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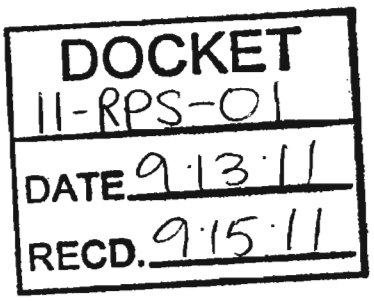

Via Electronic Mail to docket@energy.state.ca.us and RPS33@energy.state.ca.us, and U.S. Mail

California Energy Commission
Dockets Office, MS-4
Re: Docket No. 11-RPS-01
1516 Ninth Street
Sacramento, CA 95814-5512

Re: Docket No.11-RPS-01, SMUD Comments on 33% RPS POU Regulations Concept Paper

SMUD appreciates the opportunity to comment on the Energy Commission Staff's "33 Percent Renewables Portfolio Standard Publicly Owned Electric Utility Regulations Concept Paper" (Concept Paper). SMUD sees the list of issues, options, and staff recommendations presented in the Concept Paper as a good start toward this significant new obligation for Publicly Owned Electric Utilities and new responsibility for the Energy Commission. Fundamentally, however, the Concept Paper appears not to clearly recognize the regulatory role provided in statute to POU governing boards, and as a result appears to assume too great a role for the Energy Commission regulatory process. This fundamental issue must be resolved quickly, prior to entering the stage of formal CEC regulations, in order to avoid unnecessary work on the behalf of the Energy Commission Staff and interested stakeholders.

In general, SMUD agrees with the comments being filed by the California Municipal Utilities Association. Although stated in different words, SMUD's comments herein are for the most part fully consistent with the comments being filed by CMUA. SMUD comments on the Concept Paper are presented here in the order that issues were presented in the Concept Paper, with additional issues and comments added at appropriate points.

*1) **Foundational Issues***

a) Meaning of "consistent with" and "in the same manner as" (Public Utilities Code Sections 399.30 (c)(3), 399.30 (d) (1), 399.30 (d) (2), 399.30 (d)(3))
   i) Options:
      (1) Always same as those for retail sellers

(2) In spirit of rules for retail sellers; up to POUs and Energy Commission to define for specific cases
(3) Some rules the same as those for retail sellers (for instance, definitions of portfolio content categories), and some in the spirit of the rules for retail sellers, as determined by POUs and the Energy Commission

ii) Staff recommendation: Option (3); the law should be applied to all entities using the same rules to the extent practicable. In areas in which different rules apply to POUs, those rules will be as consistent as possible with those for retail sellers. (In response to this particular issue, staff requests that stakeholders specify which rules should be the same for POUs and retail sellers and what criteria should be used to determine "in the spirit of." Please include rationale.)

SMUD Comments

A. A foundational issue that was not contained directly within the Concept Paper is essential for the Energy Commission to address -- a clear delineation between POU governing board authority, and Energy Commission jurisdiction under SB 2(1X). That legislation, in §399.30(a), also requires POUs to "... adopt and implement a renewable energy procurement plan ..."; and in §399.30(e), requires the governing board of the local publicly owned electric utility to "... adopt a program for the enforcement of this article on or before January 1, 2012." When developing its own regulations for enforcement the Energy Commission must recognize the dual enforcement role provided in the law for POU governing boards. The Concept Paper has not even raised the evident issue of how to reconcile the equal responsibilities of POU governing boards pursuant to §399.30(e).

SMUD believes that the law is unclear with respect to which government entity has the primary responsibility for enforcement of the 33% RPS --the POU governing boards or the Energy Commission. POU governing boards are required to "adopt a program for the enforcement of this article", and the Energy Commission is required to "adopt regulations specifying procedures for the enforcement of this article" To go beyond the words in the statute in any manner that does not fulfill the role assigned to each government agency risks making moot the statutory role given to each of them. Moreover, in addition to a suite of obligations upon POUs, POU governing boards are granted considerable discretion to adopt measures that provide for flexible compliance with the procurement goals of each compliance period. (See §399.30(d)) SMUD encourages the Energy Commission to avoid adopting regulations that effectively usurp the authority of the POUs and their governing boards to undertake the actions required by §399.30. This fundamental observation is the basis for many of SMUD's specific comments below. SMUD believes that much more discussion is needed around this subject in order to forge the proper partnership between the Energy Commission and POU governing boards.

B. With regard to the meaning of the terms "consistent with" and "in the same manner as" in the statute, SMUD first notes that it is the obligation of the POU governing boards to adopt requirements and measures that are "consistent with" or "in the same manner as" rules for retail sellers, as the case may be. SMUD also notes that the Concept Paper discussion of these two phrases – in the same section and with a list of options covering both phrases simultaneously – may imply that the Energy Commission considers these phrases as synonymous. As Energy Commission staff indicated in the Webinar held to discuss the Concept Paper, there is no intent in the pending regulations to deem these terms synonymous.

SMUD notes that the law requires, in §399.30(c)(3), that POU governing boards adopt procurement requirements "consistent with" those established for retail sellers in §399.16. SMUD observes that there are two basic aspects of §399.16: 1) the definition of the procurement categories contained in §399.16(b), and 2) the procurement restrictions contained in §399.16(c) and directly modified by other subparts of §399.16. SMUD believes that it is reasonable for the Energy Commission to develop regulations providing guidance to POUs about the definition of procurement categories in §399.16(b), to achieve basic definitional consistency about these procurement categories among POUs. SMUD notes, however, that consistency is to be established with the statutory text in §399.16, not with definitions of these categories adopted for retail sellers by the CPUC. SMUD believes that POUs and the Energy Commission have clear authority independent of the CPUC to interpret the law regarding these requirements. SMUD also strongly contends, as argued below, that the CEC should define Category 1 as including unbundled RECs from resources that meet the characteristics of the Category.

However, SMUD believes that POU governing boards have the primary responsibility to establish "consistency" with the procurement requirements in §399.16(c) because the Legislature placed that responsibility squarely upon them, and not upon the Energy Commission. SMUD notes that the law allows retail sellers to engage in renewable procurement that is modified from the requirements in §399.16(c) in three basic ways: 1) via application to the CPUC pursuant to §399.16(e), 2) via application of §399.17, and 3) via application of §399.18. While §399.17 is not applicable on its face to POUs, §399.16(d) and §399.18 are conceptually applicable, and SMUD contends these provisions can and should be used to help to understand "consistency" of procurement requirements statewide.

