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Additional submitted attachment is included below.

**STATE OF CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

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

**COMMENTS OF THE UTILITY REFORM NETWORK AND
THE COALITION OF CALIFORNIA UTILITY EMPLOYEES ON
PROPOSED MODIFICATIONS TO THE ENFORCEMENT PROCEDURES
FOR THE RENEWABLES PORTFOLIO STANDARD
FOR LOCAL PUBLICLY OWNED ELECTRIC UTILITIES**

Matthew Freedman
The Utility Reform Network
785 Market Street
San Francisco, CA 94104
415-929-8876 x304
matthew@turn.org

Marc D. Joseph
Adams Broadwell Joseph & Cardozo
601 Gateway Blvd., Suite 1000
South San Francisco, CA 94080
650-589-1660
mdjoseph@adamsbroadwell.com

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In response to the May 7, 2020 Notice of Proposed Action, The Utility Reform Network (TURN) and the Coalition of California Utility Employees (CUE) submit these joint comments on the proposed modifications to the enforcement procedures for the Renewables Portfolio Standard (RPS) for Publicly Owned Utilities (POUs). TURN previously provided written comments on the staff implementation proposal and the draft amendments. TURN and CUE appreciate efforts made by Energy Commission staff to craft modifications to the existing regulations that, with one notable exception, faithfully implement the statutory provisions and underlying intent of SB 350 and SB 100. These comments focus primarily on this notable exception.

The proposed modifications do not incorporate adequate requirements relating to the long-term contracting requirement (LTR) codified in §399.13(b) and §399.30(d)(1). Section I addresses the legal and factual issues raised by this deficient implementation. In Section II, TURN and CUE urge the Commission to require any POU limiting its procurement due to the adoption of a cost limitation demonstrate that the assumed costs of RPS-eligible resources needed for compliance are consistently incorporated into the cost limitation and the most recently prepared Integrated Resource Planning documents.

I. LONG-TERM CONTRACTING REQUIREMENT

The long-term contracting requirement (LTR) enacted in SB 350 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 long-term contracting requirement is to promote market stability, ensure advance planning and drive the timely development of new resource capacity.

As recognized by the California Public Utilities Commission (CPUC), a long-term contract is essential for a project developer to finance construction of new renewable generation.¹ Absent sufficient advance long-term contracting by retail sellers and POU's, there may not be adequate supply at reasonable prices to allow the achievement of the SB 350 and SB 100 targets. Consistent with this understanding, the Initial Statement of Reasons (ISOR) explains that "the primary additional function of the long-term procurement requirement, as it applies to POU's, is to provide a long-term commitment from a utility which may be relied upon for developing new or repowering existing eligible renewable energy resources."² Unfortunately, the proposed regulations governing the LTR do not properly reflect this understanding.

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

The proposed regulations establish several key eligibility criteria that must be satisfied for a contract to satisfy the LTR. Most importantly, the contract must demonstrate a POU's commitment "to procure electricity products from an RPS-certified facility for a duration of at least 10 continuous years."³ For any contract at least 10 years in duration between the POU and a third party, the third party

¹ 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 Initial Statement of Reasons, page 42.

³ Proposed §3204(d)(2)(A).

must demonstrate an underlying procurement agreement of at least 10 years in duration with the relevant RPS-certified facilities.⁴

These criteria fail to provide sufficient guidance to ensure that long-term contracts will effectuate the accepted purpose of the LTR. The lack of sufficient guidance in the regulations 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 finance the development of a new generation project. A particular problem is the omission of any requirements governing the need for fixed prices or defined quantities to be procured over the duration of the contract.

As a result of this omission, the proposed rules may permit a POU to satisfy the LTR requirement with a 10-year contract that provides 99% of deliveries from an RPS-eligible facility in year 1 with the remaining 1% of total deliveries occurring between years 2 and 10.⁵ Such a structure would functionally replicate a short-term (or even one year) procurement commitment and defeat the purpose of the LTR because it could not be used to finance the development of a new facility.

