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1516 Ninth Street
Sacramento, CA 95814
(submitted via email to: docket@energy.state.ca.us and RPS33@energy.state.ca.us)

Re: Docket No. 11-RPS-01; Renewables Portfolio Standard

Docket Office:

Please find the enclosed comments from the Union of Concerned Scientists and the Utility Reform Network regarding the 33% RPS Pre-Rulemaking Draft Regulations.

Sincerely,

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COMMENTS OF THE UNION OF CONCERNED SCIENTISTS AND THE UTILITY REFORM NETWORK ON THE 33% RPS PRE-RULEMAKING DRAFT REGULATIONS

The Union of Concerned Scientists ("UCS") and The Utility Reform Network ("TURN") thank the California Energy Commission ("Commission") for providing the opportunity to submit initial comments on its "33 Percent Renewables Portfolio Standard Pre-Rulemaking Draft Regulations ("draft regulations").

Section 3203 – Portfolio Content Categories

UCS and TURN believe that the language of the statute unambiguously requires the POUs to be subject to the same portfolio content category definitions established by Senate Bill ("SB") 2 (1X) and Public Utilities Code Section 399.16. Failure to adopt equal rules would create an uneven playing field among California load-serving entities, frustrate Legislative intent, reduce the likelihood of obtaining a variety of consumer and environmental benefits identified in SB 2 (1X) and create unnecessary market uncertainty for the country's largest renewable energy program.

Public Utilities Code Section 399.30(c)(3) requires that "A local publicly owned electric utility shall adopt procurement requirements consistent with Section 399.16." On December 15, 2011, the CPUC adopted Decision 11-12-052, which implemented PU Code Section 399.16 and thereby established RPS portfolio content categories for California retail sellers. The Commission provides no justification for deviating from any of the definitions contained in D.11-12-052. Yet, the draft regulations do differ with respect to Portfolio Content Category 2. This deviation would create market confusion, and allow the POUs to apply a different set of compliance products to meet their RPS requirements.

There are two significant criteria for Portfolio Content Category 2 adopted in D.11-12-052 that the Commission has failed to include in these draft regulations. The first criterion is the restriction against transactions that purchase renewable energy credits (RECs) and electricity from a renewable energy generator, but immediately sell back the renewable electricity to the generator. These arrangements were originally deemed eligible under the 20 percent program (as "footnote 3" transactions) and prompted much criticism by a wide variety of stakeholders. The abuse of this arrangement by many retail sellers was a key driver of the fight over Tradable RECs at the CPUC and spurred efforts to create the portfolio content categories in SB 2(1X).

Based on this history, the CPUC intentionally adopted more restrictive conditions than those required under "footnote 3". Conclusion of Law # 16 of D.11-12-052 establishes requirements for Portfolio Content Category 2:

- the buyer simultaneously purchases energy and associated RECs from the RPS-eligible generation facility without selling the energy back to the generator;
- the purchased energy must be available to the buyer (i.e., the purchased energy must not in practice be already committed to another party); and
- the initial contract for substitute energy is acquired no earlier than the time the RPS-eligible energy is purchased and no later than prior to the initial date of generation of the RPS-eligible energy under the terms of the contract between the buyer and the RPS-eligible generator.

UCS and TURN are concerned with the use of different words throughout the sections in the draft regulations for the portfolio content categories that appear to be addressing the same concept. While Conclusion of Law #16, first bullet uses "the buyer simultaneously purchases energy and associated RECs" the draft regulations use "initially procured as bundled." The draft regulations should be modified to clarify that a "bundled" transaction includes both the RECs and the associated energy. Without this clarification, POUs could attach the RECs from one facility to unrelated system power in order to meet the definition of "bundled." The Commission must be explicit with respect to this requirement in order to prevent ambiguities that could be exploited.

Second, the draft regulations omit the second requirement contained in the first bullet of Conclusion of Law #16 in D.11-12-052. This is the requirement that the buyer purchase energy and RECs "without selling the energy back to the generator;" As explained above, the "footnote 3" transaction was debated extensively at the CPUC and the Legislature and proved to be a driving force behind the establishment of the three portfolio content categories in PU Code Section 399.16. Any sell-back arrangement should be properly classified as a transaction belonging in Portfolio Content Category 3.

