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 UTILITY REFORM NETWORK ON COMPLIANCE AND ENFORCEMENT ISSUES

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REPLY COMMENTS OF THE UTILITY REFORM NETWORK ON COMPLIANCE AND ENFORCEMENT ISSUES

Pursuant to the September 27, 2013 ruling of Administrative Law Judge Simon, TURN submits these reply comments on the compliance and enforcement issues in the Renewables Portfolio Standard (RPS) program.[1] These comments respond to the opening comments of Pacific Gas & Electric (PG&E), Southern California Edison (SCE), San Diego Gas & Electric (SDG&E), the Joint Parties (Joint DA Parties), and Noble Energy.

I. WAIVER OF PORTFOLIO QUANTITY REQUIREMENT (SECTION 3.2)

The Joint DA parties, Noble, SCE and SDG&E all assert that that Commission may waive the fulfillment of RPS quantity requirements for reasons other than those explicitly identified in §399.15(b)(5). SCE and SDG&E assert that this statutory paragraph contains some, but not all, of the conditions that may entitle a retail seller to receive a compliance waiver.[2] SCE urges the Commission to consider "factors not included in the statute" including any "mitigating factors" that the utility believes are relevant.[3] The Commission should reject these interpretations as flatly inconsistent with the statutory language.

The enforcement waiver provisions in §399.15(b)(5) were a subject of intense and prolonged negotiations and should not be understood to be a partial (or illustrative) list of the relevant standards. They represent a complete and exclusive list of the permissible "conditions beyond the control of the retail seller".[4] Each condition is accompanied by a required showing that the retail seller took all possible measures

[1] TURN did not submit opening comments due to staff resource and workload constraints.
[2] SCE opening comments, page 10; SDG&E opening comments, page 3.
[3] SCE opening comments, page 10.
[4] Cal. Pub. Util. Code §399.15(b)(5).

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to avoid the condition from being triggered. The Legislature chose to limit a compliance waiver to three specific situations – (1) Inadequate transmission, (2) Insufficiency of supply, or (3) Unanticipated curtailment.[5] These are not meant to represent "the most likely scenarios"[6] (as suggested by SDG&E) but are intended to constitute a complete and exclusive list of reasons for being granted a noncompliance waiver. Had the Legislature intended to allow the Commission to establish other "conditions" to serve as the basis for an enforcement waiver, such language would have been included in this paragraph.[7]

TURN urges the Commission not to allow the waiver process to become an open invitation for an IOU, ESP or CCA to provide a laundry list of possible reasons for noncompliance. Such an approach does not comport with either the clear statutory provisions or the obvious intent of the Legislature. Moreover, the Commission should focus retail sellers on achieving compliance requirements rather than manufacturing innovative excuses for waiving noncompliance.

The Commission has already been presented with several creative approaches that would result from a very loose interpretation of this paragraph. Claiming that the waiver conditions contained in statute are "largely irrelevant and inapplicable to ESPs", the Joint DA parties suggest that waivers should be available based on a wide array of potential "difficulties and challenges" including unattractive pricing.[8] Specifically, the Joint DA parties assert that a waiver should be granted if the ESP can demonstrate that it made "commercially reasonable efforts" to comply.[9] Similarly, Nobel claims that the Commission should "liberally construe" these conditions and "should not be constrained by rigid adherence to waiver conditions presumptively

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[5] Cal. Pub. Util. Code §399.15(b)(5).
[6] SDG&E opening comments, page 3.
[7] For example, the statute could have read "or any other condition beyond the control of the retail seller as determined by the Commission".
[8] Joint DA opening comments, pages 4-5.
[9] Joint DA parties opening comments, page 6.

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designed for IOUs."[10]

There is no support for applying a 'good faith' test to requests for a compliance waiver by ESPs. Because the enforcement waiver criteria listed in §399.15(b)(5) apply to "retail sellers", it would be illogical (and illegal) to conclude that the Legislature intended to limit their applicability to investor-owned utilities. In other sections of the RPS code, the Legislature explicitly limited the applicability of particular provisions to "electrical corporations".[11] This is not the case with respect to the enforcement waiver. The Commission may not presume that the Legislature intended an outcome that is directly at odds with the plain text of the statutory provisions.

