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on Pre-Rulemaking Amendments to the Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities

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
CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION
ON PRE-RULEMAKING AMENDMENTS
TO THE ENFORCEMENT PROCEDURES
FOR THE RENEWABLES PORTFOLIO STANDARD
FOR LOCAL PUBLICLY OWNED ELECTRIC UTILITIES**

I. INTRODUCTION

The California Municipal Utilities Association (“CMUA”) appreciates the opportunity to provide comments to the California Energy Commission (“Commission”) on the *Pre-Rulemaking Amendments to the Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* (“Pre-Rulemaking Draft”), issued on August 4, 2016. Senate Bill (“SB”) 350 increased the Renewables Portfolio Standard (“RPS”) target to 50 percent by December 31, 2030 and mandated that at least 65% of all renewable energy credits (RECs) used for compliance come from long-term contracts, but did not fundamentally alter the structure of the existing RPS program. Instead, it built “upon existing statutory authority to achieve the expanded RPS goal.”¹ As the Commission implements the new provisions of SB 350, it must exercise caution to ensure that it does not devalue any procurement decisions made by POUs in reliance on existing statutes and regulations.

¹ Senate Floor Analysis of SB 350, Sep. 11, 2015 at 8.

II. COMMENTS ON THE PRE-RULEMAKING DRAFT

CMUA commends staff for their efforts and believes that the Pre-Rulemaking Draft represents a good starting point for the development of regulations. As described below, CMUA recommends various further amendments and additions to the Pre-Rulemaking Draft.

A. CMUA Generally Supports the Proposed Amendment to Section 1240 (h)(1) to Provide an Affected POU With a Copy of the Record of Proceedings That is Provided to the ARB.

A coalition of POUs, including CMUA, filed comments in the current California Air Resources Board (“ARB”) Proceeding on RPS Enforcement, recommending that ARB provide a copy of the entire record transmitted by the Commission to the ARB.² The proposed amendment to Section 1240 (h)(1) appears consistent with this request and, therefore, CMUA supports it. This change will allow an affected POU to review and identify any errors or omissions in the copy of the record that was transmitted to the ARB. CMUA recommends the following minor revision to the current proposal:

Section 1240(h)(1): No ~~sooner~~ later than five days after the time for filing a petition for writ of mandate in accordance with Public Resources Code section 25901 has passed, Commission staff shall forward a notice of violation, based on the final decision of the full Commission, together with the record of proceedings, to the California Air Resources Board for determination of a penalty and to the local publicly owned electric utility.

B. CMUA Generally Supports the Revisions to the Cost Limitation Provisions.

The proposed changes to Section 3206 (a)(3) of the Pre-Rulemaking Draft appear to be consistent with SB 350, which eliminated the unnecessary requirements for establishing a cost limitation, while retaining the “prevents disproportionate rate impact” language. CMUA generally supports this proposal.

² Comments of the Joint POUs on the Revised Proposed Renewables Portfolio Standard Enforcement Regulations and the May 5, 2016 Workshop, filed May 31, 2016.

C. CMUA Generally Supports the Implementation of the New Excess Procurement Rules.

The Pre-Rulemaking Draft appears to implement the new excess procurement rules, which will apply to either the third or fourth compliance period, consistent with CMUA’s understanding of the intent of SB 350. The primary two changes are the following: (1) there is no longer a contract duration requirement for excess procurement; and (2) portfolio content category (“PCC”) 2 renewable energy credits (“RECs”) will continue to count in the excess procurement calculation but may no longer be banked as excess procurement. To the extent that the proposal is consistent with CMUA’s interpretation, then CMUA supports the proposed changes.

D. The Commission Must Provide More Flexibility for Compliance with the Long Term Procurement Requirement.

The Pre-Rulemaking Draft proposes to implement the new long term procurement requirement in an inflexible manner that could force a POU to be out of compliance with the RPS requirements through no fault of its own. The Commission must address the challenges faced by POUs in meeting this new requirement and exercise its allowable discretion to provide reasonable protections consistent with the intent of SB 350.

