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September 12, 2011

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Carla Peterman, Commissioner & Presiding Member
Renewables Committee
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

James D. Boyd, Vice Chair & Associate Member
Renewables Committee
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: Docket No. 11-RPS-01, RPS Proceeding

Dear Commissioner Peterman and Vice Chair Boyd:

The California Municipal Utilities Association (CMUA) provides these comments to the California Energy Commission (CEC) on its implementation of SBX1-2 and the August 26 "33 Percent Renewables Portfolio Standard (RPS) Publicly Owned Electric Utility Regulations Concept Paper" (Concept Paper). CMUA appreciates the efforts of CEC Staff to prepare and distribute the Concept Paper.

CMUA represents over 40 publicly-owned electric utilities (POUs) in California that provide electricity to more than one-fourth of all Californians. As you know, POUs are governed by locally-elected or locally-appointed governing boards. The actions and performance of our utilities are closely scrutinized by these local officials, in a public process governed by the Brown Act and other provisions of California law that ensure transparency and public decision-making. This also makes it easy for our local customers to have their voices heard.

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11-RPS-01

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CMUA and its members believe that CEC guidance on certain matters will assist POU efforts to meet their renewable procurement targets by providing additional certainty that procurement and other activities will fit within the mandates of SBX1-2. At the same time, guidelines are not prescriptive regulations. CMUA has substantial concerns with respect to the underlying structure of possible regulations contained in the Concept Paper, and the apparent scope of jurisdictional authority assumed therein. In order to have a constructive and meaningful discussion of the Concept Paper, it would be useful for the CEC and POUs to establish a consistent view of the overall scope of the CEC's regulatory authority under SBX1-2, before proceeding to appropriate and specific regulatory language.

SBX1-2 changed the statutory landscape surrounding renewable power obligations for both retail sellers and POUs by establishing a 33% RPS requirement under law. Moreover, the CEC was given key tasks, such as the certification, accounting, and verification obligations set forth in Public Utilities Code section 399.25 that apply to both retail sellers and POUs. Pursuant to section 399.30(n), the CEC is also required to "adopt regulations specifying procedures for enforcement of this article. The regulations shall include a public process under which the Energy Commission may issue a notice of violation and correction against a local publicly owned electric utility for failure to comply with this article." These two distinct tasks are delineated for the CEC by statute.

POU governing boards have the authority, and in fact are obligated, to develop and implement policies specifically applicable to the procurement of renewable resources, including but not limited to: (1) adoption and implementation of a procurement plan (399.30(a)), (2) implementation of procurement targets provided in section 399.30(b); (3) adoption of procurement targets consistent with section 399.16; and (4) adoption of an enforcement program per section 399.30. In addition, POUs may, but are not required to, adopt measures: (a) permitting the application of excess procurement (section 399.30(d)(1)); (b) establishing conditions for delaying timely compliance (section 399.30(d)(2)); and (c) establishing cost limitations on procurement expenditures (section 399.30(d)(3)). For each of these actions, the basic authority to craft rules in compliance with the statutory provisions lies with the POU governing boards themselves.

In short, SBX1-2 did not change the basic statutory framework of regulation for renewable procurement and ratemaking for either retail sellers or POUs; the California Public Utility Commission (CPUC) maintains those obligations for retail sellers, and the POU governing boards maintain those same obligations for their respective community utilities.

CMUA is concerned that the Concept Paper appears to be patterned after the model of CPUC regulation of IOUs, i.e., the Concept Paper appears to assume that the CEC's regulatory authority includes determining the reasonableness of POU actions in compliance with SBX1-2. For example, at Section 4(d)(ii) of the Concept Paper, the CEC Staff urges an interpretation of the statute that calls for the CEC to sit in judgment on the POU-adopted cost limitations established pursuant to the authority granted in

Section 399.30(d)(3). Of course, the ability to adjudicate the reasonableness of a POU-established cost limitation is, *de facto*, the power to establish the cost limitation for the POU by default. This is essentially a ratemaking function that is beyond the authority provided to the CEC in SBX1-2, and therefore, beyond CEC's legal purview.

Moreover, it is not practically possible for the CEC to take on these tasks. POU governing boards, on key items, perform the tasks generally performed by the CPUC on behalf of retail sellers, including:

- Review and approval of resource acquisitions by POU.
- Ratemaking and rate design to ensure that rate structures capture and allocate the costs of renewable and non-renewable power procurement, as well as all other costs of procuring, generating, transmitting, and delivering power to retail customers.
- In certain instances, the forward planning of generation, transmission, and demand-side resources to ensure the reliable provision of electric service, in coordination with energy efficiency and other programs on an integrated basis. Because POU are owned by their customers, POU have every incentive to ensure that the needs of their customer-owners are paramount.

By retaining their vertically integrated structure, and within statutory boundaries, POU must have sufficient flexibility to negotiate contracts of varying duration and complexity and to ensure reliable and economic delivery of renewable and other resources. Overly granular regulations will restrict the flexibility of POU to negotiate with counterparties, limit choices in the market, and yield unnecessarily high costs to retail consumers. Importantly, in pursuit of these goals, POU governing boards commit significant amounts of customer dollars, often in long-term, fixed price arrangements or in capital intensive investments. Often, bond covenants bind the POU to ensure that rates are adequate to cover indebtedness. The key role of balancing market risk, capital investments, and rates, is inherent in the ratemaking authority, as it is in the CPUC for retail sellers, and necessarily must remain with the POU governing boards.

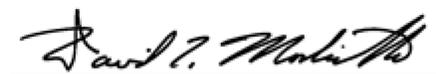
In this last regard, it was in recognition of the diversity of systems, resources, and community character of the forty-plus POU that the legislature determined that the numerous procurement tasks required by SBX1-2 be accomplished at the community level. In promulgating the regulations for procedures required by section 399.30(n), the Commission must ensure that the regulations are limited to specific regulatory authorities granted to the CEC under SBX1-2, do not duplicate or attempt to supersede the authorities of local governing bodies, and reflect the diverse character of POU while providing the flexibility for POU to meet their renewable procurement goals in the most cost effective manner.

Carla Peterman, Commissioner
James D. Boyd, Vice Chair
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In the spirit of clarifying the various roles of POU governing boards and the CEC, CMUA is attaching a matrix, Attachment A, which delineates the tasks and relevant authorities of POU governing boards and the CEC. This matrix was also provided to the CEC staff at a CEC/POU working group meeting on July 19, 2011. Also, CMUA provides Attachment B, which provides specific comments on the issues and options set forth in the Concept Paper. Please note that on many of these issues, CMUA and its members do not agree that either the question or staff's proposed options are ultimately within the scope of the CEC's regulatory authority. However, we have put our views on paper in order to keep momentum for this effort moving forward.

CMUA appreciates this opportunity to provide these comments to the CEC. CMUA believes that there are other alternative methods and tools to accomplish the goals of SBX1-2, and achieve greater clarity and certainty, without running afoul of the jurisdictional boundaries established by law. We would suggest that CEC revise the RPS Eligibility Guidelines in parallel with developing this rule. It is critical that CMUA members and the CEC clarify their respective roles to implement SBX1-2 in order to achieve the purposes of the legislature. Furthermore, CMUA is happy to work with the CEC staff in order to meet the statewide renewable power goals.

Sincerely,



David L. Modisette
Executive Director

Attachments

cc: Angela Gould
Kae Lewis
Karin Griffin

ATTACHMENT A

Roles of the CEC and POU Governing Boards under SB 2 (1X)

The statute requires a new degree of cooperation between the CEC and POU. Although the statute fairly clearly defines separate roles, the success of the whole enterprise will require that both the CEC and the governing boards of the POU work with each other, sharing information so that each entity can fulfill its statutorily-defined functions efficiently and effectively. Questions will undoubtedly arise about many of the details of implementation of the new mandates, and the POU expect to work with the CEC to answer those questions in a timely manner, so that the intent of the law is fulfilled. POU view this workshop as the first of several interactions between POU and the CEC, to ensure that this cooperation continues and works well.

