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Via Electronic and U.S. Mail to docket@energy.ca.us and RPS33@energy.ca.gov

California Energy Commission
Dockets Office, MS-4
Re: Docket No. 11-RPS-01
1516 Ninth Street
Sacramento, CA 95814-5512

Re: Sacramento Municipal Utility District (SMUD) and Turlock Irrigation District's Joint Comments on Counting Historical Procurement "In Full" for the Renewable Portfolio Standard

The Sacramento Municipal Utility District (SMUD) and Turlock Irrigation District (TID) contend that early action to achieve the State's policy goal of 20% renewables by 2010 should not be stranded by disallowing counting of unused historical procurement (energy not already counted under the Publicly Owned Utility (POU) Section 387 RPS programs) in the new 33% by 2020 statewide renewable portfolio standard (RPS).

- 1. The Energy Commission should draft RPS regulations that allow unused historical procurement to count in the SBX1 2 RPS because it is good policy to reflect early action and avoid stranded investment.*

State policy has consistently allowed banking. It has been state policy to encourage procurement of electricity from renewable energy resources since at least 2002 when SB 1078 was enacted. SB 1078 set a specific goal of 20% renewable energy sales by 2017 for retail sellers, and SB 107 accelerated this goal to 2010. Both bills left the design and implementation of parallel programs meeting this intent to each POU. SMUD, TID, and several other POUs have diligently complied with this state policy by procuring renewable energy from Energy Commission certified eligible resources on pace to meet the state target for retail sellers. Accordingly, SMUD's Board policy was a target of 20% by 2010. SMUD met and surpassed that target and consistently surpassed interim targets in the years 2003-2009.

Achieving numerical procurement targets from renewable resources by a specific date in the future is not an exact science. Over procurement is a standard feature of proper resource planning because actual deliveries of energy from variable resources such as wind and solar, and even more predictable resources such as geothermal or

biomass, often vary from those assumed in planning exercises. This fact has been recognized since 2003 -- the beginning of the RPS in California, where the California Public Utility Commission's (CPUC) initial RPS decision under SB 1078 allowed unlimited banking of excess procurement (see D.03-06-071). SMUD followed this state policy by including banking of surplus procurement in its Section 387 RPS Program, not only for the 20% by 2020 target, but also for a 33% procurement target by 2020.

SBX1 2 itself recognizes the importance of over procuring renewables in order to meet the targets expected, and counts over procurement by allowing it to be "banked" or "carried over" from one compliance period to the next. These banking provisions are a continuation of a consistent state policy in the historical retail seller and POU RPS programs that recognizes all procurement, including banked surplus, counts toward state policy objectives.

This longstanding, and ongoing, RPS policy can and should be made consistent as well as we move from the historical RPS structures to the SBX1 2 RPS. Failure to count unused or surplus procurement in the transition between RPS programs amounts to a penalty for achieving state policy. In SMUD's case, it would strand tens of millions of dollars of ratepayer investments. TID's stranded costs are over one million dollars. Such an interpretation of SBX1 2 would also create an atmosphere of uncertainty that would deter robust procurement going forward because the regulated community would not be able to rely on a consistent and responsible RPS policy over the period of its planning horizon. Entities that have had surplus procurement stranded in the past will be reluctant to procure early in the future, for fear that the surplus that may be created with that strategy would once again be "stranded" by a policy change.

SBX1 2 treats surpluses and deficits differently. It is also important *to not equate* treatment of banking and deficits in the transition to the SBX1 2 RPS, in the service of "starting with a clean slate" or a "level playing field". In fact, SBX1 2 itself treats surpluses and deficits between compliance periods differently, by recognizing early action and permitting banking of surpluses, while ignoring small deficits from one compliance period to the next. There is a rationale for this treatment. Deficits are subject to a potential penalty in the compliance period in which they occur, so carrying them forward to the next compliance period could be considered a double penalty. Surpluses, on the other hand, are banked and carried forward, because there is no better way to recognize their value *within* a compliance period. Banking is required to recognize the value of surpluses. Failing to allow banking is a disincentive toward early procurement, as it risks stranding the investments made early in order to ensure compliance.