SMUD suggests that POU governing boards are the statutory authority allowed to establish somewhat different procurement category requirements than established in §399.16(c) for POUs, so long as they are consistent with (but not necessarily the same as) the provisions in that section. POU governing boards

are empowered to make this determination initially, with the Energy Commission having responsibility to ensure that their procurement requirements are consistent with the law, pursuant to its enforcement role. In other words, the Energy Commission's enforcement role is to determine that POU boards have, in fact, acted in compliance with the law.

In addition, SMUD contends that when §399.30(c)(3) requires consistency with §399.16, interpreting the statute as a whole requires inclusion of other sections of the law that directly modify §399.16 for retail sellers, including §399.18. Here, smaller POUs that meet the requirements of this section should be allowed, consistent with similarly situated retail sellers, to procure renewable resources to meet the compliance obligations of the law without consideration of the procurement restrictions in §399.16(c). POU governing boards are capable of making this determination consistent with the law. The Energy Commission's enforcement role is to determine whether POU boards have, in fact, acted consistently with the requirements in §399.16.

With regard to the use of the term "consistent with" in §399.30(d)(2) and (d)(3), and the term 'in the same manner as' as used in §399.30(d)(1), the circumstances specified in subdivisions (b) and (c) of §399.15, as the case may be, require that "consistency" have a broader meaning than in certain parts of §399.16. For example, §399.16(c) has very specific numerical limitations on the procurement of certain renewable energy resource electricity products. However, here in §399.30(d)(2) and (d)(3), the law states that POU governing boards "may" adopt provisions to bank excess procurement in one compliance period to subsequent compliance periods in the same manner as allowed in §399.13 and "may" adopt conditions for delaying timely compliance and cost limitations for procurement expenditures consistent with §399.15. Since the circumstances in §399.15 are qualitative, and depend upon a variety of fact-intensive inquiries, POU governing boards have considerable discretion in adopting measures that are consistent with flexible compliance measures of §399.15. Here, the law sets up a standard described as "consistent with" and "in the same manner as", and grants to POU governing boards authority to adopt measures that meet those standards.

Surely, aspects of procurement that involve banking of relatively large and lumpy renewable resources, distinctive reasons for delaying timely compliance, and local cost restrictions may be different enough to reflect the underlying differences among POUs and between POUs and retail sellers while still falling along the continuum of consistency according to the law. In addition, POUs have different governance structures and procurement processes than retail sellers, which the law recognizes by allowing POUs exclusive authority to adopt procurement plans and to adopt plans that are different from those required from retail sellers. And, it is abundantly clear that SBX1 2 does not require conformity with rules adopted by the CPUC for retail sellers under those sections.

2) ***Eligibility of POU resources***
   a) Pre-June 1, 2010, contracts approved by POU under former Public Utilities Code 387 (Public Utilities Code Sections 399.12 (e)(1)(C))
      i) Options:
         (1) Resources must meet Energy Commission's eligibility rules at time of contract execution
         (2) Resources must meet the definition of renewable electric generation facility in Public Resources Code Section 25741
         (3) Resources must meet the Energy Commission's eligibility requirements applicable at the time the facility applies for RPS certification.
      ii) Staff recommendation: Option (3).

SMUD Comments

SMUD believes that the Energy Commission has authority under §399.25 to determine eligibility of renewable resources used to comply with the33% RPS. The Energy Commission has an RPS eligibility guidebook that establishes the details of which resources are eligible for the RPS and the procedures for certifying resources with the Energy Commission as eligible. Those eligibility determinations and procedures now will apply to resources approved by the governing board of a local publicly owned electric utility prior to June 1, 2010, for procurement to satisfy renewable energy procurement obligations enacted in SB1X 2. SMUD supports the Energy Commission staff Option 3.

3) ***Classification of procurement products***
   a) Portfolio content categories
      i) Portfolio Content Category 1 – interconnected or scheduled to a California balancing authority (Public Utilities Code Sections 399.16 (b)(1), 399.16 (c)(1) and 399.30 (c)(3))

         (1) Definition:
            (a) Options (one or more of the following):
               (i) Generation from a facility that has its first point of interconnection with a California balancing authority (or with distribution facilities used to serve end users within a California balancing authority) is automatically considered eligible, even if it is procured as an unbundled product or is unbundled after procurement
               (ii) Generation from a facility that has its first point of interconnection with a California balancing authority (or with distribution facilities used to serve end users within a California balancing authority) is only considered eligible if it is procured as and remains a bundled

product
(iii) Generation from a facility that has its first point of interconnection with a California balancing authority (or with distribution facilities used to serve end users within a California balancing authority) is only considered eligible if it is procured as a bundled product, even if it is subsequently unbundled
(iv) Generation scheduled into a California balancing authority is considered eligible if it is procured as a bundled product Generation scheduled into a California balancing authority is considered eligible only if it is procured as and remains a bundled product
(v) Generation dynamically transferred into a California balancing authority is considered eligible only if it is procured as a bundled product, even if it is subsequently unbundled
(vi) Generation dynamically transferred into a California balancing authority is considered eligible only if it is procured as and remains a bundled product

(b) Staff recommendation: None at this time

SMUD Comments

SMUD recommends that, should the Energy Commission promulgate regulations defining this category of resources, the definition should keep the energy in Category 1 even if originally unbundled or if eventually unbundled, so long as the generation originally met the location and interconnection requirements of Category 1. Hence, SMUD believes that Options i, iv, and vi would be appropriate to include, for the three "types" of Category 1 procurement.

This position is consistent with comments CMUA submitted to the CPUC on August 8, 2011, in response to the ALJ Ruling on portfolio content categories. Here, CMUA supports a definition of Category 1 resources that includes transactions that transfer only unbundled RECs, as long as underlying RPS-eligible generators meet the requirements of Category 1 (are located in California, have a first point of interconnection with a California balancing authority, are scheduled into a California balancing authority without substitution of energy, or are dynamically transferred into a California balancing authority).