The following table lists each of the responsibilities for POU and for the CEC (relative to POU) and cites the pertinent PUC section for each.

This document is intended to provide a common foundation for discussions of responsibilities under the law during the CEC's promulgation of RPS regulations.

July 18, 2011

SB 2 (1X) Program Elements – Matrix of Obligations

#	Element	Requirement (SB 2 (1X) language)	Responsible Party		Timeline	PUC section
			CEC	POU		
1	Procurement Plan	Adopt and implement a renewable resources procurement plan...to achieve the targets of subdivision (c).		X	<i>Annually?</i>	399.30(a) & 399.30(f)
2	Renewable energy target – first period	The governing board of a local publicly owned electric utility shall ensure all of the following: The quantities of eligible renewable energy resources to be procured for the compliance period from January 1, 2011, to December 31, 2013, inclusive, are equal to an average of 20 percent of retail sales.		X	1/1/2011 – 12/31/2013	399.30(c) (1)
3	Renewable energy targets – subsequent periods	The quantities of eligible renewable energy resources to be procured for all other compliance periods 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. The local governing board shall require the local publicly owned utilities to procure not less than 33 percent of retail sales of electricity products from eligible renewable energy resources in all subsequent years.		X	1/1/2014 – 12/31/2016 & 1/1/2017 – 12/31/2020 & annually thereafter	399.30(c) (2)
4	“Bucket” Rules	A local publicly owned electric utility shall adopt procurement requirements consistent with Section 399.16.		X	<i>Annually?</i>	399.30(c) (3) & 399.30(f)
5	“Banking” Rules	The governing board of a local publicly owned electric utility may adopt the following measures: Rules permitting the utility to apply excess procurement in one compliance period to subsequent compliance periods in the same manner as allowed for retail sellers pursuant to Section 399.13.		X	At POU discretion	399.30(d) (1)

#	Element	Requirement (SB 2 (1X) language)	Responsible Party		Timeline	PUC section
			CEC	POU		
6	“Off-Ramp” Rules	Conditions that allow for delaying timely compliance consistent with subdivision (b) of Section 399.15.		X	At POU discretion	399.30(d)(2)
7	“Cost Cap” Rules	Cost limitations for procurement expenditures consistent with subdivision (c) of Section 399.15.		X	At POU discretion	399.30(d)(3)
8	Enforcement Program	The governing board of the local publicly owned electric utility shall adopt a program for the enforcement of this article on or before January 1, 2012.		X	1/1/2012	399.30(e)
9	Notice of deliberation	Each local publicly owned electric utility shall <i>annually</i> post notice ... <i>whenever</i> its governing body will deliberate in public on its renewable energy resources procurement plan.		X	<i>Annually?</i>	399.30(f)(1)
10	Annual Report 1	A local publicly owned electric utility shall annually submit to the CEC documentation regarding eligible renewable energy resources procurement contracts that it executed during the prior year as follows: (1) A description of the eligible renewable energy resource, including the duration of the contract or electricity purchase agreement. (2) A description and identification of the electrical generating facility providing the eligible renewable energy resource under the contract. (3) An estimate of the percentage increase in the utility’s total retail sales of electricity from eligible renewable energy resources that will result from the contract.		X	Annually	399.30(g)
11	Annual Report 2	Each local publicly owned electric utility shall report, on an annual basis, to its customers and to the Energy Commission, all of the following: (1) Expenditures of public goods funds collected pursuant to Section 385 for eligible renewable energy resource development. Reports shall contain a description of programs,		X	Annually	399.30(l)

#	Element	Requirement (SB 2 (1X) language)	Responsible Party		Timeline	PUC section
			CEC	POU		
		<p>expenditures, and expected or actual results.</p> <p>(2) The resource mix used to serve its customers by energy source.</p> <p>(3) The utility's status in implementing a renewables portfolio standard pursuant to subdivision (a) and the utility's progress toward attaining the standard following implementation.</p>				
12	Enforcement regulations	On or before July 1, 2011, the Energy Commission shall adopt regulations specifying procedures for enforcement of this article. The regulations shall include a public process under which the Energy Commission may issue a notice of violation and correction against a local publicly owned electric utility for failure to comply with this article, and for referral of violations to the State Air Resources Board for penalties pursuant to subdivision (o).	X		7/1/2012 (SB 23)	399.30 (n)
13	Eligibility Certification	Certify eligible renewable energy resources that it determines meet the criteria described in subdivision (e) of Section 399.12.	X		Ongoing	399.25(a)
14	Compliance Verification	Design and implement an accounting system to verify compliance with the renewables portfolio standard by retail sellers and local publicly owned electric utilities, to ensure that electricity generated by an eligible renewable energy resource is counted only once for the purpose of meeting the renewables portfolio standard of this state or any other state, to certify renewable energy credits produced by eligible renewable energy resources, and to verify retail product claims in this state or any other state. <i>In establishing the guidelines governing this accounting system, the Energy Commission shall collect data from electricity market participants that it deems necessary to verify compliance of retail sellers and local publicly owned electric utilities, in accordance with the requirements of this</i>	X		Ongoing?	399.25(b)

#	Element	Requirement (SB 2 (1X) language)	Responsible Party		Timeline	PUC section
			CEC	POU		
		article...				
15	REC Verification	Establish a system for tracking and verifying renewable energy credits that, through the use of independently audited data, verifies the generation of electricity associated with each renewable energy credit and protects against multiple counting of the same renewable energy credit.	X		<i>Ongoing?</i>	399.25(c)
16	Certification of RECs sold to IOUs	Certify, for purposes of compliance with the renewables portfolio standard requirements by a retail seller, the eligibility of renewable energy credits associated with eligible renewable energy resources procured by a local publicly owned electric utility, if the Energy Commission determines that all of the conditions of Section 399.31 have been met.	X		Ongoing	399.25(d)

ATTACHMENT B

**THE STATE OF CALIFORNIA
BEFORE THE
CALIFORNIA ENERGY COMMISSION**

In the Matter of:)	
)	
Developing Regulations and Guidelines)	Docket No. 11-RPS-01
for the 33 Percent Renewables Portfolio)	
Standard)	
)	

**CMUA COMMENTS ON THE
33 PERCENT RENEWABLES PORTFOLIO STANDARD PUBLICLY OWNED ELECTRIC UTILITY
REGULATIONS CONCEPT PAPER**

Pursuant to the California Energy Commission (“CEC or Commission”) August 22, 2011, *Notice of Staff Meeting*, the California Municipal Utilities Association (“CMUA”) provides the following comments on the specific matters delineated in the 33 Percent Renewables Portfolio Standard Publicly Owned Electric Utility Regulations Concept Paper (“Concept Paper”). CMUA’s comments are *italicized and underlined* and follow each point in the Concept Paper. CMUA has inserted comments on issues not included in the Concept Paper as well, at appropriate points.

The Commission should not interpret these CMUA comments as acceding to Commission jurisdiction on a particular matter. CMUA sets forth, in the cover letter to this document, its views on the relevant scope of jurisdiction for both the Commission and for publicly owned utility (“POU”) governing boards. Specifically, CMUA does not believe the Commission has jurisdiction under section 399.30(n) to issue binding regulations on several items contained in the Concept Paper, including: (1) reasonable progress; (2) portfolio content categories; (3) waivers for specified purposes; (4) carryover of excess renewable procurement; and (5) cost limitations. For the sake of administrative economy, CMUA will not reiterate its objection to the Commission’s assertion of jurisdiction on each and every point.

CMUA continues to expect and anticipate a collaborative approach with the Commission to clarify the respective roles of the Commission and POUs to implement SBX1-2. CMUA’s responses to substantive questions that are outside CEC jurisdiction are provided in the spirit of that collaborative approach.

