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CalWEA Comments on Pre-Rulemaking Amendments to RPS Regulations for POUs

Additional submitted attachment is included below.

January 17, 2020

California Energy Commission
Docket No. 16-RPS-03
Docket Office
1516 Ninth Street
Sacramento CA 95814

Submitted Electronically via CEC website to Docket 16-RPS-03

Re: Comments on Pre-Rulemaking Amendments to the Renewables Portfolio Standard Regulations for Local Publicly Owned Electric Utilities

CalWEA appreciates the opportunity to participate in the Commission's pre-rulemaking activities leading toward implementation of the long-term procurement requirement (LTR) required by SB 350 (2015) and other statutory changes within the Renewables Portfolio Standard (RPS) for local Publicly Owned Electric Utilities (POUs). These comments respond to Commission staff's proposed draft amendments to the regulations and related discussion at the January 10, 2020, workshop.

CalWEA believes that the proposed amendments regarding long-term contracting fall far short of what is necessary to ensure achievement of the state's RPS goals by all POUs, and we urge revisions in the following five areas.

1. The "Independent Compliance" Option Is a Recipe for RPS Failure

The proposed regulatory amendments[1] would adopt the "Independent Compliance" option, wherein the long-term contracting requirement is evaluated separately from POU compliance with RPS procurement requirements. The Commission should not adopt this option, which would undermine the critical purpose of the long-term contracting requirement and contradict statute.[2] Instead, the Commission should adopt the

[1] Proposed section 3204 (d)(1).

[2] Cal. Pub. Util. Code § 399.13(b) requires that "at least 65 percent of the procurement a retail seller counts toward the renewables portfolio standard requirement of each compliance period shall be

"Dependent Compliance" option, which would establish LTR compliance as a precondition for POU compliance.

In adopting the long-term contracting requirement, the legislature was clear that the goals of the RPS will not be achieved without the capital investments that are made possible through long-term contracts with load-serving entities. Without such contracts, renewable energy generators are highly unlikely to materialize (or be properly maintained), and those that do will come at a higher cost, given increased risks.[3] Financing merchant renewable energy projects in the U.S. is generally limited to the back end of the contract term. Even that "tail" risk that developers must increasingly bear on contracts, which are becoming shorter in length, has created concern over a "ticking time bomb" whereby these risks could materialize at the end of the contract, causing a dampening effect on future renewable energy development.[4]

The assumption by this Commission that long-term contracts are not integral to the success of this Commission could lead a POU to claim that it received no offers to sell on a short-term basis (because there will be a shortage of generators to bid for such contracts) and that, therefore, it should not be penalized for failing to meet its RPS procurement targets. As was recognized by the Public Utilities Commission,[5] the ability to sign long-term contracts puts LSEs in the driver's seat in terms of causing renewable energy generation to be built. Therefore, making the long-term contracting requirement independent from the RPS procurement requirement is a recipe for failing to achieve the RPS goals.

2. Allowing Optional Compliance Measures to Apply to the Long-term Contracting Requirement Would Further Undermine the RPS Program

Staff proposes[6] that the optional compliance measures pertaining to RPS cost limitation provisions may be adopted and applied by a POU to address a shortfall in meeting the LTR. As Staff itself has suggested, "broadly interpreting" the statute in this way would be

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from its contracts of 10 years or more in duration or in its ownership or ownership agreements for eligible renewable energy resource." (Emphasis added.)

[3] *See*, e.g., Renewable Energy Finance: State of Play, Norton Rose Fulbright (available at: https://www.nortonrosefulbright.com/en-us/knowledge/publications/b14ab86f/renewable-energy-finance-state-of-play).

[4] *See* Stephen Lacey, "Merchant Solar And Wind: A Ticking Time Bomb?" (August 25, 2019) (podcast available at:

https://www.greentechmedia.com/articles/read/merchant-solar-and-wind-a-ticking-time-bomb).

[5] CPUC Decision 17-06-026.

[6] Proposed section 3206 (e) and "Key Topics" page 5.

inconsistent with the plain language of the statute.[7] This inconsistency was spelled out in the October 1, 2019, comments of The Utility Reform Network (TURN) in this proceeding:

> [T]he LT contract requirement may not be waved or reduced through optional compliance measures. The optional compliance measures available to POUs are outlined in §399.30(d)(2)(A) and are limited to those outlined in §399.15(b). The waiver provisions of §399.15(b)(5) only apply to the requirements of "this section" (§399.15). Since the LTR appears in §399.13(b), it is not within the scope of the requirements outlined in §399.15(b) that are eligible for compliance waivers. The Energy Commission should include this recognition in any implementing regulations.