1. POUs Face Broad Challenges in Meeting the Long Term Procurement Requirement.

a. It may be difficult or impossible for a POU to make up unanticipated lost generation.

If a contract fails or if a generating facility goes offline due to operational problems, a POU may need to replace the associated lost RECs with generation from a different long term contract or owned resource. There is typically a long lead time to successfully execute and begin receiving generation from a new long term contract or to purchase an ownership share in a

project. Because of this, it may be impossible for a POU to make up for an unexpected shortfall if it occurs near the end of a compliance period.

b. Generation and load may vary significantly from year to year.

A POU's retail load and generation from renewable resources can vary from one year to the next. For example, a POU with significant RPS-eligible hydro resources may need to make up temporary shortages during an extended drought. Similarly, an unexpected increase in load would be difficult to meet with predominantly long term contracts or owned resources.

c. Some POUs will not be able to over-procure or maintain a large reserve.

Smaller POUs and POUs with portfolios that rely on a small number of resources will likely not be able to build a sufficient buffer to protect against unexpected shortfalls. For example, if a POU relies on one project for half of its overall RPS procurement, it would be impossible to protect against the unexpected failure of that project. Small POUs may also struggle to negotiate multiple long term contracts because of the small transaction size.

d. Executing long term PCC3 contracts will be challenging.

While it is possible to arrange a long term PCC3 contract, it is unusual. A key value of unbundled PCC3 RECs is that they can be purchased after the associated energy has already been generated and sold separately.

2. The Commission Should Exercise It's Allowable Discretion to Provide Reasonable and Necessary Flexibility

The Commission's authority and discretion to adopt the RPS Enforcement Procedures is governed by the Administrative Procedures Act ("APA"), which provides in part:

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective

unless consistent and not in conflict with the statute and **reasonably necessary to effectuate the purpose of the statute.**³

While courts provide no deference to an agency when it is enacting regulations outside the scope of its authority, courts do provide significant discretion to agencies when enacting regulations “reasonably necessary to effectuate the purpose of the statute.”⁴ Courts have clarified that the APA’s use of the term “necessary” should not be given a literal interpretation. Instead, the court must:

ascertain whether the agency reasonably interpreted its power in deciding that the regulation was necessary to accomplish the purpose of the statute. Stated another way, the court's role is limited to determining whether the regulation is ‘reasonably designed to aid a statutory objective.’⁵

A narrow interpretation of the long term procurement requirement would lead to the paradoxical situation where a POU would be potentially punished for procuring sufficient renewables to meet its RPS procurement targets. If, for example, a POU relies on a long-term contract for a significant portion of its RPS resources and that contract failed six months before the end of a compliance period, then that POU would have no realistic option for executing and receiving generation from a new long-term contract. That POU may have options to quickly replace that lost generation with a new short term contract to keep in place until it can find a replacement for the long term contract. However, the current Pre-Rulemaking Draft would discourage this action because that POU could be subject to penalties that are not reduced by that short term procurement, potentially exposing that POU’s customers to both the net cost of the short term procurement and the cost of the penalties. Discouraging renewable procurement is clearly at odds with the purpose and structure of SB 350 and the RPS program in general.

³ Cal. Gov. Code § 11342.2. (emphasis added)

⁴ See *Communities for a Better Env't v. California Res. Agency*, 103 Cal. App. 4th 98, 108 (2002).

⁵ *Samantha C. v. State Dep't of Developmental Servs.*, 185 Cal. App. 4th 1462, 1481-83 (2010) (internal citations omitted).

The Commission should add a provision to the long term procurement requirements that provides the following: If a long-term contract fails to deliver electricity products through no fault of the purchasing POU (such as, due to seller default), then whatever contract the POU executes to replace the lost procurement should also be considered a long-term contract, regardless of the term of the replacement contract. CMUA supports the following addition to the long term procurement requirement:

- (D) If a contract of 10 years or more in duration fails to deliver electricity products due to conditions that are beyond the control of the POU, then the POU may designate a replacement contract of any duration. All electricity products associated with the replacement contract may count toward the long term procurement requirement defined in this subdivision.