I. Discussion of 33 Percent Renewables Portfolio Standard Publicly Owned Electric Utility Regulations Concept Paper

Energy Commission staff has drafted this concept paper to explore the issues underlying the regulations specifying procedures for enforcement of the renewable portfolio standard (“RPS”) for publicly owned electric utilities (“POUs”). Staff has provided a list of options for each issue, as well as staff recommendations where they exist. Staff requests that stakeholders respond to staff recommendations, supplying rationale for those areas in which the stakeholder disagrees with staff’s opinion. Staff also requests that stakeholders provide their own recommendations where no staff recommendation exists and list additional issues and/or options they feel should be considered by the Energy Commission in drafting the regulations. In contributing these additional recommendations, issues and/or options, stakeholders should include an explanation as to why the Energy Commission should consider them.

1) Foundational Issues

CMUA Comments

While not contained directly within the Concept Paper, it is essential that a clear delineation between POU governing board authority and CEC jurisdiction under SBX1-2 be established, so that CMUA members and the Commission can build upon a common understanding to craft appropriate and constructive regulations.

In the cover letter to these Comments, CMUA sets forth its view that:

- SBX1-2 imposes obligations on POUs in section 399.30(a), (f), (g) and (l) and on their governing boards in section 399.30(b), (c), (d), and (e).
- The sole grant of authority to the Commission with respect to POUs or their governing boards is contained in section 399.30(n) which provides for the Commission to “adopt regulations specifying procedures for enforcement of this article.” Those regulations “shall include a public process under which the Energy Commission may issue a notice of violation and correction” against a POU “for failure to comply” with SBX1-2 and “for referral of violations” to the ARB.
- The regulations must be limited to the scope specified in section 399.30(n). The standard the Commission should use in assessing whether or not a POU or its governing board has failed to comply with SBX1-2 should be the statute itself. The Commission lacks statutory authority to adopt regulations that exceed the statute and therefore effectively usurp the statutory authority of the POUs and their governing boards to undertake the actions required by section 399.30.

- a) Meaning of “consistent with” and “in the same manner as” (Public Utilities Code Sections 399.30 (c)(3), 399.30 (d) (1), 399.30 (d) (2), 399.30 (d)(3))
- i) Options:
- (1) Always same as those for retail sellers
 - (2) In spirit of rules for retail sellers; up to POU and Energy Commission to define for specific cases
 - (3) Some rules the same as those for retail sellers (for instance, definitions of portfolio content categories), and some in the spirit of the rules for retail sellers, as determined by POU and the Energy Commission
- ii) Staff recommendation: Option (3); the law should be applied to all entities using the same rules to the extent practicable. In areas in which different rules apply to POU, those rules will be as consistent as possible with those for retail sellers. (In response to this particular issue, staff requests that stakeholders specify which rules should be the same for POU and retail sellers and what criteria should be used to determine “in the spirit of.” Please include rationale.)

CMUA Comments

Various paragraphs of section 399.30 provide for POU or their governing boards to adopt requirements, rules, conditions, and limitations that are “consistent with” sections of SBX1-2 that apply to retail sellers or apply “in the same manner as” allowed for retail sellers under other sections of SBX1-2. As such, it is the POU’s obligation to comply with the statute, not the Commission’s obligation to promulgate regulations that dictate how to achieve that consistency with regulations that the California Public Utilities Commission (“CPUC”) might adopt for retail sellers. Further, it is not correct that the “consistent with” and “in the same manner as” phrases are synonymous.

Meaning of “consistent with” as used in section 399.30(c)(3), (d)(2), and (d)(3): The term “consistent with” as used in section 399.30(c)(3), (d)(2), and (d)(3) means that procurement requirements adopted by POU under section 399.30(c)(3) and measures adopted by governing boards under sections 399.30(d)(2) and (d)(3) must conform with the statutory provisions in section 399.16, section 399.15(b), and section 399.15(c) respectively. SBX1-2 does not require conformity with rules adopted by the CPUC for retail sellers under those sections. The legislature chose not to adopt a standard of conformity with regulations, but instead chose a standard of conformity with statute.

CMUA believes that the intent of the legislature in 399.30(c)(3) is to have POU procurement requirements that are broadly consistent with Section 399.16, which is also a requirement for retail sellers. Section 399.16(e) will likely lead to some differences in the procurement content requirements for retail sellers, and POU boards have the authority to also adopt procurement content requirements that

differ under section 399.30(c)(3). In addition, CMUA believes that the CEC should recognize that Sections 399.17 and 399.18 directly modify 399.16, establishing certain exemptions to the procurement content requirements thereof. CMUA believes that the consistency intent of Section 399.30(c)(3) should be interpreted to include the direct modifications to Section 399.16 found in Sections 399.17 and 399.18. To do otherwise risks establishing procurement requirements for smaller POUs inconsistent with those established in the law for smaller retail sellers.

Meaning of the phrase “in the same manner as” as used in section 399.30(d)(1): Insofar as section 399.30(d)(1) permits POU governing boards to adopt rules to permit banking “in the same manner as allowed for retail sellers pursuant to Section 399.13,” it appears that the legislature intended that that the POU governing boards, but not the Commission, must adopt banking rules that have the same statutory restrictions as provided in section 399.13(a)(4)(B) applicable to retail sellers. Thus, like retail sellers, POUs would be permitted “to accumulate, beginning January 1, 2011, excess procurement in one compliance period to be applied to any subsequent compliance period.” Further, like retail sellers, in determining excess procurement POUs must deduct from actual procurement any amounts associated with contracts of less than 10 years and not include “bucket 3” RECs as excess procurement. However, the exact nature of the banking rules may reasonably differ from those established for retailer sellers. For example, the base quantity or percentage of retail sales that is used to calculate excess procurement may be different from that used by retail sellers, insofar as each POU, with its governing board, sets its own minimum quantity and specified percentage for compliance periods two and three under section 399.30(a)-(c), so long as the POU meets the December 31, 2016, and December 31, 2020, targets and makes “reasonable progress during intervening years.” See the comment on “Procurement targets for each compliance period” below.

2) Eligibility of POU resources

- a) Pre-June 1, 2010, contracts approved by POU under former Public Utilities Code 387 (Public Utilities Code Sections 399.12 (e)(1)(C))
 - i) Options:
 - (1) Resources must meet Energy Commission’s eligibility rules at time of contract execution
 - (2) Resources must meet the definition of renewable electric generation facility in Public Resources Code Section 25741
 - (3) Resources must meet the Energy Commission’s eligibility requirements applicable at the time the facility applies for RPS certification.
 - ii) Staff recommendation: Option (3).

CMUA Comments

CEC staff poses three options for interpreting section 399.12(e)(1)(C). That statutory section provides:

A facility approved by the governing board of a local publicly owned electric utility prior to June 1, 2010, for procurement to satisfy renewable energy procurement obligations adopted pursuant to former Section 387, shall be certified as an eligible renewable energy resource by the Energy Commission pursuant to this article, if the facility is a “renewable electrical generation facility” as defined in Section 25741 of the Public Resources Code.

The first option posed by the CEC staff would require a grandfathered resource to have met the CEC’s eligibility rules at the time the contract or ownership agreement was executed. The second option requires only that the resource meets the definition of a “renewable electrical generation facility” in Public Resources Code section 25741. The third option would require that the resource meets the CEC’s eligibility requirements at the time that the facility applies for RPS certification. Of these options, CEC staff recommends the third option. However, the requirement found in the third option is not consistent with the requirements of section 399.12(e)(1)(C). Section 399.12(e)(1)(C) does not place any requirement for the underlying facility to meet the CEC’s eligibility requirements by a specific time. The CEC should not impose additional restrictions on the eligibility of resources beyond those in the statute. The only option that is consistent with the requirements of the statute is option (2). By the very terms of section 399.12(e)(1)(C), grandfathered resources must meet the definition of a “renewable electrical generation facility” as defined by section 25741 of the Public Resources Code.

As an additional note of clarification, it is clear that a resource may be grandfathered whether it is contracted for or owned by the POU. This is because section 399.12(f) defines “procure” as meaning to “acquire through ownership or contact.” Therefore, a facility approved for “procurement” could include an ownership arrangement or a contract, or a contract with an option to own.

