



# California Municipal Utilities Association

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California Energy Commission

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**14-RPS-01**

**TN # 76063**

**JUL 21 2015**

## **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* (15-Day Language), issued on July 6, 2015. CMUA's individual members may provide additional comments to the CEC that are not addressed in this letter.

### **I. COMMENTS ON THE 15-DAY LANGUAGE**

#### **A. CMUA Supports the 15-Day Language Changes to the Definition of "Bundled."**

The 15-Day Language makes significant improvements to the definition of "bundled" by both structuring the provision relating to POU-owned generation as an example and by deleting the overly restrictive final sentence. By making these changes, the definition of "bundled" now provides a useful clarification for POUs that own behind-the-meter generation, without expressly restricting the treatment of other types of power sale agreements.

CMUA notes that these changes are fully consistent with existing law and does not differ from existing interpretations of the portfolio content category requirements. As described in CMUA's Initial Comments,<sup>1</sup> California Public Utilities Code § 399.12(f) defines "procure" as to "acquire through ownership or contract." In the case where a POU or retail seller owns an eligible renewable energy resource, the electricity and RECs are procured as "bundled" by definition, regardless of whether the facility is interconnected behind the meter.

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<sup>1</sup> Initial CMUA Comments on Proposed Modification of Regulations Establishing Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities, April 30, 2015.

## **B. CMUA Supports the 15-Day Language Changes to the Excess Procurement Requirements Relating To Contract Amendments.**

The 45-Day Language included very restrictive limitations on the ability of a utility to meet the 10-year contract term requirements for the excess procurement calculation if the contract had been amended. CMUA filed comments demonstrating that these limitations were not consistent with the structure of related statutes and did not serve a clear policy purpose. The 15-Day Language corrects these issues and sets out the correct methodology for measuring the term of a contract that has been amended. CMUA fully supports these changes in the 15-Day Language.

## **C. CMUA Support Changes to the Documentation Requirements.**

The 15-Day Language adopts the proposal of the Southern California Public Power Authority to clarify that documentation other than what is expressly listed in the regulations may be used to demonstrate the portfolio content category status. CMUA supports this clarification.

## **D. CMUA Recommends Additional Clarifying Changes to the Definition of Retail Sales.**

The 15-day Language adds the following new provision:

“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) **that was not sold to the customer by the POU.**”

If the CEC does change the definition of “retail sales,” CMUA recommends that the clarification should be worded as follows: “. . . or electricity produced for onsite consumption (self-generation) **that was purchased by the end-use customer from the POU.**” This modification clarifies that “customer” does not include the POU’s own load. It also clarifies that the retail sales would be limited to generation that was actually purchased by the customer.

Further, in the case where a POU owns an eligible renewable energy resource that is interconnected behind the customer’s meter and provides onsite generation to the end-use customer, that generation would qualify as portfolio content category 1. The CEC should consider providing this example directly into the CEC’s Enforcement Procedures or in the Final Statement of Reasons (FSOR).

## E. The 15-Day Language Changes to the Enforcement Requirements Do Not Resolve the Jurisdictional Issues Posed by the Proposed Modifications.

CMUA, along with numerous stakeholders, filed comments demonstrating that the CEC would be exceeding its clear jurisdictional limits if it takes on the role of evaluating mitigating factors relating to potential POU penalties and also recommending penalties to the California Air Resources Board (ARB). While the CEC has broad authority to determine *if* a POU has violated the RPS program, it does not have any authority regarding the amount and nature of the penalties levied against a POU. Public Utilities Code section 399.30(m) grants the CEC authority to determine compliance with the RPS program. That same section gives the ARB exclusive authority over matters regarding the application of potential penalties.

Instead of expanding its role to evaluating and recommending potential financial penalties, the CEC should exercise its clear discretion in its role of determining if it *will* issue a notice of violation, or make a finding of violation. The relevant statutory language clearly is structured to give the CEC broad authority to determine that no violation has occurred.<sup>2</sup> 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.<sup>3</sup> As CMUA previously recommended, 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 findings, including findings regarding mitigating and aggravating factors, upon which the Air Resources Board may rely in assessing a penalty

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<sup>2</sup> 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 . . . .”

<sup>3</sup> 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)).

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.

The 15-Day Language changes did not resolve the issues described above, and the CEC should make further modifications to resolve these issues.

## II. CONCLUSION

CMUA appreciates this opportunity to provide these comments to the CEC on the 15-Day Language. CMUA asks that the CEC consider our recommendations.

Sincerely,



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