



California Municipal Utilities Association

915 L Street, Suite 1460 • Sacramento CA 95814 • 916/326-5800 • 916/326-5810 fax • www.cmua.org

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Initial CMUA Comments on Proposed Modification of Regulations Establishing Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities

The California Municipal Utilities Association (CMUA) would like to thank the California Energy Commission (CEC) for the opportunity to provide comments on the proposed *Modification of Regulations Establishing Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* (Proposed Modifications), issued on March 27, 2015. In order to further the discussion in this process, CMUA is submitting an initial set of comments on a subset of key issues for which CMUA has specific proposals. CMUA reserves the right to modify and further develop the proposals and positions set forth herein prior to the end of the formal comment period. CMUA intends to file comprehensive comments prior to the end of the 45-day comment period.

I. COMMENTS ON THE PROPOSED Modifications

A. Portfolio Content Category of Customer-Sited, Behind-the-Meter Generation

1. All Behind the Meter Generation

Consistent with the provisions of the Public Utilities Code, all distributed generation, including customer-sited, behind-the-meter generation is eligible to qualify as portfolio content category (PCC) 1 for the customer's host utility. Such generation meets all of the requirements of California Public Utilities Code section 399.16(b)(1)(A) because it has its first point of interconnection to distribution facilities used to serve end users within a California balancing authority area.

Failing to qualify all behind-the-meter, distributed generation as PCC1 encourages procurement from large and out-of-state projects over generation that is located close to load. This forces ratepayers to finance faraway renewable projects rather than investing in their local community. This also favors greenfield projects with greater

environmental impacts over generating facilities that generally uses space on existing buildings. This is contrary to the clear purpose of the portfolio content categories to require the procurement of generation that provides the most direct benefits to California.

This treatment is also contrary to the direction that the utility industry is taking to meet its electric generation demand. It is likely that renewable distributed generation will make up a substantial portion of the total generation portfolio in California within the next few decades. If behind-the-meter distributed generation can only qualify as PCC3, then under the CEC's current interpretation, this generation can make up no more than 10 percent of a utility's non-grandfathered renewable procurement. In order to meet the goal of 50 percent renewables by 2030 in a manner that maintains reliability while keeping costs low, California must consider and incorporate distributed generation into that target. Requiring a 50 percent renewables goal without any regard for the amount of rooftop solar that is being added to the grid would, in reality, be mandating a much higher RPS percentage and could result in significant cost increases.

2. The Proposed Definition of Bundled is Contrary to the Express Interpretation of the CPUC and the CEC.

The Proposed Modifications would amend the definition of "bundled" as follows:

"Bundled" means an electricity product that, when procured by the POU claiming the electricity product to satisfy its RPS procurement requirements, includes both the electricity and the associated renewable energy credits from an eligible renewable energy resource. If the POU owns the eligible renewable energy resource, then electricity products associated with electricity consumed onsite may be considered bundled electricity products. If the POU does not own the eligible renewable energy resource, then electricity products associated with electricity consumed onsite will be considered unbundled.¹

This new definition would limit the circumstances where generation that is serving POU load could be considered "bundled" to where the POU "owns" the eligible renewable energy resource. A restriction based on ownership is inappropriate, as it would seemingly prevent a POU from qualifying RECs as PCC1 even if the POU had a long-term power purchase agreement with a third party. This would be true even though the facility is located on the POU's own property and is serving POU load. The definition should not discriminate in the treatment of RECs based on such a distinction, as it not only unfairly penalizes one of the most common financing structures for behind-the-meter generation, but ignores common industry practices that include both owned and power purchase arrangements for generation procurement. Further, this interpretation is narrower than the prior discussion of this issue by both the CPUC and the CEC.

¹ Express Terms - Modifications of Regulations Establishing Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities ("Express Terms"), March 27, 2015, Section 3201(e).

1. CPUC and CEC Interpretation of Bundled Energy.

CMUA has strongly disagreed with the CPUC's and CEC's interpretation of the bundled requirements for PCC1 and PCC2 electricity products. However, even under this narrow interpretation, distributed generation may qualify as PCC1.

