

DOCKETED

Docket Number:	16-OIR-05
Project Title:	Power Source Disclosure - AB 1110 Implementation Rulemaking
TN #:	220713
Document Title:	COMMENTS OF THE UTILITY REFORM NETWORK ON THE AB 1110 IMPLEMENTATION PROPOSAL FOR POWER SOURCE DISCLOSURE
Description:	N/A
Filer:	System
Organization:	Utility Reform Network/Matthew Freedman
Submitter Role:	Public
Submission Date:	8/11/2017 4:51:41 PM
Docketed Date:	8/11/2017

Comment Received From: Matthew Freedman

Submitted On: 8/11/2017

Docket Number: 16-OIR-05

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Additional submitted attachment is included below.

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

In the matter of:)	
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AB 1110 Implementation Rulemaking)	Docket No. 16-OIR-05
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**COMMENTS OF THE UTILITY REFORM NETWORK ON THE
AB 1110 IMPLEMENTATION PROPOSAL FOR POWER SOURCE DISCLOSURE**

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August 11, 2017

**COMMENTS OF THE UTILITY REFORM NETWORK ON
THE AB 1110 IMPLEMENTATION PROPOSAL
FOR POWER SOURCE DISCLOSURE**

In response to the June 27, 2017 Notice of Staff Pre-Rulemaking Workshop on Updates to the Power Sources Disclosure Regulations, The Utility Reform Network (TURN) submits these comments on the proposal for implementing the requirements of AB 1110 (Ting). TURN was the outside sponsor of AB 1110 authorizing the changes to the Power Source Disclosure Program that are the subject of the rulemaking.

**I. COMPLIANCE VALUE UNDER THE RENEWABLES PORTFOLIO
STANDARD PROGRAM SHOULD NOT DETERMINE THE
GREENHOUSE GAS EMISSIONS OF AN ELECTRICITY RESOURCE
OR RENEWABLE ATTRIBUTE**

The staff proposal properly recognizes the differences between the treatment of resources procured to satisfy compliance obligations under the Renewables Portfolio Standard (RPS) program and the appropriate reporting of Greenhouse Gas (GHG) emissions intensity under the Power Source Disclosure (PSD) program. The mere fact that a retail supplier may purchase an RPS-eligible resource to satisfy the requirements of the RPS program does not mean that these purchases should be reported as zero-GHG under the PSD program.

The RPS program was originally codified as part of SB 1078 (Sher) in 2002. In enacting the program, the Legislature articulated a series of rationales that included, but were not limited to, environmental benefits. Specifically, the original statute included the following relevant findings and declarations:¹

¹ SB 1078 (Sher), 2002.

§399.11

(a) In order to attain a target of 20 percent renewable energy for the State of California and for the purposes of increasing the diversity, reliability, public health and environmental benefits of the energy mix, it is the intent of the Legislature that the California Public Utilities Commission and the State Energy Resources Conservation and Development Commission implement the California Renewables Portfolio Standard Program described in this article.

(b) Increasing California's reliance on renewable energy resources may promote stable electricity prices, protect public health, improve environmental quality, stimulate sustainable economic development, create new employment opportunities, and reduce reliance on imported fuels.

(c) The development of renewable energy resources may ameliorate air quality problems throughout the state and improve public health by reducing the burning of fossil fuels and the associated environmental impacts.

While the original program did not permit the use of any unbundled Renewable Energy Credits (RECs) to satisfy RPS compliance obligations, subsequent modifications to the program authorized the use of unbundled RECs subject to a variety of specific constraints that recognized the lower value of such products to achieve key program goals. Moreover, subsequent iterations of the RPS program (including restrictions on the use of unbundled RECs) incorporated more comprehensively articulated statutory rationales. The current statute justifies both the overall RPS program targets and limits on renewable electricity not directly delivered to California based on the following findings and declarations:

399.11 The Legislature finds and declares all of the following:

(b) Achieving the renewables portfolio standard through the procurement of various electricity products from eligible renewable energy resources is intended to provide unique benefits to California, including all of the following, each of which independently justifies the program:

(1) Displacing fossil fuel consumption within the state.

