



California Municipal Utilities Association

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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. CMUA's individual members may provide additional comments to the CEC that are not addressed in this letter.

On April 30, CMUA provided initial comments (Initial Comments)¹ recommending that the Proposed Modifications be changed to: (1) recognize that all behind-the-meter, distributed generation is eligible to qualify as portfolio content category (PCC) 1; (2) change the definition of "bundled", at a minimum, to also include not only POU ownership, but also power purchase agreements (PPAs); (3) change the requirements for PCC1 to clarify that a retail sale to a customer does not violate the prohibition on selling the underlying electricity back to the generator; (4) delete the new provisions relating to the CEC's enforcement authority; (5) provide more flexibility relating to the contract extensions for the 10-year requirement for excess procurement expansion; and (6) add force majeure and regulatory delay to the other circumstances justifying a delay of timely compliance finding.

CMUA submits these supplemental comments to expand on the arguments from its Initial Comments and to raise additional issues.

¹ Available at: http://www.energy.ca.gov/portfolio/pou_rulemaking/2014-RPS-01/2015-04-09_workshop/comments/California_Municipal_Utilities_Association_Comments_on_Proposed_Modification_of_Regulations_04-30-15.pdf.

I. COMMENTS ON THE PROPOSED MODIFICATIONS

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

CMUA's Initial Comments reiterated the clear legal and policy arguments supporting much greater flexibility in the ability to qualify behind-the-meter, distributed generation as PCC1. 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 PCC1. Even without correcting the current, restrictive interpretation of DG eligibility for PCC1, the RPS Regulations must properly recognize that where the POU is procuring the electricity products either through ownership or PPA, then those RECs are PCC1 even if the facility is located behind the meter and serving POU load. Finally, where a generating facility is located on customer owned or leased property, but the otherwise applicable contract and metering requirements are met, that transaction is also eligible to qualify as PCC1, regardless of whether the utility sells power at retail to the customer.

As stated in CMUA's Initial Comments, 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 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.

Further, CMUA supports the following change to Section 3203(a)(1):

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.

In support of these recommended changes, CMUA provides the following supplemental argument.

1. The CEC's Description of Distributed Generation is Inconsistent with the Legislative Direction Establishing the Net Metering Program.

The CEC's support for the interpretation of behind-the-meter generation as PCC3 is based on an understanding of the transaction between a POU and its customer where the only exchange of electricity products between the utility and the customer occurs when there is either an incremental surplus (where the customer is generating more than it is consuming) or where there is an incremental shortfall (onsite generation is insufficient to meet customer demand). The CEC appears to believe that all onsite generation is consumed onsite by the customer and, therefore, the associated renewable energy credits (RECs) are inherently unbundled PCC3 RECs if transferred to another entity. The CEC's interpretation only permits generation to be eligible for PCC1 if there is net surplus generation.

This interpretation is inconsistent with the relevant Net Energy Metering Program statute, Public Utilities Code section 2827, which addresses the requirements for the majority of customer sited, behind-the-meter generation.² Section 2827(b)(6) defines net energy metering as follows:

'Net energy metering' means measuring the difference between the electricity supplied through the electrical grid and the electricity generated by an eligible customer-generator and fed back to the electrical grid over a 12-month period as described in subdivisions (c) and (h).

Section 2827(h) goes on to state that:

For eligible customer-generators, the net energy metering calculation shall be made by measuring the difference between the electricity supplied to the eligible customer-generator and the electricity generated by the eligible customer-generator and fed back to the electrical grid over a 12-month period.

Section 2827 clearly states that the applicable NEM credit is determined by netting all energy "supplied through the electric grid" to the customer against all "electricity fed back to the electrical grid." This section does not contain any of the restrictions or limitations reflected in the RPS Enforcement Procedures. Section 2827 does not state that only surplus sales above the customer's own needs are being transferred to the utility, nor that the utility is only selling energy to the customer when the customer's onsite generation is insufficient to meet demand. Instead, section 2827 clearly states that **all** of the generated energy is being transferred to the utility and then the utility is providing back to the distributed generation customer **all** of the customer's energy demand.

² Subsequent programs established by the Legislature, such as the small-scale renewable program established under Section 399.20 of SBX1-2 have continued to identify these resources as RPS-eligible.

