California Municipal Utilities Association

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

Re: CMUA Comments on the 33 Percent Renewables Portfolio Standard Pre-Rulemaking Draft Regulations for Publicly Owned Electric Utilities

The California Municipal Utilities Association (CMUA) would like to thank the California Energy Commission (CEC) for the opportunity to provide comments on the 33 Percent Renewables Portfolio Standard Pre-Rulemaking Draft Regulations (draft regulations), issued on July 25, 2012. CMUA appreciates the willingness of the CEC staff and CEC Commissioners to meet with CMUA and CMUA's members throughout this process. CMUA believes that the most recent version of the draft regulations represents significant progress from the previous version of the draft regulations.

I. COMMENTS ON THE DRAFT REGULATIONS

A. Procurement Requirements

CMUA supports the proposed renewable portfolio standard (RPS) procurement requirements for compliance periods two and three as provided in Section 3204 of the draft regulations. The relevant statutory language for these two compliance periods is found in California Public Utilities Code[1] section 399.30(c)(2):

> 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 approach proposed in the draft regulations is a reasonable interpretation of this statutory provision. Additionally, the proposed methodology is consistent with the procurement practices of POUs, which will involve a significant amount of utility developed and owned generation. The methodology proposed in the draft regulations accommodates the time needed to develop and bring new projects on line.

[1] Unless otherwise specified, all statutory references are to the California Public Utilities Code.

While the proposed methodology in the draft regulations differs from the procurement requirements adopted by the California Public Utilities Commission (CPUC) in Decision (D.) 11-12-020, such a difference is consistent with the bifurcated structure of SB 2 (1X). The CEC's authority to adopt "regulations specifying procedures for enforcement" of the RPS is strictly limited to the statutory language of Section 399.30. In contrast, the CPUC has broad authority over the entities falling within its jurisdiction, including the authority to "do all things . . . which are necessary and convenient in the exercise of such power and jurisdiction."[2] Unlike the CPUC, the CEC lacks the authority to develop procurement requirements according to its own determination of the most sensible option, and is instead limited to the strict wording of the statute. The draft regulations properly interpret the relevant statutory provisions consistent with the CEC's limited role.

B. Grandfathered Electricity Products

SB 2 (1X) includes a grandfathering provision intended to protect contracts and ownership agreements that were executed prior to June 1, 2010, from being penalized for not complying with the requirements of new portfolio content category structure implemented by section 399.16. This grandfathering provision provides:

> 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:
>
> > (1) The renewable energy resource was eligible under the rules in place as of the date when the contract was executed. . . .[3]

The use of the term "count in full" is clearly intended to provide the broadest possible protection against penalties for early actions. However, the draft regulations have interpreted this phrase to result in a substantial penalty for POUs that took early actions to develop RPS generation. This penalty results because electricity products that should qualify towards a POU's portfolio content category 1 obligations simply net out from the POU's total portfolio content category requirements. This treatment results in an absurd situation where a POU that already has more than 50 percent of its RPS procurement obligations met by generation meeting the requirements of portfolio content category 1 will need to procure significant additional portfolio content category 1 electricity products.

CMUA recommends that the draft regulations be amended to permit electricity products meeting the requirements of section 399.16(d) to count towards a POU's portfolio content category 1 obligations if the generation would otherwise meet the definition of a portfolio content category 1 electricity product.

C. Definition of the Portfolio Content Categories

It is essential that the portfolio content category definitions are clear. Given the substantial difference in market price between portfolio content category 1 and portfolio content category 3, there would be devastating impacts on ratepayers if electricity products that were assumed to fall in portfolio content category 1 when procured were

[2] Cal. Pub. Util. Code § 701.
[3] *Id.* § 399.16(d).

then labeled as portfolio content category 3. Similarly, developers of renewable projects must have clear assurances about the value of the generation from a planned project. A lack of clarity could discourage the development of all new renewable resources.

However, there continues to be significant confusion about what arrangements are permissible for a portfolio content category 1 resource. The CEC should clarify that it will not attempt to restrict the definition of a portfolio content category 1 resource beyond the plain language of the relevant statutory and regulatory provisions. The CEC should clarify that the following scenarios still qualify for portfolio content category 1:

- A POU may schedule electricity from a portfolio content category 1 generating facility as well as from non RPS-eligible generation 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 portfolio content category 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 portfolio content category 1 generating facility into 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.

Clarifying that these examples qualify as portfolio content category 1 transactions is consistent with the statutory language of section 399.16 as well as the CPUC's interpretation of these provisions in D. 11-12-052. Section 399.16(b)(1)(a) only requires that the eligible renewable energy resource electricity products have a "first point of interconnection" to either a California Balancing Authority or a distribution system that "serves end users" within a California Balancing Authority Area or be "scheduled . . . into a California balancing authority without substituting electricity from another source. . . ." None of these requirements impose an obligation for real-time delivery to the POU claiming the REC in order for a product to meet the requirements of portfolio content category 1.