The Commission provides no justification in its draft regulations for omitting this requirement. Portfolio Content Category 2 transactions were deliberately distinguished from unbundled REC purchases in SB 2 (1X) because they provide the following additional benefits that REC-only purchases do not: (1) additional electricity imports that reduce the need to generate fossil-based electricity inside California, which result in air quality benefits; (2) transactions that support the development of new renewable energy resources; and (3) stable, long-term compliance options that protect California ratepayers from price volatility. In California, unbundled REC transactions have not driven the development of new renewable energy resources and are likely short-term compliance options that leave POUs with the need to

procure additional RPS products and electricity for future RPS compliance and load requirements.

It would be contrary to the legislative intent of SB 2 (1X) to continue allowing POUs to transact contracts that are functionally equivalent to REC-only purchases and count them as Portfolio Content Category 2 transactions. UCS and TURN believe that Portfolio Content Category 2 transactions should include a plan for selling the electricity generated by the RPS facility into the local market. This way, the RPS-eligible generator is not left with the additional risk of finding a buyer for variable, null power once it has been stripped of its REC. If a "firmed and shaped" contract is simply a unbundled REC purchase from an RPS-eligible facility combined with a completely unrelated power import, the renewable energy developer who is supposed to be supplying the REC must still find a buyer for its energy, which significantly increases risk and transaction costs. This type of contract only provides a long-term REC revenue stream for the developer and is much less likely to result in the construction of new renewable energy facilities. Iberdrola Renewables and Horizon Wind Energy, two renewable developers with experience building renewable generation facilities outside the state, echo this belief in their comments on a CPUC proposed decision on tradable RECs: "However, no renewable generation investment with which the Companies are familiar would stand on their own purely on REC values. The sale of energy is critical to project viability and ultimate development."[1]

Conclusion of Law #17 in D.11-12-052 also requires that the substitute energy purchased for transactions that would qualify for Portfolio Content Category 2 must have a substitute energy contract at least five years in duration or as long as the contract for the renewable electricity purchase:

> An IOU's initial contract for substitute energy must either be at least five years in duration, or as long as the contract for RPS-eligible energy, whichever is shorter. If the duration of the contract for substitute energy is shorter than that of the contract for RPS-eligible energy, the IOU should provide subsequent contracts for substitute energy (that is incremental, as defined in this decision) to the Commission via a Tier 2 advice letter, a reasonable time in advance of the initial date of generation of the substitute energy under the contract.

Again, the draft regulations provide no justification for omitting this criterion. Requiring a minimum five-year contract between the POU and the renewable electricity generator will also promote the development of new renewable energy resources. Longer-term contracts will allow POUs to rely on the generation of these facilities for the long-run, as opposed to paying for short-term contracts with renewable facilities that will likely sell their energy and RECs inside their state once their local RPS requirements ramp up, and leave POUs more desperate for higher priced, short term products to satisfy RPS requirements. Finally, price stability is an

[1] Comments of Iberdrola Renewables, Inc. and Horizon Wind Energy on the Proposed Decision of ALJ Simon Authorizing use of Renewable Energy Credits for RPS Compliance, April 15, 2009, p.3, available at: http://docs.cpuc.ca.gov/efile/CM/99861.pdf

additional value that RPS transactions containing electricity and RECs provide. A contract that contains a stable price for both the RECs and the substitute energy over the life of the substitute energy contract achieves price stability for the ratepayer.

Section 3204 – RPS Procurement Requirements

Adopting cumulative targets for all three compliance periods

The draft regulations establish procurement targets for the three compliance periods outlined in PU Code Section 399.30(b). Under the draft regulations, each POU would be required to demonstrate renewable procurement equal to an average of 20 percent of retail sales over the entire first compliance period (2011-2013). To satisfy the remaining compliance obligations through 2020, POUs would only be required to demonstrate renewable procurement equal to at least 25 percent of retail sales in 2016 and 33 percent of retail sales in 2020. This approach does not satisfy the statutory requirement to set targets based on cumulative procurement over each entire compliance period. The Commission should therefore modify the draft regulations to establish specific multi-year procurement quantities based on the linear trend approach recently adopted by the CPUC in Decision 11-12-020.

SB 2 (1X) applies the same basic procurement targets to all retail sellers and POUs. Each obligated entity must procure a cumulative quantity of renewable energy over the defined compliance period. For the 2011-2013 period, the statute requires "an average of 20 percent of retail sales" (PU Code Sections 399.30(c)(1) and 399.15(b)(2)(B)) over all three years. This approach allows an obligated entity to procure more, or less, than 20 percent in any given year and measures compliance based on a cumulative average.