The CEC's interpretation appears to be that the utility is either: (1) only selling to the distributed generation customer when the customer's generation is not available; or (2) only purchasing energy when the distributed generation customer has excess electricity. This is not consistent with the statutes relating to the net energy metering program. In particular, net-metered customers must be treated comparably in the tariffs as all other customers and the statute specifically precluded the application of stand-by charges typically applied to self-generation customers.³

The Legislature's objectives in adopting the net metering program are similar to and mirror the goals established by the Legislature for the RPS program.⁴ The net metering program also clearly envisioned the creation of RECs and the assignment of their ownership with surplus generation belonging to the utility, and on-site generation equal to the customer's load being retained by the customer.⁵ As long as a utility has utilized the appropriate tariff or contractual terms to receive both the energy and associated REC from this distributed generation through a forward sale, there is no reason why that energy should not count fully as a PCC1 resource towards the utility's RPS requirements.

B. Enforcement

1. The CEC Has Broad Authority To Determine If a POU Has Violated the RPS Program, But No Authority Regarding a Potential Monetary Penalty

Public Utilities Code section 399.30(m) grants the CEC authority to determine compliance with the RPS program. That same section gives the California Air Resources Board (ARB) exclusive purview over matters regarding the application of penalties. As such, the proposed revisions to Section 1240(d) that seek information regarding any mitigating or otherwise pertinent factors related "to a possible monetary

³ Cal. Pub. Util. Code § 2827(g) ("eligible customer generators shall not be assessed stand-by charges . . .").

⁴ Cal. Pub. Util. Code § 2827(a) states: "The Legislature finds and declares that a program to provide net energy metering combined with net surplus compensation, co-energy metering, and wind energy co-metering for eligible customer-generators is one way to encourage substantial private investment in renewable energy resources, stimulate in-state economic growth, reduce demand for electricity during peak consumption periods, help stabilize California's energy supply infrastructure, enhance the continued diversification of California's energy resource mix, reduce interconnection and administrative costs for electricity suppliers, and encourage conservation and efficiency."

⁵ Cal. Pub. Util. Code § 2827(h)(6)(A) states that: "Upon adoption of the net surplus electricity compensation rate by the ratemaking authority, any renewable energy credit, as defined in Section 399.12, for net surplus electricity purchased by the electric utility shall belong to the electric utility. Any renewable energy credit associated with electricity generated by the eligible customer-generator that is utilized by the eligible customer-generator shall remain the property of the eligible customer-generator. (B) Upon adoption of the net surplus electricity compensation rate by the ratemaking authority, the net surplus electricity purchased by the electric utility shall count toward the electric utility's renewables portfolio standard annual procurement targets for the purposes of paragraph (1) of subdivision (b) of Section 399.15, or for a local publicly owned electric utility, the renewables portfolio standard annual procurement targets established pursuant to Section 399.30."

penalty that may be imposed for noncompliance,” should be rejected.⁶ As stated in CMUA’s Initial Comments, the issue of POU penalties is expressly within the authority of the ARB. The statute separates the roles of the two agencies into a liability determination by the CEC, and a penalty determination by ARB.⁷ The Commission’s role is limited to findings of fact regarding any alleged noncompliance, and not penalties. Further, to require a POU to provide the CEC with mitigating factors prior to a determination of violation is more relevant to a recommendation on penalties than to the issue of compliance. If the CEC believes that mitigating factors are relevant to an alleged violation, it can request the POU to provide that information. It is reasonable to presume that the POU would voluntarily provide the information that is requested.

However, the CEC clearly does have broad discretion in its role of determining if it **will** issue a notice of violation, or make a finding of violation. Section 399.30(m) states that the CEC “**may** issue a notice of violation and correction against a local publicly owned electric utility for failure to comply with this article” Further, section 399.30(n)(1) provides:

(n)(1) **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”

Again, the statute is clear that the CEC has discretion in its determination as to **whether** the POU complied with the RPS requirements. It is only after that determination is made, that the CEC must refer the matter to the ARB.

The CEC’s Authority Relating to a Determination of Violation of the RPS is Quasi-Legislative. There are two broad categories of administrative rules: (1) ministerial; and (2) quasi-legislative. Courts have defined a ministerial act as:

an act that a public officer is required to perform *in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety*, when a given state of facts exists.⁸

In contrast,

“Quasi-legislative regulations are those adopted pursuant to the Legislature’s express delegation of substantive rulemaking authority and are entitled to substantial deference by courts.”⁹

⁶ Proposed Modifications, Express Terms at 22.

⁷ Cal. Pub. Util. Code § 399.30(n)(1).

⁸ Carrancho v. California Air Res. Bd., 111 Cal. App. 4th 1255, 1267 (2003).

⁹ Kawamura v. Organic Pastures Dairy Co. LLC, 160 Cal. App. 4th 1374, 1388 (2008).