Moreover, the new statutory test sought by the Joint DA Parties would permit enforcement waivers based on a standard that cannot be found either explicitly or implicitly in the law. The Joint DA parties propose that ESPs would be able to receive a waiver based on having made "commercially reasonable" efforts to comply. This approach is not feasible given the fact that the Commission does not approve ESP solicitation protocols, contract language, pricing terms, or executed contracts. Moreover, the Joint DA parties appear to believe that the Commission may authorize a waiver if available resources are not "reasonably-priced."[12] Since the Legislature explicitly limited the application of the cost containment provisions of SBx2 to "electrical corporations", there is no basis for the Commission to adopt a similar limitation for other retail sellers.

TURN urges the Commission to reject these arguments and to instead apply the statutory provisions as written. Compliance waivers should be granted only if a

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[10] Nobel Energy opening comments, page 5.

[11] For example, the cost containment provision in §399.15(c) applies exclusively to "electrical corporations".

[12] Joint DA Parties opening comments, page 5.

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retail seller satisfies the specific conditions laid out in §399.15(b)(5). Furthermore, ESPs are not entitled to an alternative waiver process. The enforcement waiver provisions enacted by the Legislature should be understood to be deliberate, explicit and complete.

II. REDUCTION IN PROCUREMENT CONTENT REQUIREMENTS (SECTION 3.3)

PG&E argues that Procurement Content Requirements (PCRs) do not represent binding compliance obligations that trigger penalties, or any particular consequences, in the event that a retail seller fails to satisfy the requirements of §399.16. Asserting that the "overarching and primary goal of the RPS program" is based on total procurement quantities, regardless of the product content, PG&E suggests the PCRs are "secondary" in importance.[13] In the event of "unexcused failure", PG&E claims that SBx2 provides "the Commission substantial discretion on whether and how to remedy any portfolio imbalance."[14]

TURN strongly disagrees with this view. The PCRs in §399.16 were a fundamental component of the overall framework enacted in SBx2. Restrictions on the types of products eligible for compliance, and limitations on the use of unbundled Renewable Energy Credits, were a key point of debate amongst stakeholders and Legislators. The PCRs should be treated as a primary and independent compliance obligation that merits the same penalties and enforcement as a violation of the procurement quantity requirements. The notion that the Commission may not even enforce these obligations, as suggested by PG&E, should not be given serious consideration.

As PG&E is well aware, there are many sections of the Public Utilities Code that

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[13] PG&E opening comments, pages 16-17.
[14] PG&E opening comments, pages 16-17.

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establish requirements on load-serving entities but do not include specific statutory penalty or enforcement mechanisms in the event of noncompliance. This fact does not mean that such requirements are optional or that the Commission has discretion to waive compliance. The Legislature enacted the PCRs with the intent that they become binding on all Publicly Owned Utilities and retail sellers. This requirement should be subject to noncompliance penalties in the event that a retail seller fails to receive a PCR reduction (pursuant to §399.16(e)).

III. IMPLEMENTATION OF AB 2187 (SECTION 3.5)

In opening comments, Noble explains that AB 2187 was intended to allow "count in full" treatment to apply to any contract executed by an ESP through January 13, 2011 with product content category treatment applying to contracts executed after that date.[15] Noble further states that, as the sponsor of this bill, it intended to limit this treatment to ESP procurement contracts and that the date change does not apply to the requirements of §399.16(d).[16] Having worked closely with Noble on the final amendments to AB 2187, TURN agrees with this interpretation.

By contrast, MEA argues that all load-serving entities should be eligible to receive "count in full" treatment for any procurement contracts executed between June 1, 2010 and January 13, 2011.[17] This position is at odds with the direct language of §399.16(c) limiting this treatment to "electric service providers only". Had the Legislature intended to modify the applicable dates for all load serving entities, there would have been no need to limit the extension only to ESPs.