(2) Adding new electrical generating facilities in the transmission network within the Western Electricity Coordinating Council service area.

(3) Reducing air pollution, particularly criteria pollutant emissions and toxic air contaminants, in the state.

(4) Meeting the state's climate change goals by reducing emissions of greenhouse gases associated with electrical generation.

(5) Promoting stable retail rates for electric service.

(6) Meeting the state's need for a diversified and balanced energy generation portfolio.

- (7) Assistance with meeting the state's resource adequacy requirements.*
- (8) Contributing to the safe and reliable operation of the electrical grid, including providing predictable electrical supply, voltage support, lower line losses, and congestion relief.*
- (9) Implementing the state's transmission and land use planning activities related to development of eligible renewable energy resources.*

Given the fact that the Legislature enumerated a number of goals for the RPS program unrelated to GHG reduction, the Energy Commission cannot reasonably conclude that the sole (or even primary) purpose of RPS procurement involves the reduction of GHG emissions. Moreover, the statutory limitations on procurement of “firmed and shaped” resources and unbundled RECs demonstrate that the Legislature believes these types of transactions to satisfy fewer of the statutory objectives than bundled transactions that directly deliver renewable energy into California. As a result, there is no basis for concluding that RPS eligibility is sufficient to bestow presumptive “zero GHG” status to any procurement credited towards RPS compliance obligations.

II. PERMITTING UNBUNDLED RENEWABLE ENERGY CREDITS AND “FIRMED AND SHAPED” RENEWABLE IMPORTS TO COUNT AS ZERO GHG PROCUREMENT WOULD BE AT ODDS WITH STATE GREENHOUSE GAS POLICY

The GHG reduction programs administered by the Air Resources Board (ARB) have fundamentally different objectives than the RPS program. Unlike the RPS program, the ARB does not permit the purchase of tradable RECs as a method of satisfying any compliance or reporting obligations.² Conforming the GHG emissions intensity methodology under the PSD program to the rules and

² Although the ARB does authorize retail suppliers to submit applications for supplemental GHG allowance retirements tied to voluntary procurement of renewable energy under the Voluntary Renewable Energy Program, all eligible renewable electricity must be “directly delivered to California.” (Title 17, Cal. Code of Regulations, §95841.1.) The voluntary purchase of unbundled RECs from outside California or RECs associated with firmed and shaped renewable energy imports would not satisfy the eligibility criteria under this program.

accounting protocols adopted by the ARB would appropriately prohibit a retail supplier from procuring unbundled RECs solely to support a zero GHG marketing claim for purchases of unspecified energy used to serve their customers. In adopting the Mandatory Greenhouse Gas Reporting Regulation, the ARB determined that treating RECs as a GHG offset would be contrary to the express requirements and the purposes of AB 32.³ Specifically, the ARB notes that “for the emissions profile of electricity generated and procured, RECs play no role in GHG accounting.”⁴ The recently enacted extension of the Cap-and-Trade program does not alter the conclusion that tradable RECs may not be used as a GHG compliance instrument.⁵ To the extent that the Energy Commission permits the purchase of tradable RECs by retail suppliers to be treated as offsets to actual GHG emissions reported to ARB, the resulting divergence between these two approaches would create confusion and undermine the coherency of California’s reporting and compliance regimes.

Most importantly, the staff proposal properly prevents the potential for the double counting of GHG emissions attributes. AB 1110 establishes an independent obligation on the Energy Commission to prevent double counting of the GHG emissions attributable to any electricity purchase reported by a retail supplier for “any specific generating facility or unspecified source located within the Western Electricity Coordinating Council”.⁶ The absence of compatible GHG

³ Final Statement of Reasons for Rulemaking Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions, California Air Resources Board, October 28, 2011, pages 108-09 (<http://www.arb.ca.gov/regact/2010/ghg2010/mrrfsor.pdf>)

⁴ *Ibid.*

⁵ The relevant provisions of AB 398 (Garcia) addressing offsets place primary importance on GHG offsets that provide “direct environmental benefits in the state” (Cal. Health and Safety Code §38562(c)(2)(E)).

