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Additional submitted attachment is included below.

STATE OF CALIFORNIA ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

In the matter of: Amendments to Regulations Specifying Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities	)	Docket No. 16-RPS-03

COMMENTS OF THE UTILITY REFORM NETWORK ON THE DRAFT AMENDMENTS TO REGULATIONS SPECIFYING ENFORCEMENT PROCEDURES FOR THE RENEWABLES PORTFOLIO STANDARD FOR LOCAL PUBLICLY OWNED ELECTRIC UTILITIES

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In response to the Revised Notice of Lead Commissioner Pre-Rulemaking Workshop, The Utility Reform Network (TURN) submits these comments on the draft amendments for the enforcement procedures for the Renewables Portfolio Standard (RPS) for Publicly Owned Utilities (POUs). TURN's written comments reinforce and expand upon the oral comments provided during the January 10th workshop.

I. LONG TERM CONTRACT OBLIGATION

The draft amendments implement the long-term contracting requirement (LTR) enacted in SB 350 and codified in §399.13(b) and §399.30(d)(1). The reasonable and effective implementation of this requirement involves correctly identifying the key features of a "long-term" contract that must be obtained and preserved to ensure compliance, determining the relationship between the LTR and overall procurement targets, establishing reasonable limits on contract assignments and amendments, and clarifying the relevance of the optional compliance measures identified in §399.15(b)(5).

As a threshold matter, the Energy Commission must recognize that the LTR is a key feature of the RPS program and a primary requirement for demonstrating overall compliance. The Legislature included this requirement in SB 350 to reflect the critical importance of long-term contracting to the development of sufficient new RPS generating resources to meet the ambitious post-2020 targets. The purpose of the LTR is to promote market stability, ensure advance planning and drive the timely development of new resource capacity. Absent sufficient advance long-term contracting by retail sellers and POUs, there may not be sufficient supply at reasonable prices to allow the achievement of the SB 350

targets. Both the Public Utilities Commission and Energy Commission must take seriously their obligation to enforce the LTR in a manner that avoids future supply shortages and minimizes the potential for market disruptions.[1]

The pre-rulemaking amendments provide insufficient protections relating to long-term contracting to achieve the goals of SB 350 and SB 100. In the following sections, TURN identifies several provisions that must be amended to ensure timely, complete and meaningful compliance by POUs.

A. Required elements of a valid "long-term" contract

The amendments fail to provide an adequate definition of "long-term contract" for purposes of enforcing the LTR. The definition in §3201(r) describes an eligible commitment as "contracts of 10 or more years in duration, ownership, or ownership agreements required by Public Utilities Code section 399.13(b)." The language in §3204(d)(2)(A) clarifies that the commitment must include "a duration of at least 10 continuous years." These provisions are not sufficient and must be augmented in several respects.

1. POU must be the counterparty/owner

Neither provision includes an explicit requirement that the POU serve as the counterparty to the contract over the relevant duration, leading to a discontinuity with the statutory provision specifying that long-term contracts must be executed by the retail seller or POU demonstrating compliance with the LTR.[2]

[1] The Public Utilities Commission has repeatedly recognized the importance of long-term contracts to developing new RPS generating resources. In D.17-06-026, the Commission noted that "in D.06-10-019 and D.07-05-028, the Commission adopted the parties' consensus that long-term contracts are necessary in order for developers to finance new and repowered RPS-eligible generation." (D.17-06-026, page 15)

[2] Cal. Pub. Util. Code §399.13(b)("Beginning January 1, 2021, at least 65 percent of the procurement a retail seller counts toward the renewables portfolio standard requirement of each compliance period shall be from its contracts of 10 years or more in duration or

This omission could inadvertently encourage POUs to seek compliance credit for long-term contracts executed by other wholesale or retail entities. TURN suggests the following edits:

> 3204(d)(2)(A) A long-term contract is defined as a contract by the local publicly owned electric utility demonstrating compliance to procure electricity products for a duration of at least 10 continuous years. A short-term contract is defined as a contract to procure electricity products for a duration of fewer than 10 continuous years.
>
> 3204(d)(2)(B) Procurement from an ownership agreement by the local publicly owned electric utility demonstrating compliance shall be classified as long-term, unless the agreement specifies that the ownership duration is for a period of less than 10 continuous years. Procurement from an ownership agreement that specifies the ownership duration is for a period of fewer than 10 continuous years shall be classified as short-term.