TURN was active in negotiating the precise language of AB 2187. Although the

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[15] Noble opening comments, pages 16-18.
[16] Noble opening comments, pages 16-18.
[17] MEA opening comments, page 5.

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statutory language is sufficiently explicit to reject MEA's expansive reading, a review of the Legislative history demonstrates that AB 2187 was limited to ESPs. Although the original bill would have extended this treatment to all retail sellers, amendments taken in the Assembly Natural Resources committee limited this treatment to ESPs. The Committee analysis explains that:

> The author has proposed amendments, reflecting a compromise with opponents, to limit application of the bill to ESPs for the limited purpose of applying the product content restrictions to contracts executed after January 13, 2011.[18]

After this amendment was made to the bill, it was passed by the Assembly and moved to the Senate for consideration. The Senate Energy, Utilities and Communications Committee analysis notes that while the RPS requirements apply to "IOUs, publicly owned utilities (POUs), community choice aggregators (CCAs), and ESPs":

> This bill allows an ESP to count the generation from any and all contracts entered into through January 13, 2011 as eligible procurement for any of the three compliance periods and for any of the three product categories or bucket requirements.[19]

"Electric Service Provider" and "Community Choice Aggregator" are separately identified in the RPS statutes and both are included in the definition of retail seller.[20] Had the Legislature intended to apply this date change more broadly, it would have either used the term "retail seller" or clarified that this change applies to ESPs and CCAs. The fact that the final language only references ESPs should be understood as intentional and exclusive.

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[18] Assembly Natural Resources Committee Analysis of AB 2187, April 23, 2012, page 3.
[19] Senate Energy, Utilities and Communications Committee Analysis of AB 2187, June 19, 2012, pages 1-2.
[20] Cal. Pub. Util. Code §399.12(j)(1), (j)(2).

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IV. NONCOMPLIANCE PENALTIES (SECTION 3.6)

While most parties support the existing $50/MWh noncompliance penalty and the $25 million maximum cap, some ESPs and IOUs suggest a variety of modifications designed to reduce the likelihood that a noncompliant retail seller (and its shareholders) would actually be liable for any meaningful consequences. TURN urges the Commission to retain the existing penalty levels, to ensure that any IOU penalties are paid by shareholders, and to reject proposals to provide retail sellers with the opportunity to manufacture additional rationales for noncompliance that go beyond the explicit requirements of the RPS statutory provisions.

SCE offers the novel argument that the Legislature did not intend for the Commission to enforce RPS noncompliance through the imposition of penalties. Claiming that the removal of language from SB 722 (the precursor to SBx2) demonstrates that "penalties are not the only enforcement tool available to the Commission under Public Utilities Code Section 2113."[21] This view is not reflected in the analyses performed by the relevant legislative policy committees considering SBx2.[22] The Legislature believed that it was authorizing a continuation of the Commission's existing noncompliance penalty mechanism. There is no basis for concluding that the Commission should alter this approach based on the enactment of SBx2.

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[21] SCE opening comments, page 11.

[22] Senate Energy, Utilities and Communications Committee Analysis of SBx2, February 15, 2011 ("This bill directs the CPUC to impose penalties on IOUs and ESPs for failure to meet the targets and to waive those penalties in specified instances where the IOUs or ESPs demonstrate specified factors have affected development of renewable generation including transmission and project delays beyond its control.); Senate Appropriations Committee Analysis of SBx2, February 23, 2011 ("The bill authorizes the Public Utilities Commission to impose penalties on investor owned utilities or energy service providers for failure to meet the bill's requirements.)