2. *SBX1 2 contains legal authority to count unused historical procurement.*

Continuation of historical RPS programs: As a foundation, it is clear that SBX1 2 is a connected continuation of historical RPS programs began under SB 1078 -- built upon a variety of previous RPS procurement requirements. It begins with a 20% procurement requirement for the first compliance period, from 2011 to 2013. The 20% requirement is in truth a continuation of the 2010 goal from the RPS program first set by SB 1078, and later accelerated by SB107. It has been extended by SBX1 2 because the State's retail sellers, by and large, failed to meet the standard in 2010. SBX1 2 also reenacts mostly the same renewable definitions, the same eligibility and certification role of the Energy Commission, the same retail-seller oversight role of the CPUC, and largely the same procurement processes by retail sellers, including "least cost-best fit". It further provides that POUs "retain" substantial discretion over procurement – discretion they had in the historical Section 387 programs. And, SBX1 2 directly transfers retail seller deficits from 2010 that are greater than 6% of retail sales in the SB 1078 RPS program to expected compliance under SBX1 2.

SBX1 2 states that pre-June 1, 2010 contracts must "count in full". Most importantly, SBX1 2 carries provisions meant to reassure electric utilities that renewable contracts from the SB 1078 programs that meet the Energy Commission eligibility guidelines are required to "count in full" toward SBX1 2 procurement. Section 399.11 provides in pertinent part:

399.11. The Legislature finds and declares all of the following:

(e) (3) California electrical corporations have already executed, and the commission has approved, power purchase agreements with eligible renewable energy resources located outside of California that will supply electricity to California end-use customers. These resources will fully count toward meeting the renewables portfolio standard procurement requirements.

In addition, Section 399.16(d) states:

Any contract or ownership agreement originally executed prior to June 1, 2010, shall count in full towards the procurement requirements established pursuant to this article, if all of the following conditions are met ...

The law does not merely state that the eligible renewable procurement from existing contracts shall "count". The Legislature said repeatedly that contracts executed prior to June 1, 2010 "*shall* [not "may"] *count in full*." Procurement from these historically signed contracts and ownership arrangements is "counted" by being eligible to claim continued procurement under these contracts for compliance under SBX1 2. However, counting "in full" implies something more than that simple concept, in two very important ways.

First, these grandfathered resources cannot be said to “count in full” if uncounted historical procurement from these contracts is not counted toward the overlapping 20% goal in the first SBX1 2 compliance period. POUs legally procured RPS-eligible procurement via pre-June 1, 2010 contracts under their Section 387 RPS programs, and should be allowed to fully count historical procurement that was **not** used to comply with their previous Section 387 goals. An interpretation of SBX1 2 to now ignore that surplus procurement serves no valid policy goal, and would be in conflict with the intent of the Legislature that such resources “will fully count” toward new RPS requirements.

Second, these grandfathered resources cannot be said to “fully count” or “count in full” if procurement from any historical contracts that are less than 10 years in duration are required to be subtracted from procurement in a compliance period prior to determining any surplus procurement from the period. This is clearly a lessening of the procurement value of these contracts that is in direct conflict with Legislative intent that they count “in full”. While SBX1 2 has a provision that procurement from contracts of less than 10 years should be subtracted when calculating excess procurement, this provision is in conflict with the “count in full” provisions, and should not apply to contracts signed prior to June 1, 2010. To apply that provision retroactively to these validly signed, historical contracts has three negative effects:

- 1) it ignores the Legislature’s direction to count these historical resources in full;
- 2) it partially invalidates and strands investments that were undertaken in full good faith; and
- 3) it provides an incentive to reduce future procurement to avoid suffering an “excess procurement loss” (entities could adjust their procurement for the first compliance period under SBX1 2 to avoid any surplus to the following compliance period, even while their historical less-than-10-year contracts count in the first period).

