

BEFORE THE CALIFORNIA ENERGY COMMISSION

**IN THE MATTER OF:
 IMPLEMENTATION OF RENEWABLES
 PORTFOLIO STANDARD
 LEGISLATION**

Docket No. 11-RPS-01

**COMMENTS OF THE NORTHERN CALIFORNIA POWER AGENCY
 ON THE DRAFT STAFF REPORT: 33 PERCENT RENEWABLES PORTFOLIO
 STANDARD PRE-RULEMAKING DRAFT REGULATIONS**

The Northern California Power Agency¹ (NCPA) offers the following comments to the California Energy Commission (CEC or Commission) on the California Energy Commission *Draft Staff Report: 33 Percent Renewables Portfolio Standard Pre-Rulemaking Draft Regulations, July 2012*, (Draft Regulations) issued on July 25, 2012, pursuant to the Notice of Workshop issued on July 20, 2012.

I. INTRODUCTION

Since the release of the first Draft Staff Report in February 2012, Staff has made several revisions to the Draft Regulations; these revisions address many of the concerns raised by NCPA and other publicly owned utility (POU) stakeholders in both written and oral comments to the Commission. NCPA appreciates these efforts, and the significant revisions that have been made to key areas of the regulations.

¹ NCPA members include the cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah, as well as the Bay Area Rapid Transit District, Port of Oakland, and the Truckee Donner Public Utility District. NCPA's Associate Members are the Plumas-Sierra Rural Electric Cooperative and Placer County Water Agency.

The Draft Regulations is an important document because it effects a fundamental change in the RPS program regime. In addition to the definitional changes made by Senate Bill (SB) 1-X-2 to California's renewable portfolio standard (RPS), the statute directs the CEC to implement regulations for the enforcement of the RPS for POU's. It is within this context that the proposed regulation should be developed.

Since the adoption of SBX1-2, the Commission and stakeholders have worked cooperatively towards developing a 33% RPS regulation that recognizes a single statewide RPS objective and different electricity provider structures. The regulation must acknowledge the distinct roles that the CEC and California Public Utilities Commission (CPUC) have with regard to RPS enforcement and verification, yet preserve the integrity of the local governance structure under which POU's operate. Indeed, as stated in the Legislative Counsel's Digest, SBX1-2 "*generally make the requirements of the RPS program applicable to local publicly owned electric utilities, except that the utility's governing board would be responsible for implementation of those requirements, instead of the PUC, and certain enforcement authority with respect to local publicly owned electric utilities would be given to the Energy Commission and State Air Resources Board, instead of the PUC.*"² SBX1-2 **does not** change the fundamental, underlying structure of the State's RPS program, wherein the local governing boards of POU's oversee the RPS programs of their respective POU's.

NCPA appreciates the ongoing efforts of CEC staff to work with stakeholders in drafting the regulation. Both the Commission and the local governing boards of the POU's have key roles in the process. As such, the outcome of this effort must be a regulation that recognizes these roles, and works to affect the intent of the Legislature within the construct of the regional electricity market in which California is a key player. Since the adoption of SBX1-2, POU's have been working towards implementing the 33% RPS. This means that the POU's are making procurement and transmission planning decisions at this time that will have long term financial impacts of the POU's and their ratepayers. The sooner outstanding issues are resolved and finalized, the greater certainty POU's, renewable energy generators, and other market participants will have regarding these transactions. As currently drafted, some of the definitions and proposed interpretations adversely implicate commercial transactions and market operations.

² SBX1-2, Legislative Counsel's Digest, section (1), emphasis added.

There are also several outstanding issues impacting implementation of the 33% RPS that the Commission has determined will be resolved in the process of revisions to the RPS Guidebooks and Eligibility Guidelines. NCPA urges the Commission to work towards resolution of those issues in an expedient matter, and appreciates the opportunity to work with Staff on clarification of these issues. In moving forward, NCPA is hopeful that further deliberations will provide the clarity needed to ensure that the language in the regulation does not have the unintended consequence of interfering with or constraining the reliable provision of electricity to California's residents and businesses.³

II. ABOUT NCPA

NCPA was established in 1968, and is a California Joint Powers Agency. NCPA's members are publicly owned entities interested in the purchase, aggregation, scheduling, and management of electrical energy. NCPA is a long-time supporter of a 33% statewide renewable portfolio standard (RPS) target for all state utilities, and supports the Legislature's recognition in Senate Bill (SB) X1 2 that the oversight of local publicly owned utility (POU) RPS programs should remain – as is now the practice - with the local governing boards and elected officials who are directly accountable to their residents and communities. NCPA supports federal, regional, and statewide efforts to reduce greenhouse gas emissions and combat global climate change, and believes that its members' RPS programs help to advance those efforts. NCPA and its members have a long history of environmental stewardship and have expended considerable resources to develop significant amounts of renewable electric generation resources, investments that are consistent with the fundamental objectives of climate change policy and a 33% RPS.⁴

