

DOCKETED

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**16-RPS-03 Shell Energy North America (US), LP Comments on
Third Proposed 15-Day Language**

Additional submitted attachment is included below.

Via CEC E-Comment System

November 13, 2020

Docket Unit
California Energy Commission
1516 9th Street, MS-4
Sacramento, CA 95814

Re: Docket No. 16-RPS-03: Comments of Shell Energy North America (US), L.P.
on the Third Proposed “15-Day Language” Addressing Modifications to the
Regulations for the POU Long Term RPS Contract Requirement

To: California Energy Commission:

On October 26, 2020, Lead Commissioner Karen Douglas issued a “Notice of Lead Commissioner Workshop” to address further (third-round) 15-Day Language for the California Energy Commission’s (“CEC”) proposed “enforcement procedures” for the Renewables Portfolio Standard (“RPS”) program. The third iteration of the proposed 15-Day Language fails to address, and in fact highlights, a fundamental flaw in the Staff’s proposed long-term RPS contracting requirement for publicly owned electric utilities (“POU”).

Shell Energy North America (US), L.P. (“Shell Energy”) provides its comments on the third round 15-Day Language, focusing on the new language addressing the Staff’s proposed long-term RPS contracting requirement for POU’s. The deficiency is found in proposed revised Section 3204(d)(2)(B)(2)(ii) and the “grandfathering” language of Section 3204(d)(2)(C)(1). These provisions highlight Staff’s erroneous view that the CEC has statutory authority to determine the eligibility of a POU’s long term RPS procurement contract based in part on the terms and conditions of **upstream** third parties’ RPS contracts. This fundamental deficiency must be rectified in the CEC’s adopted regulations.

The Staff’s proposed language, if adopted in its current form, would lead to an inconsistency between the CEC’s requirements for POU’s long-term RPS procurement agreements, and the Public Utilities Commission’s (“CPUC”) requirements for load serving entities’ (“LSE”) long-term RPS procurement agreements. In particular, neither the governing statute (P.U. Code Section 399.13(b)) nor any applicable CPUC decision dictates the terms of an

upstream third party supplier's contract, including the length of the upstream supplier's contract(s). This inconsistency between the CPUC requirements and the CEC Staff's proposal, if allowed to stand, would create confusion and uncertainty in the RPS procurement market among POU's, LSEs, and RPS project developers, which is exactly what the CEC is trying to avoid through its regulations. Staff's new proposed 15-Day Language is contrary to P.U. Code Section 399.13(b) and must be modified or rejected.

Nevertheless, if the CEC adopts some or all of the additional long term contract requirements proposed by Staff, including the requirement that a POU's third party's **upstream** contracts must be for a term of at least ten years, all of these new requirements should apply only on and after July 1, 2020. POU contracts entered into prior to July 1, 2020 should not be subject to the additional requirements that Staff seeks to impose through this proceeding.

A. The New Proposed 15-Day Language Would Impose a Requirement on Third Party Suppliers' RPS Contracts that is Not Authorized in the Enabling Statute

The new proposed 15-Day Language continues to misread the "long term procurement" requirement in P.U. Code Section 399.13(b). The statute provides that the **retail seller** (POU) must have a long term contract for eligible RPS resources to meet the long term procurement requirement. The statute does **not** require the POU's third party supplier to have a long term agreement with its supplier or with the RPS facility. In fact, the statute says nothing about the terms of an **upstream supplier's** RPS contract(s). Staff's misreading of P.U. Code Section 399.13(b) is reflected in provisions previously identified by Shell Energy in its August 5, 2020 comments. This misreading of P.U. Code Section 399.13(b) is reflected in the new proposed language that was circulated on October 26, 2020, as well.

Specifically, proposed Section 3204(d)(2)(B)(2) provides that to satisfy the long term contract requirement, a POU's contract or resale agreement with the joint powers agency or third-party supplier (i) must have a duration of at least 10 continuous years, and (ii) "the RPS-certified facility or facilities supplying the electricity products in the long-term contract are owned by the joint powers agency or third-party supplier **or are subject to a long-term contract with a remaining duration of at least 10 continuous years . . .**" Emphasis added. This highlighted language is not based on statute and must be stricken.

