

BEFORE THE CALIFORNIA ENERGY COMMISSION

**In the matter of:
Amendments to Regulations Specifying
Enforcement Procedures for the
Renewables Portfolio Standard for
Local Publicly Owned Electric Utilities**

Docket No. 14-RPS-01

California Energy Commission

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**NORTHERN CALIFORNIA POWER AGENCY COMMENTS ON
PROPOSED AMENDMENTS TO THE ENFORCEMENT PROCEDURES
FOR THE RENEWABLES PORTFOLIO STANDARD FOR
LOCAL PUBLICLY OWNED ELECTRIC UTILITIES**

The Northern California Power Agency (NCPA)¹ offers these comments to the California Energy Commission (CEC or Commission) on proposed amendments to the Regulations for *Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* (RPS Regulations), contained in the March 27, 2015 Notice of Proposed Action² (NOPA) and further addressed in the accompanying Express Terms³ and Initial Statement Of Reasons (ISOR).

I. SCOPE OF ISSUES

In these comments, NCPA focuses specifically on two proposed amendments that will significantly impact publicly owned utilities (POUs), and recommends revisions to the Express Terms and ISOR to be incorporated into the final regulation amendments. NCPA also supports the comments submitted by the California Municipal Utilities Association (CMUA), as well as those raised by CMUA's member agencies, and concurs with the positions and recommendations addressed therein. NCPA respectfully requests that the CEC modify the Express Terms and ISOR as discussed in these comments and in comments submitted by CMUA.

¹ NCPA is a not-for-profit Joint Powers Agency, whose members include the cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah, as well as the Bay Area Rapid Transit District, Port of Oakland, and the Truckee Donner Public Utility District, and whose Associate Member is the Plumas-Sierra Rural Electric Cooperative.

² *Modification of Regulations Establishing Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities*, dated March 27, 2015.

³ The proposed revisions set forth in the Express Terms will be referred to as "Proposed Amendments" throughout these comments.

II. SUMMARY OF RECOMMENDATIONS

- Modify the proposed revisions to Section 1240⁴ to retain the statutory distinction between a review of compliance under the RPS program and the separate process to determine whether or not penalties are warranted in the event of noncompliance.
- Strike the new requirement in Section 3207(c)(2)(I)⁵ requiring the reporting of POU consumption data, and rather utilize existing reports the POU's already provide to the CEC to obtain the relevant information.
- Revise the proposed definition of “bundled” in Section 3201(e) to remove the ownership restriction on counting electricity products as bundled.
- Clarify that all behind-the-meter, distributed generation that meets the interconnection requirements of Public Utilities Code section 399.16(b)(1) is eligible to qualify as Portfolio Content Category (Portfolio Content Category) 1, including POU procured electricity that is serving POU retail load, even if it is behind the meter.
- Revise the proposed changes to Section 3206(a)(1)(A)(3) to allow extensions to contracts originally for more than 10 years to qualify as excess procurement, even if the extension is for less than 10 years.

III. REVISIONS TO ENFORCEMENT PROVISIONS SHOULD BE REMOVED OR CLARIFIED

Proposed revisions to Chapter 2, Article 4, Section 1240⁶ would remove the clearly distinct division set forth in Public Utilities (PU) Code section 399.30 between the CEC’s role to verify compliance with the RPS mandate, and the California Air Resources Board’s (CARB or Air Resources Board) role in determining, what, if any penalties are warranted in the event that the CEC issues a notice of violation. PU code section 399.30(n)(1) provides that:

“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)

⁴ Unless otherwise noted, all references to “Section 1240” refer to RPS Regulation, Section 1240 (Title 20, Division 2, Chapter 2, Article 4).

⁵ Unless otherwise noted, all section references shall refer to the RPS Regulation, Title 20, Division 2, Chapter 13.

⁶ Express Terms, p. 22.

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.”