3) Classification of procurement products

a) Portfolio content categories

- i) Portfolio Content Category 1 – interconnected or scheduled to a California balancing authority (Public Utilities Code Sections 399.16 (b)(1), 399.16 (c)(1) and 399.30 (c)(3))

(1) Definition:

(a) Options (one or more of the following):

- (i) Generation from a facility that has its first point of interconnection with a California balancing authority (or with distribution facilities used to serve end users within a California balancing authority) is automatically considered eligible, even if it is procured as an unbundled product or is unbundled after procurement
- (ii) Generation from a facility that has its first point of interconnection with a California balancing authority (or with distribution facilities used to serve end users within a California balancing authority) is only considered eligible if it is procured as and remains a bundled product
- (iii) Generation from a facility that has its first point of interconnection with a California balancing authority (or with distribution facilities used to serve end users within a California balancing authority) is only considered eligible if it is procured as a bundled product, even if it is subsequently unbundled
- (iv) Generation scheduled into a California balancing authority is considered eligible if it is procured as a bundled product, even if it is subsequently unbundled
- (v) Generation scheduled into a California balancing authority is considered eligible only if it is procured as and remains a bundled product
- (vi) Generation dynamically transferred into a California balancing authority is considered eligible only if it is procured as a bundled product, even if it is subsequently unbundled
- (vii) Generation dynamically transferred into a California balancing authority is considered eligible only if it is procured as and remains a bundled product

(b) Staff recommendation: None at this time

CMUA Comments

In its Comments submitted to the CPUC on August 8, 2011, in response to the ALJ Ruling on portfolio content categories, CMUA supported Option (i). "Bucket 1" as defined in section 399.16(b)(1) includes transactions that transfer only unbundled RECs, as long as the RECs are from RPS-eligible generators that are located in California or have a first point of interconnection with a California balancing authority, or the RECs are from generation that was scheduled into a California balancing authority without substitution or dynamically transferred into a

California balancing authority. CMUA was not alone in this position, but was supported by several stakeholders, including suppliers and load serving entities.

It would be consistent with the policy objectives of SBX1-2 to include all RECs within section 399.16(b)(1) if the generator that produces the RECs meets the criteria of section 399.16(b)(1) regardless of whether the transfer of the REC occurs on a bundled or unbundled basis. California Public Resources Code section 25740.5(c) (section 4 of SBX1-2) provides:

The program objective shall be to increase, in the near term, the quantity of California's electricity generated by renewable electrical generation facilities located in this state, while protecting system reliability, fostering resource diversity, and obtaining the greatest environmental benefits for California residents.

Including unbundled as well as bundled RECs within section 399.16(b)(1) would promote the development of generation facilities in California by increasing the options that a California RPS-eligible generator would have for taking full economic advantage of its project. Conversely, excluding the generator's product from section 399.16(b)(1) if the associated REC were sold on an unbundled basis would diminish the economic value of the project, and would unnecessarily restrict the contracting options of POUs. This would be inconsistent with the programmatic objective of increasing "the quantity of California's electricity generated by renewable electrical generation facilities located in this state. . . ." and would unnecessarily increase costs to consumers if lower cost options are precluded by regulation, even though they are consistent with the statute.

To be consistent with section 399.16(b)(1), the definition of "bucket 1" must also include options (iv) and (vi) with the following changes:

(iv) Generation scheduled into a California balancing authority ~~without substituting electricity from another source~~ is considered eligible if it is procured as an unbundled product, ~~or even if it is subsequently unbundled~~

. . .
(vi) Generation dynamically transferred into a California balancing authority is considered eligible ~~only even if it is procured as an unbundled product, even if~~ it is subsequently unbundled

All three options must be selected to reflect the three ways in which eligible renewable energy products can qualify for "bucket one" treatment.

- (2) Minimum percentage of reduction of procurement content requirement, upon successful application by POU, applied to this category (Public Utilities Code Sections 399.16 (e) and 399.30 (c)(3))
- (a) Compliance period ending December 31, 2013
- (i) Options:
1. Not less than 40%
 2. Not less than 33%
 3. Not less than 25%
 4. No defined limit; decided on a case-by-case basis
- (ii) Staff recommendation: Option 4; no limit is specified for this compliance period in statute; the Energy Commission will review each application on its merits and determine the appropriate reduction, if any.

CMUA Comments

The staff correctly recognizes that section 399.16(e) does not put a limit on how much the section 399.16(c)(1) "50%" bucket 1 requirement can be reduced for the first compliance period if the conditions specified in section 399.15(b)(5) are met. However, there is no statutory support for the proposition that POU's must file an application at the CEC for a reduction of the "50%" bucket 1 requirement for the first compliance period. Section 399.30(c) provides that a POU "shall adopt procurement requirements consistent with Section 399.16," which includes section 399.16(e).

POU governing boards have the statutory authority to adopt potential reductions in "bucket 1" percentage requirements. CEC regulatory enforcement relates solely to whether the POU has adopted restrictions consistent with the law. The CEC lacks any statutory authority to require or "review each application on its merits and determine the appropriate reduction, if any." The legislature reserved this authority to the governing boards of POU's.

- (b) Compliance period ending December 31, 2016
- (i) Options:
1. Not less than 50%
 2. Not less than 40%
 3. Not less than 33%
 4. No defined limit; decided on a case-by-case basis
- (ii) Staff recommendation: Option 4; no limit is specified for this compliance period in statute; the Energy Commission will review each application on its merits and determine the appropriate reduction, if any.

CMUA Comments

CMUA's response mirrors its response to 3) a) i) (2)(a) immediately above. It is correct that the statute provides no limit for this compliance period. However, it is incorrect that the statute authorizes an application and approval process at the Commission for POU's. Again, the legislature reserved this authority to the governing boards of POU's.

- (3) Determination that generation belongs in this category
- (a) Options (one or more of the following):
- (i) POU indicates which generation it believes belongs in this category as part of compliance reporting
 - (ii) Staff determination at request of POU
 - (iii) Committee determination at request of POU
 - (iv) Commission determination at request of POU
 - (v) At end of compliance period as part of compliance and verification by staff, approved by Commission
- (b) Staff recommendation: Option (i), (v); these options will allow for the minimum administrative burden and backlog of essential work.

CMUA Comments

CMUA concurs with and applauds the sentiment that verification activities undertaken by the Commission and POU's should put a premium on the reduction of administrative burdens for both. Here, the Commission's authority under section 399.30(n) is limited to determining whether a POU determination about what goes into its "bucket 1" is consistent with the language in section 399.16(b)(1). Section 399.30(c) provides that a POU "shall adopt procurement requirements consistent with Section 399.16," which includes section 399.16(b)(1) describing the "bucket 1" criteria.

With that said, CMUA believes that portfolio content categories are an area in which non-binding guidance from the Commission may clarify and assist compliance. Some POU's may wish to have the option to request the CEC to determine whether the POU's decision that a particular resource is in "bucket 1" is consistent with section 399.16(b)(1). A similar "safe harbor" approach was adopted in regulations promulgated to implement SB 1368 and contained in 20 CCR § 2907, "Request for Commission Evaluation of a Prospective Procurement." In addition, the Federal Energy Regulatory Commission uses a "safe harbor" mechanism to determine, at the option of the non-public utility transmission provider, whether an open access tariff of that non-public utility transmission provider (not jurisdictional to the FERC for most purposes) comports with the Commission's reciprocity requirements. To have value, however, this safe harbor

determination would have to be final and not reconsidered by subsequent action, due to the substantial capital investment that is likely to be associated with the procurement decision.

- ii) Portfolio Content Category 2 – firmed and shaped incremental (Public Utilities Code Sections 399.16 (b)(2), 399.16 (c)(3) and 399.30 (c)(3))

(1) Definition:

(a) Location of renewable resource interconnection:

(i) Options:

1. May or may not be interconnected to a California balancing authority
2. Not interconnected to a California balancing authority

(ii) Staff recommendation: None at this time

CMUA Comments

CMUA recommends option 2 to avoid overlap of “bucket 2” with “bucket 1.” Option 2 reduces the potential for confusion about what should be in “bucket 1” and what should be in “bucket 2.” As CMUA noted (along with several other parties) at the CPUC in R.11.-05-005, there is no reason for a POU or retail seller to categorize a resource as a “bucket 2” resource, when it would otherwise qualify for “bucket 1.”