As interpreted by the CPUC and CEC, there are two key rules to determine if a REC is bundled or unbundled: (1) all RECs are bundled at the moment they are created; and (2) a REC cannot be "unbundled" unless there is a transaction for RECs without the associated energy. This was clearly stated by the CPUC in Decision (D.) 11-12-052:

As explained in D.10-03-021, RECs can be unbundled from the RPS-eligible generation **with which they were originally associated and sold separately**. In that case the transaction is a transaction for unbundled RECs. This is the case both in the framework of D.10-03-021 and the framework of new § 399.16. Regardless of whether the original generation and RECs would have counted in the "bundled" category under D.10-03-021, or in another portfolio content category under new § 399.16 if the RECs had been retired for RPS compliance without being transferred, **once they are unbundled and transferred, the RECs are by definition unbundled RECs**, subject to the rules of that portfolio content category.²

Similarly, the CEC's *Final Statement of Reasons* parallels the CPUC's conclusion:

Bundled products are required for PCC 1 and PCC 2 because PCC 3 in statute is defined to include unbundled RECs. PCC 1 and PCC 2 must exclude unbundled RECs to remain distinct categories and avoid a situation in which a REC could be classified in more than one PCC. This is discussed and explained in the ISOR. In order for a REC to be considered "bundled," it must be procured bundled by the POU retiring the REC for RPS compliance. **A POU that has procured only RECs, unbundled from the associated electricity, cannot be credited with having procured a PCC 1 or PCC 2 product, because PCC 1 and PCC 2 both require bundled procurement. At best, a POU that has procured only RECs may be credited with having procured a PCC 3 product.**³

Consistent with the interpretation of the CPUC, the CEC clearly describes that a REC is unbundled if it is procured separate from the associated electricity. If there is no transaction or transfer of RECs, then there cannot be any unbundled RECs.

² D.11-12-052 at 55 (emphasis added).

³ *Final Statement of Reasons: Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities*, July 2013, CEC-300-2013-004-F at A18-A19.

2. No Special Rules for Behind-the-Meter Generation.

In the 2013 FSOR, the CEC provided the following response to a comment of the Sacramento Municipal Utility District (SMUD):

33. COMMENT NO. 54.1: SMUD (see Comments, pg. 431) requests that the regulations clarify how electricity products from distributed generation facilities within SMUD's service territory, for which SMUD owns the RECs, would be classified under the PCCs.

RESPONSE: No change to the regulations. **The regulations do not classify different technologies or applications differently under section 3203.** If an electricity product meets the criteria of PCC 1, then that electricity product will be classified as PCC 1. It is possible that one eligible renewable energy resource could produce more than one type of electricity product.⁴

The CEC's response to this question makes it clear that there are no special classes of generation, such as distributed, behind-the-meter generation, that is somehow treated differently for purposes of determining if it is bundled or unbundled. Thus, generation associated with distributed generation is bundled at the time it is created and cannot be unbundled unless there is a subsequent transaction for only the RECs, without the associated energy.

3. Any Procurement From a Generating Facility Serving POU Load Is PCC1 Under the CPUC and CEC's Interpretation.

SBX1-2 defines "procure" as to "acquire through ownership or contract." The CEC's proposed definition for distributed generation ignores the second-half of this definition. While POU-owned distributed generation clearly qualifies as PCC1, as noted in response to SMUD's comment above, the PCC categorization of distributed generation is clearly determined by the appropriate contract terms. In any case where, through ownership agreement or contract, the POU procures the electricity and RECs together and then retires those RECs for its own compliance, the result is a bundled transaction that qualifies as PCC1. This is because at the moment the RECs are procured, through either ownership or contract, those RECs are bundled. The POU never transfers those RECs to any other entity, so the RECs never become unbundled.