³ On March 30, 2012, NCPA filed comments with the Commission regarding the February 2012 Draft Staff Report: 33 Percent Renewables Portfolio Standard Pre-Rulemaking Draft Regulations. The comments contained in this filing focus on the changes between the February 2012 and July 2012 drafts. To the extent that the July 2012 Draft Regulation does not reflect revisions that were addressed in the March 30 NCPA Comments, those comments are incorporated herein, rather than reiterated in this filing.

⁴ All NCPA members, consistent with SBX1-2 and previously with Senate Bill 1078 (Sher), formally adopted RPS programs that are tailored to their individual communities. Collectively, NCPA members have greater than 20% RPS, and many individual NCPA member utilities already have California-eligible RPS levels that exceed a 33% threshold.

III. COMMENTS ON SPECIFIC PROVISIONS OF THE JULY 2012 DRAFT REGULATIONS

A. Qualifying Electricity Products, Section 3202

PUC Section 399.16(d) provides that resources from “any contract or ownership agreement originally executed prior to June 1, 2010 “*count in full* towards the procurement requirements” (emphasis added). The Draft Regulations adopt the position that this means that all eligible resources from contracts executed prior to June 1, 2010 apply it to their overall compliance obligation before determining the total amount of their portfolio that is used to calculate the balance requirements.

While the position is technically correct, NCPA believes that the regulation should also include an option that allows POU that made significant financial investments in renewable energy resources that meet the current portfolio content category (PCC) requirements to make an election to use the product for PCC balancing requirements. The key issue here is recognition of early investments in eligible renewable energy products. Allowing POU to make such an election is entirely consistent with the intent of the regulation to allow POU to count these resources “in full,” without negating the full value of these PCC resources that the POU and their ratepayers invested in. Disallowing the use of PCC -eligible resources from contracts that were entered into prior to June 1, 2010 has an adverse economic impact on POU ratepayers by requiring a POU to make additional costly investments in PCC products, by not recognizing prior investments in these products.

The provisions of 3202(a)(2) should be revised to recognize that resources from agreements executed prior to June 1, 2010, “count in full” **either** by being deducted from the total RPS compliance obligation subject to the balancing requirements, or by allowing pre-June 1, 2010 resources that meet the current PCC-eligibility requirements to count towards the compliance period balancing requirements.

B. Portfolio Content Categories, Section 3203

The regulation includes provisions that further define the specific statutory requirements set forth in PUC Section 399.16(b). These definitions will serve as the foundation not only for POU resource planning decisions, but for broader, industry-wide decisions regarding the

development of renewable resources. As such, the definitions set forth in the regulation must be clear and unambiguous, and must be created in a manner that recognizes the realities of commercial transactions and market operations.

As more fully set forth in the comments submitted by the California Municipal Utilities Association, there are a number of scenarios that reflect legitimate energy transactions that could be interpreted under the proposed regulations as violations of the rule. Such an interpretation is not supported by the statute, nor by any public policy rationale. Specifically, the regulation should include language that clarifies that each of the following scenarios represents an appropriate transaction that preserves the PCC 1 nature of the electricity:

- A POU may schedule electricity from a PCC 1 generating facility as well as from non RPS-eligible generation into a California Balance Authority in an amount that exceeds the POU's total load during that same time period.
- A POU may schedule electricity from a PCC 1 generating facility into a California Balancing Authority in an amount that exceeds the POU's total load during that same time period.
- A POU may schedule electricity from a PCC 1 generating facility in a California Balancing Authority in which the POU does not serve retail load and the POU is not obligated to schedule electricity from that California Balancing Authority Area into the California Balancing Authority Area where the POU does serve retail load.

The realities of buying and selling renewable energy must be considered in the process of developing the RPS compliance rules and these kinds of transactions serve an important role in the efficient and economical operation of the electricity grid. In order to avoid adversely impacting the electricity markets, the regulation should be drafted so that transactions such as those outline above, are not restricted.