Fortunately, this is not a matter with which the Commission must wrestle, since its authority under section 399.30(n) is limited to determining whether a POU determination about what goes into its “bucket 2” is consistent with the language in section 399.16(b)(2). No additional regulatory guidance is necessary.

(b) Timing of incremental electricity resource scheduling into California balancing authority (scheduling may not precede generation of renewable product)

(i) Options:

1. Within one month of generation
2. Within same calendar year as generation
3. Within 12 months of generation
4. Within same compliance period as generation
5. Within 36 months of generation

(ii) Staff recommendation: None at this time

CMUA Comments

Consistent with its Comments at the CPUC, CMUA is highly concerned about additional requirements for “bucket 2” products that are not found in statute.

The answer to this question is “none of the above” insofar as section 399.16(b)(2) only requires that “bucket 2” electricity be ultimately “scheduled into a California balancing authority” without any requirement about **when** the electricity is “scheduled into a California balancing authority.”

- (c) Renewable resource
 - (i) Options:
 1. Intermittent resources only
 2. Both intermittent and non-intermittent resources permitted
 - (ii) Staff recommendation: None at this time

CMUA Comments

The statute provides no limitation on whether “bucket 2” is limited to intermittent resources. It may indeed be valuable to firm and shape non-intermittent resources, and the statute provides no prohibition on those products. Thus, Option 2 is correct.

- (d) Incremental resource
 - (i) Options:
 1. Incremental to California
 2. Incremental to POU
 - (ii) Staff recommendation: None at this time

CMUA Comments

See answer to ii(1)(e) immediately below.

- (e) Location of incremental resource relative to renewable resource
 - (i) Options:
 1. Must be within same balancing authority
 2. May or may not be within same balancing authority
 - (ii) Staff recommendation: None at this time

CMUA Comments

The use of the term “incremental” here is confusing and not consistent with the statutory language. The formulation of this question appears to treat the firming resource as the incremental resource, separate and apart from the renewable resource. However, section 399.16(b)(2) states that it is the “firmed and shaped eligible renewable energy resource electricity products providing incremental electricity and scheduled into a California balancing authority.” By definition, “incremental” must apply to the whole schedule. Again, to define “firming” as a

separate product would unnecessarily limit contracting options, and drive up costs to consumers.

As CMUA explained in its August 8, 2011 Comment in CPUC proceeding R.11-05-005 in response to ALJ Question 14, the inclusion of the word “incremental” in section 399.16(b)(2) only means that there must be an actual delivery of power to a California balancing authority in order to qualify as “bucket 2,” in order to distinguish a firmed and shaped product from an unbundled REC that can be included in “bucket 3” without regard for whether or not there is an actual delivery of power. Several other parties agreed.

Further, there is no basis in section 399.16(b)(2) to require the replacement energy to come from the same balancing authority as the renewable energy.

- (f) Execution of incremental resource contract
 - (i) Options:
 1. Must occur at the same time or after renewable resource contract is executed
 2. May occur before, at the same time, or after renewable resource contract is executed
 - (ii) Staff recommendation: None at this time

CMUA Comments

Subject to clarification on the use of the term “incremental” above, Option 2 would be correct. There is no basis in section 399.16(b)(2) to impose any requirements regarding the execution dates of the contracts for the replacement energy and for the renewable energy. As a practical matter, the negotiations for the two products may not occur at the same time and may not involve the same counterparties. Historically, multiple parties are required in order to ensure reliable and economic delivery of firmed and shaped renewable energy. The Commission should not restrict the ability of POUs to make prudent decisions in this regard.

- (g) Contractual relationship between renewable and incremental resources
 - (i) Options:
 1. Clear relationship must exist in contract for the renewable and/or incremental resource in order for the generation to count toward this category
 2. No contractual relationship necessary
 - (ii) Staff recommendation: None at this time

CMUA Comments

See answer to ii(1)(f) immediately above.

- (2) Determination that generation belongs in this category
 - (a) Options (one or more of the following):
 - (i) POU indicates which generation it believes belongs in this category as part of compliance reporting
 - (ii) Staff determination at request of POU
 - (iii) Committee determination at request of POU
 - (iv) Commission determination at request of POU
 - (v) At end of compliance period as part of compliance and verification by staff, approved by Commission
 - (b) Staff recommendation: Option (i), (v); these options will allow for the minimum administrative burden and backlog of essential work.

CMUA Comments

Similar to CMUA's comments on (i)(1)(a), this is an area in which the "safe harbor" process, described above, may be beneficial to both the CEC and CMUA members in providing guidance with respect to ongoing procurement activities, so that the option of having upfront guidance on pending procurement can be pursued by the POU. However, any safe harbor determination must be final.

- iii) Portfolio Content Category 3 – all other, including unbundled renewable energy credits (Public Utilities Code Sections 399.16 (b)(3), 399.16 (c)(2) and 399.30 (c)(3))
 - (1) Definition:
 - (a) Options:
 - (i) All unbundled renewable energy credits and any other generation that does not qualify for portfolio content category 1 or 2
 - (ii) Any generation that does not qualify for portfolio content category 1 or 2
 - (b) Staff recommendation: None at this time

CMUA Comments

CMUA favors Option (ii). Not all unbundled renewable energy credits will fall into "bucket 3." Unbundled RECs can and should count in "bucket 1" if they source from resources that qualify under "bucket 1." Credits from California resources, or resources that otherwise meet the definition in section 399.16(b)(1), will fall into "bucket 1."

- (2) Determination that generation belongs in this category
 - (a) Options (one or more of the following):
 - (i) POU indicates which generation it believes belongs in this category as part of compliance reporting
 - (ii) Staff determination at request of POU
 - (iii) Committee determination at request of POU
 - (iv) Commission determination at request of POU
 - (v) At end of compliance period as part of compliance and verification by staff, approved by Commission
 - (b) Staff recommendation: Option (i), (v); these options will allow for the minimum administrative burden and backlog of essential work.

CMUA Comments

This issue requires further clarification. If a resource is an eligible renewable energy resource, and is not in Buckets 1 or 2, it is automatically in Bucket 3. This is the construct of the statute.

4) Compliance and verification

a) Verification process

i) Options:

- (1) Include POU verification as part of current RPS Verification Report; full report will be sent to both CPUC and ARB
 - (a) Adopt annually
 - (b) Adopt at end of each compliance period, posting annual procurement data in each intervening year
- (2) POUs have a separate verification report
 - (a) Adopt annually
 - (b) Adopt at end of each compliance period, posting annual procurement data in each intervening year

- ii) Staff recommendation: Option (2)(b); Verification of POU and IOU compliance should take place under separate reports, so that a complication in verifying information from one group will not needlessly delay the timely verification of the other. As compliance can only be determined at the end of each compliance period, staff recommends only adopting a verification report after each period. For years when a report is not adopted, annual procurement data will be posted to allow tracking of progress toward RPS targets. An annual workshop could be held to publicly discuss findings.

CMUA Comments

CMUA supports CEC staff's recommendation of Option (2)(b), which CMUA understands will utilize existing data submittals to the largest extent possible.

The Option (1) proposal to combine the verification reports for retail sellers and POU's would be inappropriate under the statutory scheme created by SBX1-2 because the CEC plays a significantly different role for the POU's than it does for the retail sellers. The retail seller verification report is primarily used to transmit compliance information to the CPUC for use in the CPUC's RPS program. It is not appropriate for the POU RPS compliance information to be transmitted to the CPUC.

