

DOCKETED

Docket Number:	16-RPS-03
Project Title:	Amendments to Regulations Specifying Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities
TN #:	231421
Document Title:	California Municipal Utilities Association Comments - Joint POU Initial Comments on Pre-Rulemaking Amendments to POU RPS Regulations
Description:	N/A
Filer:	System
Organization:	California Municipal Utilities Association
Submitter Role:	Public
Submission Date:	1/8/2020 4:59:22 PM
Docketed Date:	1/9/2020

*Comment Received From: California Municipal Utilities Association
Submitted On: 1/8/2020
Docket Number: 16-RPS-03*

**Joint POU Initial Comments on Pre-Rulemaking Amendments to POU
RPS Regulations**

Additional submitted attachment is included below.



January 8, 2020 | Submitted Electronically

Ms. Katharine Larson
Renewable Energy Office
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

RE: Initial Comments of the Joint Publicly Owned Utilities on the Pre-Rulemaking Amendments to the Renewables Portfolio Standard (RPS) Regulations for Publicly Owned Utilities (POUs) [CEC Docket #16-RPS-03]

Dear Ms. Larson,

The California Municipal Utilities Association (CMUA), Northern California Power Agency (NCPA), and Southern California Public Power Authority (SCPPA) (collectively the “Joint POU”) respectfully submit these initial comments to the California Energy Commission on the *Key Topics for Lead Commissioner Workshop on Proposed Pre-Rulemaking Amendments to Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* (“Key Topics Document”), issued on December 13, 2019 and the *Pre-Rulemaking Amendments to Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* (“Proposed Regulations”), issued in full on December 17, 2019. The Joint POU appreciate the opportunity to review and assess the proposed amendments and key discussion items in advance of the workshop, and provide these initial comments in order to help inform the discussion among Commission staff and stakeholders during the January 10, 2020 workshop. These comments do not address the entirety of the Proposed Regulation, nor do they reflect the full panoply of comments on the Proposed Regulations, and the Joint POU plan to file more comprehensive comments on January 17, 2020.

The following sections provide the Joint POU’s initial positions on the some of the key issues raised in the Key Topics Document and Proposed Regulations.

I. COMPLIANCE PERIODS AND PROCUREMENT REQUIREMENTS

A. Procurement Quantity Requirement for the Fifth Compliance Period

The Joint POU believe that the straight-line averaging methodology should be used for all compliance periods through 2030. The Proposed Regulations would utilize a different methodology to establish the procurement quantity requirement for the fifth Compliance Period than the straight-line averaging

methodology that is used for the fourth and sixth Compliance Periods. The rationale provided for this difference is that the legislative intent language in Public Utilities Code section 399.11(a) includes a reference to an individual RPS goal of “50 percent by December 31, 2026.” While the actual impact of the difference between the methodology in the Proposed Regulations and the straight-line averaging methodology appears to be negligible, the Joint POU generally agree with the interpretation of the California Public Utilities Commission (“CPUC”) that the clear intent of the Legislature was to apply the straight-line averaging methodology to the fourth, fifth, and sixth Compliance Periods.

In 2015, SB 350 (stats. 2015) established a 50 percent renewable procurement target to be achieved over the three new compliance periods (2021 to 2030). In creating these new compliance periods and setting interim procurement targets, the Legislature did not amend the core statutory language regarding “reasonable progress.” Instead, the Legislature simply added new procurement targets to the existing language, as shown below in ~~strikeout~~ and underline:

For the following compliance periods, the quantities shall reflect reasonable progress in each of the intervening years sufficient to ensure that the procurement of electricity products from eligible renewable energy resources achieves 25 percent of retail sales by December 31, 2016, ~~and 33 percent of retail sales by December 31, 2020,~~ 40 percent by December 31, 2024, 45 percent by December 31, 2027, and 50 percent by December 31, 2030.

When the CPUC established procurement quantity requirements for the fourth, fifth, and sixth compliance periods, the CPUC noted that SB 350 did “not change the language about intervening year targets that was used in SB 2 (1X) and implemented in D.11-12-020.”¹ The CPUC then concluded that there was “no reason to revisit the CPUC’s analysis in D.11-12-020 in order to implement SB 350’s analogous requirements.”²

SB 100 (stats. 2018) increased the 2030 renewable procurement target to 60 percent, and proportionally increased the 2024 and 2027 targets. In increasing these targets, the Legislature again did not amend the “reasonable progress” language and instead only changed the numerical targets. As stated in *Horn v. Swoap*, “[t]he Legislature is presumed to be aware of a long-standing administrative practice If the Legislature . . . makes no substantial modifications to the act, there is a strong indication that the administrative practice was consistent with the legislative intent.”³ The CPUC and Commission’s implementation of this provision has been in place for over seven years and on two occasions the Legislature has chosen not to amend the relevant language. This suggests that the Legislature supports the current methodology as being consistent with the legislative intent. Therefore, the Commission should continue to use the straight-line averaging methodology in the fifth Compliance Period.

