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California Energy Commission
Docket Office, MS-4
Docket No. 13-RPS-01
1516 Ninth Street
Sacramento, CA 95814
(submitted via email to: docket@energy.state.ca.us)

Re: Docket No. 13-RPS-01; Renewables Portfolio Standard

Docket Office:

Please find the enclosed comments from the Union of Concerned Scientists and the Large-scale Solar Association regarding the proposed Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities.

Sincerely,

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**COMMENTS OF THE UNION OF CONCERNED SCIENTISTS AND THE LARGE-SCALE SOLAR
ASSOCIATION ON THE ENFORCEMENT PROCEDURES FOR THE RENEWABLES PORTFOLIO
STANDARD FOR LOCAL PUBLICLY OWNED ELECTRIC UTILITIES**

The Union of Concerned Scientists (“UCS”) and the Large-scale Solar Association (“LSA”) thank the California Energy Commission (“Commission”) for providing the opportunity to submit comments on the Enforcement Procedures for the Renewables Portfolio Standard (“RPS”) for Local Publicly Owned Electric Utilities (“POU”) Proposed Regulations (“draft regulations”), which were released in February 2013.

UCS and LSA appreciate the hard work of the Commission in developing the draft regulations. The focus of these comments is on sections of the draft regulations that must be modified to standardize rules and requirements for the POU with both those for retail sellers and the statute, to prevent market confusion and an uneven playing field between POU and retail sellers. The comments also address several areas of the draft regulations that must be clarified and strengthened in order to ensure the compliance structure establishes the proper incentives and allows for proper enforcement of the RPS program.

Section 3202 – Qualifying Electricity Products

UCS and LSA are concerned that sections of the draft regulations that describe the timeframe in which a renewable energy credit (“REC”) must be retired for RPS compliance is internally inconsistent and in places, different than the way the California Public Utilities Commission (“CPUC”) defines this 36-month timeframe. An inconsistent treatment of this timeframe will create confusion in the marketplace and lead to different treatment of RECs by POU and retail sellers.

In Decision 12-06-038, the CPUC specifies that “any renewable energy credit retired for compliance on or after January 1, 2011 by a retail seller as defined in Public Utilities Code Section 399.12(j) must be retired within 36 months *of the initial date of the associated generation.*”¹ The CPUC makes clear that the 36-month counting period for a REC begins on the actual date of initial generation and should count the month in which the REC was generated. In contrast, the Commission’s draft regulations contain inconsistent language that makes it unclear whether the 36-month counting period includes the month of initial generation. For example, section 3202(a)(2)(A)(1) says:

“If the associated REC is retired within 36 months *of the date the electricity product is generated*, the electricity product will count towards the RPS procurement targets as defined in section 3204 (a).”²

¹ D.12-06-038, Ordering Paragraph 23; *also see* discussion pp.48-51. (*emphasis added*)

² *Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities – Proposed Regulations*, California Energy Commission, February 2013, p.5 (*emphasis added*).

In this case, it seems clear that the 36-month counting period includes the month in which the electricity was initially generated. This interpretation is consistent with that of the CPUC.

However, section 3202(c) says:

“A POU may not use a REC associated with electricity products to meet its RPS procurement requirements unless it is retired *within 36 months from the initial month of the generation* of the associated electricity. For example, a POU can retire a REC associated with electricity generated *in February 2011 no later than February 28, 2014*, to claim the REC toward the POU’s RPS procurement requirements.”³

If one assumes the 36-month counting period begins on the date of initial generation so that it includes the generation month, the POU in this example would need to retire the REC no later than January 31, 2014, not February 28, 2014. There is also confusing language regarding this issue in section 3206(a)(5)(E): “Any REC qualifying as historic carryover shall be retired within 36 months *of the month* in which the REC was generated.”⁴ Does “of the month” include the month of initial generation, as specified in section 3202(a)(2)(A)(1), or should the POU not count the month of initial generation, according to what the draft regulations appear to suggest in section 3202(c)?

UCS and LSA request that the Commission clarify that the 36-month REC counting period in the draft regulations includes the initial month of generation, to make the rules consistent with the rules established by the CPUC for retail sellers and the draft regulations in section 3202(a)(2)(A)(1).