CMUA also supports verification reports being adopted at the end of each compliance period, rather than annually. CMUA believes that it would be unnecessary and administratively burdensome for the CEC to adopt a compliance report on an annual basis. Additionally, the CEC would not be able to determine compliance on an annual basis because SBX1-2 does not provide minimum RPS procurement requirements for any single calendar year, in any compliance period, but instead speaks to an average (for CP1) and "reasonable progress" (for CP2 and CP2).

b) Non-compliance triggers

i) Options (one or more of the following):

- (1) Does not meet procurement target requiring the utility to procure a minimum quantity of eligible renewable energy resources for a compliance period, without a demonstration of conditions beyond the control of the POU that would delay timely compliance
- (2) Does not meet portfolio content category required minimum or maximum percentages for a compliance period, without a demonstration of conditions beyond the control of the POU that would delay timely compliance
- (3) Not timely filing sufficient documentation for the Energy Commission to determine POU compliance with the law at the end of a compliance period, without successful application for a late filing
 - (a) More than 30 days late
 - (b) More than 60 days late
 - (c) More than 90 days late
 - (d) Not submitted
 - (e) Other
- (4) One or more required annual reports is not received in a timely manner
 - (a) More than 30 days late
 - (b) More than 60 days late
 - (c) More than 90 days late
 - (d) Not submitted
 - (e) Other
- (5) Procurement plan is adopted late
- (6) Does not provide adequate documentation to demonstrate that conditions exist beyond the control of the POU that would delay timely compliance, and that

- reasonable measures were taken to overcome those conditions
- ii) Staff recommendation: Options (1), (2), (3)(c), (3)(d), (6); the law clearly sets targets for each compliance period and minimum and maximum percentages for each portfolio content category. Additionally, the Energy Commission will need to timely determine each POU's status in achieving the goals of the RPS targets for each compliance period and will rely on reports and documentation submitted by the POUs for those compliance years.

CMUA Comments

In principle, CMUA agrees with CEC staff that Options (1), (2), and (3) all present clear statutory requirements that each POU must meet. However, in Options (1) and (2), CEC staff uses the phrase "without a demonstration of conditions beyond the control of the POU that would delay timely compliance." This phrase implies that the POUs must make an affirmative showing to the CEC before granting a waiver as permitted under section 399.30(d)(2). As discussed above, this is not the structure set out by the legislation. Instead, SBX1-2 directs the governing board of each POU to adopt conditions that allow for waiver consistent with section 399.15(d)(5). Options (1) and (2) should be restated as follows:

- (1) Does not meet procurement target requiring the utility to procure a minimum quantity of eligible renewable energy resources for a compliance period, ~~without a demonstration of conditions beyond the control of the POU that would delay timely compliance~~ unless the governing board of the local publicly owned electric utility adopts conditions that allow for delaying timely compliance consistent with section 399.15(b)(5) and those conditions were met or unless the governing board of the local publicly owned electric utility adopts cost limitations for procurement expenditures consistent with section 399.15(c) and compliance would require exceeding the cost limitations.
- (2) Does not meet portfolio content category required minimum or maximum percentages for a compliance period, ~~without a demonstration of conditions beyond the control of the POU that would delay timely compliance~~ unless the governing board of the local publicly owned electric utility adopts conditions that allow for delaying timely compliance consistent with section 399.15(b)(5) and those conditions were met or unless the governing board of the local publicly owned electric utility determines that reduces the procurement content requirements for the local publicly owned electric utility consistent with section 399.16(e).

CMUA agrees that Option (3) presents a clear statutory requirement. Of the options presented by CEC staff, CMUA believes that Option 3(c)'s 90 day requirement is reasonable.

As discussed above, CMUA rejects CEC staff's characterization of Option (6). The CEC's role is not to approve of the specifics of the waiver conditions or cost limitations as those are adopted by a POU's governing board. The CEC's role is limited to determining whether each POU adopted flexible compliance mechanisms pursuant to the procedures set out in the legislation. Option (6) should be rejected.

- c) Criteria and process for determining whether POUs have met procurement requirements
 - i) Procurement targets for each compliance period
 - (1) Process used to determine POU compliance
 - (a) Options:
 - (i) Same process as that used for retail sellers
 - (ii) Same process, but require POUs to procure renewable resources for the remaining unmet need after long-term contracts executed after June 1, 2010, are removed, up to the total number of kWhs that represents the percentage of total retail sales required for that compliance period
 - (b) Staff recommendation: None at this time

CMUA Comments

The Concept Paper offers only two options, and both would result in POU compliance being determined through the "same process as that used for retail sellers." It is in error to assume that the "process used to determine POU compliance" must be "the same process as that used for retail sellers."

Section 399.30 imposes three requirements on POUs or their governing boards: **First**, section 399.30(a) requires each POU to procure a "minimum quantity" of renewable electricity stated as "a specified percentage of total kilowatt hours sold to the utility's retail end-use customers each compliance period, to achieve the targets of [section 399.30(c)]." **Second**, section 399.30(b) requires the governing board of each POU to implement procurement targets that require its POU to procure "a minimum quantity of eligible renewable energy resources for each" of the three compliance periods. **Third**, section 399.30(c) requires an average of 20% to be procured for the first compliance period but does not require an average percentage for the second and third period. The governing board is only required to ensure that its POU must attain "25 percent of retail sales by December 31, 2016, and 33 percent of retail sales by December 31, 2020" with "reasonable progress" during "intervening years" and with 33 percent being attained "In all subsequent years."

The clear intent of the legislature was to have the POU's move in an orderly fashion from 20% in the first compliance period to 33% for all years after 2020 with the POU's and their governing boards having discretion to fashion plans for the intervening years so long as the plans meet the requirements of section 399.30(a)-(c). The "minimum quantities" selected by one POU and its governing board for the second and third compliance periods may differ from the "minimum quantities" selected by another POU and its governing board for the second and third compliance periods so long as the end-of-period targets established in section 399.30(c) are attained and there is "reasonable progress in each of the intervening years."

The CEC has authority to determine whether a POU and its governing board has complied with the requirements of section 399.30(a)-(c) as specified in those sections, but the CEC lacks authority to direct how a POU governing board shall comply or to impose more specific requirements on POU's and their governing boards.

- (2) Time period used to determine compliance for compliance period ending December 31, 2016 (Public Utilities Code Section 399.30 (c)(2))
 - (a) Options:
 - (i) January 1, 2016 to December 31, 2016
 - (ii) January 1, 2014 to December 31, 2016
 - (iii) Other time period
 - (b) Staff recommendation: None at this time

CMUA Comments

Options a(i) and (ii) are clearly incorrect. Section 399.30(c)(2) requires that each POU "achieves 25 percent of retail sales by December 31, 2016." That is a target to be achieved by a specific date, December 31, 2016. The staff errs in thinking that the specification of a year-end target implies that the target must also be an average for a "time period" such as a calendar year or any other period of time.

This does not mean that the POU's need not establish minimum quantity and percentage targets for the second compliance period as a whole, or that they may or may not set procurement goals or monitoring parameters for intervening years within the compliance period. POU's and their governing boards must set the "minimum quantity" and "specified percentage" targets required by section 399.30(a)-(b), and they must show "reasonable progress during the intervening years" as required by section 399.30(c)(2). However, as discussed above, the POU's and their governing boards have discretion in setting those targets so long as they comply with section 399.30(a)-(c).

(3) Time period used to determine compliance for compliance period ending December 31, 2020 (Public Utilities Code Section 399.30 (c)(2))

(a) Options:

(i) January 1, 2020 to December 31, 2020

(ii) January 1, 2017 to December 31, 2020

(iii) Other time period

(b) Staff recommendation: None at this time

CMUA Comments

See response to (2) above. Again, this does not mean that the POU's need not establish minimum quantity and percentage targets for the third compliance period as a whole, or that they may or may not set procurement goals or monitoring parameters for intervening years within the compliance period. POU's and their governing boards must set the "minimum quantity" and "specified percentage" targets required by section 399.30(a)-(b), and they must show "reasonable progress during the intervening years" as required by section 399.30(c)(2). However, as discussed above, the POU's and their governing boards have discretion in setting those targets so long as they comply with section 399.30(a)-(c).

ii) Percentage limitations for portfolio content categories

(1) Portfolio content category 1 (Public Utilities Code Sections 399.16 (b)(1), 399.16 (c)(1) and 399.30 (c)(3))

(a) Options (one or more of the following):

(i) Use contract information, which could demonstrate, as necessary depending on the portfolio content category definition, scheduling for the renewable resource and whether generation in this category is procured as a bundled product

(ii) Use NERC e-Tags to verify generation scheduled into a California balancing authority; the NERC e-Tag must show that the generation came from the same RPS-eligible resource as the RECs with which the NERC e-Tag is matched

(iii) Use dynamic transfer agreements to verify generation dynamically transferred to a California balancing authority

(b) Staff recommendation: Options (i), (ii), (iii); contract information would provide appropriate assurance, as needed, that generation counted toward this category is scheduled into a California balancing authority and/or bundled. NERC e-Tags adequately demonstrate the timing and quantity of generation scheduled into a California balancing authority from the renewable resource. Dynamic transfer agreements with the balancing authority sufficiently demonstrate that the generation represented belongs in this category.