¹ D.16-02-040 at 8.

² *Id.*

³ *Horn v. Swoap*, 41 Cal. App. 3d 375, 382 (1974); see also *Bd. of Trustees of California State Univ. v. Pub. Employment Relations Bd.*, 155 Cal. App. 4th 866, 877–78 (2007) (“When the Legislature is aware of prior practice, but fails to change it in a later statutory enactment, courts infer not that the enactment expresses legislative disapproval, but rather that it expresses legislative acquiescence – an acknowledgment that the practice is consistent with legislative intent.”).

II. LONG-TERM PROCUREMENT REQUIREMENT

A. Independent Implementation

The Proposed Regulations would assess compliance with the long term procurement requirement independently from the procurement quantity requirement and the portfolio balance requirement. The Joint POUs generally support an independent implementation of the long term procurement requirement. However, it is essential that all applicable optional compliance mechanisms are available for all RPS procurement requirements, including the long term procurement requirement.

B. Definition of a Long Term Contract

The Proposed Regulations define a long term contract as “a commitment to procure electricity products for a duration of 10 continuous years.” This is an adequate starting point, but further discussion is necessary because it is essential that the Commission define long term contracts in a broad and flexible way that does not unduly limit contracting options or structures, or undermine regulatory certainty in long-term procurement planning.

The Proposed Amendments must also clearly reflect that the long term nature of a contract is not impacted by the subsequent failure of a project. For example, if a POU executes a ten year contract and in year three, the project suffers a failure and is not subsequently brought back into service, the renewable energy credits (“RECs”) that the POU received during the initial three years must continue to qualify as long term procurement. Similarly, if a resource fluctuates in generation throughout its delivery term (such as may be the case with certain eligible hydroelectric resources), that fluctuation does not affect the long term nature of the contract.

C. Applicability of Delay of Timely Compliance to Long Term Procurement Requirement

As stated above, the “delay of timely compliance” optional compliance mechanism must apply to the long term procurement requirement. This is supported by the legislative intent and structure of the RPS program. Public Utilities Code section 399.15(b)(5)’s statement that the CPUC “shall waive enforcement of this *section* if it finds that the retail seller has demonstrated any of the following conditions are beyond the control of the retail seller and will prevent compliance” does not mean that this optional compliance mechanism cannot apply to the long term procurement requirement, which is located in Public Utilities Code section 399.13(b).

First, a review of the relevant legislative history shows that the topic of long term procurement has historically been addressed in Section 399.13 because that section dealt with planning, procurement, and solicitations. Further, prior to SB 350, there was not a mandate for long term procurement in the same sense that there was for the procurement quantity requirement or portfolio balance requirement. Instead, SB 107 (stats. 2006) put limitations on the CPUC’s ability to approve short term contracts of investor owned utilities (“IOUs”). Specifically, the CPUC could only approve these IOU short term contracts, if it had established minimum procurement requirements for long term procurement. Thus, long term

procurement was dealt with in Section 399.13 because it was tied to authorizing short term procurement. When the long term procurement requirement was restructured to be a standalone requirement, it remained in Section 399.13 because that is where the relevant language was already located. Nothing in any of the legislative history suggests that this drafting decision was intended to eliminate the optional compliance mechanisms that would apply to this modified requirement.

Second, under the RPS program, the delay of timely compliance provision serves an essential function as the mechanism where a violation or penalty can be waived if the affected entity demonstrates that good cause justifies waiver and that the noncompliance was caused by events outside the entity's control. As explained by the CPUC in D.14-12-023, the CPUC's primary analysis of mitigating circumstances occurs when a retail seller files a request for waiver, generally based on the delay of timely compliance provisions provided in Section 399.15(b)(5). D.14-12-023 states:

[t]he statutory provisions for waiver of enforcement on [procurement quantity requirement] and reduction of [portfolio balance requirement] **direct the [CPUC] to consider a range of factors that focus heavily on whether the retail seller took all actions within its control that would have helped it comply.** It is at the stage of deciding on a request for waiver or reduction that the Commission will consider in some detail the behavior of the retail seller, not at the time a penalty is imposed for any deficits that may remain after a decision on the waiver or reduction request.⁴