This change should ensure that there is no misunderstanding regarding the requirement that the POU demonstrating LTR compliance be the counterparty to any long-term contract or the owner of the facility.

2. Requirements to prevent sham long-term contracts

The staff proposal fails to address other important elements that should characterize an LTR-eligible commitment. This omission is problematic because it opens the door to potential 'sham' long-term contracts that satisfy the bare-bones criteria of contract duration without actually constituting a legitimate long-term commitment that could legitimately be used to finance the development of a new generation project. TURN is concerned about the potential for 'sham' long-term contracts that are constructed to meet LTR compliance requirements but are functionally short-term agreements.

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in its ownership or ownership agreements for eligible renewable energy resources.")(emphasis added)

The Energy Commission should prevent 'sham' agreements by incorporating several key requirements.

First, annual procurement quantities should not vary significantly over the term of the long-term agreement. A POU should be prohibited from receiving LTR credit for a 10-year contract that provides (for example) 99% of deliveries in the first year with the remaining 1% spread out over the next 9 years. This scenario is not hypothetical. In 2013, Pacific Gas & Electric (PG&E) sought CPUC approval of a "long-term" contract that provided 90% of deliveries in the first year with the remaining deliveries occurring over the following 9 years.[3] TURN opposed PG&E's contracts on the basis that the deal structures were intentionally designed to evade the banking rules that provided preferential treatment to long-term commitments.[4] The Public Utilities Commission agreed with TURN's objections and rejected cost recovery for PG&E's proposed agreements.[5]

Second, a 'sham' long-term contract could fail to specify any particular quantities or prices with amounts and costs being negotiated annually. Under this type of contract, the buyer and seller would agree to regular adjustments to the prices and volumes during the course of the 10-year period, perhaps including options for either buyer or seller to terminate the agreement without penalty if they fail to reach an accommodation. This type of structure would effectively constitute a series of short-term contracts that are not held together by any meaningful or consistent long-term commitment. Such a structure should not be permitted to count for LTR compliance.

[3] PG&E Advice Letters 4299-E, 4300-E, 4301-E, filed October 10, 2013.
[4] Protest of TURN and the Coalition of California Utility Employees to PG&E Advice Letters 4299-E, 4300-E, and 4301-E, filed October 30, 2013.
[5] CPUC Energy Division disposition letter re: PG&E Advice Letters 4299-E, 4300-E, and 4301-E, transmitted May 19, 2014.

Allowing agreements that lack fixed quantities or prices to be characterized as "long-term" would invite market participants to offer POUs contracts that impose no meaningful obligations over an extended period of time. The absence of these features renders any agreement nothing more than a speculative exercise that could not be relied upon by developers to finance new and repowered generation. Therefore, the Energy Commission should clarify that agreements without these elements do not satisfy the basic criteria for long-term contract eligibility.

TURN recognizes that there may be many different strategies a bad-faith market participant could develop to circumvent the intent of the long-term contracting obligation. TURN recommends that the Energy Commission include two specific requirements to prevent most, if not all, 'sham' contracts:

(1) Require that any eligible long-term contract include either fixed quantities over the entire term or quantities that represent a fixed percentage of the output of one or more specific generating facilities over the entire term.

(2) Require that any long-term contract include defined pricing terms that are not subject to renegotiation prior to the end of the 10-year period.

These requirements would prevent many types of 'sham' long-term contracts that could otherwise be used to demonstrate LTR compliance. In addition, TURN recommends that the Energy Commission include a catch-all provision that directs POUs to seek pre-clearance of any LTR contract structure that materially deviates from a conventional long-term contract. This 'pre-clearance' requirement could allow POUs to seek guidance from the Energy Commission for unusual long-term contract structures negotiated in good faith. Energy

Commission review would establish a safe harbor that prevents disputes when any such agreements are submitted for compliance at a later date.