Further, the courts have clarified that “the formulation and adoption of rules is the clearest example of a quasi-legislative function performed by an agency, a form of substantive lawmaking delegated by the Legislature.”¹⁰

The authority to implement the RPS is split between the POU governing Boards, the CEC, and the ARB. This grant of authority to the CEC is limited to determining whether or not the POU has complied with the RPS mandates. However, it is clear that the nature of the CEC’s authority, within the limited scope of determining if there is a violation of the RPS, is quasi-legislative. Section 399.30(m) expressly directs the CEC to adopt “regulations,” and does not prescribe the manner in which the CEC must perform this duty. Most importantly, the CEC has clear discretion not to issue a notice of violation. In making a determination as to **whether** there was a violation, the CEC must ensure that it is acting reasonably, considering all relevant factors, and supporting the purpose of the RPS program.¹¹ The CEC has clear authority within its discretion to determine whether there is a violation, including a finding that no violation occurred based on relevant factors.¹² Those factors can be reflected in the final decision’s findings of fact.

The Commission’s authority to determine compliance and make findings of fact regarding any alleged noncompliance is wholly separate and independent from the authority granted to ARB to determine a potential penalty. Accordingly, while the CEC’s final decision should properly reflect all findings of fact related to the alleged violation, the CEC steps out of its role as a fact finder of violations when recommending a penalty amount to the ARB. Moreover, the CEC surpasses its authority by suggesting that its record “will serve as the basis for any subsequent ARB penalties assessed against a POU”, and that “ARB does not intend to re-adjudicate ... any findings of fact regarding the decisions.”¹³ If the CEC does seek to provide additional clarity in the context of its enforcement discretion, such clarification should relate to the discretion that the CEC has regarding a determination of **whether** a violation exists, and is more properly reflected in the proposed amendments to Section 1240(g) as follows:

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

¹⁰ Carrancho v. California Air Res. Bd., 111 Cal. App. 4th 1255, 1266 (2003).

¹¹ California Hotel & Motel Assn. v. Indus. Welfare Com., 25 Cal. 3d 200, 211-12 (1979) (The relevant requirements for a quasi-legislative determination are: “first, did the agency act within the scope of its delegated authority; second, did the agency employ fair procedures; and third, was the agency action reasonable. Under the third inquiry, a reviewing court will not substitute its independent policy judgment for that of the agency on the basis of an independent trial de novo. A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered **all relevant factors**, and has demonstrated **a rational connection between those factors, the choice made, and the purposes of the enabling statute.**” (emphasis added)).

¹² Schwartz v. Poizner, 187 Cal. App. 4th 592, 598 (2010).

¹³ CEC Initial Statement of Reasons, Section 1240(d)(1), at 13 (March 27, 2015).

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.

C. Excess Procurement

The CEC should revise the proposed changes to the excess procurement provisions to ensure that the definition is both consistent with the Legislative intent of the statute and does not needlessly hinder the ability of entities to extend existing agreements when necessary.

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.

As CMUA described in its Initial Comments, the rules for excess procurement are already extremely difficult to meet. POUs are not subject to the contract term limitations that are applicable to the retail sellers pursuant to section 399.13(b).¹⁴ These long-term contract requirements for retail sellers, and the IOUs in particular, predate SB1X-2 and have a long and complex history involving numerous CPUC decisions.¹⁵ Additionally, the term of a contract is part of the standard terms and conditions that IOUs must include in renewable contracts, unless a modification is approved by the CPUC. These broader requirements do not have any applicability to POUs, and therefore, when implementing this narrow provision relating to excess procurement, the CEC must focus on the intent of this provision and not all of the related long-term contracting requirements. The primary purpose of the long-term contracting requirement is to support the broader purpose of the RPS to incentivize the construction of new renewable generation.

¹⁴ Cal. Pub. Util. Code § 399.13(b) (A retail seller may enter into a combination of long- and short-term contracts for electricity and associated renewable energy credits. The commission may authorize a retail seller to enter into a contract of less than 10 years' duration with an eligible renewable energy resource, if the commission has established, for each retail seller, minimum quantities of eligible renewable energy resources to be procured through contracts of at least 10 years' duration.).

¹⁵ See, e.g., D.07-05-028.

The Proposed Modifications do not expressly support this policy purpose. Section 399.13(A)(4)(B) only specifies that the CPUC must deduct from the excess procurement calculation “the total amount of procurement associated with contracts of less than 10 years in duration” If a 10-year contract is executed and then extended by an additional 3 years, the contract is still more than 10 years in duration. Similarly, if a 7-year contract is extended by 4 years, that contract is also more than 10 years in duration. Section 399.13(A)(4)(B) does not provide any express limitation on extending the duration of the contracts, and shorter-term extensions may be necessary for a myriad of reasons, including as stop-gap measures while utilities develop longer term resources.