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

⁴ Proposed §3204(d)(2)(A)(3).

⁵ 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 (PG&E Advice Letters 4299-E, 4300-E, 4301-E, filed October 10, 2013). TURN and CUE 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 (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). The Public Utilities Commission agreed with TURN and CUE’s objections and rejected cost recovery for PG&E’s proposed agreements (CPUC Energy Division disposition letter re: PG&E Advice Letters 4299-E, 4300-E, and 4301-E, transmitted May 19, 2014).

of a meaningful long-term commitment would frustrate the ability of developers to rely on such agreements to finance new and repowered generation. To prevent this outcome, the Energy Commission should clarify that agreements lacking several key elements do not satisfy the basic criteria for long-term contract eligibility.

As proposed in TURN's prior comments, the Energy Commission could prevent "sham" agreements by adding the following requirements:

- (1) Any eligible long-term contract must 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 a term of at least 10 years.
- (2) Any eligible long-term contract must include defined pricing terms that are not subject to renegotiation prior to the end of the 10-year period.

The Energy Commission should allow any contract materially deviating from these requirements to be submitted for advance certification. The Energy Commission may grant advance certification of LTR eligibility if the POU is able to demonstrate that the contract is tied to the development of new generation resources and that variances from the pricing or quantity requirements over the 10-year term are justified, commercially reasonable and negotiated in good faith. The availability of an advance certification process would ensure that POUs are able to retain reasonable flexibility for agreements that satisfy the primary objective of the LTR requirement.

TURN and CUE strongly urge 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 in advance along with processes to allow for ongoing review of any creative approaches to long-term contracting.

B. Short-term resale agreements

The proposed regulations would allow a POU to satisfy the LTR through procurement of RPS-eligible energy from another retail seller or POU under a short-term agreement.⁶ In such a case, the only binding criteria for LTR eligibility would be a demonstration that the seller (a retail seller or POU) has executed a contract to procure the underlying RPS-eligible electricity pursuant to a commitment of at least 10 years in duration.⁷ This provision violates explicit statutory requirements and may not be adopted as drafted. At a minimum, the Energy Commission must revise the regulations to enforce the statutory requirement that LTR credit is only available for procurement commitments of at least 10-years in duration made by the POU itself.

The LTR requirement appears in Public Utilities Code §399.13(b) as follows:⁸

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

⁶ The term “retail seller” refers to an Investor Owned Utility, Community Choice Aggregator, or Electric Service Provider.

⁷ Proposed §3204(d)(2)(A)(2)(“ A long-term contract includes a resale agreement, whereby a retail seller or POU sells a portion of the electricity products procured under a long-term contract with one or more RPS-certified facilities to a second POU, regardless of the duration of the resale agreement, if the contract executed by the retail seller or first POU otherwise meets the requirements of a long-term contract.”)

⁸ Cal. Pub. Util. Code §399.13(b)[*emphasis added*]

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.

Under a plain reading of the relevant statutory language, commitments of at least 10 years in duration must be made by the retail seller or POU seeking credit for the procurement. The statutory provision explicitly limits the eligibility of POU or retail seller procurement to meet the LTR to “its contracts of 10 years or more in duration”. In this construction, “its contracts” plainly means the specific commitment made by the POU or retail seller. This provision does not allow for the transfer, sale or assignment of long-term contract credit amongst retail sellers or POU through short-term transactions that convey the characteristics of any pre-existing underlying contract held by the seller.

The disconnect between the statutory requirement and the proposed regulation is not acknowledged, explained or justified in the Initial Statement of Reasons (ISOR). The ISOR begins by asserting that the statutory provision “appears to identify a preference for the retail seller’s own long-term contracts.”⁹ This characterization has no basis. The state establishes a requirement that the POU or retail seller satisfy the LTR through “its contracts of 10 years or more in duration”.¹⁰ The ISOR’s characterization of a legislative “preference” suggests that the CPUC and Energy Commission may entirely ignore the requirement. Such an interpretation is flatly inconsistent with the statute, has no basis in any other section, and would not withstand judicial review.