In D.11-12-052, the CPUC did not specify any requirements beyond those contained in statute to determine that an electricity product is initially categorized as portfolio content category 1.[4] D.11-12-052 specifically discussed SB 2 (1X)'s elimination of the previous delivery requirement:

> New Public Utilities Code § 399.21, added by SB 2 (1X), amends and renumbers current § 399.16, which authorizes the use of renewable energy credits (RECs) for RPS compliance under certain conditions. New § 399.21 makes a conforming change to eliminate the requirement in current § 399.16(a)(3) that the electricity associated with a REC must be "delivered to a retail seller, the Independent System Operator, or a local publicly owned electric utility."[5]

[4] D.11-12-052 at 17-23.
[5] D.11-12-052 at 14, footnote 23 (emphasis added).

D.11-12-052 goes on to establish a two-part test for determining when a REC would lose its portfolio content category 1 designation.[6] First, it has to be "unbundled", in this case by the initial procurer selling off the underlying energy, and secondly, that the REC has been "transferred to another owner." Absent this second requirement, the REC retains its Portfolio Content Category 1 status.

> Procurement from contracts or ownership agreements signed or utility-owned generation going into commercial operation, on or after June 1, 2010, should be counted in the portfolio content category described in new Pub. Util. Code § 399.16(b)(1), if the generation facility from which the electricity is procured is certified as eligible for the California RPS and has its first point of interconnection with the electricity distribution system used to serve end user customers within the metered boundaries of a California balancing authority area, **so long as the renewable energy credits originally associated with the electricity have not been unbundled and transferred to another owner**, and all other procurement requirements for compliance with the California RPS are met.[7]

If the CEC determines that additional regulatory language is necessary to clarify the requirements for portfolio content category 1, CMUA suggests the following clarifying language:

> (1) Portfolio Content Category 1 electricity products must be procured as and remain bundled in order to be classified in Portfolio Content Category1. An electricity product remains bundled if the electricity is delivered by or on behalf of a POU into a California Balancing Authority and the associated REC is not resold by the POU. The facility generating the electricity and associated RECS must be interconnected to a transmission network within the WECC service territory and must be an RPS- certified facility. For purposes of this Section 3203, the first point of interconnection to the WECC transmission grid is the substation or other facility where generation tie lines from the RPS- certified facility interconnect to the network transmission grid. Portfolio Content Category 1 electricity products must also meet at least one of the following criteria:
>
> D. Mitigating Factors

Section 1240(d)(1) of the draft regulations provides the requirements for an answer filed in response to a Complaint for failure to meet the RPS requirements:

> The local publicly owned electric utility shall file an answer with the Chief Counsel within 45 calendar days after service of the complaint. In addition to those matters set out in Section 1233 (b), the answer shall include all data, reports, analyses, and any other information deemed relevant by the local publicly owned electric utility to any claims, allegations, or defenses

[6] As noted in CMUA's previous comments, our interpretation of Section 399.16 goes further and allows that it is only the initial procurement of RECs that determines their status, and that once determined, a portfolio content category 1 REC could be resold to a third-party and retain its portfolio content category 1 status. This interpretation is an issue that we plan to explore further with Commission staff.
[7] D.11-12-052 at 69, Conclusion of Law 13 (emphasis added).

> made in the answer. The answer may include a discussion of factors deemed relevant by the local publicly owned utility 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 a requirement of the Renewables Portfolio Standard, these regulations, or any order or decision adopted by the Commission pertaining to the Renewables Portfolio Standard.

At the answer stage of an enforcement proceeding, it is inappropriate to require a POU to present "factors deemed relevant by the local publicly owned utility in mitigating any penalties that may be imposed by the [ARB] . . . ." Such a requirement presumes that the POU did in fact fail to meet a requirement of the RPS. Instead, the focus of an answer should be the submission of all information relevant to a determination of the matters raised in the compliant. Accordingly, CMUA recommends that the CEC strike this language from the draft regulations.

E. Portfolio Balance Requirement Reduction

Section 399.16(e) provides an optional compliance mechanism that permits a retail seller to apply to the CPUC for a reduction in the procurement content requirements of section 399.15(c). CMUA has advocated that the direction of section 399.30(c)(3) for POU governing boards to adopt procurement requirements consistent with section 399.16 includes adapting section 399.16(e) to the POU structure. The draft regulations are consistent with CMUA's interpretation in this regard as provided in Section 3206(a)(4). However, the draft regulations incorrectly restrict the application of section 399.16(e) to a reduction of portfolio content category 1 but not to allow an increase in the permissible procurement of portfolio content category 3.