TURN suggests the following additions to the draft amendments:

> 3204(d)(2)(A)(v) A long-term contract shall specify, for the entire term of the agreement, the procurement of fixed quantities or quantities that represent a fixed percentage of the output of one or more eligible renewable energy resources.
>
> 3204(d)(2)(A)(vi) A long-term contract shall specify, for the entire term of the agreement, exact pricing terms that cover the electricity, Renewable Energy Credits and other environmental attributes to be conveyed to the buyer.
>
> 3204(d)(2)(G) A local publicly owned electric utility may seek, prior to its use for purposes of complying with the long-term procurement requirement, an advance determination by the Commission that a long-term contract or ownership agreement satisfies the requirements of this section.

TURN urges the Energy Commission to recognize the importance of addressing these types of concerns in advance. The failure to lay down clear guidelines at this time could result in a flood of 'sham' contracts that are later disallowed, or grandfathered, after being submitted to demonstrate compliance for the 2021-2024 period. The Energy Commission should do its best to avoid this outcome by establishing more comprehensive requirements at this time along with processes to allow for ongoing review of any creative approaches to long-term contracting.

B. Contract Amendments

Although the draft amendments address situations where contract amendments alter the duration of the overall agreement, there is no guidance relating to amendments that adjust provisions other than duration. Consistent with the recommendations in the prior section, TURN supports clarifications relating to

the need for any LTR-eligible commitment to include defined quantity and pricing terms. However, TURN recognizes that long-term contracts may be amended during their term to address various issues that arise between the counterparties. During the January 10th workshop, some POU representatives noted the potential for amendments that alter the net capacity (MW) without altering the total energy (MWh) to be procured by the buyer.

TURN does not oppose allowing minor changes in capacity that do not materially affect the total energy to be provided under the agreement. However, any amendment that makes significant changes to the quantities or pricing of renewable energy to be conveyed over the remaining term should represent a sufficiently material change to warrant Commission review.

TURN therefore suggests the following additions to the draft amendments:

> 3204(d)(2)(F)(iii) Amendments to a long-term contract that materially affect the quantities of renewable energy or pricing for the remaining duration should be submitted to the Commission for an advance determination that the contract continues to satisfies the requirements of this section.

This provision would ensure that the Commission has an opportunity to identify any pricing or quantity changes that create 'sham' contracts that no longer impose meaningful long-term commitments capable of financing the development of new renewable generation.

C. Contract assignments

The draft amendments would allow a POU to "assign a long-term contract to another POU and transfer the benefit under the LTR, even if the assignment

period is for fewer than 10 years."[6] TURN is concerned that this provision would effectively allow the 'repackaging' of contracts that were originally long-term but are 'assigned' on a short-term basis. The lack of any restrictions on assignment could inadvertently invite gaming and 'temporary' assignment designed to circumvent the purpose of the LTR.

The Public Utilities Commission addressed this issue in a series of decisions. In D.17-06-026, the Commission affirmed that any "repackaging" of a long-term contract must remain consistent with the approach adopted in D.12-06-038 which requires each retail seller to demonstrate that it has made a long-term commitment (via ownership or contract) for output from RPS-eligible facilities.[7] Under no circumstances may a single long-term contract or ownership agreement to be divided, assigned or resold as a series of short-term contracts. In D.18-05-026, the Commission reaffirmed this requirement in denying a petition for modification filed by Shell Energy.[8]

TURN does recognize that many POUs participate in joint purchases of renewable energy under long-term contracts that involve multiple POUs and are organized through public power associations such as the Northern California Power Agency or Southern California Public Power Authority. It is reasonable for the Energy Commission to permit amendments to long-term contracts jointly executed by multiple POUs that adjust the obligations of individual POUs while preserving the total aggregated quantities and pricing for all POUs participating in the contract.

TURN therefore suggests the following additions to the draft amendments:

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[6] *Key Topics for Lead Commissioner Workshop*, Energy Commission staff, December 13, 2019, page 6.
[7] D.17-06-026, pages 21-22.
[8] D.18-05-026, page 27.

3204(d)(2)(F)(iv) Any assignment of a long-term contract must impose a procurement obligation on the new buyer with a prospective duration of at least 10 continuous years.