The proposed language of Section 3204(d)(2)(B)(2)(ii) improperly imposes an additional long-term RPS procurement obligation beyond the retail seller's long-term RPS procurement contract obligation. The proposed language requiring a long-term procurement contract between

a third party and eligible RPS facilities would impose a new RPS compliance requirement that is not found in P.U. Code Section 399.13(b) or in the CPUC's June 2017 implementing decision (D.17-06-026). This proposed language represents an unlawful overreach.

P.U. Code Section 399.13(b) addresses the **retail seller's** (POU's) long term contract requirement for eligible RPS resources. The statute provides as follows: "[A]t 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." Emphasis added. The phrase "**its** contracts of 10 years or more in duration" refers to the "**retail seller's**" contracts, not a third party's upstream contract(s) with a supplier or an RPS project developer.

The statute requires the POU (the retail seller) to have a long term contract for eligible RPS resources. The third party supplier that has a long term contract with the POU does not also have to have an upstream long term contract for its own RPS supplies. The proposed additional 15-Day Language is inconsistent with the statute and presents the risk of a legal challenge. The CEC may not lawfully impose an additional requirement that is not reflected in the applicable statute. The language of Section 3204(d)(2)(B)(2)(ii) is not authorized by statute and should be deleted.

B. The New Proposal To "Grandfather" POU's Pre-July 1, 2020 Agreements Highlights the Absence of any Statutory Requirement Regarding the Terms of a Third Party Supplier's Upstream Contracts

In its October 30, 2020 "Key Topics Guide," Staff notes that "prior to July 1, 2020, POU's could only rely on the statutory requirements for long-term procurement as the RPS POU Regulations had not yet been updated to implement the statutory requirements." Key Topics Guide at p. 1. On this basis, Staff "finds it reasonable to distinguish requirements for contracts executed prior to July 1, 2020, from those executed on or after this date." Id.

Staff's new proposed 15-Day Language acknowledges that prior to July 1, 2020, POU's were not required to meet any additional long term contracting requirements beyond the statutory requirement set forth in P.U. Code Section 399.13(b). Nevertheless, Staff proposes new language in Section 3204(d)(2)(C)(1) (Option A or Option B) that would impose a long term contract requirement on a POU's third party supplier's **upstream** contracts, both before and after the Staff's proposed transition date of July 1, 2020.

In the Key Topics Guide, Staff states: “[T]he proposed implementation of the LTR characterizes contracts between a POU and a third party other than the RPS-certified facility as long-term **only if both the POU’s individual contract and the upstream contract with the RPS-certified facility meet the requirements of a long-term contract.**” Guide at p. 5 (emphasis added). The new proposed language states: “For purposes of this section 3204(d), for a POU subject to the provisions of Public Utilities Code section 9621, the POU’s contract **and any associated underlying contract(s)** shall specify reasonably consistent procurement quantities over the term of the contract”

The statute says **nothing** about the terms and conditions of the upstream contracts or projects being supplied to the POU, except that the resource(s) must be RPS-eligible. Staff proposes, however, that even for “grandfathered” contracts (contracts executed prior to July 1, 2020), the upstream third party’s arrangements must be long-term in nature. The CPUC has imposed a long term contract requirement on LSEs since 2007 (see D.07-05-028)(May 3, 2007). **Never** has the CPUC imposed any terms and conditions on LSEs’ upstream suppliers’ contracts for RPS resources.

Since 2007, LSEs have been required to procure long term RPS supplies for 0.25 percent of their prior year’s retail sales. Never has the CPUC specified the terms for the upstream contracts that are relied upon by the LSE in its own long term contracts, other than the resource(s) must be RPS-eligible.

In this connection, the CPUC determined in D.17-06-026 that long-term contracts executed by LSEs prior to 2021 will count toward the 65 percent requirement for compliance periods beginning in 2021 (pursuant to P.U. Code Section 399.13(b)). The CPUC stated: “Excluding existing long-term contracts would reduce the value of the procurement from those contracts and . . . create a disadvantage for retail sellers and their customers by undermining the value of customers’ pre-existing investments in long-term RPS contracts made in accordance with the program rules in effect at the time.” Decision at p. 17.

The CPUC is not imposing, retroactively, any new requirements for upstream suppliers’ RPS procurement contracts. The CEC should not do so either - with respect to POUs’ long term RPS contracts.