⁶ Cal. Pub. Util. 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.”)

regulatory regimes between California and other Western states creates serious concerns regarding symmetrical treatment of GHG emissions for zero GHG renewable generation products not directly scheduled into California.

If unbundled RECs and firmed-and-shaped imports were permitted to be treated as zero GHG resources, there is no assurance that positive GHG emissions would be properly imputed to the “null” power from the associated renewable generators. Since there are no specific requirements governing retail product disclosures for purchases of “null” power by many retail suppliers not serving California customers, there is no assurance that GHG accounting symmetry will be achieved. For example, a retail supplier serving customers outside California may purchase null power from a renewable generator but fail to report any associated GHG emissions to its customers. TURN notes that these concerns about the treatment of null power are shared by other market participants. A 2015 guidance document published by Sonoma Clean Power notes that

the issue of how null power is handled is problematic. Based on SCP’s research, it appears to be common practice for null power in other states to be sold as zero emission and non-renewable. This means that SCP has determined that it should not claim to have lower emission energy when purchasing an out-of-state Category 3 REC because to do so would mean that the emissions from the local system power source are not reported by any retail provider in any state.... if any Category 3 RECs are used by SCP, they will be limited to the amount allowed under the RPS (approximately 3%) and GHG impacts will be calculated on the basis of the source of delivered energy alone (e.g., typically natural gas).⁷

Another form of double counting could occur in the event that a retail supplier purchases unbundled RECs from a behind-the-meter renewable generator located in California. In this event, the zero GHG production from the generator would effectively be counted three times – once by offsetting electricity purchases by the retail supplier serving the customer, a second time when the

⁷ Sonoma Clean Power Resource Summary and Guidance (Feb 2015), pages 14-15.

customer claims to be receiving zero GHG energy from the behind the meter system to power their home or business, and a third time when the REC purchaser seeks to offset the GHG emissions associated with purchased power from unspecified sources.⁸

TURN also strongly agrees that the treatment of “firmed and shaped” renewable imports (which match imports of unspecified energy with unbundled RECs) should be tied to the source of the substitute electricity import. While TURN recognizes the fact that the ARB applies an “RPS adjustment” as a method of reducing compliance obligations under Cap-and-Trade, this mechanism does not reflect a conclusion by ARB that the imported energy has no associated GHG emissions. Indeed, the ARB has identified problematic instances where an out-of-state renewable generator sells its RECs for use in a “firmed and shaped” import but also separately sells its null power into California as a zero GHG product under Cap-and-Trade.⁹

Unlike other specified renewable generation purchases reported by retail suppliers, “firmed and shaped” products involve imports of unspecified electricity into California from throughout the West. The electricity imports do not need to be sourced from the same region as the renewable generator which means that a zero GHG claim may be tied to a REC from a cleaner subregion (the Northwest) being matched with unspecified substitute energy from a dirtier subregion (the Southwest). Moreover, imports of unspecified energy are typically temporally untethered from the renewable generation claimed as the “source” of the import. It is possible to import all the substitute electricity in a single month (or a week) from system resources used to “firm and shape” an entire

⁸ TURN has previously identified concerns over customers making environmental claims without proper REC ownership in comments filed with the CPUC in R.14-07-002 (Net Energy Metering).

⁹ “RPS Adjustment: Past and Future”, CARB staff presentation, December 14, 2015 (<https://www.arb.ca.gov/cc/capandtrade/meetings/20151214/rpssb350.pdf>)

year's worth of output from an intermittent renewable generator. As a result, this product differs significantly from the direct real-time delivery of bundled electricity and the associated RECs from a renewable generator to a California retail supplier.

Under the staff proposal, retail suppliers still have the option of matching out-of-state RECs with imports of electricity sourced to zero GHG resources. For example, a retail supplier could import hydropower to ensure that the "firmed and shaped" product receives a zero GHG attribution under the PSD program. TURN believes that this option would preserve the opportunity to use "firmed and shaped" imports to make zero GHG claims under conditions that are commercially reasonable.