3204(d)(2)(F)(v) A long-term contract jointly executed by multiple local publicly owned electric utilities through a public power association may be amended to reallocate quantities of renewable energy amongst the individual buyers without jeopardizing eligibility for compliance with the requirements of this section.

This additional language should prevent 'temporary' assignments and allow for reallocations amongst the initial buyers to occur consistent with the circumstances described by POU representatives during the January 10th workshop.

D. Relevance of optional compliance measures

The staff paper provided at the January 10th workshop identifies the potential for POUs to use "optional compliance measures" pursuant to §399.15(b)(5) to address shortfalls relating to the LTR. There is no support in the text of the law or the Legislative history to support a broader application of this provision.

The optional compliance measures available to POUs are outlined in §399.30(d)(2)(A) and limited to those expressly identified in §399.15(b). The waiver provisions of §399.15(b)(5) only apply to the requirements of "this section" (§399.15). Since the LTR appears in a different section (§399.13(b)), it is not within the scope of the requirements outlined in §399.15 that are eligible for compliance waivers. The Energy Commission should continue to recognize this unambiguous limit on the availability of optional compliance measures in any implementing regulations.

E. Dependent vs. Independent Compliance obligation

The draft amendments establish the LTR as a separate and independent obligation from the other procurement requirements outlined in the statutes. This stands in contrast to the approach taken by the Public Utilities Commission which sets LTR compliance as a prerequisite to any application of procurement quantities towards the overall targets and the portfolio balance requirements.

This second (dependent) approach was adopted by the Public Utilities Commission in D.17-06-026 for all retail sellers under its jurisdiction. As explained in D.17-06-026, this approach more effectively and accurately implements the statutory scheme, under which "the new LT requirement must be construed as an inflexible requirement of RPS compliance."[9] The adoption of the independent compliance approach by the Energy Commission would represent a significant break from the CPUC rules and create an unprecedented disconnect between RPS compliance rules applicable to POUs and CPUC-jurisdictional retail sellers.

The language of Public Utilities Code §399.13(b) expressly limits the ability of a retail seller or POU to count any quantities towards compliance unless at least 65% of the total volumes are sourced from long-term contracts or ownership agreements. Procurement volumes may only be counted if "at least 65 percent of the procurement" satisfies the LTR criteria.[10] The dependent approach accurately implements this restriction by only allowing a POU to "count" procurement towards any other "requirement" of the program if 65% of the total has been

[9] D.17-06-026, page 11.

[10] 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. Beginning January 1, 2021, at least 65 percent of the procurement a retail seller counts toward the renewables portfolio standard requirement of each compliance period shall be from its contracts of 10 years or more in duration or in its ownership or ownership agreements for eligible renewable energy resources.)(emphasis added)

sourced from long-term commitments. By contrast, the independent approach would allow a POU to count 100% of procurement towards all other requirements even if none of the volumes were sourced from long-term commitments. That outcome is clearly at odds with the plain text of the statute.

One of TURN's practical concerns relates to the lack of defined noncompliance penalties for failure to meet the LTR under the independent compliance approach. The Energy Commission is not proposing any material changes to Section 1240(g) which establishes the requirement that any decision finding noncompliance may include penalties, and that "any suggested penalties shall be comparable to penalties adopted by the California Public Utilities Commission for noncompliance with a Renewables Portfolio Standard requirement for retail sellers." The comparability principle is problematic given that the Public Utilities Commission assesses penalties for LTR shortfalls using the dependent compliance approach. At a minimum, the Energy Commission should clarify that any penalties for LTR shortfalls will be set at the same level that apply to shortfalls for RPS procurement quantities.

Given the importance of using the RPS program to drive the development of additional clean generation operating on the system, TURN does not support any approach to implementing the LTR that could encourage POUs to engage in additional short-term procurement from existing resources in lieu of making long-term commitments to new generation. The Energy Commission should take all practical actions to avoid sending this signal in the development of final amendments.

