

BEFORE THE CALIFORNIA ENERGY COMMISSION

**Rulemaking to Establish Enforcement
Procedures for Renewables Portfolio
Standard for Publicly Owned Electric
Utilities**

Docket No. 13-RPS-01

**M-S-R PUBLIC POWER AGENCY COMMENTS ON THE
PROPOSED REGULATIONS FOR ENFORCEMENT PROCEDURES
FOR THE RENEWABLE PORTFOLIO STANDARD FOR
LOCAL PUBLICLY OWNED ELECTRIC UTILITIES**

The M-S-R Public Power Agency¹ offers these comments on the February 2013 Proposed Regulations – *Enforcement Procedures for the Renewable Portfolio Standard for Local Publicly Owned Electric Utilities* (Proposed Regulations), and the related Notice of Proposed Rulemaking (NOPA),² released on March 1, 2013. The Proposed Regulations and NOPA documents address implementation of Senate Bill (SB) X 1-2 (2010), which required the California Energy Commission (CEC) to adopt regulations specifying procedures for enforcement of the renewable portfolio standard (RPS) for publicly owned electric utilities (POUs).

I. INTRODUCTION

The M-S-R Public Power Agency (M-S-R) pursues the development of renewable energy projects and contracts within California and outside of the State, on behalf of its member agencies who are obligated to meet the 33% RPS. Because of these interests, M-S-R has been an active participant in the Commission’s RPS-related proceedings, and continues to work with stakeholders and Commission staff in developing procedures for enforcement of the RPS that reflect the statutory intent of SBX1-2 to increase the state’s RPS procurement, yet recognizes the

¹ Created in 1980, the M-S-R Public Power Agency is a public agency formed by the Modesto Irrigation District, the City of Santa Clara, and the City of Redding. M-S-R is authorized to acquire, construct, maintain, and operate facilities for the generation and transmission of electric power and to enter into contractual agreements for the benefit of any of its members. As such M-S-R does not serve retail load within California but supplies wholesale power under long-term contracts to its retail load-serving members.

² The NOPA packet also includes the Initial Statement of Reasons (ISOR), the Supporting Materials for the Economic and Fiscal Impact Statement and Assessment, and the POU Cost Analysis.

unique nature of California's electricity markets, including the role that POUs play in that market.

This Commission's procedures for enforcement of the RPS for POUs is a crucial and integral part of the state's overall implementation of SBX 1-2, and will have a significant impact on POUs. The underlying state policy of increasing renewable energy is not new, and many entities, including members of M-S-R, already had renewable energy procurement plans that reflect the state's desire to increase renewable energy and encourage low greenhouse gas emitting resources. Indeed, each of M-S-R's members has been engaged in resource planning processes with the objective of meeting their RPS requirements by the end of the first compliance period.

It is important that the RPS enforcement rules recognize the scope of authority granted to the various state and local agencies charged with implementing the RPS, *including* the local governing boards for POUs. This Commission has authority over establishing the procedures for enforcement of the RPS, and the provisions of Section 3208 and 1240 of the Proposed Regulations set forth a detailed and comprehensive process for enforcement of the regulations and the issuance of a notice of violation and correction, as authorized under PUC section 399.30(1) upon a finding of noncompliance. This process properly applies to the verification of quantitative and ministerial applications of the statute. For those matters – such as adoption of optional compliance measures – where the state legislature has granted discretion to the local governing boards of the POUs, the Commission's role does not extend to making a unilateral determination of applicability. M-S-R urges the Commission to make the necessary changes to the Proposed Regulations, as more fully addressed herein, to ensure that the procedures for enforcement of the RPS follow the mandates set forth in Public Utilities Code³ sections 399.11, *et seq.*

³ Unless otherwise noted, all statutory references shall be to the California Public Utilities code (PUC).

II. COMMENTS ON THE PROPOSED REGULATIONS⁴

A. Provisions Regarding Optional Compliance Measures Should be Revised to Reflect the Authority of POU Governing Boards Under the Statute.