C. RPS Procurement Requirements, Section 3204

The Draft Regulations properly excludes a demonstration of quantitative requirements for POU's RPS procurement during the intervening years of the first three compliance periods. The regulation also properly adopts a compliance obligation for the second

and third compliance periods that is consistent with the statute. The calculation for determining the RPS procurement targets for each compliance period represent a reasonable interpretation of the statute, and also acknowledges the fact that renewable energy procurement is lumpy in nature. In section 3204(a), the Draft Regulations set RPS procurement requirements for the second compliance period as the sum of 20% of a POU's 2014 retail sales, 20% of its 2015 retail sales, and 25% of its 2016 retail sales. For the third compliance period, RPS procurement requirement equates to the sum of 25% of 2017 retail sales, 25% of 2018 retail sales, 25% of 2019 retail sales, and 33% of 2020 retail sales. This calculation reflects a total of at least 25% RPS by 2016 and 33% RPS by 2020, as required by Public Utilities Code (PUC) Section 399.30(c). Furthermore, the need to reach 25% by 2016 and 33% by 2020 will require POU's to procure increasing amounts of renewable energy during the intervening years, or rely on long term planning commitments that are intended to result in the necessary RPS procurement. Either way, POU's will be progressing towards the required amounts or risk failure in attaining their RPS mandate.

Applying the procurement trajectory proposed in the regulation ensures that POU's are held to the required standard, even if procurement during any of the intervening years of the second or third compliance periods falls below 20% or 25% respectively. If, on an annual basis, RPS procurement falls below the 20%/25% standard, the POU will have to procure even more renewable resources in the subsequent years to ensure that the total compliance period obligation is met. This interpretation of the statute is not only reasonable, but it represents sound public policy and recognizes the variances associated with renewable energy procurement that led to the adoption of a multi-year compliance periods for the first nine years of the new program.

While the CPUC has taken a somewhat different approach with regard to its oversight of retail sellers, this does not necessitate an identical rule for POU's. As noted herein and throughout SBX1-2, the authority that the Legislature has granted to the CPUC over retail sellers is not analogous to the authority that the CEC has over POU's. The CPUC has adopted an approach that is consistent with their general oversight and jurisdiction over retail sellers, and one that is supported not only by SBX1-2 itself, but by the CPUC's broader statutory authority to oversee the operations of electrical corporations. Nothing in the statute prohibits the lawful and reasonable interpretation set forth in the Draft Regulations.

D. Procurement Plans and Enforcement Programs, Section 3205

1. Procurement Plans

PUC Section 399.30(a) provides that:

“In order to fulfill unmet long-term generation resource needs, each local publicly owned electric utility shall adopt and implement a renewable energy resources procurement plan that requires the utility to procure a minimum quantity of electricity products from eligible renewable energy resources, including renewable energy credits, 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 subdivision (c).”

As NCPA and several stakeholders had previously addressed with the Commission, adoption and implementation of the POU renewable energy resources procurement plan is within the exclusive purview of the local governing boards of the POU. In fact many – if not all – POU already have RPS procurement plans that detail the manner in which the POU will achieve the RPS mandate. NCPA appreciates the Commission’s recognition of this important provision in the statute, and the revisions in section 3205(a) of the Draft Regulations regarding the POU RPS Procurement Plans, the CEC’s review of such plans, and the elements listed therein.

2. Enforcement Programs

SBX1-2 directs each POU’s governing board to adopt a program for enforcement of the RPS mandate. Specifically, POU Section 399.30(e) provides that:

“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. The program shall be adopted at a publicly noticed meeting offering all interested parties an opportunity to comment. Not less than 30 days’ notice shall be given to the public of any meeting held for purposes of adopting the program. Not less than 10 days’ notice shall be given to the public before any meeting is held to make a substantive change to the program.

The Draft Regulations properly reflects the requirements set forth in the statute and the corresponding obligations of the POU vis-à-vis the CEC.

E. Optional Compliance Measures, Section 3206

1. Approval of Alternate Compliance Measures

The statute gives local governing boards the discretion to adopt alternate compliance measures:

“The governing board of a local publicly owned electric utility may adopt the following measures:

(1) 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.

(2) Conditions that allow for delaying timely compliance consistent with subdivision (b) of Section 399.15.

(3) Cost limitations for procurement expenditures consistent with subdivision (c) of Section 399.15.” (PUC section 399.30(d))

Section 3206(d) states that “the Commission will not consider the application of any rule or rule revisions adopted by a POU under this Section 32016 that *the Commission* determines does not comply with Public Utilities Code Section 399.30, these regulations, or any applicable order or decision adopted by the Commission pertaining to the RPS.” Because it is the POU and not the CEC that has the authority to adopt regulations “in the same manner” (PUC section 399.30(d)(1)) or “consistent with” (PUC section 399.30(d)((2) and (3)) the provisions of 399.13, and 399.15(b) and (c), respectively, section 3206(d) exceeds the Commission’s authority and should be stricken from the regulation.