The ISOR makes another critical mistake in asserting that:

The requirements in this subdivision for repackaged contracts are generally similar to the requirements for repackaged contracts for retail sellers, as established in CPUC Decision D.07-05-028 and modified in CPUC Decision D.12-06-038. In CPUC Decision D.17-06-028, the CPUC

⁹ Initial Statement of Reasons, page 40.

¹⁰ Cal. Pub. Util. Code §399.13(b).

authorized the use of repackaged contracts for purposes of the long-term procurement requirement, as long as the retail seller's commitment for the repackaged share has a duration of at least 10 continuous years.¹¹

The claim that the requirements governing "repackaged contracts" are "generally similar" to those adopted by the CPUC is incorrect. In particular, the reliance on D.07-05-028 is fundamentally misplaced because that decision implemented a different statutory provision with requirements that are not consistent with §399.13(b). In D.07-05-028, the CPUC implemented the requirements of §399.14(b) which was enacted in SB 107 (Simitian, 2006). The language of §399.14(b) directed the CPUC to condition authorization for short-term contracting on a requirement that minimum quantities be procured either through long-term contracts or newly developed resources.¹² This provision was subsequently deleted and replaced with the current language in §399.13(b) as part of SB 350. The new provision does not allow short-term commitments for newly developed resources to satisfy the LTR. Since the statutory provision implemented in D.07-05-028 no longer exists, and was subsequently replaced by the operative language in §399.13(b), there is no basis for the Energy Commission to rely the 2007 CPUC Decision for purposes of justifying the proposed regulations. The ISOR also fails to acknowledge that, in a series of decisions implementing the SB 350 LTR, the CPUC placed no reliance on D.07-05-028 and

¹¹ Initial Statement of Reasons, page 45.

¹² D.07-05-028, pages 2-3, footnote 2 (The language of §399.14(b) read as follows: "The commission may authorize a retail seller to enter into a contract of less than 10 years' duration with an eligible renewable energy resource, subject to the following conditions:

(1) No supplemental energy payments shall be awarded for a contract of less than 10 years' duration. The ineligibility of contracts of less than 10 years' duration for supplemental energy payments pursuant to this paragraph does not constitute an insufficiency in supplemental energy payments pursuant to paragraph (4) or (5) of subdivision (b) of Section 399.15.

(2) The commission has established, for each retail seller, minimum quantities of eligible renewable energy resources to be procured either through contracts of at least 10 years' duration or from new facilities commencing commercial operations on or after January 1, 2005.")

did not permit contracts with newly developed generation resources to satisfy the long-term obligation.

More importantly, the CPUC decisions implementing the SB 350 LTR explicitly address situations where an existing long-term contract held by one retail seller is resold, in whole or in part, to another retail seller. In D.12-06-038, the CPUC rejected requests by several parties to permit “slicing and dicing” of eligible long-term contracts into short-term resale contracts that retain a “long-term” attribute.¹³ In D.17-06-026, the CPUC affirmed that any “repackaging” of a long-term contract must remain consistent with the approach adopted in D.12-06-038.¹⁴ In D.18-05-026, the CPUC reaffirmed this treatment in rejecting a petition by Shell that sought to allow the requirements of §399.13(b) to be satisfied when a long-term contract is repackaged with portions resold to a subsequent buyer making a commitment of less than 10 years.¹⁵

All of the relevant CPUC holdings affirmatively reject the interpretation embraced in the Energy Commission’s proposed regulations. As a result, the proposed regulations governing resale or repackaging agreements are fundamentally different from the requirements adopted by the CPUC. The ISOR fails to identify or explain the basis for this differential treatment. The only possible justification appears in the following statement at the beginning of the ISOR:

To the extent that there are differences between the CPUC’s implementation of RPS requirements for retail sellers and the CEC’s proposed implementation of requirements for POUs, these differences are generally based on the differences in the statutory treatment of POUs and

¹³ In R.11-05-005, both Noble and PG&E requested changes to the long-term contract obligations that would have permitted short-term contracts to substitute for long-term contracts required under the RPS obligations. The Commission declined to adopt this treatment in D.12-06-038.