If a POU entered into an 8-year contract with a generator, the Proposed Modifications would discourage a POU from extending the contract any duration less than 10 years. Such an extension, on top of an existing 8-year term may not be possible or reasonable. Further, in this example, the CEC’s proposals would convert a 10-year statutory requirement into an 18-year requirement.

The rules of statutory construction provide that:

All consistent statutes which can stand together, if related to the same subject, shall be construed together, and with reference to whole system of which they form part, and shall be harmonized, and effect given to all, if this can consistently be done, so as to make the law consistent in all its parts and uniform in its application and results.¹⁶

Therefore, it is instructive to examine how other parts of the RPS deal with contract extensions. For example, section 399.16(d)(3), dealing with grandfathering, provides that if a contract is 15 years in length, then “[t]he duration of the contract may be extended if the original contract specified a procurement commitment of 15 or more years.” Section 399.16(d) does not require that the contract be extended by at least 15 more years, instead no minimum extension is required. Consistent with section 399.16(d), the excess procurement rules should not require only contract extensions of 10-years in duration meet this requirement. Instead, the CEC should look to the actual length of the contract.

As recommended in CMUA’s Initial Comments, CMUA supports the following change to the Proposed Modifications:

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

¹⁶ Cohn v. Isensee, 45 Cal. App. 531 (1920).

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 for the duration of the contract.

D. Implementation of SB 591

The primary purpose for the reopening of the Enforcement Procedures was to implement the alternative compliance requirements applicable to the Merced Irrigation District (MID) pursuant to Senate Bill (SB) 591 (2013). The clear intent of SB 591 is to provide genuine and consistent relief to the economically disadvantaged community served by MID. CMUA understands that the Proposed Modifications implement SB 591 in manner that would provide no relief to MID during the second compliance period and is very unlikely to provide any relief during the third compliance period. This could be true even if during an individual year, MID's large hydro resource produced more electricity than the total annual retail sales of MID. Such a result is clearly inconsistent with the plain language of SB 591. The CEC should change the Proposed Modifications to fulfill the Legislature's intent of providing economic relief to the ratepayers served by MID. In particular, the CEC should give MID the flexibility to invest the majority of its RPS funds back into its own community.

E. POU Consumption Reporting

CMUA requests that the CEC further review the purpose and intent of any additional reporting requirements, and ensure that the most administratively simple mechanism be utilized for meeting that objective.

The Proposed Modifications would require that POUs report on the following:

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.

To the extent that the requested information is already reported to the CEC in a separate filing, it should be accessed from that filing. Alternatively, there may be other data that can more directly support the CEC's objective.

Beyond the issue of the necessity of this reporting requirement, CMUA recommends two changes for clarity. First, this proposal requests "consumption by the POU" and specifies that this includes "water pumping." This is structurally similar to the definition of retail sales, which provides:

(bb) "Retail sales" means sales of electricity by a POU to end-use customers and their tenants, measured in MWh. This does not include

energy consumption by a POU, **electricity used by a POU for water pumping**, or electricity produced for onsite consumption (self-generation).

The reference to “water pumping” in the definition of retail sales, and presumably in the new reporting provision, is intended purely as a representative example of POU load. However, because water pumping is the only example provided, it has led to some confusion on this issue as to whether water pumping has a special designation. CMUA recommends that the CEC either strike “water pumping” from both of these provisions, or provide greater clarity that water pumping is not unique among all POU consumption in being excluded from retail sales.

Further, the final clause of the proposed new reporting requirement may also cause unnecessary confusion. This clause requires reporting of “the annual amount in MWh being satisfied with electricity products.” CMUA does not believe that it is common practice for a POU to assign RECs to the POU’s own consumption that are not counted towards the POU’s RPS obligation. It is unlikely that the relevant accounting mechanisms would be in place to track POU owned or contracted renewable generation that serves a POU’s own load. As described in CMUA’s Initial Comments, these RECs are PCC1 and, therefore, valuable for meeting a POU’s RPS obligations. CMUA recommends deleting this clause.

F. Green Pricing Program

The Sacramento Municipal Utility District (SMUD) will concurrently file comments that support adding an express provision in the Enforcement Procedures that permits a POU to subtract load associated with customers that participate in a qualifying green pricing program from the POU’s retail sales calculation. CMUA supports SMUD’s comments and requests that the CEC give full consideration to this request.

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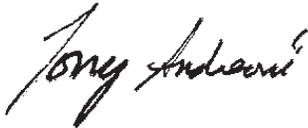
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II. CONCLUSION

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,



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