E. CMUA Recommends that the Commission Clarify the Ordering of the Application of the Long Term Procurement Requirement and the Excess Procurement Rules.

The Commission should interpret the language of SB 350 to mean that the 65 percent long term procurement requirement is only applied to the following: (1) the RECs remaining after any excess RECs are banked; plus (2) any excess procurement from a prior compliance period being applied in the current compliance period. To clarify this intent, the Commission should adopt the following additional subparts to Section 3204 (d)(1) and 3206(a)(1):

3204(d)(1)(D): For purposes of determining compliance with the requirements specified in this subdivision, electricity products that are qualified as excess procurement, pursuant to Section 3206 (a)(1), shall be counted in the compliance period in which the electricity products are applied.

3206(a)(1)(I): Electricity products that qualify as excess procurement and are applied to a future compliance period shall be included in the calculation of the RPS procurement requirements of the future compliance period to which they are applied. The length of the contract and the portfolio content category classification of the electricity from which the REC was derived is used to determine compliance for the compliance period for which the REC is applied.

F. The Commission Should Implement SB 350’s Amendment to the Curtailment Provision of Section 399.15(b)(5) in a Manner that Expands its Scope.

Consistent with the language of SB 350, the Commission should revise Section 3206(a)(2)(A)(3.) to delete the following language: “was necessary to address the needs of a balancing authority.” Consistent with this SB 350 amendment, there are two key elements to this curtailment provision: (1) what qualifies as “unanticipated curtailment”; and (2) how to determine if the waiver would result in an increase in GHG emissions. CMUA recommends that Commission staff consider this issue further to broaden the impact of this provision consistent with the intent of SB 350. CMUA recommends that the Commission amend the regulatory language to incorporate the following two elements: (1) Unanticipated curtailment means all curtailment that is not the result of a planned outage; and (2) A delay of timely compliance would not result in an increase in emissions of greenhouse gases if the governing board of a publicly owned electric utility makes such a finding as part of its most recent Procurement Plan.

G. The Commission Must Give Further Consideration to the Unanticipated Transportation Electrification Provision.

CMUA recommends that the Commission seek further input from stakeholders to properly implement the new unanticipated transportation electrification provision. This provision raises various complicated implementation issues and more work is needed to develop appropriate regulations. Two of the key issues are the following:

1. What is the Proper Source of Forecast Data?

The Pre-Rulemaking Draft proposes to rely on “projections for best-case implementation” of transportation electrification. It is unclear whether this refers solely to data reported by the POU or whether a state agency’s forecast that incorporates POU data would be used. There do not appear to be any current reporting requirements for all POUs to provide a

forecast that includes a range of transportation electrification adoption scenarios specific to the POU's service territory. More information is needed on what is currently reported in other forums and what potential changes in relevant reporting may occur in the near future.

2. What is the Appropriate Forecast Time Period?

The current proposal would base the determination on the “most recently available information.” This would be problematic because, depending on what data is used, it could be updated frequently. It would likely be impossible for transportation electrification to exceed best case scenarios if the data is updated multiple times throughout a single RPS compliance period. If publicly filed forecast data is used, then the determination should be based on the data that is filed prior to the relevant compliance period, rather than simply on the most recent data. That would provide a more reasonable time period when considering planning timelines for securing additional procurement.

H. CMUA Recommends That the Commission Eliminate or Revise the Reference to IRPs in the RPS Regulations.

The Pre-Rulemaking Draft proposes to add Section 3205 (a)(4), which would require POUs subject to Public Utilities Code Section 9621 to incorporate their Procurement Plans into their integrated resource plans (“IRPs”). A strict interpretation of this requirement could lead to confusion because IRPs are fundamentally different from RPS Procurement Plans. Many POUs update their Procurement Plans based on the RPS Compliance Period cycle, which will likely differ from the schedule that most POUs follow for adopting IRPs. Procurement Plans may need to be updated quickly to adopt or exercise an optional compliance mechanism, such as a cost limitation. It would not be possible to perform an entire IRP every time a POU updates its RPS Procurement Plan.