Section 3204 – RPS Procurement Requirements

Section 3204 of the draft regulations establishes total procurement requirements for the three compliance periods for the POUs. Under the draft regulations, each POU would be required to procure renewable energy equal to an average of 20 percent of retail sales through the first compliance period (2011-2013). To satisfy procurement obligations for the two remaining compliance periods (2014-2016 and 2017-2020), POUs would only be required to maintain a procurement level equivalent to 20 percent of retail sales through 2015 and increase to 25 percent by 2016, and maintain a level of 25 percent through 2019, increasing to 33 percent of retail sales in 2020. Meanwhile the CPUC has directed the 17 retail sellers in the state to calculate the cumulative procurement obligations by assuming a forward linear procurement trend throughout the intervening years.⁵

Public Utilities Code section 399.15(b)(2)(B) establishes the overall RPS procurement

³ *Id.* (emphasis added)

⁴ *Id.* p.23. (emphasis added)

⁵ See CPUC Decision 11-12-020.

requirement for retail sellers and section 399.30(c)(1-2) establishes the procurement requirements for the POUs. Instead of establishing annual procurement requirements, in both cases the statute creates a cumulative obligation for each compliance period. To guide the calculation of procurement required for the last two compliance periods, both sections of statute contain an identical phrase which specifies that these quantities shall “reflect reasonable progress in *each of the intervening years...*”⁶

Clearly, the Legislature’s use of the exact same words to guide the procurement between compliance deadlines for all load-serving entities indicates that all load-serving entities should approach “reasonable progress” in the same way. Despite this, the Commission’s interpretation of “reasonable progress” as a trend equivalent to coasting for 2-3 years, with an uptick in procurement in the last year of a compliance period is dramatically different from the CPUC’s decision, which was issued in December of 2011. The inconsistent interpretation of “reasonable progress” among the two agencies also seems contrary to the Commission’s stated desire to work with the CPUC “to ensure the proposed regulations were consistent with the RPS rules and policies established by the CPUC for retail sellers of electricity...”⁷ In addition, the Commission’s proposal would establish a procurement requirement for the POUs that is significantly lower than the requirement established for California’s retail sellers (many of which are much smaller than several POUs). This uneven playing field between the POUs and the retail sellers places an unfair clean energy investment burden, which will benefit all Californians, on the ratepayers of retail sellers.

In the *Initial Statement of Reasons for Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* (“Statement of Reasons”), the Commission justifies a lower procurement requirement for the POUs because:

POUs are subject to the procurement requirements of Public Utilities Code section 399.30(c), which does not include provisions similar to Public Utilities Code section 399.15(b)(2)(C) and does not cross reference or require consistency with Public Utilities Code section 399.15(b)(2)(C).⁸

While Public Utilities Code section 399.30(c) does not explicitly cross reference the section of statute defining the procurement requirement for the retail sellers, it contains almost identical language requiring reasonable progress in each of the intervening years. The Commission’s Statement of Reasons completely ignores this. Instead, the Commission justifies its lower RPS requirement because the statute imposes “additional requirements” on the retail sellers.⁹ However, the additional requirement the Commission refers to is section 399.15(b)(2)(C), which clarifies that retail sellers must procure no less than the quantities associated with all

⁶ Public Utilities Code sections 399.15(b)(2)(B) and 399.30(c)(2) (*emphasis added*)

⁷ Draft regulations at Preface.

⁸ *Initial Statement of Reasons for Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities*, California Energy Commission, March 2013, p.19.

⁹ *Id.*

intervening years by the end of each compliance period.¹⁰ This is not an “additional requirement” on the retail sellers but rather a restatement of the overall procurement requirement, and is not a justified reason for the Commission to establish a lower procurement requirement for the POUs.

The Commission has failed to justify why the POUs in California should be held to a substantially lower overall RPS procurement requirement than the retail sellers and is proposing a procurement trajectory that directly contravenes the Legislature’s intent for “reasonable progress” to occur in the same manner for all load-serving entities throughout the compliance periods. The Commission should therefore modify the draft regulations to establish specific multi-year procurement quantities based on the linear trend approach adopted by the CPUC in Decision 11-12-020.

Section 3205 – Procurement Plans and Enforcement Plans

The draft regulations only require the POUs submit one procurement plan within 60 days of the effective date of this regulation. In addition, the draft regulations do not require the POUs’ procurement plans to include any analysis of how project failures or delays may impact RPS compliance obligations, or actions the POUs will take to minimize these risks.

Public Utilities Code section 399.13 requires electrical corporations to submit annual renewable energy procurement plans that describe potential compliance delays and assess the risk that eligible renewable energy resources will not be built, be delayed, or not deliver electricity as required by the contract.¹¹ 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 the reasons for 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 did not reach the 20 percent RPS goal by 2010 or their own adopted RPS goals. Identifying potential challenges to compliance *before* they occur and actions taken to mitigate this risk will improve the chances that POUs will be able to reduce project development risks and mitigate the possibility of falling short on compliance obligations. Such documentation will also provide the Commission with valuable information it will need to determine whether circumstances beyond the control of the POU existed, which prevented RPS compliance. Therefore, the Commission should require POUs to submit at least one procurement plan per compliance period, and contain information in the plan that addresses expected or existing challenges to meeting RPS compliance obligations, and steps that will be taken to mitigate and minimize those risks.

