STATE OF CALIFORNIA

BEFORE THE CALIFORNIA ENERGY COMMISSION

In the matter of, Implementation Of Renewables Portfolio Standard Legislation	Docket No. 11-RPS-01

M-S-R PUBLIC POWER AGENCY COMMENTS ON THE 33 PERCENT RENEWABLES PORTFOLIO STANDARD PRE-RULEMAKING DRAFT REGULATIONS

Pursuant to the California Energy Commission (Commission or CEC) Notice dated September 2, 2011, the M-S-R Public Power Agency (M-S-R) submits these comments on the "*33 Percent Renewables Portfolio Standard Pre-Rulemaking Draft Regulations,*" issued on July 25 (Proposed Regulation), and the July 30 Staff Workshop (July 30 Workshop).

I. INTRODUCTION

The M-S-R Public Power Agency[1] pursues the development of renewable energy projects and contracts within California and outside of the State, on behalf of its member agencies who are obligated to meet the 33% renewable portfolio standard (RPS). Because of these interests, M-S-R has been an active participant in this proceeding, and continues to work with stakeholders and Commission staff in efforts to develop a regulation that reflects the statutory intent of Senate Bill (SB) X 1-2 to increase the state's RPS procurement, provide for a enforcement program, and recognize the unique nature of California's electricity markets, including the role that publicly owned utilities paly in that market.

M-S-R appreciates the steps that the CEC Commissioners and Staff have taken to address the concerns raised by the POUs that would be bound by these regulations. Since issuance of the first Concept Paper on this issue, there has been marked progress in clarifying various provisions and ensuring that the regulation reflects not only the specific provisions of the statute, but real-life

[1] Created in 1980, the M-S-R Public Power Agency is a public agency formed by the Modesto Irrigation District, the City of Santa Clara, and the City of Redding. M-S-R is authorized to acquire, construct, maintain, and operate facilities for the generation and transmission of electric power and to enter into contractual agreements for the benefit of any of its members. As such M-S-R does not serve retail load within California but supplies wholesale power under long-term contracts to its retail load-serving members.

constraints associated with the development and delivery of electricity products to California's businesses and residents. The July 2012 draft of the Proposed Regulation reflects a number of significant corrections, and M-S-R appreciates Staff's ongoing work to address additional areas of the regulation that may result in unintended restrictions on the renewable energy market.

Despite the progress that Staff and Stakeholders have made in moving towards a final, comprehensive program that addresses renewable energy compliance matters, there are still a number of outstanding issues – some to be addressed in the context of the regulation itself, others that are addressed through the RPS Eligibility Guidebook or related documents – that result in a fair amount of uncertainty for affected stakeholders regarding the ultimate construct under which their RPS compliance must fall. Basic assumptions underlying the procurement decisions currently being made and the lack of clarity regarding some basic interpretive issues regarding, for example, product content category (PCC) 1 resources, is problematic. M-S-R is concerned that this disconnect means later-in-time decisions by the CEC could negate the benefits of financial decisions and investments being made at this time, and force even greater RPS compliance costs on POUs. M-S-R looks forward to continuing to work with the CEC to finalize and clarify these remaining issues.

II. COMMENTS ON THE PROPOSED REGULATION[2]

A. Section 3202, Qualifying Products.

In order to give full force and effect to the statutory provision in section 399.16(d) that resources from "any contract or ownership agreement originally executed prior to June 1, 2010 "*count in full*" (emphasis added) toward the RPS requirement, the regulation should clarify that a POU may either take the entire amount of the pre-June 1, 2010 contract and apply it to their overall compliance obligation or, in the alternative, for those resources that meet the current definition of a PCC, use the product for their PCC balancing requirement.[3] Any other interpretation renders absurd the statutory call for fully utilizing these resources, as prohibiting entities from making this election would result in POU ratepayers paying a premium for resources that are now of lesser value based on the regulation's interpretation of the statute.

These financial impacts on POU ratepayers have a significant effect on the POU's future procurement decisions and could adversely impact the ability of a POU to finance additional PCC-

[2] M-S-R supports the comments submitted by the California Municipal Utilities Association.

[3] In this discussion, M-S-R assumes that the resources meet the full range of requirements set forth in section 366.16(d)(1)-(3).

eligible resources, especially in the first compliance period. Accordingly, following the rules of statutory interpretation that the requires the legislation to be read to clear meaning to the terms used therein, "according to the usual, ordinary import of the language employed",[4] M-S-R urges the CEC to revise section 3202(a)(2) to recognize the grandfathered resources can "count in full" as set out in the current draft, and include a provision that allows, in the alternative, PCC-eligible resources that meet the current eligibility definition to be counted toward the balance requirements.

B. Section 3203, Portfolio Content Categories.

The CEC's overall role in the context of a POU's RPS program is to determine compliance at the end of the compliance period. Accordingly, it is imperative that the definitions set forth in the regulation be not only clear and concise, but also consistent with the manner in which the electricity sector operates. Both current and future renewable energy projects and transactions are significantly impacted by the definitions of the portfolio content categories, and any ambiguity within these provisions would be detrimental to both the POU affected, as well as the overall market.