Resources that meet the requirements of Category 1 are intended to meet certain policy objectives of the RPS law, and they do so by virtue of their location within California or similar characteristic that ensures delivery of the renewable electricity generated within California (specifically, within a California balancing authority). This is true regardless of whether the RECS associated with the resource are unbundled and transferred or remain bundled. The specific policy objectives, found in California Public Resources Code section 25740.5(c), are to: "... increase, in the near term, the quantity of California's electricity generated by renewable electrical generation facilities located in this state, while protecting

system reliability, fostering resource diversity, and obtaining the greatest environmental benefits for California residents."

The clear intent of Category 1 is to foster resources that are in or are delivered directly to California customers via a California balancing authority, and procurement of unbundled RECs from such energy does not thwart this policy – the generation is still in California or used by California ratepayers. Also, SMUD contends that small scale distributed resources located in California should be in Category 1 even if a procuring entity merely purchases the RECs from the resources, while the energy is used on-site.

(2) Minimum percentage of reduction of procurement content requirement, upon successful application by POU, applied to this category (Public Utilities Code Sections 399.16 (e) and 399.30 (c)(3))
   (a) Compliance period ending December 31, 2013
      (i) Options:
         1. Not less than 40%
         2. Not less than 33%
         3. Not less than 25%
         4. No defined limit; decided on a case-by-case basis
      (ii) Staff recommendation: Option 4; no limit is specified for this compliance period in statute; the Energy Commission will review each application on its merits and determine the appropriate reduction, if any.
   (b) Compliance period ending December 31, 2016
      (i) Options:
         1. Not less than 50%
         2. Not less than 40%
         3. Not less than 33%
         4. No defined limit; decided on a case-by-case basis
      (ii) Staff recommendation: Option 4; no limit is specified for this compliance period in statute; the Energy Commission will review each application on its merits and determine the appropriate reduction, if any.

SMUD Comments

SMUD agrees with Energy Commission staff's Option(ii) to the extent that it correctly recognizes that §399.16(e) does not put a limit on how much the "50%" Category 1 requirement can be reduced for the first and second compliance periods if the conditions specified in §399.15(b)(5) are met. SMUD contends, however, that POU governing boards have the authority and capability of approving a reduction in the percentage requirement pursuant to the law. The statute does not require POUs to apply to the Energy Commission to make this

determination. As part of its general enforcement role under §399.30(n), the Energy Commission can determine whether a POU has met the requirements of the statute in establishing a revised Category 1 procurement requirement, but this should occur as part of the Energy Commission's overall enforcement review, not through some up-front application process that does not have statutory support. It may be appropriate for Energy Commission regulations to specify how the Energy Commission will judge whether legal requirements have been followed in POU adoption of such reductions, but an upfront application process is unsupported in the statute and unnecessary.

(3) Determination that generation belongs in this category
  (a) Options (one or more of the following):
    (i) POU indicates which generation it believes belongs in this category as part of compliance reporting
    (ii) Staff determination at request of POU
    (iii) Committee determination at request of POU
    (iv) Commission determination at request of POU
    (v) At end of compliance period as part of compliance and verification by staff, approved by Commission
  (b) Staff recommendation: Option (i), (v); these options will allow for the minimum administrative burden and backlog of essential work.

SMUD Comments

SMUD supports the Energy Commission staff recommendation here. POUs should be free to procure resources as flexibly and normally as possible, determining as they do so which category the resources fall into consistent with the law and any regulations the Energy Commission establishes. A procurement by procurement approval process by the Energy Commission or staff would be unduly burdensome for both POUs and the Energy Commission.

ii) Portfolio Content Category 2 – firmed and shaped incremental (Public Utilities Code Sections 399.16 (b)(2), 399.16 (c)(3) and 399.30 (c)(3))

(1) Definition:
  (a) Location of renewable resource interconnection:
    (i) Options:
      1. May or may not be interconnected to a California balancing authority
      2. Not interconnected to a California balancing authority
    (ii) Staff recommendation: None at this time

SMUD Comments

There is no rationale for a POU or retail seller to categorize a resource as a Category 2 resource, when by virtue of location or interconnection characteristic it would qualify as a Category 1 resource. Consistent with our answer regarding the definition of a Category 1 resource, anything meeting the requirements of Category 1 should not be somehow confused with another category of resource. The Energy Commission does not have to include in any defining regulations a provision about whether or not a Category 2 resource is interconnected to a California balancing authority. If, however, the Energy Commission chooses to establish such a regulatory definition, it should clearly define resources in Category 2 as not having a first point of interconnection in a California balancing authority, and those that are so interconnected to a California balancing authority as belonging in Category 1.

(b) Timing of incremental electricity resource scheduling into California balancing authority (scheduling may not precede generation of renewable product)
   (i) Options:
      1. Within one month of generation
      2. Within same calendar year as generation
      3. Within 12 months of generation
      4. Within same compliance period as generation
      5. Within 36 months of generation
   (ii) Staff recommendation: None at this time

SMUD Comments

SMUD is wary of additional requirements for Category 2 products that are not necessary to implement the statute. The answer to this question is driven only by verification issues, which likely would require that the "substitute power" be delivered within the same compliance period as when the Category 2 generation is claimed for compliance, so that the generation can be distinguished from Category 3 resources. No finer degree of timing is required by law, and the Energy Commission should not consider such. Section 399.16(b)(2) only requires that Category 2 electricity be "scheduled into a California balancing authority" without any specific timing requirement. So the only criteria that should apply is the ability to distinguish between Category 2 and Category 3 resources in a compliance period. This can occur either if the "substitute power" is delivered within the same compliance period as the renewable generation, or if the renewable generation is not claimed by a POU until associated with "substitute power", which may occur in the next compliance period. Both of these options should be allowed for maximum flexibility to

procure power consistent with the varying market needs and procurement timing practices of each POU.

(c) Renewable resource
  (i) Options:
    1. Intermittent resources only
    2. Both intermittent and non-intermittent resources permitted
  (ii) Staff recommendation: None at this time

SMUD Comments

Option 2 is clearly the right option. The statute provides no limitation on the types of renewable resources that can be included in Category 2, as long as incremental energy is delivered. There is no limitation to intermittent resources, and the Energy Commission should not adopt such by regulation. There are circumstances, such as transmission constraints, where non-intermittent resources can be procured but at times must use "substitute power" to achieve the required incremental delivery to a California balancing authority. As long as incremental energy is contractually delivered, these resources should be in Category 2 (or Category 1 if applicable), and not in the relatively restricted Category 3.