CMUA Comments

The staff's recommendation appropriately allows flexibility in showing that a resource fits within portfolio content category 1. However, option (i) should be revised to strike the phrase "and whether generation in this category is procured as a bundled product" insofar as RECs can be included in "bucket 1" if the underlying resource meets the criteria for being in "bucket 1" as discussed above and also below.

- (2) Portfolio content category 2 (Public Utilities Code Sections 399.16 (b)(2), 399.16 (c)(3) and 399.30 (c)(3))
- (a) Firm and shaped:
- (i) Options (one or more of the following):
1. Use contract information to demonstrate, as necessary depending on the portfolio content category definition, scheduling for the renewable and incremental resources and/or a contractual link between the renewable resource and the incremental resource
 2. Use NERC e-Tags to verify firm and shaped generation scheduled into a California balancing authority; NERC e-Tags must include the RPS ID # of the resource with which the NERC e-Tag is matched
- (ii) Staff recommendation: Options 1, 2; contract information would provide appropriate assurance, as needed, that generation counted toward this category is scheduled into a California balancing authority and/or demonstrates a contractual connection. NERC e-Tags adequately demonstrate the timing and quantity of generation scheduled into a California balancing authority and can show a link to the RPS-eligible resource via the RPS ID#.

CMUA Comments

CMUA agrees that some combination of NERC e-Tags and contract information can be used for verification. However, this is a technical issue that should involve a thorough examination of what is actually on the e-Tag, and how it may relate to prevailing commercial practices, which may well change over time.

More fundamentally, however, and as noted in response to the definition of "incremental" in the Portfolio Category 2 discussion above, the use of the term "incremental" in the statute applies to the firm and shaped product, not just the replacement energy.

- (b) Incremental:
 - (i) Options:
 - 1. Contract information to demonstrate, as necessary, the timing of contract execution for and/or the contractual relationship between the renewable and incremental resources
 - (ii) Staff recommendation: Option 1; contractual information should be adequate to demonstrate the incremental nature of the generation that is used to firm and shape renewable generation.

CMUA Comments

See response to question 2(a) immediately above. CMUA does agree that contractual information should provide any data required.

- (3) Portfolio content category 3 (Public Utilities Code Sections 399.16 (b)(3), 399.16 (c)(2) and 399.30 (c)(3))
 - (a) Options:
 - (i) Any generation that does not qualify for the first two categories is automatically counted in this category
 - (ii) All unbundled renewable energy credits, regardless of whether the renewable resource has its first point of interconnection with a California balancing authority, automatically count toward this category
 - (b) Staff recommendation: None at this time

CMUA Comments

Option (i) is correct. As numerous parties and CMUA explained in its August 8, 2011 Comment to the CPUC in R.1-05-005 in response to ALJ Question 10, "bucket 1" as defined in section 399.16(b)(1) includes transactions that transfer only RECs, as long as the RECs are from RPS-eligible generators that meet the one of the criteria in section 399.16(b)(1).

- iii) Reasonable progress in intervening years of each compliance period (Public Utilities Code Section 399.30 (c)(2))
 - (1) Options (one or more of the following):
 - (a) Summarize how POUs define their own reasonable progress without opinion
 - (b) Define reasonable progress in the regulations as a percentage
 - (c) Define the process and criteria in the regulations used to determine reasonable progress for POUs
 - (d) Release verified data
 - (i) Adopted by full Commission
 - (ii) Not adopted by full Commission
 - (e) Release unverified data

- (i) Adopted by full Commission
 - (ii) Not adopted by full Commission
- (2) Staff recommendation: Options (c), (e)(ii); statute limits the authority to mandate demonstration of specific quantities of procurement for intervening years. If a reasonable process was identified in regulations for POU to follow in achieving their ultimate RPS achievement goals at the end of each compliance period, the Energy Commission could release unverified data submitted in the POU's annual reports to serve as a snapshot of POU progress in intervening years.

CMUA Comments

Staff should reconsider their recommendation of option (c). Defining "the process and criteria in the regulations used to determine reasonable progress for POU" would be prescriptive. The legislature set percentage targets when it thought it should be prescriptive, but section 399.30(c)(2) leaves it to the discretion of POU governing boards to set targets so that there will be "reasonable progress in each of the intervening years sufficient to ensure that the procurement" of renewables meets the December 31, 2016, and December 31, 2020, year-end targets.

- iv) Deficits associated with a previous renewables portfolio standard (Public Utilities Code Section 399.15 (a))
- (1) Options:
- (a) No deficits shall be applied to future compliance periods if a POU procured at least 14 percent of retail sales from renewable energy resources in 2010 (from 399.15 (a))
 - (b) No deficits shall be applied to future compliance periods if a POU procured at least 10 percent of retail sales from renewable energy resources in 2010
 - (c) No deficits shall be applied to future compliance periods regardless of the percentage of retail sales procured from renewable energy resources in 2010
- (2) Staff recommendation: None at this time

CMUA Comments

Option (c) is correct. For POU, no deficits shall be applied to future compliance periods regardless of the percentage of retail sales procured from renewable energy resources in 2010. Section 399.15(a) addresses IOU deficits and implies that in some instances there may be a carryover of a 2010 deficit. There is no comparable provision for POU.

- v) Excess procurement from previous compliance periods (Public Utilities Code Sections 399.13 (a)(4)(B) and 399.30 (d)(1))
- (1) When can excess procurement begin to be applied to future compliance periods, for those POU that adopt rules permitting the use of excess procurement?
- (a) Options:
- (i) January 1, 2011 (date provided in 399.13(a)(4)(B))
 - (ii) June 1, 2010
 - (iii) Another date
 - (iv) At the discretion of POUs
- (b) Staff recommendation: Option (i); staff can see no compelling reason to apply a different standard from that applying to retail sellers.

CMUA Comments

Option (i) is correct. Section 399.30(d)(1) provides that POU governing boards may adopt “rules permitting the utility to apply excess procurement in one compliance period to subsequent compliance periods in the same manner as allowed for retail sellers pursuant to Section 399.13,” and section 399.13(a)(4)(B) provides that the accumulation of excess procurement can begin on January 1, 2011.

- (2) Can excess procurement from portfolio content category 3 be applied toward a future compliance period, for those POUs that adopt rules permitting the use of excess procurement?
- (a) Options:
- (i) Yes
 - (ii) No (from 399.13 (a)(4)(B))
- (b) Staff recommendation: Option (ii); staff can see no compelling reason to apply a different standard from that applying to retail sellers.

CMUA Comments

Option (ii) is correct. Section 399.30(d)(1) provides that POU governing boards may adopt “rules permitting the utility to apply excess procurement in one compliance period to subsequent compliance periods in the same manner as allowed for retail sellers pursuant to Section 399.13,” and section 399.13(a)(4)(B) provides: “In no event shall electricity products [in “bucket three”] be counted as excess procurement.”

- (3) Length of contracts allowed for excess procurement that can be applied to a future compliance period, for those POUs that adopt rules permitting the use of excess procurement?
- (a) Options:

- (i) At least 10 years (from 399.13(a)(4)(B))
- (ii) At least 5 years
- (iii) At least 3 years
- (iv) At the discretion of POU's
- (b) Staff recommendation: Option (iv); as contracts remain under the purview of POU's and are not approved by the Energy Commission, it is reasonable to leave this issue to the discretion of POU's.