For the second and third compliance periods, SB 2 (1X) similarly establishes cumulative quantities for the entire compliance period. For the POUs, this quantity is based on two key assumptions – the achievement of a specified percentage in the final year and the demonstration of "reasonable progress in each of the intervening years"(PU Code Section 399.30(c)(2)). The draft regulations focus on the first assumption by requiring a POU to demonstrate renewable procurement equal to 25 percent of retail sales in 2016 and 33 percent of retail sales in 2020. This approach ignores the cumulative obligation and appears to place no requirements on the amount of procurement occurring in years other than 2016 and 2020.

Taken to its extreme, the draft regulations may allow a POU to deliberately structure procurement transactions to provide increased quantities in those two compliance years. Even worse, a POU could deliberately reduce renewable procurement in other years without any apparent risk of a penalty. The draft regulations do not require any minimum level of procurement in these other years, suggesting that POUs could actually procure less than 20 percent, and perhaps even zero percent, outside of compliance years. This outcome is completely inconsistent with the requirement for multi-year compliance periods which demonstrate "reasonable progress" towards the 25 percent and 33 percent targets.

The draft regulations attempt to implement the "reasonable progress" requirement by allowing a POU governing board to identify any "set of actions" that are even tangentially related to renewable energy procurement. Section 3204(d) invites POUs to submit consultant reports, permit applications, modeling studies, and even evidence of failed solicitations. This showing is easily gamed and merely encourages POUs to manufacture a narrative supporting the concept of "reasonable progress". Such an outcome is not consistent with the text of SB 2 (1X) and substantially diverges from the conclusions reached by the CPUC.

The CPUC recently adopted Decision 11-12-020 which implements the procurement targets for retail sellers. In this Decision, the CPUC found that SB 2 (1X) requires multi-year quantities for every compliance period. The CPUC noted that the new law is intended to "alter the compliance requirements so as to reduce the significance of procurement variations between years and to provide more flexibility to achieve quantitative requirements over time."[2] This outcome would not be served by the proposed requirements in Section 3204.

The Commission should modify Section 3204(d) by removing (d)(1) and establishing that "reasonable progress" is demonstrated by satisfying the quantitative showing in (d)(2) and (d)(3). If a POU fails to meet the cumulative requirements identified in (d)(2) and (d)(3), the Commission should allow the "set of actions" identified in (d)(1) to be submitted for consideration in any enforcement proceeding related to noncompliance pursuant to PU Code Section 399.30(n) and (o).

The incorrect interpretation of the "reasonable progress" requirement, and the lack of any binding cumulative procurement targets, raises serious questions about the proper implementation of the product category limitations in proposed Section 3204(e). If there are no multi-year compliance requirements for POUs, it is not obvious how the Commission intends to apply the product category limits to "the compliance period ending December 31, 2016" or "the compliance period ending December 31, 2020." (Section 3204(e)(2) and (e)(3)). A POU could interpret these two requirements to mean that the product category limitations apply only to the final years of the second and third compliance periods, and that there are no product category limits applicable to other years. The Commission cannot allow this interpretation to prevail.

Application of product category limits to post-June 1, 2010 procurement

Proposed Section 3204(e) incorrectly interprets the product category limitations in SBx2 by stating that POUs must procure at least 50 percent of total renewable resources from the first product category in the first compliance period, at least 65 percent in the second compliance period, and at least 75 percent in the third compliance period. (Section 3204(e)). This interpretation omits a critical modifying condition – the product content limitations only apply to procurement contracts executed after June 1, 2010 (PU Code Section 399.16(c)). The draft regulations impermissibly apply this limitation to the entire portfolio of procurement resources

[2] CPUC Decision 11-12-020, page 15.

including transactions executed prior to June 1, 2010.

There is a significant difference between these two approaches. The Legislature took great care to craft a limitation that applied only to newly executed procurement transactions in recognition of the fact that some POUs and retail sellers had substantial quantities of unbundled RECs and firmed-and-shaped resources in their existing portfolios. As a result, no pre-June 1, 2010 procurement may be counted towards the limitations in PU Code Section 399.16(c).