As more fully set forth in the comments submitted by the California Municipal Utilities Association, there are a number of scenarios that reflect legitimate energy transactions that could be interpreted under the proposed regulations as violations of the rule. Such an interpretation is not supported by the statute, nor by any public policy rationale, and therefore should be clarified in the regulation. Specifically, the regulation should include language that makes it clear that each of the following scenarios are appropriate transactions that preserve the PCC 1 nature of the electricity:

- A POU may schedule electricity from a PCC 1 generating facility as well as from non RPS-eligible generation into a California Balance Authority in an amount that exceeds the POU's total load during that same time period.
- A POU may schedule electricity from a PCC 1 generating facility into a California Balancing Authority in an amount that exceeds the POU's total load during that same time period.
- A POU may schedule electricity from a PCC 1 generating facility in a California Balancing Authority in which the POU does not serve retail load and the POU is not obligated to schedule electricity from that California Balancing Authority Area into the California Balancing Authority Area where the POU does serve retail load.

[4] See, for example, *Phelps v. Stostad*, 16 Cal. 4th 23, 32, 65 Cal. Rptr. 2d 360, 365 (1997) citing *DuBois v. Workers' Comp. Appeals Bd.*, 5 Cal. 4th 382, 387, 388, 20 Cal. Rptr. 2d 523, 525-526 (1993).

Renewable resources, by their very nature, cannot generally be located where the load is located, nor operate when the demand for electricity is the highest. Accordingly, it is important to be able to schedule those resources in an economic and efficient manner. M-S-R urges the Commission to ensure that these transactions are not restricted under the regulation, and indeed, that the regulation recognize the benefit that these kinds of transactions serve in that they not only allow entities to schedule electricity from renewable resources, but they facilitate the efficient and economical operation of the electricity grid, including sometimes highly constrained transmission facilities.

C. Section 3204, RPS Procurement Requirements.

In section 3204, the Commission has proposed a reasonable and statutorily supportable calculation for determining the procurement requirements of a POU at the end of each compliance period. The proposed regulation appropriately acknowledges not only the "lumpy" nature of renewable procurement, but the existing renewable portfolios of many POUs, that include a mix of resource and contract types.

There is no statutory support for a prohibition against the proposed interpretation, and despite the fact that the California Public Utilities Commission (CPUC) has taken a somewhat different approach with regard to its oversight of retail sellers, this does not invalidate the appropriate interpretation applied by the CEC for POUs. Indeed, the authority that the legislature has granted to the CPUC over retail sellers is not analogous to the authority that the CEC has over POUs. It is for this reason that the CEC has properly proposed that the compliance RPS procurement requirements for the second compliance period be the sum of 20% of a POUs 2014 retails sales, 20% of its 2015 retails sales, and 25% of its 2016 retail sales. Likewise, the third compliance period requirement of 25% of 2017 retail sales, 25% of 2018 retail sales, 25% of 2019 retail sales, and 33% of 2020 retail sales, is a reasonable and appropriate interpretation of the statutory requirement. Even if POU procurement during any of the intervening years of the second compliance period dips below 20%, the POU will still be held to a final compliance period obligation that would equal at least 20% during each of those intervening years, thereby ensuring that the provisions of the statute are met.

D. Section 3206(a)(5), Historic Carry-Over

M-S-R appreciates the inclusion of new section 3206(a)(5) that addresses the manner in which a POU can carry-over historic RPS-eligible procurement prior to the implementation of the new 33% RPS mandate. This new provision represents a reasonable recognition of past RPS procurement

decisions, and indeed recognizes the early actions of POUs that made significant investments in emerging renewable projects prior to the adoption of SBX1-2. As proposed, after netting the RPS procurement (inclusive of the annual procurement target increase) from the period 2004 to 2010, as long as the net of that calculation results in an annual procurement target for 2010 that is no less than 20%,that historic procurement can be carried over to the 33% program, into any compliance period.

M-S-R urges the Commission to slightly modify this provision to reflect the RPS programs that were lawfully adopted by the POUs prior to the 33% mandate.[5] POUs that had their own RPS programs, and that did not surrender or sell RECs in excess of their stated procurement targets, should be able to utilize that extra renewable procurement for purposes of establishing the baseline and the overall 2010 percentage. The 20% by 2010 target does not allow the POUs to capture all of the benefits and costs invested in their early RPS resources, since it sets a target that is arbitrarily high, and indeed, even in excess of the current mandate of 20% by 2013 (399.30(c)(1)). Accordingly, it would be appropriate to adjust the history carry-over calculation in section 3206(a)(5) to allow POUs with documented RPS procurement programs to use the percentages adopted by their boards as the final 2010 target number for purposes of determining amounts that can be carried over into the 33% RPS program compliance periods.[6]

E. Section 3206(d), Application of POU Optional Compliance Measures.

The February 2012 iteration of the draft regulation had proposed a provision that required a POU to submit their Optional Compliance Measures to the CEC for review and approval. The July 2012 Draft Regulation properly strikes this provision. However, as currently drafted, the regulation continues to advance the premise that the Commission has "veto" authority over the measures adopted by the local governing boards of the POUs. Section 3206(d) provides that *"in determining a POU's compliance with the RPS procurement requirements, the Commission will not consider the application of any rule or rule revision adopted by a POU under this Section 3206 that the Commission*

