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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 15-DAY LANGUAGE MODIFICATION OF REGULATIONS SPECIFYING 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

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COMMENTS OF THE UTILITY REFORM NETWORK
ON 15-DAY LANGUAGE MODIFICATION OF REGULATIONS
SPECIFYING THE ENFORCEMENT PROCEDURES
FOR THE RENEWABLES PORTFOLIO STANDARD
FOR LOCAL PUBLICLY OWNED ELECTRIC UTILITIES

In response to the July 21, 2020 Notice of Availability, The Utility Reform Network (TURN) submits these comments on the proposed 15-day language 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, the draft amendments and the proposed regulations. TURN appreciates efforts made by Energy Commission staff to improve the consistency between the proposed regulations and the relevant statutory requirements. However, the 15-day language continues to contain significant loopholes that undermine the ability of the Commission to effectively enforce the 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.[1] 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. 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 POUs, is to provide a long-term commitment from a utility which may be relied upon for developing new or repowering existing

[1] The California Public Utilities Commission has repeatedly recognized the fact that a long-term contract is essential for a project developer to finance construction of new renewable generation. *See* D.17-06-026, page 15 ("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.")

eligible renewable energy resources."[2] Unfortunately, the proposed regulations governing the LTR fail to adequately implement the specific requirements, and the overall intention, of the statutory provisions in two key respects.

I. SHORT-TERM CONTRACTS CANNOT BE USED TO SATISFY THE LONG-TERM REQUIREMENT

The 15-day language amends Section 3204(d) to allow POUs to receive LTR credit for short-term procurement from another POU so long as the seller can demonstrate a separate long-term commitment to the underlying resources.[3] This new proposal expressly violates the explicit statutory requirements and may not be adopted as drafted. As explained in TURN's prior comments, the Energy Commission must enforce the statutory requirement that LTR credit is only available if the POU makes its own procurement commitments of at least 10-years in duration. The applicable statutory language neither exempts transactions between POUs from this obligation nor allows differential treatment based on prior contracts executed by the seller.

The LTR requirement appears in Public Utilities Code §399.13(b) as follows:[4]

> 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.

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

[2] Initial Statement of Reasons, page 42.
[3] Proposed Section 3204(d)(2)(A)(2)
[4] Cal. Pub. Util. Code §399.13(b)[***emphasis added***]

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 POUs through short-term transactions that convey the characteristics of any pre-existing underlying contract held by the seller.

TURN's previous comments noted that disconnects between the plain statutory requirement and the proposed regulation are 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."[5] This characterization has no basis. The Legislature established a requirement that the POU or retail seller satisfy the LTR through "its contracts of 10 years or more in duration".[6] 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.

TURN's prior comments also noted that 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 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.[7]

[5] Initial Statement of Reasons, page 40.
[6] Cal. Pub. Util. Code §399.13(b).
[7] Initial Statement of Reasons, page 45.

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 those contained in the current version of §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.[8] This provision was subsequently deleted and replaced (as part of SB 350) with the current language in §399.13(b). 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 did not permit contracts with newly developed generation resources to satisfy the long-term obligation.

[8] 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.")

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.[9] 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 which obligates any retail seller seeking LTR credit to demonstrate its own commitments of at least 10 years.[10] 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.[11]

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 retail sellers and/or the difference in operations of POUs as utilities owned or operated by local governments.[12]

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[9] 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.

[10] D.17-06-026, pages 21-22.

[11] D.18-05-026, pages 25-27.

[12] Initial Statement of Reasons, pages 9-10.

This explanation cannot be reasonably used to support the differential application of the LTR to POUs 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 POUs. Any differences in "operations of POUs" are not relevant, and not identified, for purposes of the application of the LTR.

Taken together with the CPUC requirements, the 15-day language would permit contrary outcomes for retail sellers and POUs. Transactions between retail sellers, or between retail sellers and POUs, would not allow LTR credit unless the buyer makes a commitment of at least 10 years in duration. But contracts entirely between POUs could receive LTR credit even if they involve short-term commitments by the purchasing POU. The inconsistent treatment of POUs and retail sellers violates the law, is not logically defensible, and leads to absurd results. To remedy this problem, the 15-day language must be modified to delete Section 3204(d)(2)(A)(2) in its entirety.

II. REQUIRED ELEMENTS OF A VALID "LONG-TERM" CONTRACT HAVE NOT BEEN ADEQUATELY IDENTIFIED IN THE PROPOSED REGULATIONS

The 15-day language amends Section 3204(d) to require any POU long-term contract to involve procurement "from an RPS-eligible facility for a duration of at least 10 continuous years" with "nonzero" quantities for each of the 10 years.[13] While TURN appreciates this effort to address concerns about 'sham' long-term contracts, the language is insufficient to accomplish the desired objective. TURN urges the Commission to consider additional criteria to satisfy the long-term contract requirement. At a minimum, the Commission should clarify that it will consider further modifications to the rules if it determines, through an ongoing

[13] Section 3204(d)(2)(A).

review of actual transactions, that POUs are engaging in creative contracting structures designed to circumvent the intent of the LTR requirement.

TURN's prior comments highlighted the potential for "sham" long-term contracts to 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 drafted, the regulation would provide LTR credit for a contract that specifies deliveries of 10,000 MWh in the first year of a "long-term contract" with deliveries of 1 MWh in each of the following nine years. This type of structure would functionally replicate a short-term procurement commitment and defeat the purpose of the LTR because it could not be used to finance the development of a new facility.

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.

TURN previously proposed that 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.

If the Commission is not willing to adopt TURN's proposed requirements, it should place all market participants on notice that new rules may be adopted if ongoing review reveals evidence of POUs utilizing creative contracting structures that functionally replicate short-term contracts and defeat the goal of using the LTR to enable the financing of new renewable generation projects. This public notice, combined with regular reviews of long-term contracts submitted by POUs, would allow the Commission to ensure that actual market behavior is consistent with Legislative intent and the state's clean energy goals.

III. CONCLUSION

TURN urges the Commission to adopt the modifications proposed in these comments. Absent amendments to conform the language to the statutory requirements, the final regulations will be deficient and vulnerable to judicial review.

Respectfully submitted,

MATTHEW FREEDMAN

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

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