Section 3206 of the Proposed Regulations sets forth the requirements for each of the optional compliance mechanisms authorized by PUC sections 399.13, *et seq*, including the measures specifically listed in PUC section 399.30(d). Revisions should be made to section 3206 to properly reflect the scope of the CEC's authority relevant to these provisions. In essence, the enforcement regulations are used by the CEC once the verification process is complete. This Commission is charged with verifying the total amount of renewable energy procured for each compliance period, and the amount of renewable energy eligible for each of the portfolio content categories (PCCs) created by SBX1-2 for POU and retail sellers. For POU, the Commission must then make a determination of compliance, based on the data contained in the extensive annual and compliance period reports that the POU are required to submit to the Commission.⁵ That determination requires the Commission to review the verified information to ascertain whether the total procurement and balancing requirements have been met, and if not, if they are excused by the optional compliance measures that may be adopted by the POU. This review of the verified data is a ministerial act. Similarly, the Commission will determine whether or not annual and compliance-period reports were timely submitted (based on the deadlines set forth in the regulations), and whether procurement plans and enforcement programs were timely forwarded (based on the requirements set forth in the statute and deadlines set by the regulations). As with reviewing the verified data, these acts are ministerial. As drafted, various provisions in section 3206 exceed the Commission's authority.

The provisions of section 3206 should be revised to:

- (1) Strike the references to a Commission determination in section 3206(e) regarding the applicability of the optional compliance mechanisms that may be adopted by a POU pursuant to PUC section 399.30(d),

⁴ M-S-R's members are members of the California Municipal Utilities Association (CMUA), and the cities of Redding and Santa Clara are also members of the Northern California Power Agency (NCPA). The individual M-S-R members support the positions and arguments contained in the comments submitted to the Commission by the organizations of which they are members.

⁵ See section 3207, Compliance Reporting for POU.

- (2) Add certainty to the scope of review proposed in section 3206(d),
- (3) Strike references to extra statutory requirements in section 3206(a)(3).

1. Section 3206(e) Should Not Include a Commission Determination of Consistency

As proposed, Section 3206(e) exceeds the CEC’s authority in enforcing the RPS. Under the provisions of section 399.30(d), the “governing board of a local publicly owned electric utility may adopt . . . measures” that permit it to apply excess procurement in one compliance period to a subsequent compliance period, that establish conditions for delaying timely compliance, and establish cost limitations for procurement expenditures. For each of these provisions, the POU must ensure that the established rules are “in the same manner” for purposes of developing the excess procurement measure, and “consistent with” the provisions in 399.15 (b) and (c) for delaying timely compliance and establishing cost limitations, respectively.

There is no authority granted to the CEC to make a determination regarding the form of the optional compliance mechanisms adopted by the POUs. A “caveat” in the regulations that states the Commission will not apply a POU’s compliance measures if the Commission makes a determination that the measure is lacking is analogous to approval/veto over the measures, and exceeds the statutory authority set forth in PUC section 399.30. There must be some evidence or information to indicate that the POU acted improperly in adopting the provisions at issue before the agency can attempt to invoke such a provision, in order to overcome the legal presumption that POU local governing boards are acting properly in their adoption of the alternate compliance measures delineated in the statute.⁶ The Commission cannot merely make a determination NOT to apply the measure.

This provision appears to be based on the assumption that because the Commission has the responsibility for developing a procedure for enforcement of the RPS, the Commission must also define the provisions of PUC section 399.30 in order to carry out their responsibility to enforce the RPS. This supposition exceeds the scope of authority granted to the Commission in the statute. The Commission has the responsibility to verify compliance for retail sellers and POUs. For POUs, the Commission is also charged with establishing procedures for enforcement,

⁶ California Evid. Code, § 664; [providing that “[i]t is presumed that official duty has been regularly performed].

including a public process for issuing a notice of violation and correction. However, the Commission's authority to enforce the RPS does not extend to making unilateral determinations regarding the sufficiency of a POU measure that is adopted under the authority of PUC section 399.30(d). Adoption of these measures will be very entity-specific. Each of the specific categories set forth in PUC section 399.15(b)(5), for example, must be reviewed and analyzed in light of the POU's own procurement plans in determining whether compliance is beyond the control of the POU. Likewise, the POUs will base their cost limitation provisions on the three specific factors set forth in PUC section 399.15(c) when adopting measures regarding cost limitations on renewable expenditures.