Section 3205(c) of the draft regulations requires that any materials containing procurement status, future procurement plans, or enforcement programs that POUs distribute to their

¹⁰ Public Utilities Code Section 399.15(b)(2)(C).

¹¹ See Public Utilities Code sections 399.13(a)(5)(B) and (D)

governing boards for consideration at a public meeting should also be made available to the public. The Commission should clarify that if a POU distributes materials to its governing board, these materials should be made available to the public “upon distribution” to the governing board, consistent with the requirements of Public Utilities Code Section 399.30(f)(3). In other words, POU should not simply be allowed to disclose materials to the public during the meeting, with no prior opportunity to review or prepare comments, or after the meeting when procurement or enforcement measures have already been adopted.

Section 3206 – Optional Compliance Measures

POUs should assess noncompliance risk before flexible compliance measures are adopted

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 LSA do not believe that these requirements establish sufficient accountability for the POU or obviate the need for regularly submitted procurement plans that identify compliance risks, risk mitigation options, and what circumstances may justify compliance delays or waivers in the future. Simply requiring a POU to adopt its own flexible compliance rules within the year it plans to exercise them allows a POU to tailor its compliance off-ramps to the specific situation it finds itself in at the time, no matter how poorly it may have managed its portfolio in the past.

This proposed regulation fails to hold the POU 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 POU to assess the risk of project failure in their RPS portfolio *before* noncompliance occurs, and allowing the POU to create their flexible compliance policies in the same calendar year as they plan to use them essentially gives a green light to POU to make bad decisions, and leaves the Commission with little evidence to retroactively assess whether the POU were acting in good faith. In addition, by providing the Commission a sense of what compliance challenges a POU may face or anticipate in the future, the POU will give parties time to proactively address the problems before they jeopardize compliance and give the Commission a sense of which aspects of the RPS program may need to be modified in the future to enhance its overall efficiency and effectiveness. For these reasons, the Commission should require the POU to submit rules regarding flexible compliance, as allowed in Public Utilities Code section 399.30(d), in their procurement plans, which should be submitted at least once every compliance period. Practically speaking, this means that the POU should submit a procurement plan within 60 days of the effective date of this regulation, update the plan to address the second compliance period beginning January 1, 2014, and provide at least one more update for the third compliance period, beginning January 1, 2017.

POUs should apply to the Commission for reductions to portfolio content limitations.

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

The Commission must be the entity charged with approving or rejecting a request to reduce product content category limits. 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.

Standards for using flexible compliance measures should be consistent for all load-serving entities

The draft regulations must use a standard triggering flexible compliance for the POUs that is consistent with both the statute and that required for retail sellers. Proposed section 3206(a)(2)(A) “delay of timely compliance” would allow POUs to delay RPS compliance as long as they can make a finding that “reasonable cause” exists for such a delay. Using the “reasonable cause” standard to justify RPS noncompliance is not consistent with the standard established in Public Utilities Code section 399.15(b)(5), which allows retail sellers to delay or waive RPS compliance if certain “...conditions are beyond the control of the retail seller and will prevent compliance.” Since Public Utilities Code section 399.30(d)(2) allows POUs to adopt “Conditions that allow for delaying timely compliance consistent with subdivision (b) of Section 399.15”, UCS and LSA believe the statute clearly requires the POUs and retail sellers to use the same standard – “beyond the control” - to trigger flexible compliance measures. By hinging flexible compliance on “reasonable cause” instead of conditions “beyond the control of the retail seller” the Commission creates an uneven playing field between the retail sellers and the POUs and makes it easier for POUs to justify noncompliance.

A few lines later, proposed section 3206(a)(2)(A)(1) indicates that a POU may use “inadequate transmission” as a justification for not meeting RPS requirements. Instead of requiring the POU to address certain factors before concluding that “inadequate transmission” justifies

noncompliance, as required by Public Utilities Code section 399.15(b)(5)(A)(i-ii)¹², the Commission simply suggests that the POUs “may find that” one of two factors – listed in section 3206(a)(2)(A)(1)(i-ii) - may exist.