[5] It is important to note that these RPS programs were adopted as part of a formal action by the local governing boards of the entities at issue. Their "targets" were not arbitrarily set, but rather reflect the then-current statutory direction, and were based on the POU's best assessment of their renewable portfolio options. See Modesto Irrigation District, Resolution 2003-245, Approving Establishing Renewable Portfolio Standard that Recognizes the Intent of the Legislature to Encourage Renewable Resources, dated December 16, 2003. Likewise, the City of Redding adopted a Renewable Portfolio Standard on July 17, 2003, in Resolution 2003-92.

[6] As an alternative, if the Commission is looking to adopt a uniform calculation to apply to all POUs, M-S-R recommends that the Commission utilize a formula that incorporates the RPS set forth in Senate Bill 1078 (2002). Such a trajectory is consistent with the provisions of PUC Section 387 that made POUs responsible for "implementing and enforcing a renewables portfolio standard that recognizes the intent of the Legislature to encourage renewable resources, while taking into consideration the effect of the standard on rates, reliability, and financial resources and the goal of environmental improvement."

determines does not comply with the Public Utilities Code Section 399.30, these regulations, or any applicable order or decision adopted by the Commission pertaining to the RPS."

This provision exceeds the CEC's authority in enforcing the RPS. Under the provisions of section 399.30(d), the "governing board of a local publicly owned electric utility may adopt . . . measures" that permit it to apply excess procurement in one compliance period to a subsequent compliance period, that establish conditions for delaying timely compliance, and establish cost limitations for procurement expenditures. For each of these provisions, the POU need only ensure that the established rules are "in the same manner" for purposes of developing the excess procurement measure, and "consistent with" the provisions in 399.15 (b) and (c) for delaying timely compliance and establishing cost limitations, respectively. As with the form of the POU's procurement plan, there is no authority granted to the CEC to make a determination regarding the form of the optional compliance mechanisms adopted by the POUs. A "caveat" in the regulation that states the CEC will not apply a POU's compliance measures if the CEC "determines" that it is lacking, is the same as the previous attempt by the CEC to include approval/veto power over the measures, and exceeds the statutory authority set forth in section 399.30(n). There must be some evidence or information to indicate that the POU acted improperly in adopting the provisions at issue before the agency can attempt to invoke such a provision. That is necessary in order to overcome the legal presumption that POU local governing boards are acting properly in their adoption of the alternate compliance measures delineated in the statute.[7] Accordingly, section 3206(d) should be stricken from the regulation.

F. Title 20, Section 1240, Enforcement Provisions.

The proposed revisions reflected in section 1240(d) of the July version of the regulation should be stricken. The February 2012 version of the Regulation originally set forth the procedure that would apply to any complaint pertaining to the RPS requirements for POUs. That procedure begins with a complaint (1240(b)), which is to be initiated by the Commission staff. Filing of the complaint is followed by the submission of an answer (section 1240(d)) by the POU that addresses the matters addressed in the compliant. This process continues with the opportunity for the Commission staff to file a response (1240(b)), followed by a formal hearing (1240(f)), and a final decision by the full Commission (1240(g)). Only after a final decision confirms that there has been a violation of the RPS is that matter referred to the California Air Resources Board (CARB), who may make a decision to impose penalties under their separate authority.

[7] California Evid. Code, § 664; [providing that "[i]t is presumed that official duty has been regularly performed].

In the July 2012 revisions, new language has been proposed for section 1240(d) that presumes a violation of the RPS by the POU even in advance of a formal response, hearing, and most importantly, a Commission decision. The new language provides that "*The answer may include a discussion of factors deemed relevant by the [POU] in* ***mitigating any penalties*** *that may be imposed by the [CARB] pursuant to Public Utilities Code Section 399.30, subdivisions (n) and (o),* ***because of the utility's failure*** *to meet the requirements of the RPS . . .*" (section 1240(d), emphasis added).

Until such time as there has been a hearing and a final Commission decision finding that the POU has not complied with the RPS, there is no "failure" by the POU. Indeed, the answer filed by the POU may provide all of the information necessary for the Commission to drop the proceeding or otherwise make a finding of full compliance. However, as worded, the regulation presupposes that a POU is in violation of the regulation, and indeed, would have the POU start to address penalties before a determination of noncompliance has even been made. Further complicating this matter is the fact that the "penalty phase" of the proceeding is before the CARB, and not before the CEC. Accordingly, there is no clear direction to the POU regarding what information CARB would request during deliberations on what, if any, penalties may be applied. Accordingly, it is inappropriate to include a reference to mitigation of penalties (and an assumption of guilt) in the regulatory language regarding a POU's answer to a Commission complaint.

III. Conclusion

M-S-R appreciates the opportunity to provide these comments and looks forward to working with Staff in preparation of the final regulation to be approved by the Commission. M-S-R urges the Commission to review the current draft and to make the necessary revisions addressed herein.

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Respectfully submitted,

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