III. NO PRIVATE PARTY HAS A LEGAL ENTITLEMENT UNDER CURRENT CALIFORNIA LAW TO MAKE ANY PARTICULAR GREENHOUSE GAS CLAIMS RELATING TO RENEWABLE ENERGY CREDITS

During the July 14th workshop, some retail suppliers referenced prior commitments to purchase RECs that were tied to specific GHG-related claims already made to their customers. These suppliers complained that the staff proposal would effectively 'change the rules' by preventing them from continuing to make such claims. It was also suggested by certain retail suppliers and third-party stakeholders that the staff proposal would deprive some retail sellers of a property right and would constitute an unconstitutional taking of private property.¹⁰ The Energy Commission should forcefully reject any such arguments.

¹⁰ July 14, 2017 workshop transcript, pages 40, 50.

There is no federally recognized property right associated with RECs and no national definition relating to the environmental value of a REC that applies to California. FERC has repeatedly held that RECs exist solely as a creation of state law and that state law determines all relevant rules relating to ownership and compliance value.¹¹ This determination has been upheld and cited in a series of district and appellate court decisions.¹² As a result, the definition of RECs and their assumed GHG value in other state jurisdictions has no binding impact on the determinations made pursuant to California law.

There is no established right under California law for any buyer or seller to make GHG-related marketing claims tied to the purchase of unbundled RECs. Prior to the enactment of AB 1110, there was no official state standard governing the permissible GHG disclosures or marketing claims for RECs apart from the rules adopted by ARB under the Cap-and-Trade and MRR programs. In a recent decision denying the investor-owned utilities permission to advertise the GHG content of voluntary renewable energy products offered to subscribers, the CPUC noted that “there is currently no statewide methodology to calculate a greenhouse gas emissions rate associated with the generation resources included in a load-serving entity’s retail products”.¹³ As a result, there is no basis to legitimately assert that the staff proposal impermissibly infringes upon any private property rights under either the Takings clause or the Contracts Clause of the US Constitution.¹⁴

¹¹ *American Ref-Fuel* 105 FERC ¶61,004 (2003); *WSPP* 139 FERC ¶ 61,061 (2012)

¹² For example, see *Wheelabrator Lisbon Inc. v. Conn. Dep’t of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008); *Allco Fin. Ltd. v. Robert J. Klee*, Docket Nos. 16-2946, 16-2949, (2d Cir. 2017).

¹³ CPUC Decision 16-05-006, page 31.

¹⁴ Under a long line of US Supreme Court cases addressing challenges under the Contracts Clause, state policies that impair private contracts are permissible so long as the state identifies a legitimate public purpose and shows that the policy is consistent with a legislative enactment. See *Energy Reserves Group v. Kansas City Power & Light*, 459 US 400 (1983); *Exxon Corp. v. Eagerton*, 462 US 176 (1983); *Midland Realty Co. v. Kansas City Power & Light*, 300 US 109 (1937); *Union Dry Goods v. Georgia Public Service Corp.*, 248

IV. THE LEGISLATIVE HISTORY OF AB 1110 SUPPORTS THE STAFF PROPOSAL

The Commission must recognize that the enactment of AB 1110 was driven, in significant part, by the concern that some retail suppliers have made broad claims regarding the low GHG content of their electricity supply portfolios based primarily upon the purchase of unbundled Renewable Energy Credits (RECs) from out-of-state generation. Preventing a continuation of this practice is not only consistent with the overall intent of the bill but also honors the very specific guidance provided by the author to conform the PSD program methodology to the approaches taken by the Air Resources Board under the Mandatory Greenhouse Gas Reporting Program and Cap and Trade.

While earlier versions of AB 1110 explicitly required the Energy Commission to adopt a methodology that relied upon data provided to ARB under the Mandatory Greenhouse Gas Reporting Program, the final bill simply directs the Energy Commission to “adopt a methodology, in consultation with the State Air Resources Board” that relies “on the most recent verified greenhouse gas emissions data”.¹⁵ The letter submitted to the Journal by Assembly Member Ting (the bill author) on August 28, 2016 explains that

Although the bill does not require the use of a specific methodology, or data source, for determining emissions intensity, it is my intent that the CEC’s approach should be consistent, to the extent practicable, with the approach taken by ARB under its existing programs including the Mandatory Greenhouse Gas reporting requirements, Cap-and-Trade, as well as the CEC’s Power Source Disclosure Program. These programs include protocols for reporting data on GHG emissions and allowing specific adjustments to compliance obligations. By conforming its

US 372 (1919); Producers Transportation Co. v. Railroad Commission of California, 251 US 228 (1920).