On April 24, 2012, the CPUC released a *Proposed Decision Setting Compliance Rules for the Renewables Portfolio Standard Program* (PD), which adopted a similar interpretation of section 399.16(e) as the CEC's interpretation in the draft regulations:

> As an initial matter, we note that this section addresses "reduction" of a quantitative portfolio content requirement. Although it would have been possible for the legislative language to authorize the Commission to "change" or "alter" a quantitative portfolio content requirement, it did not do so. Therefore, this section allows the Commission to lower the requirement of a minimum level of procurement meeting the criteria of Section 399.16(b)(1), with the limitation on certain reductions expressed in the last sentence of the section. It does not authorize the Commission to *increase* the limit on procurement meeting the criteria of Section 399.16(b)(3).[8]

On May 14, CMUA filed Comments on the PD, refuting this interpretation.[9] In response, the CPUC's final decision on RPS compliance rules removed the language limiting the

[8] PD at 74.

[9] California Municipal Utilities Association Comments on Proposed Decision Setting Compliance Rules for the Renewables Portfolio Standard Program, May 14, 2012 at 4-9.

applicability of section 399.16(e) to portfolio content category 1.[10] CMUA summarizes its arguments made to the CPUC below.

1. The Statutory Language Permits an Increase in Portfolio Content Category 3 Procurement.

The CEC's draft regulations do not provide a rationale for the determination that section 399.16(e) does not permit an increase in the permissible procurement of portfolio content category 3 procurement. The interpretation of the CPUC's PD hinges on the use of the word "reduction." This is an inaccurate reading of section 399.16(e), which uses the terms "reduction" and "reduce" in a very broad sense, providing: "[t]he commission may reduce a procurement content requirement of subdivision (c). . . ." The clear intent and meaning of this phrase is to allow the CPUC to lessen the burden of the procurement content requirements set forth in section 399.16(c).

Interpreting the term "reduction" as strictly limited to ***lowering*** the percentage obligations found in section 399.16(c) is in conflict with the structure of the entirety of section 399.16. There is no percentage obligation associated with portfolio content category 2,[11] so applying this language to this category of electricity product would be meaningless. Section 399.16(c)(2) provides a maximum level of procurement for portfolio content category 3,[12] so a reduction in this numerical amount would serve to penalize the retail sellers. This would lead to the irrational conclusion that this flexible compliance mechanism was intended to provide the CPUC with the authority to make the requirements of SB 2 (1X) more burdensome.

Such an interpretation is also in conflict with the third sentences of section 399.16(e), which provides: "The [CPUC] shall not, under any circumstance, reduce the obligation specified in paragraph (1) of subdivision (c) below 65 percent for any compliance obligation after December 31, 2016." In this case, the Legislature very clearly did intend to impose a limit specific to only portfolio content category 1. Rather than referring generally to the procurement content requirements of subdivision (c), the statute specifically references the portion of subdivision (c) that provides the portfolio content category 1 requirements, paragraph 1.[13] This demonstrates that the Legislature very clearly knew how to limit section 399.16(e) to portfolio content category 1. If the Legislature had intended section 399.16(e) to be restricted to lowering portfolio content category 1 obligations, then it would have been written as follows:

> A retail seller may apply to the [CPUC] for a reduction of a procurement content ~~requirement~~obligation specified in paragraph (1) of subdivision (c). The [CPUC] may reduce a procurement content ~~requirement~~obligation

[10] D.12-06-038 at 82.
[11] Cal. Pub. Util. Code § 399.16(c)(3) ("Any renewable energy resources contracts executed on or after June 1, 2010, not subject to the limitations of paragraph (1) or (2), shall meet the product content requirements of paragraph (2) of subdivision (b).").
[12] *Id.* § 399.16(c)(2) ("Not more than 25 percent for the compliance period ending December 31, 2013, 15 percent for the compliance period ending December 31, 2016, and 10 percent thereafter of the eligible renewable energy resource electricity products associated with contracts executed after June 1, 2010, shall meet the product content requirements of paragraph (3) of subdivision (b).").
[13] *Id.* § 399.16(c)(1) ("Not less than 50 percent for the compliance period ending December 31, 2013, 65 percent for the compliance period ending December 31, 2016, and 75 percent thereafter of the eligible renewable energy resource electricity products associated with contracts executed after June 1, 2010, shall meet the product content requirements of paragraph (1) of subdivision (b).").