The differences between the flexible compliance triggers for retail sellers, and those proposed for the POUs seem small, but further erode the requirements for the POUs to meet their RPS obligations and create a growing disconnect between the RPS obligations of the POUs versus those of the retail sellers. The Statement of Reasons provides no rationale for this approach and in fact indicates that the POUs should be subject to the same requirements and same standards under this proposed section as retail sellers.¹³ For this reason, UCS and LSA urge the Commission make the following changes to section 3206(2):

(2) Delay of compliance

(A) A POU may adopt rules permitting the POU to make a finding that **any of the following conditions are beyond the control of the POU** ~~reasonable cause exists to delay the timely compliance with RPS procurement requirements~~, as defined in section 3204, **and will prevent timely compliance**. Such a finding shall be limited to one or more of the following causes for delay and shall demonstrate that the POU would have met its RPS procurement requirements but for the cause of delay **beyond its control**:

1. There is inadequate transmission capacity to allow sufficient electricity to be delivered from eligible renewable energy resource, or proposed eligible renewable energy resource projects, to the extent applicable, using the current operational protocols of the balancing authority in which the POU operates. A POU that owns transmission or has transmission rights **must consider both whether** ~~may find that~~:
 - i. The POU has undertaken all reasonable measures under its control **in a timely fashion** and consistent with its obligations under local, state, and federal laws and regulations to develop and construct new transmission lines or upgrades to existing lines intended to transmit electricity generated by eligible renewable energy resources, in light of its expectation for cost recovery.
 - ii. The POU has taken all reasonable operational measures to maximize cost effective purchases of electricity from eligible renewable energy resource in advance of transmission availability.

¹² PU Code section 399.15(b)(5)(A)(i and ii) require the CPUC, in deciding whether a retail seller may delay or waive RPS compliance due to inadequate transmission, to consider *both* whether “the retail seller has undertaken reasonable measures...to develop and construct new transmission lines or upgrades...” and “Whether the retail seller has taken all reasonable operational measures to maximize cost-effective deliveries of electricity from eligible renewable energy resource in advance of transmission availability.”

¹³ Initial Statement of Reasons at p. 32

2. Permitting, interconnection, or other circumstances have delayed procured eligible renewable resource projects, or there is an insufficient supply of eligible renewable energy resources available to the POU. The POU must also find that **it has done all of the following:**

The adoption of flexible compliance measures should be considered substantive changes to a POU's RPS program and trigger public notice requirements.

UCS and LSA also recommend that in section 3206(a)(1), the Commission clarify that any POU proposals to adopt flexible compliance measures must be considered a “substantive change to the program”, which triggers the public notice requirements in Public Utilities Code section 399.30(e): “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 include this notice requirement for the portfolio balance requirement reductions but not for the other flexible compliance measures. In order to ensure transparency in the adoption of all flexible compliance measures and consistent application of the notice requirement, the draft regulations must require the ten-day notice provision for all of the flexible compliance measures.

The Commission should clarify that POUs may not sell generation eligible for historic carry-over.

UCS and LSA continue to believe that the draft regulations do not provide sufficient guidance about “historic carry-over” generation will be treated in the RPS program. UCS and LSA have previously asked the Commission to clarify that historic carry-over generation may only be claimed by the entity for whom it was originally generated and cannot be sold or transferred to another utility for its own RPS obligations.¹⁴ UCS and LSA reiterate that request for clarification in these comments. Historic carry-over is not classified in the portfolio content categories, and as such the sale or transfer of such generation would be inconsistent with portfolio content category requirements and should not be eligible for portfolio content category treatment. It also remains unclear how historic carry-over generation will be appropriately verified if, according to section 3206(a)(5)(B), the generation does not to have been tracked in the Western Renewable Energy Generation Information System (“WREGIS”). The Commission has not yet demonstrated how it will ensure that this generation will be accurately tracked and verified, including how it will ensure there is no double counting.

Section 3207 – Compliance Reporting for POUs

UCS and LSA appreciate the new language in section 3207(c)(2)(H) and 3207(c)(3) that includes requirements for POUs to identify actual or potential problems that may delay compliance, set

¹⁴ UCS and LSA Comments on the second version of pre-rulemaking draft regulations for the 33 Percent RPS Program, p.6 (August 13, 2012).

forth plans to address those issues and requires the POUs specify actions taken demonstrating reasonable progress toward meeting the RPS requirements. This new language strengthens the draft regulations by requiring POUs to provide basic information about both the barriers to and their progress toward meeting the RPS requirements. UCS and LSA applaud the Commission for making these changes. Yet, while including a discussion of why compliance delays may be necessary is a logical and important component of a compliance report, UCS and LSA maintain that addressing these issues *before* POUs miss compliance deadlines will help POUs and policymakers address and hopefully prevent noncompliance in the first place. Therefore, UCS and LSA continue to suggest that risk analysis and mitigation plans should be included in procurement plans, submitted at least once a compliance period.

Finally, UCS and LSA reiterate the request that proposed section 3207(d)(3) stipulate that any excess procurement a POU plans to apply to a compliance period should be verified and identified by generation unit to ensure it qualifies under the banking rules.¹⁵

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

Sincerely,



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¹⁵ *Id.*