¹⁵ Cal. Pub. Util. Code §398.4(k)(2).

approach to the ARB programs, the CEC would ensure consistent treatment amongst GHG programs administered by the state.¹⁶

The staff proposal properly recognizes the author's intent and adheres to the authority and direction provided in the statutory text. The fact that the final language was somewhat less prescriptive than in earlier versions is not consequential. The Energy Commission is acting within its authority to align the GHG emissions intensity methodology with approaches taken by the ARB to the maximum extent practicable.

V. ADJUSTMENTS ATTRIBUTABLE TO TRANSMISSION AND DISTRIBUTION LINE LOSSES SHOULD BE CONSISTENT ACROSS RETAIL SUPPLIERS

The staff proposal addresses the statutory requirement that distribution and transmission line losses be taken into account for purposes of developing the GHG emissions intensity factors.¹⁷ The proposal further endorses the use of a transmission line loss correction factor of 1.02 to electricity imported into a California Balancing Authority.¹⁸ TURN agrees with these general approaches but urges the Energy Commission to adopt more specific and standardized requirements for purposes of calculating both distribution and transmission line losses.

It is not clear whether different retail suppliers apply inconsistent approaches to the calculation of line losses. For example, some retail suppliers may calculate line losses from the generator busbar while others may use a delivery point (such as the EZ-GEN hub) as the basis for measuring losses. The Energy Commission should ensure that consistent protocols are applied to these calculations to prevent divergent methodologies from skewing any of the GHG emissions

¹⁶ AB 1110 letter to the Assembly Journal, Assembly Member Phil Ting, August 31, 2016.

¹⁷ Staff proposal, page 6.

¹⁸ Staff proposal, page 14.

intensity results. Furthermore, the staff proposal does not offer any specific approach to calculating distribution line losses. The Energy Commission should require, at a minimum, transparent calculations by each retail supplier that can be compared to ensure reasonableness and consistency.

VI. THE PROPOSED GHG INTENSITY ADJUSTMENT FOR SAN FRANCISCO IS CONSISTENT WITH §398.4(K)(2)(D)

As explained in prior comments, the adjustment authorized by §398.4(k)(2)(D) was included specifically to assist the San Francisco Public Utilities Commission (SFPUC). It does not appear to have general applicability and should not be understood to effect a wider set of retail suppliers. This provision was intended to permit SFPUC to carry over procurement of zero GHG electricity that exceeds total retail sales. In the event that SFPUC receives excess zero GHG electricity in a given year, and does not resell that excess to another entity as a specified source, §398.4(k)(2)(D) allows zero GHG credit to be rolled forward into a future year.

The specific situation that justifies this provision relates to SFPUC's procurement of electricity from the three powerhouses that comprise the Hetch Hetchy hydroelectric system. In certain years, SFPUC receives excess electricity from this system that cannot be used to serve customers and is resold as unspecified power into the wholesale market. To the extent that SFPUC has already achieved a zero GHG portfolio in that year, the Commission may permit additional GHG reductions tied to the remarketed hydroelectric power to be 'banked' and applied to a future year.

TURN strongly supports the staff proposal to permit SFPUC to begin the accumulation of surplus credits for generation occurring no earlier than 2019. Although SFPUC would prefer that the Energy Commission certify surplus emissions credits based on production prior to 2019, this outcome is

inappropriate and not mandated by statute. The relevant provision of AB 1110 references “previous years” in order to permit excess generation starting in the first year of the new program to be applied to subsequent years. It would be inappropriate to permit SFPUC to reach back to generation occurring prior to 2019 for the purpose of establishing its ‘bank’ since there are no PSD program GHG reporting requirements applicable to those prior years.

Respectfully submitted,

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Dated: August 11, 2017