(d) Incremental resource
  (i) Options:
    1. Incremental to California
    2. Incremental to POU
  (ii) Staff recommendation: None at this time

SMUD Comments

It is clear that Category 2 resources require the actual delivery of power to California (to a California balancing authority), in contrast to Category 3 resources which have no such requirement. It is also clear that the distinction between Category 1, which also requires the delivery of power, and Category 2 is that the power delivered may come from substitute resources used to "firm" and/or "shape" the underlying renewable generation and provide an energy delivery schedule that makes efficient use of the transmission system and allows procurement and delivery that fits the needs of the procuring entity. Category 1 resources must be delivered directly without such substitute power, or be located so as to interconnect within California or a California balancing authority.

Given this background, SMUD does not believe that either of the proposed Energy Commission staff options reaches the correct result. SMUD agrees with CMUA's August 8, 2011 comment, in R.11-05-005 in response to ALJ Question 14,

that the inclusion of the word "incremental" in §399.16(b)(2) only means that there must be an actual delivery of power to a California balancing authority in order to qualify as Category 2 resource. The power that is delivered- the firmed and shaped substitute power- is incremental in the sense that it represents power delivery beyond or "incremental to" to that required by Category 3.

SMUD emphasizes that the Energy Commission should not read more into the word incremental in the statute than is necessary to distinguish between the Categories. If the Energy Commission interprets "incremental" to mean that the power must somehow be "new" to California, the consequence will be significant market disruption issues and significant verification issues. An interpretation that the Category 2 power must be somehow "new" to the procuring POU has some of the same issues, potentially requiring verification that goes well beyond the simple circumstances of the contract for the Category 2 resource.

(e) Location of incremental resource relative to renewable resource
  (i) Options:
    1. Must be within same balancing authority
    2. May or may not be within same balancing authority
  (ii) Staff recommendation: None at this time

SMUD Comments:

SMUD believes that Energy Commission staff Option 2 is correct. There is no basis in §399.16(b)(2) to require the replacement energy to come from the same balancing authority as the renewable energy. SMUD can see no reason to establish such a requirement.

(f) Ex ecution of incremental resource contract
  (i) Options:
    1. Must occur at the same time or after renewable resource contract is executed
    2. May occur before, at the same time, or after renewable resource contract is executed
  (ii) Staff recommendation: None at this time

SMUD Comments:

SMUD believes that Energy Commission staff Option 2 is preferable, should the Energy Commission accept the proposed definition of "incremental" above. Again, all that is important here is distinguishing between the categories of resources, and there is no reason to establish rules regarding the timing of contracts for this distinction, as long as the Energy Commission can track the

firming energy to renewable generation. For Category 2 resources, the basic requirement is that substitute power is delivered, and it is that fact and not the date on the firming contract that distinguishes this procurement from Category 3 procurement.

However, should the Energy Commission determine that more meaning is needed for the term "incremental" in the statute than described in comments above, SMUD could support Option 1 as the sole additional distinction established for Category 2 resources. In this construct, a Category 2 resource would not have to be "incremental" in some fashion to California or to the procuring POU, as posited in (d) above, but would simply have to be associated with a new contract for firming and shaping resources, signed at the same time as or after the contract for Category 2 renewable resources.

(g) Contractual relationship between renewable and incremental resources
  (i) Options:
    1. Clear relationship must exist in contract for the renewable and/or incremental resource in order for the generation to count toward this category
    2. No contractual relationship necessary
  (ii) Staff recommendation: None at this time

SMUD Comments:

SMUD believes that Energy Commission staff Option 2 is the better option. The concept of firming and/or shaping to deliver substitute energy to a California balancing authority does not require any contractual relationship between the contract for the renewable generation and the substitute resource. This service can be provided within or as part of the renewable contract or completely separate from that contract, through a different contract or resource associated with the procuring entity. Again, all that is important here is distinguishing between the categories of resources, and there is no reason to establish rules regarding connections between or among contracts for this distinction. For Category 2 resources, the basic requirement is that substitute power is delivered, and it is that and not whether there is a contractual relationship with the renewable resource that distinguishes the procurement from Category 3 procurement. Of course, the procuring entity must have contracts with both the renewable resource and the substitute power being delivered, but these contracts do not need any further association.

(2) Determination that generation belongs in this category

(a) Options (one or more of the following):
  (i) POU indicates which generation it believes belongs in this category as part of compliance reporting
  (ii) Staff determination at request of POU
  (iii) Committee determination at request of POU
  (iv) Commission determination at request of POU
  (v) At end of compliance period as part of compliance and verification by staff, approved by Commission
(b) Staff recommendation: Option (i), (v); these options will allow for the minimum administrative burden and backlog of essential work.

SMUD Comments

Similar to SMUD's comments on determination of Category 1 resources, SMUD concurs with the Energy Commission staff recommendation here. POUs should be free to procure resources as flexibly and normally as possible, determining as they do so which category the resources fall into consistent with the law and any regulations the Energy Commission establishes further defining the Categories. A procurement by procurement approval process by the Energy Commission would be unduly burdensome for both POUs and the Energy Commission, and should be avoided.

iii) Portfolio Content Category 3 – all other, including unbundled renewable energy credits (Public Utilities Code Sections 399.16 (b)(3), 399.16 (c)(2) and 399.30 (c)(3))

(1) Definition:
  (a) Options:
    (i) All unbundled renewable energy credits and any other generation that does not qualify for portfolio content category 1 or 2
    (ii) Any generation that does not qualify for portfolio content category 1 or 2
  (b) Staff recommendation: None at this time

SMUD Comments

SMUD strongly favors Option (ii) above. Category 1 and Category 2 resources should be clearly defined, and then Category 3 resources are the remainder. Presumably, this would primarily entail unbundled RECs from resources whose first point of interconnection is outside of a California balancing authority. However, SMUD strongly contends that not all unbundled renewable energy

credits will fall into Category 3, as those from resources located so that they interconnect with or within a California balancing authority should be included in Category 1.

