word "shall" as used here is not permissive, but rather has the same meaning as "must." Accordingly, the language, properly understood, states a directive: If the Commission finds that any of the listed conditions are present, are beyond the control of the retail seller seeking the waiver, and will prevent the retail seller's compliance with the PQR, then the Commission ***must*** grant a waiver. There is no discretion involved. Since, as just shown, the language in § 399.15(b)(5) is prescriptive rather than permissive, UCS/LSA/Sierra Club's bald assertion—that "If the Legislature had intended for the compliance waivers described in the statute to be an incomplete list, the statute would clarify that the list contained in statute is not limiting"—obviously fails on its face.

In light of the above, it is clear that whether or not the Commission has the discretion to grant PQR waivers for reasons other than the prescriptive conditions listed in § 399.15(b)(5) cannot and does not hinge on the language in that section of the statute. Rather, as discussed in the Joint Parties' opening comments, the Commission's discretion must and in fact does derive from other sources. For the large investor-owned utilities ("IOUs") that are subject to its general jurisdiction, the Commission's discretion derives from its broad authority under Section 701 to

"do all things…which are necessary and convenient in the exercise of such power and jurisdiction."[5] For ESPs and other non-IOU retail sellers over which the Commission has only limited authority for purposes of the RPS program, the discretion to waive the PQR for reasons other than those listed in § 399.15(b)(5) derives from the Commission's express statutory authority to determine "the manner" in which such entities "participate in the [RPS] program."[6]

In short, the Commission clearly has discretion to grant PQR waivers for reasons other than the conditions listed in § 399.15(b)(5), and the Joint Parties urge the Commission to exercise that discretion if and when presented with waiver requests that demonstrate other reasonable grounds for granting such a waiver.

3.3. Reduction of Procurement Content Requirement

UCS/LSA/Sierra Club assert that "a reduction in a procurement content requirement does not reduce the retail sellers' overall [RPS] procurement obligations—these obligations must be made up at a later date."[7] However, § 399.15(c)(9) expressly provides that "Deficits associated with the compliance period shall not be added to a future compliance period." UCS/LSA/Sierra Club's position is thus contrary to the Legislature's intent in some if not all cases.

To explain, a retail seller seeking a waiver of the procurement content requirement ("PCR") will presumably only be allowed to submit its waiver request at the time it submits its compliance report for the last year of the compliance period—that is, in the year after the last year of the compliance period. As a practical matter, PCR waiver requests will almost if not always be with respect to the minimum requirement for Category 1 resources. In some cases, it may be possible for a retail seller that is granted reduction in Category 1 to "make up" the

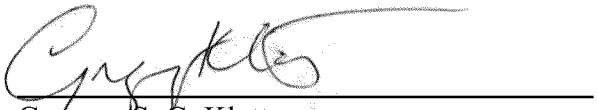
[5] All statutory references herein are to the Public Utilities Code.
[6] *See,* D.05-11-025 at 10-13; *see also,* D.06-10-019 and D.11-01-026.
[7] UCS/LSA/Sierra Club Opening Comments at 6.

shortfall with proportional increases Category 2 and Category 3 resources it had already procured during the compliance period in questions (or using "excess" procurement from an earlier period). In some if not most cases, however, the retail seller is likely to have a PQR deficit that in the same amount as its PCR shortfall of Category 1 resources.[8] In such circumstances, the effect of § 399.15(c)(9) is to preclude the Commission from requiring a retail seller that is granted a PCR waiver to "make up" the underlying procurement deficit in the next compliance period.

III. CONCLUSION

For the reasons above, the Joint Parties urge the Commission to reject the recommendations and positions of GPI and UCS/LSA/Sierra Club with respect to: (1) the procedural requirements for the submittal of RPS compliance reports; (2) the issue of whether the Commission has the discretion to grant PQR waivers for reasons other than the conditions listed in § 399.15(b)(5); and (3) the issue of whether the Commission may require a retail seller that is granted a PCR waiver to "make up" the corresponding PCR shortfall in the subsequent compliance period.

Respectfully submitted,



Gregory S. G. Klatt
DOUGLASS & LIDDELL, APC

Attorney for the Joint Parties

November 12, 2013

[8] In such cases, any reduction granted with respect to a retail seller's PCR for a given compliance period should automatically result in a corresponding, one-for-one reduction in the retail seller's PQR for that period.

VERIFICATION

I, Gregory S. G. Klatt, attorney for the Joint Parties, am authorized to make this Verification on their behalf. I declare under penalty of perjury that the statements in the foregoing Reply Comments of the Joint Parties on Compliance and Enforcement Issues 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.

Executed on November 12, 2013, at Woodland Hills, California.

Gregory S. G. Klatt
DOUGLASS & LIDDELL
21700 Oxnard Street, Suite 1030
Woodland Hills, California 92367
Telephone: (818) 961-3002
Email: klatt@energyattorney.com