While the statute requires the CEC to adopt regulations specifying procedures for enforcement of the RPS, (PUC section 399.30(n)), unlike the alternate compliance measures that are adopted by the CPUC for the retail sellers, the CEC does not have the authority to adopt the measures for the POUs. That authority rests exclusively with the POUs. There is an evidentiary presumption that the local governing boards of the POUs are acting in a lawful manner in implementing the various optional compliance mechanisms.⁵ Just as the Legislature did not create a program under which the POUs’ RPS procurement plans are subject to Commission approval, neither are the various measures adopted thereunder, including the optional compliance measures authorized by PUC Section 399.30(d).

⁵ In order to overcome this presumption, there must be some evidence or information to indicate that the POU acted improperly in adopting the provisions at issue. California Evid. Code, § 664; [providing that “[i]t is presumed that official duty has been regularly performed].

In Section 3206(d), the regulations would purport to give the CEC “approval” over the optional compliance mechanisms adopted by the POU. It is imperative that the regulation be focused on a final determination of compliance, and that the lines between POU and CEC jurisdiction, which are clearly delineated in SBX1-2, not be blurred; the role of the CEC may not lawfully usurp the authority expressly provided to the POU governing boards in the statute.

2. Historic Carry-Over.

NCPA supports the addition of the provisions in section 3206(a)(5). In that section, the CEC formally recognizes the manner in which POU would apply excess RPS procurement from periods of time prior to the adoption of SBX1-2. This provision allows POU to utilize the full economic benefit of their prior investments in renewable energy resources. It is reasonable to preclude a POU from applying the RECs that have already been applied to their previous RPS programs from being retired for compliance in the current 33% program. However, it is also reasonable for this provision to recognize POU RPS investments that were part of duly recognized and adopted POU programs, and to apply the procurement targets and objectives associated with those programs to the baseline and final 2010 formula used to calculate the pre-2011 procurement that can be carried forward.

As proposed, after netting the RPS procurement from the period 2004 to 2010, as long as net amount is not less than 20% by 2010, that historic procurement can be carried over to the 33% program, in any compliance period. POU that had their own RPS programs, and that did not surrender or sell RECs in excess of their stated procurement targets, should be able to utilize that number for purposes of establishing the baseline and the overall 2010 percentage. This would recognize the full value of the POU’s early investments, where the requirement to achieve 20% RPS by 2010 does not. Given the fact that the statute itself calls for all retail sellers and POU to achieve 20% RPS by 2013, it is unduly restrictive to require POU to achieve that target three years early in order to recognize the benefit of their early actions. This is especially true in instances where the POU were on target to achieve their previously adopted RPS goals, but for adoption of SBX1-2.⁶ Accordingly, it would be appropriate to adjust the history carry-over

⁶ NCPA notes that the state mandated RPS target, originally set forth in Senate Bill 1078 (2002), set an RPS of 20% by 2017. In lieu of recognizing individual POU targets, the Commission could look to this trajectory, which is consistent with the provisions of PUC Section 387 that made POU responsible for “implementing and enforcing a renewables portfolio standard that recognizes the intent of the Legislature to encourage renewable resources, while

calculation in section 3206(a)(5) to allow POU's with documented RPS procurement programs to use the percentages adopted by their local governing boards as the net 2010 target number for purposes of determining amounts that can be carried over into the 33% RPS program compliance periods.

F. Compliance Reporting, Section 3207

NCPA appreciates the recognition in section 3207(b) that the data required by the CEC for RPS compliance purposes may be combined with existing reports that are already provided to the Commission. Section 3207 requires POU's to submit a great deal of information to the CEC. This section includes both annual reporting requirements and compliance period reporting requirements. Since the POU's already submit multiple reports to the CEC each year, it is likely that a significant portion of this information will be included within the scope of such other reports. NCPA looks forward to working with the CEC to determine the appropriate format for submission of these reports, and working toward the creation of a single, consolidated POU report that will reduce the redundancy of reporting impacts on both the POU's that are submitting the reports and the CEC staff that is called upon to review them.

G. RPS Enforcement, Section 3208; Title 20, Section 1240

The Draft Regulations outline the enforcement process that is to be undertaken by Commission staff. (Title 20, Section 1240) However, NCPA objects to the proposed addition that presumes a violation has occurred in advance of a Commission decision, and places matters regarding penalties within the purview of the Commission proceeding. Neither of these is appropriate, and the regulation should be revised to correct this.