The Energy Commission can and should avoid these negative affects by a reasonable interpretation of the “count in full” phrase in SBX1 2.

An interpretation that does not count unused procurement from historical contracts treats the renewable energy from these contracts in three different ways, rather than always counting the procurement “in full:”

- 1) If the procured energy is delivered after January 1, 2011, and is from contracts of 10 years or longer, it retains its full procurement value and is “counted in full”;

- 2) If the procured energy is delivered after January 1, 2011 and is from a contract of less than 10 years, it counts for compliance, but only *partially*, because the proposed treatment of these contracts reduces their value when calculating surplus procurement in a compliance period; and
- 3) Any unretired, pre-2011 procurement from these “count in full” contracts” would simply not count. Here, the contracts also only count *partially*, as the energy used for compliance in the Section 397 RPS counts there, but the unused procurement that is not carried is not counted anywhere.

This is not what the statute requires, and the Energy Commission Staff should adopt an interpretation consistent with legislative intent by allowing the unused procurement from contracts signed prior to June 1, 2010 to “count in full”.

The Energy Commission must exercise its enforcement authority consistently.

The Energy Commission’s Pre-Rulemaking Draft Regulations are predicated upon enforcement authority granted in Pub. Util. Code Section 399.30(n), which states:

“On or before July 1, 2011, the Energy Commission shall adopt regulations specifying procedures for the 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 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).”

The Energy Commission Staff reads this authority quite broadly to empower the Commission to promulgate requirements, among others, covering qualifying electricity products, portfolio content categories, and procurement requirements, and the intent of phrases such as “consistent with” and “in the same manner as”. Indeed, Staff claims the authority to reclassify “eligible renewable energy resource electricity products” from one Portfolio Content Category to another, though reclassification is not mentioned expressly in the statute. (See *Section 3203(a)(3) and (b)(4)*). If there is broad authority to craft regulations reclassifying products where reclassification is not mentioned in the statute, there is certainly authority allowing the full counting of unused historical procurement based on the express language in the law.

SMUD and other POUs believe that the Energy Commission should exercise its authority conservatively, but consistently as well. It must balance state policy goals. This task includes promulgating regulations to credit early action while stimulating enough demand for a sustainable RPS industry.

While exercising this authority, the Energy Commission must also recognize that certain POUs are situated fundamentally differently than retail sellers, including 11 POUs that met and surpassed the 20% by 2010 state policy with fully eligible renewables. This is the exact situation where the Energy Commission should exercise its authority to fashion rules that are appropriate to the different

circumstances of the POUs. This is not a case where Staff should argue that the lack of an express rule discussing unused historical procurement in the case of retail sellers means that the Energy Commission has no authority to draft regulations recognizing the good work of POUs and preventing stranded costs.

The Energy Commission should give weight to the legislative grant of POU discretion over procurement. The Energy Commission should also give appropriate weight to Section 399.30(m), which indicates that local publicly owned electric utilities shall retain discretion over the mix of eligible renewable resources procured and reasonable procurement costs for those resources. As there is no explicit language in the statute stating that POUs cannot count unused historical procurement, the Energy Commission should defer to POU procurement discretion in counting such procurement, as long as POUs do not include ineligible resources nor overstate their unused procurement.

Section 399.25 in SBX1 2 indicates that the California Public Utilities Commission should adopt, for retail sellers, rules allowing these entities “to accumulate, beginning January 1, 2011, excess procurement in one compliance period to be applied to any subsequent compliance period.” This language does not apply to the separate issue of counting unused historical procurement for POUs. Unused historical procurement is not covered by this section of SBX1 2 simply because it occurred prior to January 1, 2011 so cannot “accumulate” after that date and cannot move from one compliance period under SBX1 2 to subsequent periods. Rather than covered by the excess procurement rules that the statute imagines will be created for retail sellers related to SBX1 2 procurement, the issue of unused historical procurement relates to appropriate treatment of surplus procurement in the transition from POUs historical Section 387 RPS structures into the SBX1 2 RPS.