II. EXCESS PROCUREMENT

As pointed out in the *Key Topics* staff paper, SB 350 prohibits any retail seller or POU from banking excess procurement of PCC2 resources.[11] The draft amendments would prohibit any use of banked PCC2 RECs from compliance periods 1, 2 and 3 after the end of compliance period 4. This outcome is consistent with the treatment adopted by the Public Utilities Commission for retail sellers in D.17-06-026.[12] It represents a reasonable approach to harmonizing the prohibition on banking of excess PCC2 RECs with the recognition that POUs may require some flexibility to use existing banked quantities of PCC2 RECs.

At the January 10th workshop, some POUs proposed allowing banked PCC2 RECs from Compliance periods 1, 2, and 3 to be carried forward through Compliance period 5. There is no compelling rationale for providing an additional three years of eligibility for banked PCC2 resources. The Energy Commission should reject such proposals and align its rules with those adopted by the Public Utilities Commission.

Additionally, the proposed amendments prohibit the banking of any excess compliance in the event that any RPS procurement requirement, including the LTR, is not satisfied.[13] This treatment is appropriate and should not be modified. Under no circumstances should any POU be permitted to accumulate excess compliance during a period when any RPS procurement requirement, including those relating to Portfolio Balance or long-term contracting, have not been fully satisfied.

[11] The banking of PCC3 resources was already prohibited under prior law.
[12] D.17-06-026, pages 29-30.
[13] Proposed §3206(a)(1)(B) and §3201(ee).

III. RESALE OF GRANDFATHERED (PCC0) RESOURCES

The draft amendments do not make any material changes to the requirements governing the resale of RPS resources procured prior to June 1, 2010 that are treated as PCC0. Existing regulations prevent any resale from conveying the PCC0 status unless the resale was "explicitly included in the original contract or ownership agreement terms".[14] This treatment is identical to the approach adopted by the Public Utilities Commission. During the January 10th workshop, some POUs suggested that this regulation should be modified to allow grandfathered resources to retain their PCC0 classification under newly executed resale agreements. These POUs seek to resell products as PCC0 that would otherwise be classified as PCC2 and PCC3 in order to obtain a higher market price. The Energy Commission should decline to make this change.

The Legislative authorization for PCC0 treatment was intended to allow retail sellers and POUs that executed contracts in good faith, under rules in place prior to June 1, 2010, to fully count these resources towards later-enacted Portfolio Balance Requirements (PBRs). There is no basis for making PCC0 treatment tradable or assignable. Any new transaction involving the resale of PCC0 resources occurs in an environment when the counterparties are fully aware of the PBRs and cannot claim that requirements adopted after the resale date materially altered their reasonable expectations relating to compliance value. TURN strongly urges the Energy Commission not to introduce any new and controversial changes into the PCC0 resale rules.

IV. COST LIMITATIONS

The proposed amendments adjust Section 3206(a)(3) to modify the cost limitation rules and eliminate certain statutory requirements that were stricken in SB 350.

[14] Proposed §3202(b)

TURN agrees with the changes made to implement the specific revisions to Public Utilities Code §399.15(c). However, the proposed amendments ignore other elements of SB 350 that are relevant to the development of a cost limitation by POU governing boards.

A major new requirement enacted as part of SB 350 involves the establishment of the Integrated Resource Planning process. Pursuant to Public Utilities Code §9621 and 9622, each POU with annual demand exceeding 700 GWh must adopt an Integrated Resource Plan and submit it to the Energy Commission for review. In order to ensure that POUs take a consistent approach to the development of IRP plans and RPS cost limitations, the Energy Commission should require that any cost limitation incorporate relevant assumptions from the most recent IRP plans.

TURN suggests the following additions to the draft amendments:

> 3206(3)(B) Adopted cost limitation rules shall be set at a level that the POU has determined will prevent disproportionate rate impacts. Any assumptions relating to the cost and supply of eligible renewable energy resources, and anticipated rate impacts of renewable energy procurement, shall be consistent with those used in the most recent Integrated Resource Plan developed by the local publicly owned electric utility.

The addition of this requirement should ensure that POUs provide consistent assumptions in the development of RPS cost limitations and IRP plans. This type of consistency is critical to ensuring transparency with respect to resource planning and forecasting exercises.