(2) Determination that generation belongs in this category
  (a) Options (one or more of the following):
    (i) POU indicates which generation it believes belongs in this category as part of compliance reporting
    (ii) Staff determination at request of POU
    (iii) Committee determination at request of POU
    (iv) Commission determination at request of POU
    (v) At end of compliance period as part of compliance and verification by staff, approved by Commission
  (b) Staff recommendation: Option (i), (v); these options will allow for the minimum administrative burden and backlog of essential work.

SMUD Comments

Similar to SMUD's comments on determination of Category 1 and 2 resources, SMUD supports the Energy Commission staff recommendation here. POUs should be free to procure resources as flexibly and normally as possible, determining as they do so which category the resources fall into consistent with the law and any regulations the Energy Commission establishes further defining the Categories. A procurement by procurement approval process by the Energy Commission or its staff would be unduly burdensome for both POUs and the Energy Commission, and should be avoided.

However, there is a nuance here that deserves further discussion. Given the 'catch-all' nature of Category 3 – those resources not in Category 1 or Category 2 are automatically in Category 3 – there is little or no need beyond basic renewable eligibility to verify that a resource "belongs" in Category 3. It is SMUD's understanding that basic renewable eligibility issues are more appropriately the topic of the RPS renewable guidebook process, not the regulatory process.

4) **Compliance and verification**
  a) Verification process
    i) Options:
      (1) Include POU verification as part of current RPS Verification Report; full report will be sent to both CPUC and ARB
        (a) Adopt annually
        (b) Adopt at end of each compliance period, posting annual procurement data in each intervening year

(2) POUs have a separate verification report
(a) Adopt annually
(b) Adopt at end of each compliance period, posting annual procurement data in each intervening year

ii) Staff recommendation: Option (2)(b); Verification of POU and IOU compliance should take place under separate reports, so that a complication in verifying information from one group will not needlessly delay the timely verification of the other. As compliance can only be determined at the end of each compliance period, staff recommends only adopting a verification report after each period. For years when a report is not adopted, annual procurement data will be posted to allow tracking of progress toward RPS targets. An annual workshop could be held to publicly discuss findings.

SMUD Comments

SMUD supports Energy Commission staff's recommendation of Option (2)(b). The Option (1) proposal to combine the verification reports for retail sellers and POUs would be inappropriate under the statutory scheme created by SBX1 2 because the Energy Commission plays a significantly different role for the POUs than it does for the retail sellers. The retail seller verification report is primarily used to transmit compliance information to the CPUC for use in the CPUC's RPS program. There is no need for the POU RPS compliance information to be transmitted to the CPUC.

SMUD also supports verification reports being adopted after each compliance period, rather than annually. SMUD believes that it would be unnecessary and administratively burdensome for the Energy Commission to adopt a compliance report on an annual basis. Additionally, the Energy Commission would not be able to determine compliance on an annual basis because SBX1 2 does not allow establishment of minimum RPS procurement compliance requirements on an annual basis. Instead, each POU is required to procure sufficient RPS eligible resources in the intervening years to ensure that the POU meets the procurement requirements by the end of the each compliance period.

b) Non-compliance triggers
i) Options (one or more of the following):
(1) Does not meet procurement target requiring the utility to procure a minimum quantity of eligible renewable energy resources for a compliance period, without a demonstration of conditions beyond the control of the POU that would delay timely compliance
(2) Does not meet portfolio content category required minimum or maximum percentages for a compliance period, without a demonstration of conditions beyond the control of the POU that would delay timely compliance
(3) Not timely filing sufficient documentation for the Energy Commission to

determine POU compliance with the law at the end of a compliance period, without successful application for a late filing
(a) More than 30 days late
(b) More than 60 days late
(c) More than 90 days late
(d) Not submitted
(e) Other

(4) One or more required annual reports is not received in a timely manner
(a) More than 30 days late
(b) More than 60 days late
(c) More than 90 days late
(d) Not submitted
(e) Other

(5) Procurement plan is adopted late

(6) Does not provide adequate documentation to demonstrate that conditions exist beyond the control of the POU that would delay timely compliance, and that reasonable measures were taken to overcome those conditions

ii) Staff recommendation: Options (1), (2), (3)(c), (3)(d), (6); the law clearly sets targets for each compliance period and minimum and maximum percentages for each portfolio content category. Additionally, the Energy Commission will need to timely determine each POU's status in achieving the goals of the RPS targets for each compliance period and will rely on reports and documentation submitted by the POUs for those compliance years.

SMUD Comments

SMUD agrees with Energy Commission staff that Options (1), (2), and (3) all present clear statutory requirements that each POU must meet. However, SMUD believes that Energy Commission staff description of what is meant by compliance in these options is too simplified. For Option (1), the Energy Commission staff mentions §399.30(d)(2), which allows a POU governing board to adopt conditions for delaying timely compliance. In addition, the regulations must acknowledge §399.30(d)(3), which allows POU governing boards to adopt conditions that would delay or alter compliance because of specific cost limitations. In both of these cases, it should be clear that there is no affirmative, up-front, application process regarding these optional requirements. Rather, the POU governing boards have the authority and the capability to adopt these requirements at their option, in compliance with the statute, and the CEC regulations should be limited to determining whether the requirements adopted by the board are compliant with the statute and whether the requirements adopted were or were not met in the case that they are invoked to delay or alter compliance.

With regard to Option 2, the Energy Commission staff option is again too simplified. There are a variety of potential compliance structures for the portfolio content categories, a variety established by §399.30(c)(3) and the provisions of 399.16 to which that section refers, including §399.16(e) and §399.18 (in SMUD's contention). Again the regulations should not describe or imply that a POU governing board must make an affirmative, up front showing or application to the Energy Commission before establishing an alternative category structure as allowed by statute. As discussed above, this is not the structure set out by the legislation. Instead, SBX1 2 allows the governing board of each POU to adopt measures that waive enforcement consistently with §399.15(b)(5). Options (1) and (2) should be restated as follows:

> ***Does not meet procurement target requiring the utility to procure a minimum quantity of eligible renewable energy resources for a compliance period, unless the governing board of the local publicly owned electric utility adopts conditions that allow for delaying timely compliance consistent with §399.15(b)(5) and those conditions were met or unless the governing board of the local publicly owned electric utility adopts cost limitations for procurement expenditures consistent with §399.15(c) and compliance would require exceeding the cost limitations.***
>
> ***Does not meet portfolio content category required minimum or maximum percentages for a compliance period, as determined by the statute with consideration of changes adopted by the governing board of the local publicly owned electric utility consistent with §399.16(e) or §399.18.***

SMUD agrees that Option (3) presents a clear statutory requirement and agrees that Option 3(c) and 3(d) are reasonable. SMUD appreciates that Energy Commission staff is proposing no compliance obligation at this point for the timeliness of annual reports and adoption of procurement plans. While SMUD will commit to providing annual information and to adopting procurement plans as required by the statute, SMUD agrees that these activities do not require regulations regarding compliance to be adopted by the Energy Commission.