C. If the CEC Imposes New “Upstream” Contract Requirements on POU RPS Contracts Executed on and after July 1, 2020, POU’s “Grandfathered” -- Pre-July 1, 2020 -- Contracts Should Only be Subject to the Statutory Requirements, as Implemented by the CPUC in D.17-06-026

As explained in Shell Energy’s August 5, 2020 comments, there is no legitimate policy reason to require the POU’s upstream third party supplier to have a long term RPS procurement contract. The increased RPS procurement target under SB 350 and SB 100 provide a compelling incentive for developers to pursue new and/or repowered RPS resources.

Moreover, allowing the retail seller’s (POU’s) counterparty to provide a **portfolio** of eligible RPS supplies through a combination of new, repowered and existing projects, and through a combination of long- and short-term contracts, will increase the third party’s procurement flexibility and reduce the cost of a retail seller’s (POU’s) RPS procurement.

Small POU’s, in particular, have difficulty entering into contracts directly with RPS facilities. POU’s will have a greater opportunity to enter into long term RPS procurement contracts if their third party suppliers provide the eligible RPS resources from a portfolio of long- and short-term RPS supplies. Providing this procurement flexibility will maintain the POU’s commitment while supporting the development of RPS projects.

Nevertheless, if the CEC imposes some or all of the additional requirements proposed by Staff, including a requirement that a POU’s third party’s **upstream** contracts must be for a term of at least ten years, all of these new requirements should apply only on and after July 1, 2020. POU contracts entered into prior to July 1, 2020 should not be subject to the additional requirements that Staff seeks to impose through this proceeding.

D. Conclusion

The Staff’s third amended 15-Day Language fails to address a fundamental deficiency in the proposed long term contracting regulations. The new proposed language, like the previously proposed language, exceeds the authority granted to the CEC under P.U. Code Section 399.13(b). The statute does not authorize the CEC to impose a requirement that a retail seller’s (POU’s) third party supplier must have a long term RPS procurement contract.

If, however, the CEC imposes additional requirements, including a requirement that a POU's third party's upstream contracts must be for a term of at least ten years, all of these new requirements should apply only on and after July 1, 2020. POU contracts entered into prior to July 1, 2020 should be "grandfathered." These contracts should not be subject to the additional requirements proposed by Staff in this proceeding.

Thank you for your consideration of these comments. Red-lined language proposing changes to the new, third amended 15-Day Language is attached.

Very truly yours,

A handwritten signature in blue ink, appearing to read "John W. Leslie". The signature is fluid and cursive, with a long horizontal stroke at the end.

John W. Leslie
of
Dentons US LLP

Attorneys for Shell Energy North America (US), L.P.

Shell Energy Proposed Red-lined Changes to the Staff's Third Revised 15-Day Language

3204(d)(2) Electricity products will be classified as long-term or short-term based on the contracts, ownership, or ownership agreements through which they are procured. For the purpose of this subdivision, long-term procurement refers to procurement from long-term contracts, ownership, or ownership agreements, subject to the following:

...

(B) A long-term contract includes the following contract structures:

...

2. A POU's contract or resale agreement with a joint powers agency or third-party supplier if ~~both of the following are~~ is satisfied:

i. The POU's contract or resale agreement with the joint powers agency or third-party supplier has a duration of at least 10 continuous years.

~~ii. The RPS certified facility or facilities supplying the electricity products in the long term contract are owned by the joint powers agency or third party supplier or are subject to a long term contract with a remaining duration of at least 10 continuous years, and the POU, or the joint powers agency or third party supplier or other party on the POU's behalf, submits documentation demonstrating this.~~

...

(C) Long-term contracts executed on or after July 1, 2020, shall additionally satisfy the requirements of subparagraphs (C)1.-3. Contracts executed prior to July 1, 2020, are not required to meet the requirements of subparagraphs (C)1. – 3. for the term of the contract in effect as of July 1, 2020. With the exception of extensions or renewals of contracts meeting the criteria of subparagraph (B)4., contracts executed prior to July 1, 2020, that are amended on or after July 1, 2020, where the amendment modifies the duration, quantity, pricing, or other provision that materially relates to the contract's classification as long-term, shall additionally satisfy all of the requirements of subparagraphs (C)1. – 3.

1. Reasonably consistent contracted-for quantities. For purposes of this section 3204 (d), for a POU subject to the provisions of Public Utilities Code section 9621, the POU's contract ~~and any associated underlying contract(s)~~ shall specify reasonably consistent procurement quantities over the term of the contract, as provided in subparagraphs i.-iv.:

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