The Legislature granted explicit authority to CARB regarding penalties to enforce the RPS mandate.⁷ Health and Safety (H&S) Code section 38580 confers enforcement authority on CARB, and in exercising this authority CARB sets the final amount of a penalty based on all relevant circumstances, giving consideration to the eight factors specified in H&S Code section 42403. Under PU Code section 399.30(n)(1), CARB must also ensure that the penalties imposed are comparable to those adopted by the CPUC for retail sellers. This distinct role the legislature has reserved to the Air Resources Board is separate and apart from the Commission’s role to determine compliance with the RPS mandates.

The Legislature expressly granted the CEC authority to enforce the RPS mandates and determine compliance. That express delegation of authority does not extend to matters regarding the imposition of penalties in the event of noncompliance. The Legislature has placed matters regarding penalties for noncompliance within the sole purview of the Air Resources Board.

A. *Changes to the RPS Regulation fail to recognize the distinction between the authority granted to CARB and CEC under the RPS Program.*

Changes to Section 1240(d)(1) would improperly expand the role of the CEC to include matters that are relevant to “a possible monetary penalty.” Such a revision exceeds the CEC’s statutory authority and is contrary to the bifurcated roles the Legislature has conferred on the CEC and CARB relevant to the RPS program. Factors related solely to *penalties* are not appropriately part of the POU’s initial answer to a complaint that is geared to determining *compliance*. Whereas the current Regulation speaks to information:

“deemed relevant by the local publicly owned electric utility to support findings of fact regarding any mitigating factors *related to any alleged violation*”;⁸

the Proposed Amendments would expand this section to include:

“any mitigating *or otherwise pertinent* factors related to any alleged violation or to a possible monetary penalty that may be imposed for noncompliance.”⁹

⁷ Such authority is consistent with the Air Resources Board’s role in regulating air quality, and PU Code section 399.30(n)(3) provides that “for purposes of this subdivision, this section is an emission reduction measures pursuant to Section 38580 of the Health and Safety Code.”

⁸ Section 1240(d).

⁹ Express Terms, p. 22, emphasis added.

It is inappropriate for the answer to a compliant regarding an alleged violation to also include a review of “a possible monetary penalty that may be imposed for noncompliance.” Additional information that is not relevant to compliance, but rather only relevant to the potential imposition of penalties, assumes that the Commission has a role in making a determination regarding a potential penalty, which it does not.

The fact that the Proposed Amendment states that the POU *may* present this information is immaterial. The Proposed Amendment clearly contemplates that the findings contained in a Commission decision will include findings regarding mitigating factors relevant to a penalty, and the ISOR further states that CARB will have no independent review of the factors that agency is required to apply as part of its penalty authority.¹⁰ As such, under the Proposed Amendments, a POU would be precluded from addressing the mitigating factors before the Air Resources Board when that agency reviews a referral for the possible imposition of penalties. Such an outcome is contrary to the clear distinction of regulatory roles set forth in the Legislation.

The proposed addition blurs the unambiguous statutory distinction between the duties the Legislature has conferred on the Commission, and the separate responsibilities conferred on the Air Resources Board as it pertains to POUs and the RPS program. The ISOR further compounds this error in discussing the rationale to support the proposed revisions. The ISOR states:

“The Energy Commission’s final decision regarding any complaint issued pursuant to section 1240 will include all findings of fact, including any findings regarding any mitigating and aggravating factors, upon which the ARB will rely in assessing a penalty. The Energy Commission’s final decision and supporting record will serve as the basis for any subsequent ARB penalties assessed against a POU. The ARB does not intend to re-adjudicate the Energy Commission’s final decisions, any POU violations set forth in the decisions, or any findings of fact regarding the decisions. Consequently, it is in a POU’s interest, when providing an answer to an Energy Commission complaint, to identify any and all mitigating or otherwise pertinent factors related to any alleged violation or a possible monetary penalty that may be imposed by the ARB for noncompliance with the RPS. The changes to subdivision (d)(1) will encourage POUs to consider and address all mitigating and pertinent factors when answering an Energy Commission complaint.”¹¹

While it is NCPA’s understanding that the CEC does not intend to usurp CARB’s role in the RPS process, the proposed changes to Sections 1240(d) and (g), and the discussion supporting

¹⁰ ISOR, p. 13.