With regard to Energy Commission staff's recommendation of Option (6) as a compliance obligation, SMUD disagrees. Establishing a separate compliance obligation for lack of adequate demonstration of conditions for delaying compliance is tantamount to double penalization, as this demonstration is included in Option 1. The Energy Commission's role is limited to determining whether each POU adopted flexible compliance mechanisms pursuant to authorities in the legislation and met those mechanisms as adopted under Option (1). Option (6) is duplicative and should be removed.

c) Criteria and process for determining whether POUs have met procurement

requirements

i) Procurement targets for each compliance period
   (1) Process used to determine POU compliance
      (a) Options:
         (i) Same process as that used for retail sellers
         (ii) Same process, but require POUs to procure renewable resources for the remaining unmet need after long-term contracts executed after June 1, 2010, are removed, up to the total number of kWhs that represents the percentage of total retail sales required for that compliance period
      (b) Staff recommendation: None at this time

SMUD Comment

With recognition of the potential differences in procurement styles, timing, and criteria among POUs and between POUs and IOUs, as allowed by statute and reflecting the quite different structures and sizes of utilities throughout the state, SMUD agrees that Option 1 is reasonable – the same basic process for verification could be established for POUs as the Energy Commission currently follows in the retail seller verification reports. The process does not need to be identical, of course, and the differences mentioned above may lead to different structures in the end. Given the smaller size and greater number of POUs, it may be reasonable for the Energy Commission to establish a verification report process that covers one or more POUs, similar to how energy efficiency and resource adequacy reporting is handled. Certainly, there is no need for the verification report(s) for the POUs to be addressed to or sent to the CPUC, but rather this report should be sent to the POU governing boards as appropriate and to the Air Resources Board.

SMUD believes that option 2, discussing requiring procurement for the RPS in relation to 'unmet need' is not an option that is supported by the statute.

   (2) Time period used to determine compliance for compliance period ending December 31, 2016 (Public Utilities Code Section 399.30 (c)(2))
      (a) Options:
         (i) January 1, 2016 to December 31, 2016
         (ii) January 1, 2014 to December 31, 2016
         (iii) Other time period
      (b) Staff recommendation: None at this time
   (3) Time period used to determine compliance for compliance period ending December 31, 2020 (Public Utilities Code Section 399.30 (c)(2))
      (a) Options:
         (i) January 1, 2020 to December 31, 2020
         (ii) January 1, 2017 to December 31, 2020

(iii) Other time period
(b) Staff recommendation: None at this time

SMUD Comments

SMUD agrees with the general concept in the Energy Commission staff options that there must be a time-based measurement included in compliance determination, and SMUD contends that a complete reading of the statute indicates compliance is to be measured by procuring sufficient renewable generation to equal a percentage of retail sales for each compliance period. Therefore, SMUD contends that Option (ii) above is the correct option for each compliance period. First, SMUD notes that Section 399.30(a) requires that POUs adopt a procurement plan that requires a minimum quantity of renewable resources "... as a specified percentage of total kilowatthours sold to the utility's retail end-use customers, each compliance period...." While the specified percentage that is required for each POU can vary, SMUD believes that the language is clear that a percentage is required and measured by retail sales in the entire compliance period. Second, SMUD notes that the first compliance period is clearly set up to achieve an average of 20% of retail sales for the compliance period, and that after 2020, 33% of retail sales are to be achieved for the annual compliance periods established in that timeframe. SMUD sees no reason for compliance periods between 2013 and 2021 to be treated differently, or to be treated in such a manner as to be arguably in nonconformance with Section 399.30(a).

While agreeing that the time period for measuring compliance for the first and second period is the compliance period itself, SMUD must emphasize that this does not mean that every POU must necessarily meet the same percentage requirement for the compliance period. As discussed later in comments regarding setting interim targets and showing reasonable progress, SMUD contends that POU governing boards have the authority to set these targets and progress metrics in compliance with the law, and that they do not have to be identical, but in fact can reflect differential conditions amongst POUs. POUs and their governing boards have discretion in setting those targets so long as they comply with §399.30(a)-(c).

ii) Percentage limitations for portfolio content categories
(1) Portfolio content category 1 (Public Utilities Code Sections 399.16 (b)(1), 399.16 (c)(1) and 399.30 (c)(3))
(a) Options (one or more of the following):
(i) Use contract information, which could demonstrate, as necessary depending on the portfolio content category definition, scheduling for the renewable resource and whether generation in this category is procured as a bundled product

(ii) Use NERC e-Tags to verify generation scheduled into a California balancing authority; the NERC e-Tag must show that the generation came from the same RPS-eligible resource as the RECs with which the NERC e-Tag is matched
(iii) Use dynamic transfer agreements to verify generation dynamically transferred to a California balancing authority

(b) Staff recommendation: Options (i), (ii), (iii); contract information would provide appropriate assurance, as needed, that generation counted toward this category is scheduled into a California balancing authority and/or bundled. NERC e-Tags adequately demonstrate the timing and quantity of generation scheduled into a California balancing authority from the renewable resource. Dynamic transfer agreements with the balancing authority sufficiently demonstrate that the generation represented belongs in this category.

SMUD Comments

SMUD agrees that the Energy Commission staff recommendation to effectively use all information available as needed is reasonable and allows needed flexibility in showing that a resource fits within portfolio content category 1. However, SMUD disagrees that there should be a blanket requirement that the energy in Category 1 should be procured "... as a bundled product," since there are instances where energy that belongs in the category can be unbundled, as argued above.