> specified in paragraph (1) of subdivision (c) to the extent the retail seller demonstrates that it cannot comply with that subdivision because of conditions beyond the control of the retail seller as provided in paragraph (5) of subdivision (b) of Section 399.15. The [CPUC] shall not, under any circumstance, reduce the obligation specified in paragraph (1) of subdivision (c) below 65 percent for any compliance obligation after December 31, 2016.

The Legislature very clearly and deliberately used different statutory language than what is provided above. The clear meaning of the statutory language is that the CPUC is empowered to reduce the burden of section 399.16(c). Pursuant to this clear meaning, the CPUC has the authority to increase the allowable procurement of portfolio content category 3 electricity products. Consistent with section 399.30(c)(3), the governing board of a POU is similarly empowered.

2. The Intent of SB 2 (1X) Supports an Interpretation of Section 399.16(e) that Permits an Increase of Portfolio Content Category 3 Procurement.

There is a clear and broadly used rule of statutory construction, which provides that courts:

> must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.[14]

In determining the Legislature's intent in adopting section 399.16(e), it is important to look at the context of that section. Key to understanding section 399.16(e) is section 399.15(b)(5), which gives the CPUC the authority to waive enforcement of the RPS requirements if a retail seller demonstrates that one of various conditions prevented it from complying and was beyond its control. These conditions include: (1) inadequate transmission capacity; (2) permitting, interconnection, or other problems resulting in delay; (3) lack of adequate supply of eligible RPS resources; or (4) unanticipated curtailment by a balancing authority. This optional compliance mechanism allows the CPUC to ***completely excuse*** a retail seller from its compliance obligations if it met one of these requirements. Section 399.16(e) is directly related to this limitation because relief under section 399.16(e) is only available to a retail seller to the extent that one of the conditions in section 399.15(b)(5), highlighted above, prevented the retail seller from complying with section 399.16(c).

It is in this context that the purpose of section 399.16(e) is clear. This section serves as an intermediate flexible compliance mechanism for a utility that meets one of the conditions of section 399.15(b)(5) but where the utility wishes to comply to the extent possible, rather than simply seeking a full exemption. Unlike section 399.15(b)(5), section 399.16(e) still requires the utility to fully comply with the procurement quantity requirements of SB 2 (1X). It is clear then that any significant limitation on a utility's ability to rely on section 399.16(e) would only result in the utility fully relying on section 399.15(b)(5) and, therefore, being excused from any enforcement for noncompliance.

[14] *See* Torres v. Parkhouse Tire Serv., Inc., 26 Cal. 4th 995, 1003 (2001).

Therefore, this is not a matter of increasing portfolio content category 3 procurement at the expense of the other two categories, but rather increasing portfolio content category 3 procurement rather than fully waiving enforcement of the compliance requirements. The result of this interpretation could very well mean less procurement of renewable energy, a result clearly at odds with the intent of SB 2 (1X). The CEC's draft regulations should follow the CPUC and remove the language limiting the applicability of section 399.16(e) to reducing portfolio content category 1 obligations.

F. Formal/Informal Preapproval Process for POU RPS Program Elements

CMUA supports the language of Section 3206(b) of the draft regulations as a reasonable interpretation and implementation of the various optional compliance measures provided by SB 2 (1X). CMUA believes that any mandatory preapproval process for a POU's optional compliance measures would be contrary to the CEC's authority under SB 2 (1X). However, CMUA believes that the multiyear compliance structure for the first three compliance periods presents a unique challenge for POUs complying with SB 2 (1X). A POU may rely on an optional compliance mechanism in one year, but may not receive any indication of the CEC's interpretation of this action until several years later. CMUA recommends that the CEC consider adopting a formal or informal process where a POU can present specific questions regarding RPS compliance to the CEC. The POU's reliance on the CEC's response to these questions could then serve as a factor considered during a Section 1240 enforcement hearing.

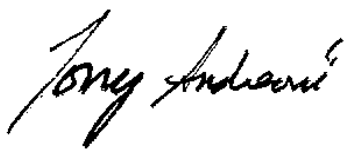
G. Calendar Year Requirement

The draft regulations require that substitute energy in a firmed and shaped contract "must be scheduled into the California balancing authority within the same calendar year as the electricity from the RPS- certified facility is generated."[15] This requirement should be amended to accommodate current industry practice, which includes adjustments after a calendar year has passed, because the ultimate obligation of the delivering party is not known until the end of the last hour on December 31.

II. CONCLUSION

CMUA appreciates the efforts by the CEC staff in developing the RPS Enforcement Rule for POUs, and also appreciates this opportunity to provide our comments.

Sincerely,



Tony Andreoni, P.E.
Director of Regulatory Affairs

[15] Draft Regulations at Section 3203(b)(2)(D).