The Energy Commission should recognize the important reasons for such legislative discretion to POU procurement practices -- that POUs vary significantly in size, service territory, and historical RPS procurement record. The Energy Commission should fashion rules that are appropriate to the different circumstances of the POUs, in deference to the POU procurement discretion afforded by the statute.

3. The Energy Commission should recognize unused procurement from historical contracts with appropriate guidance and constraints.

As discussed above, good policy dictates that the Energy Commission recognizes unused procurement from contracts executed prior to June 1, 2010. SMUD and fellow POUs have also shown that the Energy Commission has the legal authority to count unused historical procurement. We strongly urge the Energy Commission to use its authority to affirmatively set a policy enabling this credit for early action, and provide clear upfront guidance to POUs regarding the eligibility of this unused procurement under SBX1 2.

Suggested criteria for counting unused historical procurement. The Energy Commission's first obligation is to ensure that historical POU procurement is counted once, and only once, but in full, for RPS compliance. The Energy Commission has the authority and ability to do this calculation using WREGIS and publicly available POU information. The Energy Commission can also establish reasonable criteria for such calculations in order to "enforce" this treatment and give weight to statutory intent. Three criteria that the Energy Commission could adopt to count unused historical procurement are as follows:

1. **Limit to Energy Commission Eligible renewables:** Since the eligibility of historical procurement is predicated on the "count in full" language of SBX1 2, and since that text in Section 399.16 requires that the energy resource must have been eligible under the rules in place at the time the historical contract was executed, the Energy Commission would be reasonable in limiting unused historical procurement to procurement that met Energy Commission eligibility rules, rather than POU definitions at the time. This requirement tracks the text of the statute and promotes the clear "statewide conformance" intent of SBX1 2.
2. **Limit to resources tracked in WREGIS:** The Energy Commission could justifiably require that any unused historical procurement must be tracked in WREGIS, as must the procurement going forward under SBX1 2. Tracking in WREGIS means that only relatively recent (generally must be entered in WREGIS within 90 days of generation) historical procurement from resources already included in WREGIS can be carried forward into the first SBX1 2 compliance period.
3. **Limit to "20% by 2010" cases:** The Energy Commission could justifiably condition any calculation of surplus procurement on first meeting the state policy RPS goal of achieving 20% eligible renewables by 2010. This requirement again promotes the clear "statewide conformance" intent of SBX1 2, allowing fair credit to a POU for fully "recognizing the intent" of the legislature in Section 387 and achieving the state policy expected by 2010. It ensures that no POU could be credited with unused historical procurement for use in the SBX1 2 compliance periods without first meeting the basic standard required for retail sellers.

Within whatever guidance is adopted, however, the Energy Commission must determine whether any POU has been reasonably tracking and counting procurement so that a measurement of unused historical procurement is reasonable. The Energy Commission has the authority to get the information necessary to determine this and to develop 'safe harbor' structures to reduce administrative and reporting burdens. For example, if the POU claims only the excess generation in 2010 over 20% then there should be no question that the method is reasonable because the POU target is no other than the state target of 20%.

However, if the POU includes excess procurement from prior years in its 2010 total, measured against interim goals set by the POU for those years, then the analysis of what is reasonable is more challenging. One criteria for measuring reasonableness should be whether the interim goals represented reasonable progress toward the 20% goal. Another criteria could be whether the goals were set in good faith to assist the POU in reaching 20% in light of the procurement challenges unique to that POU. Here, a reasonable "safe harbor" provision may be that the POU is only counting surplus procurement forward based on interim targets that lie above the 1% of retail sales increase per year requirement in the SB 1078 statute, including the expected jump to at least 20% by 2010.

Criteria such as these would assist the Energy Commission in determining whether POU targets for calculating excess were set unreasonably low, such that the targets did not promote achievement of the 20% by 2010 state policy. SMUD submits that such situations are rare, and that the Energy Commission should only deny carryover in circumstances that are clearly unreasonable.

Respectfully submitted,

/s/

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cc: Dan Severson, Turlock Irrigation District
Corporate Files