D.14-12-023 expands on this, clarifying what goes into this analysis:

[t]he requirement that a retail seller must show that it took all reasonable steps to avoid failing to attain its [procurement quantity requirement] or procure within its [portfolio balance requirement] **allows the retail seller to show exactly what it did, and why those actions did not work, to avert the procurement deficit.** In this demonstration, the retail seller will have the opportunity to bring out a number of circumstances that show the efforts it made, which of course will also show the nature of the problems the retail seller faced.⁵

If the Commission does not apply the delay of timely compliance optional compliance mechanism to the POU long term procurement requirement, then the Commission's enforcement process will be lacking essential fairness and process protections. A POU could be in violation of the RPS and face penalties even if the noncompliance resulted from events completely outside the control of the POU and despite the POU taking all reasonable actions. Further, because the CPUC applies the long term procurement requirement differently, a retail seller would still have access to the delay of timely compliance mechanism. This would mean that a POU would face a penalty where a similarly situated retail seller would be excused. This creates a misalignment in the RPS. The Legislature would not leave such a major distinction between POU's and retail sellers to mere inference, and instead such an issue, if so intended, would have been expressly stated. The Commission must apply the delay of timely compliance mechanism to all of the RPS procurement requirements.

⁴ *Id.* at 39-40.

⁵ *Id.* at 36.

Finally, as the Key Topics Document notes, “the allowable causes for delaying timely compliance provided in statute appear to directly address long-term contracting and development of new projects.”⁶ This conclusion is supported not only by sound public policy, but also by the rules of statutory interpretation. In addition to recognizing operational and grid-related constraints that may limit the ability of retail sellers to get contracted-for renewable energy resources to their customers, this provision *explicitly* recognizes the myriad issues that can arise in the context of developing new renewable energy projects.⁷ When looking at the entirety of the RPS mandate, including the objective of the new long term procurement requirement provisions, coupled with the rules of statutory interpretation, it is clear that the Legislature intended this provision to apply to the long term procurement requirement. When reviewing the statutory language to discern the intent, the first level of review is to look at the plain meaning of the language; however, the courts have noted that the Commission cannot stop there when faced with a possible contradiction with the purpose of the statute.⁸ The courts have consistently held:

[the] fundamental rule is to ascertain the Legislature's intent in order to give effect to the purpose of the law. [Citation] We first examine the words of the statute and try to give effect to the usual, ordinary import of the language while not rendering any language surplusage. These words must be construed in context and in light of the statute's obvious nature and purpose, *and must be given a reasonable and commonsense interpretation that is consistent with the Legislature's apparent purpose and intention.* [Citation] Our interpretation should be practical, not technical, and should also result in wise policy, not mischief or absurdity. [Citation] We do not interpret statutes in isolation. Instead, we read every statute with reference to the entire scheme of law of which it is a part in order to harmonize the whole.⁹

In this case, applying a provision that allows the Commission to waive enforcement of an RPS mandate in the event of “permitting, interconnection, or other circumstances that delay procured eligible renewable energy resource projects” just to *short term* contracts would be contrary to the rules of statutory construction and render an absurd result. Instead, the Commission should read the statute as a whole and give the provisions a “*reasonable and commonsense interpretation that is consistent with the Legislature's apparent purpose and intention.*” It is simply not reasonable to assume that the Legislature intended to encourage greater long-term commitments, but not to afford the parties entering into such arrangements the same level of protections afforded to short-term commitments.

⁶ Key Topics Document at 5.

⁷ Cal. Pub. Util. Code § 399.15(b)(5)(b).

⁸ “But the ‘plain meaning’ rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.” (*Ibid.*)” (Levin v. Winston-Levin (Cal. Ct. App., Sept. 13, 2019, No. G056353) 2019 WL 4386025, at *5)

⁹ Hubbard v. California Coastal Com. (2019) 38 Cal.App.5th 119, 135–136 [250 Cal.Rptr.3d 397, 409] (emphasis added), citing Pasadena Metro Blue Line Construction Authority v. Pacific Bell Telephone Co. (2006) 140 Cal.App.4th 658, 663–664, 44 Cal.Rptr.3d 556 (Pasadena Metro Blue Line) and 20th Century Ins. Co. v. Superior Court (2001) 90 Cal.App.4th 1247, 1275, 109 Cal.Rptr.2d 611.