V. GREEN PRICING PROGRAM EXEMPTION

The proposed amendments implement a provision of SB 350 that allows POUs to exclude retail sales associated with a voluntary green pricing program subject to

certain criteria.[15] TURN does not have specific concerns about the language developed by the Energy Commission. In in the *Key Topics* staff paper, the staff requests feedback on the implementation of the statutory requirement for a POU to procure, to the extent possible, renewable energy excluded pursuant to this provision from projects "located in reasonable proximity to program participants."[16]

This obligation should be understood to place a priority on voluntary green pricing programs that obtain renewable energy from projects providing tangible local economic and environmental benefits. POUs seeking the retail sales exemption should therefore be required to demonstrate that they made all reasonable efforts to procure renewable energy to serve subscribers from resources physically located within their service territory. For resources located outside their service territory, TURN proposes that the Energy Commission provide a safe harbor if resources are newly developed to serve voluntary green pricing program subscribers. This safe harbor recognizes the value of programs that lead to the development of additional clean generation.

TURN therefore suggests the following additions to the draft amendments:

> 3204(9)(b)(4) To the extent possible, the POU sought to procure the electricity products from RPS certified facilities that are located within its service territory. ~~in reasonable proximity to program participants.~~ For resources located outside its service territory, the POU may satisfy this showing with procurement from facilities that are newly developed to serve program participants.

The addition of this language should accurately implement the intent of this portion of §399.30(c)(4).

[15] Public Utilities Code §399.30(c)(4).
[16] *Key Topics for Lead Commissioner Workshop*, Energy Commission staff, December 13, 2019, page 8.

VI. QUALIFYING PROCUREMENT OF LARGE HYDROELECTRIC GENERATION

The *Key topics* staff paper requests feedback on whether a POU seeking special treatment pursuant to Public Utilities Code §399.30(k) should be required to apply the output of any hydroelectric generation (as defined in §399.30(k)(2)) to serve its retail customers.[17] The unambiguous answer is yes. The Energy Commission must require any POU seeking the RPS procurement reduction to apply all claimed eligible hydroelectric generation to their retail sales. Any resale quantities of the specified hydroelectric resource to other buyers should be deducted from quantities assumed to "satisfy" the POU's retail sales.

TURN was involved in the negotiations over this provision of SB 350. In that process, both the Northern California Power Association and the California Municipal Utilities Association expressed concern that the newly increased RPS targets could force a few POUs to procure renewable energy that, in combination with their legacy hydroelectric resources, would supply more than 100% of their retail sales. These POUs argued that their legacy zero-carbon hydroelectric generation provided such a significant share of customer needs that the Legislature should agree to limit their RPS obligations.

The statutory language addresses this concern by limiting the RPS procurement obligation to "the portion of its retail sales not supplied by its own hydroelectric generation."[18] Any resale of "hydroelectric generation" to another market participant would necessarily increase "the portion of its retail sales not supplied by its own hydroelectric generation."[19] Unless the resold hydroelectric output is

[17] *Key Topics for Lead Commissioner Workshop*, Energy Commission staff, December 13, 2019, page 11.
[18] Public Utilities Code §399.30(k)(1)(A)
[19] Public Utilities Code §399.30(k)(1)(A)(emphasis added)

removed from the calculation of any limits on RPS procurement, the hydroelectric output would be double counted by both the POU seeking the RPS reduction and a subsequent buyer claiming the resource in its Power Source Disclosure Program (PSDP) submissions. Since the Energy Commission is required to prevent double counting in the PSDP, it cannot allow two retail suppliers to make claims involving the same unit of output.[20]

Although POUs may engage in the resale of energy from hydro as unspecified energy, any practice of selling the output as a specified product (which allows the buyer to make environmental or resource claims) would result in the resource no longer supplying any portion of the POU's retail sales. The Energy Commission should clarify this treatment in its final regulations to the extent that it is not already abundantly obvious in the current draft language.

Respectfully submitted,

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[20] Public Utilities Code §398.4(k)(2)(E)("Ensure that there is no double-counting of the greenhouse gas emissions or emissions attributes associated with any unit of electricity production reported by a retail supplier for any specific generating facility or unspecified source located within the Western Electricity Coordinating Council when calculating greenhouse gas emissions intensity.")