(2) Portfolio content category 2 (Public Utilities Code Sections 399.16 (b)(2), 399.16 (c)(3) and 399.30 (c)(3))
(a) Firmed and shaped:
(i) Options (one or more of the following):
1. Use contract information to demonstrate, as necessary depending on the portfolio content category definition, scheduling for the renewable and incremental resources and/or a contractual link between the renewable resource and the incremental resource
2. Use NERC e-Tags to verify firmed and shaped generation scheduled into a California balancing authority; NERC e-Tags must include the RPS ID # of the resource with which the NERC e-Tag is matched

(ii) Staff recommendation: Options 1, 2; contract information would provide appropriate assurance, as needed, that generation counted toward this category is scheduled into a California balancing authority and/or demonstrates a contractual connection. NERC e-Tags adequately demonstrate the timing and quantity of generation scheduled into a California balancing authority and can show a link to the RPS-eligible resource via the RPS ID#.

(b) Incremental:
(i) Options:
1. Contract information to demonstrate, as necessary, the timing of contract execution for and/or the contractual relationship between the renewable and incremental resources
(ii) Staff recommendation: Option 1; contractual information should be adequate to demonstrate the incremental nature of the generation that is used to firm and shape renewable generation.

SMUD Comments

SMUD agrees that the Energy Commission staff recommendation to effectively use all information available as needed is reasonable and allows needed flexibility in showing that a resource fits within portfolio content category 2.

SMUD also agrees that contractual information should provide any data required regarding contract timing, should the Energy Commission adopt a regulatory treatment of 'incremental' that requires examination of contract terms and details beyond the basic information required for determining delivery of energy as envisioned for Category 2 resources.

(3) Portfolio content category 3 (Public Utilities Code Sections 399.16 (b)(3), 399.16 (c)(2) and 399.30 (c)(3))
(a) Options:
(i) Any generation that does not qualify for the first two categories is automatically counted in this category
(ii) All unbundled renewable energy credits, regardless of whether the renewable resource has its first point of interconnection with a California balancing authority, automatically count toward this category
(b) Staff recommendation: None at this time

SMUD Comments

Similarly to other recommendations above concerning Category 3 resources, SMUD believes that Option (i) here is correct. All that should be required for verification of Category 3 resources is verification of renewable eligibility, and it is not necessary to re-verify renewable eligibility in the compliance process, if a resource has already been certified as renewable by the CEC and is being tracked in WREGIS.

iii) Reasonable progress in intervening years of each compliance period (Public Utilities Code Section 399.30 (c)(2))

(1) Options (one or more of the following):
  (a) Summarize how POUs define their own reasonable progress without opinion
  (b) Define reasonable progress in the regulations as a percentage
  (c) Define the process and criteria in the regulations used to determine reasonable progress for POUs
  (d) Release verified data
    (i) Adopted by full Commission
    (ii) Not adopted by full Commission
  (e) Release unverified data
    (i) Adopted by full Commission
    (ii) Not adopted by full Commission

(2) Staff recommendation: Options (c), (e)(ii); statute limits the authority to mandate demonstration of specific quantities of procurement for intervening years. If a reasonable process was identified in regulations for POUs to follow in achieving their ultimate RPS achievement goals at the end of each compliance period, the Energy Commission could release unverified data submitted in the POUs' annual reports to serve as a snapshot of POU progress in intervening years.

SMUD Comments

SMUD does not believe that the Energy Commission need establish regulations regarding "reasonable progress", nor verify that such reasonable progress is occurring. In essence, staff's Option (a) is correct, but does not need to be turned into some regulatory language, merely established as a part of the reporting procedures that will occur under the law.

Accomplishing reasonable progress is not in itself a compliance obligation, but merely a way to move toward and in some cases define what the overall compliance obligation for compliance period is for a POU, and is a determination made by the POU governing boards under the law. Should a POU governing board establish percentage requirements in the intervening years as a proxy for "reasonable progress", these percentage requirements are translated into the amount of energy necessary for eventual compliance in the compliance period, and cannot be considered compliance obligations themselves, pursuant to §399.15(b)(1)(C). Should a POU governing board establish an alternative vehicle for "reasonable progress", there is still no support in law for Energy Commission regulations to determine or verify compliance with these POU board adopted protocols.

iv) Deficits associated with a previous renewables portfolio standard (Public Utilities Code Section 399.15 (a))
  (1) Options:

(a) No deficits shall be applied to future compliance periods if a POU procured at least 14 percent of retail sales from renewable energy resources in 2010 (from 399.15 (a))
(b) No deficits shall be applied to future compliance periods if a POU procured at least 10 percent of retail sales from renewable energy resources in 2010
(c) No deficits shall be applied to future compliance periods regardless of the percentage of retail sales procured from renewable energy resources in 2010

(2) Staff recommendation: None at this time

SMUD Comments

Option (c) is correct. For POUs, no deficits should be applied to future compliance periods regardless of the percentage of retail sales procured from renewable energy resources in 2010. Prior to the enactment of SBx1 2, POUs adopted a variety of RPS requirements and structures pursuant to Section 387. Section 399.15(a) addresses IOU deficits and includes specific conditions related to the 20% by 2010 RPS in place for retail sellers to indicate when there may be a carryover of a 2010 deficit. These conditions are not applicable in any reasonable way for POUs, given the differential history.

v) Excess procurement from previous compliance periods (Public Utilities Code Sections 399.13 (a)(4)(B) and 399.30 (d)(1))

(1) When can excess procurement begin to be applied to future compliance periods, for those POUs that adopt rules permitting the use of excess procurement?

(a) Options:
(i) January 1, 2011 (date provided in 399.13(a)(4)(B))
(ii) June 1, 2010
(iii) Another date
(iv) At the discretion of POUs

(b) Staff recommendation: Option (i); staff can see no compelling reason to apply a different standard from that applying to retail sellers.

SMUD Comments

SMUD contends that the excess procurement described in §399.30(a)(4)(B) refers to procurement under the 33% RPS law, which begins either on January 1, 2011 or on the day that the law is effective (SMUD believes that it is the latter). Hence, the only date at which "excess procurement" can be begin to be applied from "one compliance period to subsequent compliance periods" is on January 1,

2014, the beginning of the second compliance period, and Option (iii) is the correct staff option. Calculating excess compliance requires an initial compliance period from which to transfer excess forward, and the first compliance period, as mentioned above begins is January 1, 2011 or later. While under §399.13(a)(4)(B), the law says that accumulation of excess compliance can begin on January 1, 2011, SMUD contends that accumulation may not be able to begin until the law is effective, and that in any case, it is not applied until the beginning of the second compliance period. SMUD contends that the issue of any excess compliance from previous RPS programs enacted by POU governing boards is not explicitly governed by any section of law.