The CPUC recently issued decisions implementing the procurement targets and product categories. In Decision 11-12-052, the CPUC noted that "the June 1, 2010 date is expressly tied to the limitations on the use of procurement in each portfolio content category for RPS compliance."[3] The CPUC correctly implemented SB 2 (1X) to apply only to post-June 1, 2010 procurement transactions. The draft regulations inexplicably ignore this important element of the limitation. If the Commission does not conform this requirement to the statutes and the CPUC definition, POUs would face entirely different limitations. Many would be able to apply their previous resource commitments used to satisfy the 20 percent RPS towards the 50 percent, 65 percent and 75 Portfolio Content Category 1 percent requirements under the 33 percent RPS. As a result, some POUs could receive extensive credit for pre-2010 procurement activities and rely heavily on Category 2 and 3 procurement to meet the incremental RPS targets.

As a result, proposed section 3204(e) must be revised to read as follows: (changes in underline)

> (1) No less than 50 percent of the electricity products <u>associated with procurement executed after June 1, 2010 that are</u> used to meet the RPS procurement requirement for the compliance period ending December 31, 2013, must meet the definition of Product Content Category 1.
>
> (2) No less than 65 percent of the electricity products <u>associated with procurement executed after June 1, 2010 that are</u> used to meet the RPS procurement requirement for the compliance period ending December 31, 2016, must meet the definition of Product Content Category 1.
>
> (3) No less than 75 percent of the electricity products <u>associated with procurement executed after June 1, 2010 that are</u> used to meet the RPS procurement requirement for the compliance period ending December 31, 2020, or any compliance period thereafter, must meet the definition of Product Content Category 1.

Unless the Commission makes this modification, the POU regulations will not be consistent with the explicit text of SB 2 (1X).

[3] D.11-12-052, page 48

Preventing REC-reshuffling and double counting of pre-2011 procurement

Proposed Section 3204(b) allows a POU to apply a REC towards RPS procurement requirements so long as it is retired within 36 months from the initial month of generation of the associated electricity. This section fails to address the potential for POUs to use "REC reshuffling" to circumvent restrictions on banking and must be modified.

Absent a change to the draft regulations, POUs could procure bundled or unbundled RECs in one compliance period but delay their retirement in the WREGIS system until a future compliance period. For example, a POU could procure a quantity of third product category unbundled RECs on January 2, 2014 but subsequently realize that the RECs are not needed to satisfy the second period compliance obligation (2014-2016). Because the RECs have a 36 month shelf life, the POU could wait until January 1, 2017 to 'retire' the unbundled RECs. These RECs would then be used to satisfy a compliance obligation that does not take effect until December 31, 2020, nearly seven years after the REC was procured. This is not consistent with the statutory prohibition that "[i]n no event" shall bucket category 3 be used for banking. To address this concern, the Commission should assume that any procurement occurring during a particular compliance period is credited towards compliance in that period.

Even worse, a POU could delay the retirement of RECs associated with pre-2011 procurement originally intended to be applied to its RPS goals in 2009 or 2010. For example, a POU that originally procured a renewable MWh in June 2009 for compliance with its 20 percent RPS program could delay retirement of the REC in WREGIS until June of 2012. This delay means that the 2009 REC (which was supposed to be used for the 20 percent requirement) can be counted towards the 2011-2013 procurement target. Since POUs had no enforceable RPS targets prior to 2011, it is possible that a POU could move large quantities of renewable energy delivered prior to 2011 into the 2011-2013 compliance period merely by delaying REC retirements. This strategy is tantamount to double counting and should be explicitly prohibited. It also violates the prohibition on the banking of any procurement occurring prior to January 1, 2011 (PU Code Section 399.13(a)(4)(B)).

To prevent this gaming strategy, the CEC should prohibit any application of RECs to the 2011-2013 compliance period if those RECs were associated with renewable energy deliveries previously reported by a POU in a prior year portfolio. If a POU already claimed that a certain renewable resource was part of their 2009 or 2010 resource mix, the POU should not be allowed to also receive credit for the same MWh during the 2011-2013 compliance period. The CEC can determine whether a REC was previously counted by reviewing POU public reports and filings with the Commission (including their power source disclosure and RPS reporting forms).

Section 3205 – Procurement and Enforcement Plans

The draft regulations appear to only require the POUs submit one procurement plan by January 1, 2013. In addition, the draft regulations do not require the POUs to include any analysis of how project failures or delays may impact RPS compliance obligations. Procurement plans that

are regularly updated and made available to the public and the Commission are an important component of ensuring POU accountability and success of the RPS program. At minimum, the Commission should require the POUs to submit a procurement plan prior to each compliance period.