CMUA Comments

Staff is correct.

- d) Conditions allowing waiver of enforcement
 - i) Reasonable conditions that allow for delay of timely compliance (including inadequate transmission, unanticipated curtailment of resources, and permitting, interconnection or other circumstances that delay procurement), for those POU's that adopt such conditions (Public Utilities Code Sections 399.15 (b)(5)-399.15 (b)(9) and 399.30 (d)(2))
 - (1) Options (one or more of the following):
 - (a) Use the same criteria for timely compliance delays as those used for retail sellers
 - (b) Establish criteria in regulations by which Energy Commission will determine reasonableness of timely compliance delays; Energy Commission will use these criteria to evaluate at the end of each compliance period for those POU's that do not meet targets
 - (c) Tiered compliance based on size of POU
 - (d) Exemption from demonstrating compliance for POU's under a certain size
 - (2) Staff recommendation: Option (b); while the criteria for evaluating the reasonableness of timely compliance delays should be similar for retail sellers and POU's, there may be different considerations that need to be taken into account, requiring slight disparities. In addition, no language in the statute indicates that exemptions or variations in the rules are necessary for smaller POU's.

CMUA Comments

CMUA rejects all of the options presented by CEC staff. As discussed above, the CEC does not have the authority under SBX1-2 to determine the reasonableness of a POU's conditions for delaying timely compliance. Section 399.30(d)(2) very clearly provides the governing board of a POU with the discretion to adopt "Conditions that allow for delaying timely compliance consistent with subdivision (b) of Section 399.15." Section 399.15(b)(5) in turn specifies what must be shown to waive enforcement. The CEC may determine under section 399.30(n) whether the POU's conditions for delaying timely

compliance are consistent with section 399.15(b)(5) but lacks authority to develop its own conditions. The CEC's role is limited to determining whether the governing board of the POU complied with the requirements of SBX1-2.

ii) Reasonable conditions that allow procurement expenditures to meet or exceed cost limitations, for those POU's that adopt such conditions (Public Utilities Code Sections 399.15 (c) and 399.30 (d)(3))

(1) Options:

- (a) Use the same criteria for cost limitations as those used for retail sellers
- (b) Establish criteria in regulations by which Energy Commission will determine reasonableness of cost limitations; Energy Commission will use these criteria to evaluate at the end of each compliance period for those POU's that do not meet targets

(2) Staff recommendation: Option (b); while the criteria for evaluating the reasonableness of exceeding cost limitations should be similar for retail sellers and POU's, there may be different considerations that need to be taken into account, requiring slight disparities.

CMUA Comments

CMUA rejects all of the options presented by CEC staff. As with the conditions for waiver discussed above, the CEC has no statutory authority to prescribe the criteria for determining the reasonableness of a POU's cost limitations. SBX1-2 very clearly provides the governing boards of each POU with the authority to adopt cost limitations consistent with section 399.15(c). Section 399.15(c) and (d) in turn specify what must be taken into account in establishing a cost limitation. The CEC may determine under section 399.30(n) whether the POU's cost limitations are consistent with section 399.15(c) and (d) but lacks authority to develop its own criteria.

With specific regard to cost limitations, it is difficult to ascertain how the Commission would be able to examine and/or overturn the rate design and level determinations of a POU governing board without engaging in a ratemaking function for that POU. This is far afield from the CEC's statutory role prescribed in section 399.30(n), and would furthermore conflict with other statutory mandates providing that POU governing boards have this responsibility. Again, the CEC's role is limited to determining whether the governing board of the POU complied with the procedural requirements of SBX1-2.

- e) Dispute resolution process
 - i) If POU's dispute Energy Commission findings
 - (1) Options:
 - (a) Same process currently used for retail sellers that dispute Energy Commission findings
 - (b) Different process from that used for retail sellers
 - (2) Staff recommendation: Option (a); staff can see no compelling reason to adopt a different process from that applying to retail sellers.
 - ii) If another party disputes Energy Commission findings
 - (1) Options:
 - (a) Same process outlined in the Renewable Energy Program Overall Program Guidebook
 - (b) Different process from that outlined in the Renewable Energy Program Overall Program Guidebook
 - (2) Staff recommendation: Option (a); staff can see no compelling reason to adopt a different process from that presented in the RPS Guidebook.

CMUA Comments

Given the foundational issues that remain with respect to the scope of Commission and POU governing board jurisdiction, it is premature to opine upon such issues as dispute resolution, which will depend largely upon what substantive issues are sought to be resolved. In all events, any dispute resolution process should be limited to the CEC's implementation or the enforcement procedures call for in Section 399.30(n).

Reporting

- a) Regulatory streamlining
 - i) Options (one or more of the following):
 - (1) Modify existing forms submitted to the Energy Commission by POU's to reflect reporting requirements imposed by SBX1-2
 - (2) Allow consolidated/aggregated reports at the discretion of POU's; those whose reports are aggregated by another party must submit an attestation verifying that all of the information representing their POU is correct and complete
 - (3) Do not allow consolidation of reports
 - ii) Staff recommendation: Options (1), (2); staff feels that reporting should be streamlined in any possible way, including aggregated reports and modifications to existing reports already submitted to the Energy Commission.

CMUA Comments

CMUA supports the staff's recommendation. Some POU's are members of joint powers agencies ("JPA"). They may find it efficient to submit consolidated reports through the JPA.

Other Issues

Exemption from Procurement Content Category Requirements

Section 399.30(c)(3) directs POU's to adopt "procurement requirements consistent with section 399.16." As discussed above and made evident in the CEC staff's Concept Paper, the meaning of the phrase "consistent with" is subject to a wide range of interpretations. When interpreting a statutory provision that is reasonably susceptible to multiple interpretations, it is necessary to look to the rules of statutory construction. One such rule provides that:

All consistent statutes which can stand together, if related to the same subject, shall be construed together, and with reference to whole system of which they form part, and shall be harmonized, and effect given to all, if this can consistently be done, so as to make the law consistent in all its parts and uniform in its application and results.¹

A reasonable application of this principle would be to look not only to section 399.16 but also to those statutes in the RPS statutory scheme that reference section 399.16. One key statute referencing 399.16 is section 399.18, which provides:

(a) This section applies to an electrical corporation that as of January 1, 2010, met either of the following conditions:

(1) Served 30,000 or fewer customer accounts in California and had issued at least four solicitations for eligible renewable energy resources prior to June 1, 2010.

(2) Had 1,000 or fewer customer accounts in California and was not connected to any transmission system or to the California Independent System Operator.

(b) For an electrical corporation or its successor, electricity products from eligible renewable energy resources may be used for compliance with this

¹ In re First Nat. Bank in Oakland, 96 Cal. App. 107, 111 (1928) (citing Cohn v. Isensee, 45 Cal. App. 531, 537 (1920)).

article, notwithstanding any procurement content limitation in Section 399.16, provided that both of the following conditions are met:

(1) The electrical corporation or its successor participates in, and complies with, the accounting system administered by the Energy Commission pursuant to subdivision (b) of Section 399.25.

(2) The Energy Commission verifies that the electricity generated by the facility is eligible to meet the requirements of Section 399.15.

Applying section 399.18 to POUs would mean that a POU that was similarly situated to the electrical corporations covered by section 399.18(a)(1) could adopt procurement requirements consistent with the exemption from 399.16 found in 399.18(b).

This process of looking to cross referenced statutes will likely be used throughout SBX1-2. One clear example is in the adoption of cost limitations for POUs. Section 399.30(d)(3) provides that the governing board of a POU may adopt cost limitations consistent with section 399.15(c). However, many of the key descriptive provisions relating to cost limitations are found in section 399.15(d), which cross references 399.15(c). Specifically, section 399.15(d)(1) provides that the cost limitation should be set “at a level that prevents disproportionate rate impacts.” To reject the application of 399.18 to POUs would be to reject requiring a POU to seek to avoid disproportionate rate impacts in the development of its cost limitations. All the provisions of SBX1-2 and other related statutes should be construed together and should be interpreted as consistent.