The current definition of "bundled" is sufficient. However, if there is a need for greater clarity on this issue, the change to the Proposed Modifications should be in the form of an illustrative example, as follows:

"Bundled" means an electricity product that, when procured by the POU claiming the electricity product to satisfy its RPS procurement requirements, includes both the electricity and the associated renewable

⁴ *Id.* at A20

energy credits from an eligible renewable energy resource. For example, An Electricity product is bundled if the POU procures the electricity product from a generation facility located on property that is owned or leased by a POU and where the associated electricity is consumed by the POU onsite.

3. The CEC Should Clarify That a Retail Sale to a Customer that Has a Distributed Generation Facility That is selling its output to the POU does not violate the prohibition of resales back to the generator.

In any case where a POU procures the electricity and RECs from a facility that meets the interconnection requirements of section 399.16(b)(1), then that is a PCC1 electricity product. If this procurement is with a distributed generation facility that is located on a customer's owned or leased property, there is no special limitation just because a facility is located close to load. As long as the metering and contractual requirements meet the necessary standards for reporting and verification, there should be no difference between this type of transaction and an arrangement with a large utility scale generating facility located far from load.

The CEC has raised a concern that a facility located on customer property could be considered to violate Section 2303(a)(1)'s prohibition on selling the "underlying electricity from the electricity product back to the eligible renewable energy resource from which the electricity product was procured."⁵ This concern is misplaced. The POU will not be selling that underlying energy back to the customer. Instead, the customer is simply a retail customer of the POU who receives electric service like any other customer. The retail sale is not of the character that the CEC sought to prohibit with Section 3203(a)(1). The CEC was presumably protecting against transactions where a generator would sell electricity and the associated RECs to a POU, who would then immediately sell the electricity back to the generator at wholesale. The generator would then be able to make a subsequent wholesale sale of the initially procured electricity to a third party.

However, in the case of distributed generation interconnected within a California balancing authority, a customer's electric service is retail load separate from the generating facility, the utility is selling electricity to serve this retail load, and the customer has no authority or ability to sell the electricity that it receives to any third party. If a corporation sold bundled electricity and RECs from a utility scale solar facility to a POU and that same corporation had a large industrial plant that was a customer of the same POU, the RECs would still qualify as PCC1 even though the generator is getting retail electric service from the POU. There is no basis to treat a small generating facility that is located near load as any different.

⁵ POU Enforcement Procedures, Section 3203(a)(1).

The CEC should consider the following clarification:

Portfolio Content Category 1 electricity products must be procured bundled to be classified as Portfolio Content Category 1, and the POU may not resell the underlying electricity from the electricity product back to the eligible renewable energy resource from which the electricity product was procured. For purposes of this section 3203, a retail sale to a customer is not a resale of the underlying energy resource back to the eligible renewable energy resource.

B. Complaints and Investigations

Section 399.30(m) to (o) clearly and unambiguously create separate roles for the CEC and California Air Resources Board (ARB). Section 399.30(n)(1) clearly delineates the difference between these two roles:

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.

There is no role for the CEC to consider or recommend the penalties that a POU may be assessed in the event of noncompliance. The penalties are to be set by the ARB. For the CEC to even recommend a penalty would require the CEC to evaluate the criteria of the Health & Safety Code used to determine the penalty level, an area in which the CEC has neither the expertise or the legal authority to do so. Further, the proposed revisions to Section 1240(d)(1) would inappropriately require a POU to provide information regarding mitigating factors as part of an answer to a complaint. The POU's answer under 1240(d)(1) is the first step in the process of determining noncompliance. Factors that go to determining the amount of any penalty that may be imposed are relevant only if there is a finding of noncompliance. Since the CEC must determine whether there is a violation purely based on consistency with the statute, mitigation factors are irrelevant to that determination.

Consistent with these distinct roles, the CEC should delete all proposed modifications to Section 1240.