¹¹ *Id.*

the Proposed Amendments in the ISOR quoted above, do just that. The ISOR discussion is problematic in several respects.

First, the proposed revisions would require CARB to rely solely on the CEC's record for all aspects of its review, including application of mitigating factors related to a potential penalty. Section 1240(g) currently provides:

“The decision will include all findings, including findings regarding mitigating and aggravating factors, upon which the Air Resources Board **may rely in assessing a penalty** against a local publicly owned electric utility.”¹²

CARB has the statutory authority to impose penalties to enforce the RPS rules, and that authority requires CARB to take into account all relevant circumstances, including, but not limited to the eight factors set forth in H&S Code section 42403(b). Pursuant to the current RPS Regulation, in addition, CARB *may* rely on the CEC's findings regarding mitigating and aggravating factors relevant to a final determination of noncompliance. However, under the proposed changes, CARB has no such discretion, as the ISOR states that:

“[the] Commission's final decision regarding any complaint issued pursuant to section 1240 will include all findings of fact, including any findings regarding any mitigating and aggravating factors, upon which the **ARB will rely in assessing a penalty**.”¹³

The Proposed Amendments to Section 1240(b) adds language that the POU should provide information relevant “*to a possible monetary penalty that may be imposed for noncompliance,*” and according to the ISOR, CARB will have no discretionary authority to review the Commission findings relevant to the assessment of potential penalties. This improperly usurps CARB's legislative authority.

When read in its totality, the ISOR discussion clearly anticipates that the record regarding possible monetary penalties is closed and that the CEC's findings regarding any potentially mitigating factors are “final.” The ISOR states:

“... *it is in a POU's interest, when providing an answer to an Energy Commission complaint, to identify any and all mitigating or otherwise pertinent factors related to any alleged violation or a possible monetary penalty that may be imposed by the ARB for noncompliance.*”¹⁴

¹² Section 1240(g)

¹³ ISOR at p. 13.

¹⁴ *Id.*, emphasis added.

This is an improper expansion of the express statutory authority granted to the CEC by the Legislature. The purpose of the POU's answer to a complaint is to provide information, including any mitigating or otherwise pertinent factors, "*related to any alleged violation.*" Likewise, the CEC's review of the information provided by the POU is also "related to any alleged violation." While it is appropriate (and indeed in the POU's best interest) for the CEC to have information regarding mitigating or otherwise pertinent factors that relate to any *alleged violation*, it is totally inappropriate to seek information relevant to "a possible monetary penalty that may be imposed for noncompliance." Furthermore, as noted above, the fact that the POU is not *required* to provide this information is immaterial; when the proposed change and the rationale set forth in the ISOR are read together, the Commission is stating that the information cannot later be provided to CARB in the event a notice of violation is issued, which would preclude a POU from providing to CARB information relevant to that agency's independent determination of whether or not a penalty should be imposed.

Finally, ISOR language regarding the intent of the Air Resources Board should be removed as irrelevant. The obligations and responsibilities of the Commission and CARB are set forth in the statute. CARB's role regarding the potential imposition of penalties should not and cannot be abrogated or otherwise limited by a second-hand statement of intent. Accordingly, statements regarding the manner in which it is believed that CARB may carry out its statutory obligations are not appropriately included in the ISOR discussion.

B. The Commission has discretionary authority that is properly applied when issuing a final decision pursuant to Section 1240(g).