¹⁴ D.17-06-026, pages 21-22.

¹⁵ D.18-05-026, pages 25-27.

retail sellers and/or the difference in operations of POU as utilities owned or operated by local governments.¹⁶

This explanation cannot be reasonably used to support the differential application of the LTR to POU and retail sellers. The statutory obligation articulated in §399.13(b), and cross-referenced in §399.30(d)(1), is identical for retail sellers and POU. Any differences in “operations of POU” are not relevant, and not identified, for purposes of the application of the LTR.

The proposed regulations would permit illogical outcomes when applied to retail sellers and POU. A retail seller with a long-term contract could repackage and resell discrete quantities to POU under short-term agreements that convey LTR compliance credit. But the same retail seller reselling these quantities under identical short-term contracts to other retail seller would not be permitted to convey any LTR credit under CPUC rules. The inconsistent treatment of POU and retail sellers violates the law, is not logically defensible, and leads to absurd results.

When combined with the absence of any meaningful requirements for long-term contracts, the proposed regulations would allow the following hypothetical transaction to count towards LTR credit:

- An Electric Service Provider (ESP) enters into a 10-year contract with its own marketing affiliate for generation from a previously built RPS-eligible facility. The contract conveys 990 MWh in Year 1 and 1 MWh in each of the remaining 9 years.
- The ESP enters into a 1-year contract with a POU to resell 990 MWh (the entire first year quantity) from its 10-year contract.

¹⁶ Initial Statement of Reasons, pages 9-10.

- The POU receives long-term contract credit for 990 MWh.
- The ESP remains obligated to purchase the remaining 9 MWh over the following 9 years.

As can be seen from this example, the proposed regulations would enable functionally short-term procurement commitments to be “laundered” through retail sellers like ESPs to provide LTR credit to POUs. The underlying 10-year contract structure highlighted above would fail to enable the financing of newly developed generation and would permit POUs to satisfy all of their LTR requirements through 1-year contracts. The opportunities for gaming would be enormous, potentially spawning a new set of market products intended to take advantage of this precise loophole.

The Energy Commission should not allow or encourage these efforts to circumvent the LTR obligation. The adoption of the sensible modifications proposed by TURN and CUE represent concrete steps that bring the regulations into alignment with the statutory provision and effectuate the accepted purpose of the LTR obligation.

II. COST LIMITATIONS

The proposed regulations modify Section 3206(a)(3) to align the cost limitation rules with the revised statutory requirements under SB 350. TURN and CUE generally agree with the changes made to align this regulation with the specific revisions to Public Utilities Code §399.15(c).¹⁷ However, the proposed regulations

¹⁷ Pursuant to §399.30(d)(2)(B), POUs are permitted to adopt cost limitations that are consistent with §399.15(c).

should account for 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 (IRP) 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 POU's 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.

An accounting for the IRP process can be achieved with the following additions to the draft amendments (proposed additions shown in underline):

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 modest requirement should ensure that POU's 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.

Respectfully submitted,

MATTHEW FREEDMAN

_____/s/_____
Attorney for The Utility Reform
Network
785 Market Street, 14th floor
San Francisco, CA 94103
Phone: 415-929-8876

MARC D. JOSEPH

_____/s/_____
Adams Broadwell Joseph & Cardozo
601 Gateway Blvd., Suite 1000
South San Francisco, CA 94080
Telephone: (650) 589-1660
Facsimile: (650) 589-5062
mdjoseph@adamsbroadwell.com
Attorneys for CUE

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