[22] Senate Appropriations Committee Analysis of SBx2, February 23, 2011

SCE further complains that shareholder penalties result in a misalignment of shareholder and ratepayer interests and suggests that the Commission allow utilities to invest in ratebased transmission and distribution assets as an alternative to either actual compliance or paying noncompliance penalties.[23] This suggestion should be emphatically rejected. Over the past decade, TURN has witnessed the powerful motivating force of shareholder penalties on utility procurement efforts. Absent this threat, TURN is not confident that utilities will focus on good-faith compliance activities and may instead propose endless alternative ways to spend money that would otherwise go towards renewable procurement. It would be a waste of the Commission's time to invite proposals for alternative compliance strategies that are increasingly attenuated from the core goal of RPS procurement. The Commission should not take this opportunity to radically alter the noncompliance penalty framework, eliminate shareholder penalties, or encourage alternative strategies for compliance that do not involve RPS procurement.

The Joint Parties and SCE separately assert that penalty levels should be based on the expected cost of renewable procurement needed to satisfy the relevant deficit. The Joint Parties propose varying the penalty based on the Product Content Category that is the basis for the shortfall.[24] SCE suggests that penalties should be capped at no more than $10 million per year.[25] These suggestions are not reasonable and would only dramatically complicate the process of enforcement. Moreover, calibrating the penalty to the expected cost of compliance would merely encourage ESPs to pay penalties rather than actually comply with RPS requirements. To the extent that a retail seller would pay the same, or perhaps less, under noncompliance, there would be significant incentive to not undertake the substantial work involved in procuring, scheduling and managing renewable generation.

[23] SCE opening comments, pages 12-14.
[24] Joint DA parties, page 13.
[25] SCE opening comments, page 4.

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Finally, PG&E makes a pitch for allowing any retail seller to offer rationales that extend far beyond any of the permissible excuses identified in statute as the basis for avoiding noncompliance penalties.[26] PG&E suggests that such evidence could be used to avoid levying penalties and may justify alternative remedies. The Commission should reject the notion that a retail seller failing to comply with specific program requirements, and lacking a waiver, should receive a second opportunity to construct a sympathetic narrative intended to justify the avoidance of penalties. Moreover, there is no basis for concluding that any alternative remedies are appropriate or permissible especially since the Commission is precluded from requiring additional procurement in a subsequent compliance period to satisfy shortfalls from a prior period.[27]

V. ALTERNATIVE COMPLIANCE MECHANISM (SECTION 3.7)

Several parties offer very preliminary suggestions regarding the development of an Alternative Compliance Mechanism.[28] These proposals are designed to reduce the cost of noncompliance, to make noncompliance potentially less costly than actual compliance, and to eliminate the potential for any utility shareholder consequences. TURN has historically opposed Alternative Compliance Mechanisms because they represent a solution in search of a problem.

The current noncompliance penalty mechanism is not broken and does not require reforms. Moreover, there is no need to link RPS noncompliance to the establishment of new funding sources for public goods programs, grid investment or GHG

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[26] PG&E opening comments, page 8.
[27] Cal. Pub. Util. Code §399.15(b)(9) ("Deficits associated with the compliance period shall not be added to a future compliance period.")
[28] Joint DA Parties opening comments, page 17; Noble opening comments, pages 22-24; PG&E opening comments, pages 3, 27.

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purchases. There is no basis for creating new programmatic initiatives for the sole purpose of finding ways to spend RPS penalty funds that may never be assessed or collected. The Commission should therefore defer any consideration of Alternative Compliance Mechanisms until and unless the current penalty structure is no longer viable or effective.

Respectfully submitted,

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VERIFICATION

I, Matthew Freedman, am an attorney of record for THE UTILITY REFORM NETWORK in this proceeding and am authorized to make this verification on the organization's behalf. The statements in the foregoing document are true of my own knowledge, except for those matters which are stated on information and belief, and as to those matters, I believe them to be true.

I am making this verification on TURN's behalf because, as the lead attorney in the proceeding, I have unique personal knowledge of certain facts stated in the foregoing document.

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

Executed on November 12, 2013, at San Francisco, California.

_________/s/_____________

Matthew Freedman
Staff Attorney

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