Proposed Title 20, Section 1240, properly concludes that only Commission staff may initiate a complaint proceeding against a POU for failure to meet the RPS. (Title 20, Section 1240(b)) Under the statute, only the CEC is authorized to bring a complaint against the POU, as it is the CEC that has access to all of the compliance data at the end of each compliance period, and it is the CEC that the Legislature has tasked with enforcing the mandate as it relates to the POU's. Pursuant to the procedure set forth in Title 20, Section 1240, once a complaint is filed

taking into consideration the effect of the standard on rates, reliability, and financial resources and the goal of environmental improvement.”

and served, the POU has 45 calendar days to file an answer. (Title 20, Section 1240(d)) The process continues with the optional filing of a response by the Commission (Title 20, Section 1240(e)), followed by a hearing and issuance of a decision (Title 20, Section 1240(f)), and then referral of a notice of violation to the California Air Resources Board (CARB) “based on the final decision of the full Commission” (Title 20, Section 1240(h)).

This process, originally set forth in the February 2012 draft regulation, allows for a deliberative process during which the Commission can present evidence of purported non-compliance, and the POU can present its position, which is then followed by a Commission decision. It is not until the Commission has issued a final decision (Title 20, Section 1240(g)) that a determination of non-compliance is confirmed. This process also preserves the checks and balances drafted into the statute, whereby the Commission – upon the determination of noncompliance – refers the matter to CARB, who has the sole jurisdiction over matters regarding the imposition of penalties.

In the July 2012 Draft Regulations, Title 20, Section 1240(b) is revised to provide that:

“The answer may include a discussion of factors deemed relevant by the [POU] in **mitigating any penalties** that may be imposed by the Air Resources Board pursuant to Public Utilities Code Section 399.30, subdivisions (n) and (o), **because of the utility’s failure** to meet the requirements of the RPS . . .” (section 1240(d), emphasis added).

The proposed additions to this section are inappropriate because they presume a “failure” on the part of the POU before a hearing, and before a final Commission decision has confirmed such a conclusion. The POU “answer” was originally drafted as the appropriate place for a POU to provide the information necessary for the Commission to drop the proceeding or otherwise make a finding of full compliance. As revised, this section presupposes that a POU is in violation of the regulation. It further places the POU in the position of responding to an allegation of a violation and concurrently arguing for mitigation of penalties, even if the defense is that there is no violation. This proposed revision also inserts the Commission into the “penalty phase” of any action, where the statute has clearly delineated CARB as the entity to address what, if any, penalties may be appropriate *if* there is a referral of a violation. While it is appropriate for the Commission to require the POU to file an answer to the allegations raised in a Complaint, it is not appropriate for that document to also address penalties, as the information

and process employed by CARB in making a determination of what, if any penalties, are appropriate would not be a part of the record in the Commission’s proceeding at the time the Complaint is filed.

Accordingly, in order to retain the clear jurisdictional distinction set forth in SBX1-2, and to avoid a presumption of noncompliance in advance of a final decision of the full Commission on the matter, the proposed addition to Title 20, Section 1240(b) referencing a discussion of factors relevant to mitigation of penalties and the utilities “failure” to meet the RPS should be stricken.

H. Provisions Should be Added to Address 399.30(i)

Consistent with the provisions incorporated throughout the Draft Regulations to address the statute’s particular treatment of various POUs due to their existing long term contracts, any RPS enforcement regulation should also include specific references to the provisions of 399.30(i). The Legislature recognized certain pre-existing constructs that warranted different treatment under the RPS, and as such, should also be reflected in the Commission’s RPS implementation of SBX1-2.

Section 399.30(i) provides that:

“For a local publicly owned electric utility that was in existence on or before January 1, 2009, that provides retail electric service to 15,000 or fewer customer accounts in California, and is interconnected to a balancing authority located outside this state but within the WECC, an eligible renewable energy resource includes a facility that is located outside California that is connected to the WECC transmission system, if all of the following conditions are met:

(1) The electricity generated by the facility is procured by the local publicly owned electric utility, is delivered to the balancing authority area in which the local publicly owned electric utility is located, and is not used to fulfill renewable energy procurement requirements of other states.

(2) The local publicly owned electric utility participates in, and complies with, the accounting system administered by the Energy Commission pursuant to this article.

(3) The Energy Commission verifies that the electricity generated by the facility is eligible to meet the renewables portfolio standard procurement requirements.”

VI. CONCLUSION

NCPA appreciates the opportunity to provide these comments to the Commission and the willingness of CEC staff to work with stakeholders on issues of clarification regarding the implementation of the RPS enforcement regulation. NCPA looks forward to continuing to work with the CEC on these matters. If you have any questions regarding these comments, please do not hesitate to contact the undersigned or Scott Tomashefsky at 916-781-4291 or scott.tomashefsky@ncpa.com.

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Respectfully submitted,



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