CMUA recommends that this new provision be amended as follows:

Beginning January 1, 2019, a POU subject to the Public Utilities Code section 9621 shall incorporate that includes its renewable energy resources procurement plan into the POU's integrated resource plan developed and adopted pursuant to Public Utilities Code section 9621, shall be deemed to have complied with the The noticing requirements of paragraph (3) shall be satisfied for elements of a POU's integrated resources plan intended to replace the POU's renewable energy resources procurement plan.

I. CMUA Recommends That the Commission Give Further Consideration to the New Green Pricing Provision.

The Green Pricing provision is complicated and presents many implementation challenges. Similar to unanticipated transportation electrification, the Commission should seek further input from Stakeholders. Based on discussions with its members, CMUA provides the following initial recommendations:

1. Third Party Green Pricing Programs

Some POU's may use third parties to help run or manage their green pricing programs. This could include having the third party procure the relevant generation and/or maintain the relevant WREGIS accounts for these customers. Nothing in the language of SB 350 would expressly prohibit this type of arrangement, and the Commission's Regulations should not be unnecessarily restrictive. The Commission should clarify that a POU can still use this provision if a third party runs the green pricing program on behalf of the POU.

2. Marketing Claims

SB 350 specifies that RECs credited to a customer under this provision "shall not be further sold, transferred, or otherwise monetized for any purpose."⁶ The Commission should clarify that a POU customer may make marketing claims based on their participation in a green pricing program without violating the "monetized for any purpose" provision.

⁶ Cal. Pub. Util. Code § 399.30(c)(4).

3. Reasonable Proximity

SB 350 included a requirement that, “to the extent possible,” a POU should “seek to procure those eligible renewable energy resources that are located in reasonable proximity to program participants.”⁷ The Commission’s regulations must recognize that there are likely a wide variety of ways that POUs could make this demonstration, and consequently, should avoid prescriptive requirements. CMUA recommends that this demonstration should be made in a POU’s RPS Procurement Plan.

As currently proposed in the Pre-Rulemaking Draft, the requirements exceed the language of SB 350. To be consistent with SB 350, the proposal must, at a minimum be amended as follows:

(C) To the extent possible, the electricity products excluded from retail sales shall be procured by the POU from eligible renewable energy resources that are located in the POU’s service territory and in reasonable proximity to program participants.

J. Additional Clarifying Changes

CMUA recommends the additional clarifying changes to properly implement SB 350:

3204(d)(1)(C): An electricity product classified as Portfolio Content Category 2 under the requirements of section 3203 (b) and qualifying electricity products eligible under the requirements of section 3202(a)(2) and (3) shall count toward the long-term procurement requirement of this subdivision if the electricity product is procured under a contract of at least 10 years in duration or an ownership agreement, even if the matching incremental electricity is not associated with a contract of at least 10 years in duration or an ownership agreement.

and

3206(a)(1)(F): If a POU meets the requirements of section 3204 (d) beginning January 1, 2017, the POU may elect for the provisions of section 3206 (a)(1)(C) to take effect for the compliance period beginning January 1, 2017. A POU shall designate this election to utilize this provision in its compliance filing.

⁷ *Id.*

III. CONCLUSION

CMUA appreciates the opportunity to provide comments on the Pre-Rulemaking Draft.

Dated: September 9, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Justin Wynne", with a stylized flourish at the end.

Justin Wynne
Braun Blaising McLaughlin & Smith PC
915 L Street, Suite 1480
Sacramento, CA 95814
(916) 326-5813
wynne@braunlegal.com

Attorneys for the
California Municipal Utilities Association