The Commission has considerable discretion as a regulatory agency. Reviewing the POU compliance filings and any filings in response to a potential complaint are quasi-legislative functions, and therefore require the Commission to exercise its authority in reviewing all relevant factors. That discretionary authority would also be exercised in issuing the findings and making a determination of compliance. Indeed, if the Commission's findings include a determination that a notice of violation is not warranted, then there is no need to forward the record to CARB,¹⁵ and there would be no role for the CARB in determining a potential penalty. This discretionary authority exists with or without the proposed changes to Section 1240(d), and with or without

¹⁵ See Section 1240(h)(1).

specifically enumerating the provisions of H&S Code section 42403(b) in the RPS Regulation. NCPA recommends that section 1240(g) be revised to clearly express this by making the following revision:

The decision of the full Commission shall be a final decision, and shall include a determination of whether or not the POU failed to comply with the RPS requirements. There is no right of reconsideration of a final decision issued under this section 1240. The decision will include all findings, including findings regarding mitigating and aggravating factors, upon which the Air Resources Board may rely in assessing a penalty against a local publicly owned electric utility pursuant to Public Utilities Code section 399.30, subdivisions (l) and (m). A notice of violation will be issued only upon a finding of noncompliance.

While the Commission’s findings regarding compliance are appropriate, the Commission’s consideration of the eight factors set forth in H&S Code section 42403 relative to a potential penalty cannot properly be reflected as “findings” without exceeding the CEC’s express statutory authority. The Commission has no authority – quasi-legislative or ministerial – regarding the potential imposition of penalties for the RPS program. Furthermore, if the CEC’s final decision does include “suggested penalties for the Air Resources Board to consider, as appropriate,”¹⁶ that recommendation must not be set forth as a “finding” and cannot be used to supplant an independent CARB review that is required if a potential penalty is to be imposed.

IV. COMPLIANCE REPORTING OF POU CONSUMPTION DATA MUST BE CLARIFIED

In addition to the reporting requirements that are specific to the RPS Regulation, POUs submit a multitude of reports to the Commission each year, many of which include information regarding retail sales, renewable energy procurement, and POU consumptions data. This is in addition to the many related reports that are provided to other agencies. It is in this light that NCPA asks that the Commission view any additional requests for information, in order to ensure that the information sought is both necessary and unique, in that it is not already provided to the Commission under an existing reporting requirement.

¹⁶ Express Terms, p. 23.

The Proposed Amendments would add a new requirement to Section 3207(c)(2).¹⁷ This change would require POU's to provide the following:

(I) A description of the energy consumption by the POU, including any electricity used by the POU for water pumping, the purpose of this consumption, the annual amount in MWh, and the annual amount in MWh being satisfied with electricity products.

In explaining the proposed revision, the ISOR¹⁸ states that:

“This information is needed to verify that energy consumption by the POU was properly characterized and was not otherwise counted as retail sales. Since a POU’s RPS procurement requirements are based on the POU’s retail sales, mischaracterizing the POU’s own energy consumption as a “retail sale” would result in higher RPS procurement requirements for the POU. Similarly, mischaracterizing retail sales as the POU’s own energy consumption would result in lower RPS procurement requirements for the POU.”

This new reporting requirement should not be adopted for several reasons. First, lacking a clear explanation of how the retail sales number is otherwise verified, or providing context for how the data will be verified, the information could result in an erroneous calculation of the POU’s retail sales. Great care should be taken to ensure that all data utilized in this assessment is consistent in both context and analysis to avoid such a scenario. Second, since this data is already provided to the Commission, the Proposed Amendment presents an additional and duplicative reporting burden on POU's. The imposition of added reporting requirements should only be done in instances where the Commission does not already have access to the information sought.

A. *The Proposed Revision requires additional reporting, but fails to address the context in which the requested data will be assessed.*

The information currently provided to the CEC as part of the POU’s RPS report includes a number for total retail sales. The RPS Regulation defines retail sales as excluding “*energy consumption by a POU, electricity used by a POU for water pumping, or electricity produced for onsite consumption (self-generation).*”¹⁹ As such, the POU consumption data is not part of the

¹⁷ Express Terms, pp. 18-19.

¹⁸ ISOR, pp. 11-12.

¹⁹ Section 3201(bb).

retail sales figure that is included in the POU's RPS Report and upon which the compliance obligation is determined.