Public Utilities Code Section 399.13 requires electrical corporations to submit annual renewable energy procurement plans that describe potential compliance delays and an assessment of the risk that eligible renewable energy resources will not be built, delayed, or not delivered as required by the contract.[4] Given the high likelihood that not all signed contracts will result in built projects, or deliver power exactly when initially planned, POU procurement plans should assess the potential for compliance delays and project failure. A review of existing POU procurement plans recently filed with the Commission reveals little analysis of project failure and few options in the event that currently contracted resources fail to achieve commercial operations on schedule. Project failure has been a significant reason why POUs have not reached the 20 percent RPS goal by 2010 or their own adopted RPS goals. Failure to document the potential for failing to meet RPS requirements due to project failure will make it very difficult for the CEC to, using hindsight, determine whether a POU has failed to meet its RPS requirements, as required by PU Code Section 399.30(o).

Section 3206 – RPS Compliance Options

Proposed Section 3206(b) would require a POU to amend its procurement plan if it intends to rely on rules that allow for delay of timely compliance. Proposed section 3206(c) requires that such amendments be submitted to the CEC within 30 days *after* adoption "for a determination of consistency with the requirements of Public Utilities Code 399.30." UCS and TURN do not believe that these requirements establish sufficient accountability on the POUs or obviate the need for regularly submitted procurement plans that contain a discussion of what flexible compliance options a POU may want to exercise in the future. Simply requiring that a POU adopt its own flexible compliance rules within the year that they plan to exercise them allows a POU to tailor its compliance off-ramps to the specific situation it finds itself in at the time.

This proposed regulation fails to hold the POUs accountable for any poor planning decisions or insufficient risk management and encourages bad actors to deliberately adopt more generous flexible compliance rules at the latest possible date. Without requiring the POUs to assess the risk of project failure in their specific RPS portfolio *before* noncompliance occurs, and allowing the POUs to create their flexible compliance policies in the same calendar year as they plan to use them essentially gives a green light to POUs to make bad decisions, and leaves the CEC with little evidence to retroactively assess whether the POUs were acting in good faith. The CEC should require that the POUs submit rules regarding flexible compliance, as allowed in PU Code Section 399.30(d) in the first procurement plan, due January 1, 2013. These rules can be updated and modified as necessary in subsequent procurement plans.

[4] *See* Public Utilities Code sections 399.13(a)(5)(B) and (D)

On a related issue, proposed section 3206(a)(4) would allow any POU to reduce their portfolio content category 1 requirement without advance CEC approval so long as the reduction does not go below 65 percent for the final compliance period. The POU need only hold a public meeting before making the change and notify the Commission 10 days in advance and must include the change in its procurement plan. This approach is not consistent with PU Code Section 399.30(c)(3) which establishes the same conditions that appear in PU Code Section 399.16(e) for retail sellers. PU Code Section 399.16(e) explicitly requires that any retail seller seeking a reduction in the procurement content limitation apply to the CPUC for approval. In order to be consistent, the Commission should modify proposed section 3206(a)(4) by adding the requirement that any POU seeking a reduction must submit a request to the Commission accompanied by the information described in 3206(a)(4)(D).

The Commission must be the entity charged with approving or rejecting such a request. Absent this change, any POU could unilaterally decide to eliminate the product category limits for the first two compliance periods without any threat that such an action will lead to a finding of noncompliance by the Commission. Such an outcome is unacceptable and contrary to clear legislative intent. The Commission must fix this loophole to prevent widespread efforts to circumvent the product category limits by POUs.

Section 3208 – RPS Enforcement

Proposed Section 3208 would require that "any complaint pertaining to the enforcement of a RPS requirement" be filed in accordance with proposed Section 1240 which limits the filing of complaints to Commission staff. This section would prohibit any other stakeholder (including TURN and UCS) from filing a complaint against a POU. It is not clear why the Commission seeks to curtail possible complaints by consumer and environmental organizations.

Rather than limiting involvement by others, the Commission should modify the draft regulations to conform to Section 1231 which allows any member of the public to initiate a complaint alleging noncompliance with any decision or rule. There is no justification for this deviation from standard Commission practice. At a minimum, the Commission should encourage stakeholders to raise concerns about POU noncompliance. Stakeholders are often able to provide additional insights and new data that will assist the Commission in discharging its oversight responsibilities. The Commission should encourage such participation and be willing to entertain complaints filed by a range of interested parties.

UCS and TURN thank the Commission for the opportunity to provide these comments.

Sincerely,

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