If the Commission were to enforce the long term procurement requirement in the face of a delivery failure that occurred due to an interconnection delay, for example, disallowing the use of a properly adopted optional compliance measure, a POU could be faced with a disallowance of RPS-eligible PCC 1 RECs that under the statute would otherwise be counted as excess procurement. This result, as the CPUC has noted, would be counterintuitive.¹⁰ Instead, the Commission should implement the long term procurement requirement in a way that fully recognizes the legislative intent behind the RPS program generally, and the specific long term procurement requirement mandate, which would allow POUs to utilize both the cost limitation *and* delay of timely compliance optional compliance measures to the long term procurement requirement.

D. Treatment of Contract Amendments

The Proposed Regulations identify specific types of contract amendments that may affect a contract's long term status, including: (a) modifications to the contract duration; (b) increases in the nameplate capacity or expected quantities; (c) changes in the allocation of generation that were not addressed in the original contract; and (d) substitutions of different resources or fuel sources. The Joint POUs have significant concerns that this proposal is overly restrictive and could have unintended consequences that would adversely impact the efficacy and value of certain renewable energy contracts. The Joint POUs offer the following examples, and welcome further discussion of this topic at the January 10 Workshop.

First, the expected quantities of generation specified in a contract should not be viewed as a limit on what can be counted as long term procurement over the term of a contract. While power purchase agreements ("PPAs") may specify an expected generation quantity, this is typically not a ceiling on procurement, but instead is primarily relevant for economic reasons. Typically, generation in excess of this expected amount would be compensated at a different price. However, the fact that actual generation may exceed the expected quantity does not mean that the output does not qualify as long term procurement. All generation from the resource qualifies as long term procurement, even if actual generation far exceeds any expected quantity amount specified in the contract. Any other interpretation could needlessly constrain the efficient operation of a resource.

Second, all generation associated with any expansion of an existing long term project should qualify as long term procurement, regardless of whether the expansion was addressed in the original contract. While most PPAs do address the possible expansion of a generating facility, many do not. In any case, facilitating the purchase of the output of an expansion of a project by the existing buyer/buyers supports the state's long term planning efforts. If the Commission's regulations measure the long term nature of the project based purely on the delivery start of the output of the expansion, it would create a disincentive for the development of new renewable energy capacity. An expansion of an existing project can provide significant efficiencies and cost savings because the parties already have a base contract and an existing financial relationship (simplifying the contracting process), the project likely already has the necessary infrastructure (meaning less development costs), and the site has already met various environmental and permitting requirements (meaning project failure is less likely). If a POU is

¹⁰ D.17-06-026 at 14.

in year 10 of a 15-year solar contract, and the developer is able to add additional panels to increase the total project's output, the Commission's regulations should not discourage that development by devaluing the additional output.

Further, measuring the output of an expansion separately from the rest of the project would lead to unnecessary administrative complexities and burdens. For example, assume that in year 12 of a 20-year contract, a developer adds 5 MW to an existing 20 MW project that is offered to the POU for the remainder of the contract and the whole project has a single meter. If the Commission were to treat the expanded 5 MW as short term and the 20 MW original project as long term, then the POU would need to apportion all RECs from the single project into long-term and short-term RECs. The Commission would need to develop formulas for this apportionment for each technology type and project development scenario. There may be additional complexities in both the WREGIS process and the compliance reporting process. The Commission must consider the practical requirements of such a proposal.

Third, many long term contracts specify that the developer may provide substitute RECs from a portfolio of resources. This could be necessary to address generation shortfalls during extended maintenance or other periods where the project is not able to generate electricity. Including this flexibility, particularly for long term contracts, may be essential to a project's viability for a POU. For example, it may be impossible for a POU to find substitute long term procurement to cover a temporary short-fall in output from an existing project because that substitute energy would also need to be from a long-term contract. Thus, POU's may need additional protections against these types of shortfalls in output. PPAs that include these provisions will not always specify the exact source of the substitute Electricity Products. However, as long as these long term contracts include express provisions describing the portfolio structure, then the contract fully complies with the statutory requirements and the intent of the long term procurement requirement. Additionally, constraints on these types of contracts would needlessly limit the ability of parties to maximize the value of the renewable resource as the contract matures, which would be to the detriment of the utility ratepayers funding the resource. The Commission's regulations must not inhibit or devalue these contracts.

III. RETAIL SALES REDUCTION FOR VOLUNTARY GREEN PRICING/SHARED RENEWABLE GENERATION PROGRAM

A. Geographic Location Requirement

The SB 350 provision that allows POU's to reduce their retail sales based on customer participation in certain qualifying green pricing programs requires that the POU must have, to the extent possible, sought to procure resources that are located in a reasonable proximity to program participants. In implementing this reasonable proximity limitation, the Commission should be guided by the overall intent of the RPS program, including (1) reducing GHG emissions, (2) developing new generating facilities, and (3) improving air quality and public health, particularly in disadvantaged communities.¹¹ This provision should also be implemented in a fair and reasonable manner that does not arbitrarily

¹¹ Cal. Pub. Util. Code § 399.11.

punish certain POUs based solely on geography or demographics. The Commission’s regulations should not act as a roadblock and prevent the development of a new project that would otherwise be built, but rather ensure that the intent of the provision to foster green pricing programs can be recognized.