C. Excess Procurement

The Proposed Modifications include the following changes:

Electricity products procured under contracts of less than 10 years in duration shall be subtracted from the calculation of excess procurement, unless the electricity product meets the criteria in section 3202 (a)(2). If electricity products are procured under a contract of less than 10 years duration that has been amended to extend the term, the duration of the amended contract will be calculated from the contract amendment execution date to the amended contract end date. If a contract of at least 10 years duration is amended to extend the term by fewer than ten years, electricity products that are procured after the end of the original contract term will be subtracted from the calculation of excess procurement.⁶

The Proposed Modifications would make it even more difficult to use excess procurement, and without any indication of the policy objectives that would be met by imposing additional restrictions. The Proposed Modifications would only permit the inclusion of generation from a contract that has been extended, if the contract extension itself is more than ten year in length.

In light of the strict limitations on excess procurement, the CEC should not add any further restrictions without clear statutory support and significant public benefit. CMUA recommends that the proposals should be as follows:

Electricity products procured under contracts of less than 10 years in duration shall be subtracted from the calculation of excess procurement, unless the electricity product meets the criteria in section 3202 (a)(2). If electricity products are procured under a contract of less than 10 years in duration that has been amended to extend the total term to at least 10 years in duration, then electricity products generated as of the beginning of the Compliance Period in which the contract amendment occurs will be eligible to qualify as excess procurement. If a contract of at least 10 years in duration is amended to extend the term by any length, electricity products that are procured after the end of the original contract term will be eligible to qualify as excess procurement.

D. Delay of Timely Compliance

It would be beneficial for the CEC to provide greater guidance on the optional compliance measures so that a POU governing board has a better understanding of the CEC's interpretation of the RPS. One area that would be beneficial would be if the CEC could provide examples of "other circumstances" that are consistent with the requirements of the RPS. Section 399.15(b)(5) specifies that one basis for delay of timely compliance includes:

⁶ Express Terms, Section 3206(a)(1)(A)(3.).

Permitting, interconnection, or other circumstances that delay procured eligible renewable energy resource projects, or there is an insufficient supply of eligible renewable energy resources available to the retail seller.

While a POU's governing board may make a finding that a delay of timely compliance event has occurred, it will likely be many more years until the CEC will determine if the POU governing board's action was consistent with section 399.30. During this substantial delay, the POU will be unsure about the status of its compliance with the RPS. As describe below, CMUA recommends adding force majeure and regulatory delay to add greater clarity.

1. Force Majeure

As explained by the California Supreme Court:

“Force majeure,” or the Latin expression “vis major,” is not necessarily limited to the equivalent of an act of God. The test is whether under the particular circumstances there was such an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise of prudence diligence and care.⁷

Force majeure events clearly fit within the intent of this section to provide an exemption for events outside of the control of the POU. Therefore, force majeure should be listed as an example for “other circumstances.”

2. Regulatory Delay

The multi-year compliance periods, lengthy verification process, and delays in certification of certain eligible energy resources have created some serious challenge for the POUs. If, for example, a POU were to learn that the CEC disagreed with its interpretation of the PCC of a long-term contract, that POU may have relied on that contract for 6 or more years of procurement by the time that the POU learns of the CEC's determination. More specifically, it is likely that the verification process will not be completed until very near the end of the second compliance period. That means that a POU that learns that the CEC has issued a compliant against it, may only have a matter of months to make up three years of compliance issues. Additionally, several POUs were significantly impacted by the suspension of the RPS Eligibility Guidelines related to biomethane, and the subsequent delay in resolving that issue.

Because of this challenges, CMUA recommends that regulatory delay be listed as an example for “other circumstances.”

⁷ Pac. Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal. 2d 228, 238 (1946) (citing National Carbon Co. v. Bankers' Mortgage Co., 77 F.2d 614, 617 (1935)).

II. CONCLUSION

CMUA appreciates this opportunity to provide these comments to the CEC on the Proposed Modifications. CMUA asks that the CEC consider CMUA's recommendations.

Sincerely,



Tony Andreoni, P.E.
Director of Regulatory Affairs
California Municipal Utilities Association
915 L Street, Suite 1460
Sacramento, CA 95814
tandreoni@cmua.org



Justin Wynne
Braun Blaising McLaughlin Smith, P.C.
915 L Street, Suite 1270
Sacramento, CA 95814
(916) 326-5813
wynne@braunlegal.com

Attorney for the California Municipal
Utilities Association