Moreover, allowing the LTR to be waived or reduced through optional compliance measures would further undermine the effectiveness of the LTR. The provisions of §399.15(b)(5), which pertain to waivers for RPS procurement requirements, are specific and limited to define circumstances that are largely out of the control of LSEs. These provisions were very carefully crafted by stakeholders (including CalWEA) at the time. The importance of these limitations cannot be overstated, because their effect is to instigate the proactive efforts of LSEs to overcome compliance obstacles within, or partly within, their control and prevent a scenario in which an LSE sits back passively and then points to obstacles as an excuse for non-compliance. For example, at the recent workshop, more than one POU representative referred to POUs failing to comply "through no fault of their own" because of development failures.[8] This excuse ignores the important role of the POU in terms of performing due diligence and developing sufficient procurement margins. Staff's Independent Compliance proposal to delink the LTR requirement from RPS procurement requirements and then to enable POUs to apply the optional compliance measures related to cost limitation provision to the LTR requirement would enable just these types of excuses.

The Commission should follow the correct interpretation of the CPUC and not enable the LTR to be waived or reduced through optional compliance measures.

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[7] Staff's "Key Topics for Lead Commissioner Workshop" states (p. 5) that "staff seeks additional feedback on reconciling this interpretation with the statutory language of PUC section 399.15 (b)(5), which on its face could appear to limit applicability of the delay of timely compliance measure to the RPS procurement target."

[8] Remarks of the representatives of the California Municipal Utilities Association and the Southern California Public Power Association at the January 10, 2020, workshop.

3. The Definition of "Long-Term" Must Require 10 Years in Each Executed Contract

The staff proposal regarding the eligibility of an amended long-term contract does not meet its own stated characterization of "the core intent" of the LTR: "to provide long-term planning certainty for new and repowered projects."[9] Staff would enable amendments that extend the duration of a long-term contract to be classified as long-term regardless of the length of the extension.[10] This does not meet the core intent of the LTR, because adding a few years to a long-term contract late in the contract term would not "provide long-term planning certainty for new and repowered projects." A developer can obtain financing for major capital repairs based on the certainty provided by a 10-year contract, but cannot do so based on a short-term contract extension.[11]

Therefore, as CalWEA discussed in its October 1, 2019, comments, the proposed regulations should be amended to require that any added length to a long-term contract be considered "long-term" only when the amendment is made at least 10 years prior to the end of the amended delivery term. As with the proposed regulation for short-term contracts,[12] the duration of the amended contract should be "measured from the amendment execution date until the amendment end date. "

4. POUs Should Assign Contracts on a 10-year Basis, with Flexibility for Joint Purchases Made by Public Power Associations

The proposed regulations would allow a POU to "assign a long-term contract to another POU and transfer the benefit under the LTR, even if the assignment period is for fewer than 10 years."[13] We have reviewed and agree with the proposed amendments included in the January 17, 2020, comments of TURN that would transferred the LTR benefit only when such assignments are for at least 10 years, excepting long-term contracts jointly executed

[9] Key Topics, p. 6.

[10] Proposed section 3204 (d)(2)(A)(ii).

[11] This point was made by the October 1, 2019, comments of J.Aron & Company (a Goldman Sachs subsidiary) in this proceeding. ("[I]f a contract was originally short term (e.g., 7 years), it is unlikely that it would have been the basis for financing a new project in the first instance. Instead, it is more likely that the contract would have been executed with the owner of an existing project. If such a contract is then amended to add another 5 years, the new contract would have no bearing on the financing of the renewable project.")

[12] Proposed section 3204 (d)(2)(A)(iii).

[13] Key Topics, p. 6.

by multiple POUs that adjust the obligations of individual POUs while preserving the total aggregated quantities and pricing for all POUs participating in the contract.[14]

We note that, unlike other types of LSEs in California, which under CPUC rules must assign contracts on a 10-year basis in order to obtain LT credit, the loads of POUs are relatively stable, enabling POUs to plan for and manage necessary long-term contracts. Moreover, considerable flexibility is already built into the RPS program, including the three product content categories, the three-year compliance periods, banking provisions and several special exemptions that have been made to accommodate the special circumstances of numerous publicly owned utilities.

5. The Long-term Contract Definition Should be Expanded to Include Key Provisions

CalWEA agrees with the recommended amendments suggested by TURN in its January 17, 2020, comments that would provide an adequate definition of "long-term contract" for purposes of enforcing the LTR.[15] These amendments would specify that: the POU must be the counterparty/owner; that any eligible long-term contract 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 the entire term; and that any long-term contract include defined pricing terms over the 10-year period. We also support TURN's recommendation for a provision enabling POUs to seek to pre-clear any LTR contract. This would create a safe harbor for POUs that would help to avoid disputes when any such agreements are later submitted for compliance.

Sincerely,

/s/

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[14] TURN January 17, 2020, comments at section I.C.

[15] *Id.* at section I.A.