Given the number and diversity of POUs, a rigid test is not appropriate. For example, some POUs are located in heavily forested regions that receive substantial snowfall in the winter. Locating an appropriately-sized project within such a territory is likely impossible. Such a POU may need to locate a project many miles from its service territory. Similarly, a POU may seek to locate a community solar project in a disadvantaged community that is outside of its service territory so that the project can serve as an economic driver. It would be counter to the express legislative intent of the RPS to prevent a POU from locating a project in a disadvantaged community solely because of a geographic limitation. Further, a group of POUs could jointly develop a community solar project. This may be necessary to make the project economically viable for all the POUs. However, in a joint project scenario, it will be much more difficult to meet all of the POU geographic limitations.

The Commission should consider an option where the POU can identify the factors that it used to determine that it met the “seek to procure” and “reasonable proximity” test. It could function similar to the cost limitation, where the discretion remains with the POU governing board, but the determination needs to be publicly adopted and the relevant information must be provided to the Commission. This demonstration could include: (1) a showing that the RFP expressly provides extra points or additional value being attached to local projects; (2) a discussion of the unsuitability of local locations for the project; or (3) other economic factors, such as the cost of the program or local job opportunities.

IV. DELAY OF TIMELY COMPLIANCE

A. Unanticipated Increase in Retail Sales Due to Transportation Electrification

SB 350 added to the list of conditions that can justify a delay of timely compliance, a circumstance where there was an unanticipated increase in retail sales due to transportation electrification. Section 399.15(b)(5)(D)(ii) specifies that part of the consideration for determining if the increase in retail sales is unanticipated is to look to forecasts for the entity’s service territory based on the most recently available information filed with the State Air Resources Board (“ARB”), the Commission, or another state agency. The Proposed Regulations add to the list of sources of forecast information, the POU’s own integrated resource plan (“IRP”).

The Joint POUs have significant concerns with this IRP proposal and urge the Commission to address this issue during the January 10 Workshop. The IRPs must be prepared at least once every five years, which means that many POUs are on different IRP cycles. For example, some POUs may update their IRPs every two years while others update the IRP every five. Because this delay of timely compliance condition is based on a deviation from a forecast, the fact that POU IRP forecasts are not made on a consistent schedule makes the IRP an unsuitable source for this information. Further, the IRP forecasts may not serve the same purposes as information that is filed in other forums and thus may not provide the same usefulness in measuring how unexpected a retail sales increase is.

V. COMPLIANCE REPORTING

A. Reporting Energy Consumption by a POU

The Proposed Regulations add the following new sentence to the reporting requirements for the description of energy consumption by a POU, shown in underline below:

A description of the energy consumption by the POU, including any electricity used by the POU for water pumping, the purpose of this consumption, the annual amount in MWh, and the annual amount in MWh being satisfied with electricity products. The POU shall separately identify the annual amount of MWh being satisfied with electricity products for each type of energy consumption by the POU.

The Joint POUs request additional clarification on the intent of this new sentence including the problem that it is attempting to address. The Commission should describe how this differs from the existing reporting requirement. Based on initial internal discussions, the Joint POUs believe that POUs already differentiate by the type of load that is counted as POU consumption.

B. Deadline for Submitting Compliance Report

In Section 3207 (d) of the Proposed Regulations, the Commission would provide a POU with 60 days after it receives the Commission's draft verification results to submit the Compliance Report for the applicable compliance period. This may provide insufficient time to complete a thorough review and to verify the accuracy of the information provided – particularly if the 60 days falls over time-constrained periods (*e.g.*, time-intensive data reporting demands from regulatory agencies, holidays) – as well as for larger POUs with robust data sets, or for smaller POUs that are staff-constrained. The Joint POUs respectfully request that the Commission both allow 60 *business days* rather than *calendar days* and to provide a mechanism whereby a POU could ask for an additional, reasonable amount of time to submit the Compliance Report for good cause.

VI. CONCLUSION

The Joint POUs appreciate the opportunity to provide this preliminary feedback to Commission staff and look forward to engaging with staff and stakeholders during the January 10 workshop on these and other elements of the proposed amendments. Thank you for the time and attention to these comments.