The proposed new reporting requirement is problematic in that there is no context for how it will be used to verify the retail sales figure. Since this consumption data should already be excluded from the reported retail sales value, there is nothing upon which to compare the POU consumption data for purposes of verifying whether that figure was properly calculated. Neither the RPS Regulation, nor the Proposed Amendments, address how the retail sales number is verified and what, if any, other sources of data the Commission uses to corroborate the number. Without this context, any findings regarding the characterization of the POU consumption would be of little value, and could result in confusion and misinformation in the event that differing benchmarks are used for making the finding.

To completely address the issue of determining whether or not POU consumption is properly characterized, data regarding *both* total sales and POU consumption must be assessed, and the source of that data must be known in order to ensure that the verification is based on a consistent format. Providing additional data for verification purposes is of no use without a comparison source and without context regarding what that data is being compared against.

B. The Proposed Amendment will result in an unnecessary and duplicative reporting obligation for POUs.

The POUs already provide a significant amount of information to the CEC regarding electricity sales, and in fact already report the retail sales and non-retail throughput to the CEC on an annual basis. To the extent that the Commission is looking to assess the retail sales versus POU consumption data, the information is reported in the Power Source Disclosure Report, submitted annually. As such, the Commission should already have the information needed to make the necessary determination of the applicable retail sales figure upon which to assess the POU's compliance with the RPS Regulation.

Rather than require additional information, without the proper context for how that information will be used, the CEC should refer to the existing reports already provided to the Commission by the POUs. Utilizing the Power Source Disclosure Report provides the Commission with both essential elements of data that are necessary to determine the appropriate retail sales figure, and avoids the imposition of additional reporting mandates. To the extent that the Power Source Disclosure Report does not provide the level of specificity the CEC is seeking,

it should be revised to address this issue, rather than require the same data to be submitted in multiple formats in duplicative reports.

NCPA welcomes the opportunity to work with staff to discuss the manner in which the data already provided to the CEC can be better utilized to meet the additional needs of the RPS program, without additional reporting burdens being placed on the POU's.

V. OTHER ISSUES

As more fully set forth in the comments submitted by CMUA, NCPA also recommends that the Commission incorporate the following changes into the Proposed Modifications.

A. The definition of “bundled” should not be limiting.

The Commission should revise the Proposed Amendments to Section 3201(e) defining “bundled.” The proposed definition is unduly restrictive and placed an unwarranted restriction on the POU’s interest in the renewable resource. As such, the definition of “bundled” in Section 3201(e) should be revised to remove the ownership restriction on counting electricity products as bundled.

B. Section 3203(a)(1) should be changed to clarify resource eligibility for PCC 1.

As more fully addressed in the comments submitted by CMUA and the Southern California Public Power Authority, it is imperative that the RPS Regulations properly reflect the eligibility requirements of the renewable resources to ensure that valuable generation can be counted under the appropriate PCC. As such, the RPS Regulations should be amended to clarify that all behind-the-meter, distributed generation that meets the interconnection requirements of PU Code section 399.16(b)(1) is eligible to qualify as PCC 1, including POU procured electricity that is serving POU retail load, even if it is behind the meter.

C. Proposed Changes to the Eligibility of Excess Procurement Should be Modified.

Proposed Amendments regarding the calculation of generation that may be counted towards excess procurement should also be revised. The Commission should clarify that contracts with an original term of 10 or more years already meet the statutory objective of encouraging long term commitments, and any generation from a contract extension – even if the extension is for less than 10 years – should be eligible for excess procurement.

VI. CONCLUSION

NCPA appreciates the opportunity to provide these comments on the Proposed Amendments, and respectfully requests adoption of the revisions addressed herein. Please do not hesitate to contact the undersigned or Scott Tomashefsky at 916-781-4291 or scott.tomashefsky@ncpa.com with any questions.

Dated this 11 day of May, 2015.

Respectfully submitted,



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