SMUD contends that the issue of any excess compliance from previous RPS programs enacted by POU governing boards is not explicitly governed by any section of SBX1 2.

(2) Can excess procurement from portfolio content category 3 be applied toward a future compliance period, for those POUs that adopt rules permitting the use of excess procurement?
   (a) Options:
      (i) Yes
      (ii) No (from 399.13 (a)(4)(B))
   (b) Staff recommendation: Option (ii); staff can see no compelling reason to apply a different standard from that applying to retail sellers.

SMUD Comments

Option (ii) is correct. Section 399.30(d)(1) provides that POU governing boards may adopt "rules permitting the utility to apply excess procurement in one compliance period to subsequent compliance periods in the same manner as allowed for retail sellers pursuant to §399.13(a)(4)(B), which provides: "In no event shall electricity products [in Category 3] be counted as excess procurement."

However, SMUD contends that use of Category 3 resources for compliance in a compliance period does not affect or constrain the calculation of and transfer of other, Category 1 and 2, resource procurement as excess procurement.

(3) Length of contracts allowed for excess procurement that can be applied to a future compliance period, for those POUs that adopt rules permitting the use of excess procurement?
   (a) Options:
      (i) At least 10 years (from 399.13(a)(4)(B))
      (ii) At least 5 years

(iii) At least 3 years
(iv) At the discretion of POUs

(b) Staff recommendation: Option (iv); as contracts remain under the purview of POUs and are not approved by the Energy Commission, it is reasonable to leave this issue to the discretion of POUs.

SMUD Comments

Staff is correct. In this instance, SMUD believes that §399.30(m) trumps the 10 year restriction in §399.13(a)(4)(B). SMUD also contends that POUs retain discretion to determine excess compliance from previous RPS programs enacted by POU governing boards without regard to the 10 year restriction in §399.13(a)(4)(B).

d) Conditions allowing waiver of enforcement
   i) Reasonable conditions that allow for delay of timely compliance (including inadequate transmission, unanticipated curtailment of resources, and permitting, interconnection or other circumstances that delay procurement), for those POUs that adopt such conditions (Public Utilities Code Sections 399.15 (b)(5)-399.15 (b)(9) and 399.30 (d)(2))
      (1) Options (one or more of the following):
         (a) Use the same criteria for timely compliance delays as those used for retail sellers
         (b) Establish criteria in regulations by which Energy Commission will determine reasonableness of timely compliance delays; Energy Commission will use these criteria to evaluate at the end of each compliance period for those POUs that do not meet targets
         (c) Tiered compliance based on size of POU
         (d) Exemption from demonstrating compliance for POUs under a certain size
      (2) Staff recommendation: Option (b); while the criteria for evaluating the reasonableness of timely compliance delays should be similar for retail sellers and POUs, there may be different considerations that need to be taken into account, requiring slight disparities. In addition, no language in the statute indicates that exemptions or variations in the rules are necessary for smaller POUs.
   ii) Reasonable conditions that allow procurement expenditures to meet or exceed cost limitations, for those POUs that adopt such conditions (Public Utilities Code Sections 399.15 (c) and 399.30 (d)(3))
      (1) Options:
         (a) Use the same criteria for cost limitations as those used for retail sellers
         (b) Establish criteria in regulations by which Energy Commission will determine reasonableness of cost limitations; Energy Commission will use these criteria to evaluate at the end of each compliance period for

those POUs that do not meet targets

(2) Staff recommendation: Option (b); while the criteria for evaluating the reasonableness of exceeding cost limitations should be similar for retail sellers and POUs, there may be different considerations that need to be taken into account, requiring slight disparities.

SMUD Comments

SMUD agrees in principle with staff's recommended option (b) in these cases. However, SMUD believes that the regulations must be carefully crafted here, as the conditions for delaying timely compliance and conditions to meet or exceed cost limitations are adopted by POU governing boards under SBX1 2, under their authority and their option, and the Energy Commission's authority is limited to determining whether the governing board of the POU complied with the procedural requirements of SBX1 2. Adoption of limited regulatory criteria by which the Energy Commission will judge compliance with these conditions may be reasonable, but the basic decision to even establish the conditions rests with POU governing boards, and CEC regulations should not constrain that authority.

e) Dispute resolution process

i) If POUs dispute Energy Commission findings

(1) Options:

(a) Same process currently used for retail sellers that dispute Energy Commission findings

(b) Different process from that used for retail sellers

(2) Staff recommendation: Option (a); staff can see no compelling reason to adopt a different process from that applying to retail sellers.

ii) If another party disputes Energy Commission findings

(1) Options:

(a) Same process outlined in the Renewable Energy Program Overall Program Guidebook

(b) Different process from that outlined in the Renewable Energy Program Overall Program Guidebook

(2) Staff recommendation: Option (a); staff can see no compelling reason to adopt a different process from that presented in the RPS Guidebook.

SMUD Comments

Given the foundational issues that remain with respect to the relative positions with respect to the scope of Commission and POU governing board jurisdiction, is it premature to opine upon such issues as dispute resolution, which will depend largely upon what substantive issues are sought to be resolved.

Reporting

a) Regulatory streamlining
   i) Options (one or more of the following):
      (1) Modify existing forms submitted to the Energy Commission by POUs to reflect reporting requirements imposed by SB X1 2
      (2) Allow consolidated/aggregated reports at the discretion of POUs; those whose reports are aggregated by another party must submit an attestation verifying that all of the information representing their POU is correct and complete
      (3) Do not allow consolidation of reports
   ii) Staff recommendation: Options (1), (2); staff feels that reporting should be streamlined in any possible way, including aggregated reports and modifications to existing reports already submitted to the Energy Commission.

SMUD Comments

SMUD supports the staff's recommendation. Some POUs are members of joint powers agencies ("JPA"). They may find it efficient to submit consolidated reports through the JPA.

Respectfully submitted,

/s/

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cc: Corporate Files