It is unlawful for the Commission to adopt a rule that would replace the judgment of this Commission over the judgment of the local governing boards of the POUs. Section 3206(e) provides that the Commission will not apply a POU optional compliance measure if the Commission makes a determination that the measure is somehow invalid. This proposed language does not recognize the scope of discretion that the POU has under the enabling legislation. Furthermore, this proposed determination is made outside of the enforcement process, and would be based entirely on unarticulated factors. The authority to adopt procedures for enforcement of the RPS does not extend to allowing the Commission staff to replace its interpretation regarding the sufficiency of a measure that has been adopted by a POU. Section 3206(e) should be revised to strike the references to the Commission's determination regarding the validity of the alternate compliance measures.

2. Section 3206(a)(3) Should Not Include Extra-Statutory Factors.

The Proposed Regulations should not require POUs to include factors outside of the statutory requirements when adopting their cost limitations for procurement expenditures. The statute clearly delineates the factors that must be considered when establishing a limitation on the procurement expenditures for all eligible renewable energy resources used to comply with the renewables portfolio standard. Specifically, in establishing this limitation, the POUs "shall rely on the following: (1) The most recent renewable energy procurement plan, (2) Procurement expenditures that approximate the expected cost of building, owning, and operating eligible renewable energy resources, (3) The potential that some planned resource additions may be

delayed or canceled.”⁷ The Proposed Regulations would also require the POU’s to include factors set forth in PUC section 399.30(d), despite the fact that this section is not referenced in the enabling legislation. While factors such as disproportionate rate impacts and the total costs of all procurement credited toward achieving the RPS will likely be factored into the expenditure limitation adopted by the POU, the statute does not specifically require these considerations as part of the POU’s process; they should not be required by the regulations. The ISOR states that these factors should be included because staff found no reason to apply different considerations to the POU’s than those required of electrical corporations;⁸ this ignores the clear and unambiguous language in the statute that lists only those factors set forth in PUC section 399.15(c).

Such considerations are consistent with PUC section 399.15(c), but solely within the discretion of the POU. The POU’s are not required to implement their program using the same interpretation or limitations that the California Public Utilities Commission (CPUC) has adopted for the electrical corporations under that agency’s jurisdiction. Indeed, the rules applicable to the electrical corporations differ in many material respects, rendering it impossible to lawfully apply a single rule to all utilities. This difference is clearly set forth in the statute, and is important to keep in mind; the Commission should not rely on an overly broad interpretation that would have a single rule applied to all of the IOU’s and to each individual POU program.

Section 3206(a)(3) should be revised to read:

(3) Cost limitations

(A) A POU may adopt rules for cost limitations on the procurement expenditures used to comply with its RPS procurement requirements.

~~(B) Such cost limitation rules shall ensure that:~~

- ~~1. The limitation is set at a level that prevents disproportionate rate impacts.~~
- ~~2. The costs of all procurement credited toward achieving the RPS are counted toward the limitation.~~
- ~~3. Procurement expenditures do not include any indirect expenses including, without limitation, imbalance energy charges, sale of excess energy, decreased generation from existing resources, transmission upgrades, or~~

⁷ PUC section 399.15(c).

⁸ ISOR, p. 33.

~~the costs associated with relicensing any POU-owned hydroelectric facilities.~~

(~~CB~~) In adopting cost limitation rules, the POU shall rely on all of the following:

1. The most recent renewables energy resources procurement plan
2. Procurement expenditures that approximate the expected cost of building, owning, and operating eligible renewable energy resources.
3. The potential that some planned resource additions may be delayed or canceled.

3. Section 3206(d) Should Provide Certainty Regarding Timing and Review Criteria.

The Proposed Regulations include an option for a POU to have the Executive Director of the Commission review any of the optional compliance measures adopted under section 3206 “to determine consistency with the requirements of [PUC] section 399.30.” To the extent that a POU would want the Commission to review any of its provisions and provide an advisory opinion, this section provides that option. However, this provision does not address specific rules applicable to the review process, nor guaranteed turnaround times on review. If it is to be useful, it must be more specific. There should be a definite time during which the Commission must reply to the POU regarding its determination of consistency, and the scope of review must be bounded. Section 3206(d) should be revised to read:

A POU may request the Executive Director of the Commission to review any rule or rule revision adopted under this section 3206 to determine whether the Commission believes it to be consistent ~~its consistency~~ with the requirements of Public Utilities Code section 399.30. The Executive Director shall make a determination, ~~to the extent reasonably possible~~, within 120 days of receipt of a complete request for review. A complete request for review shall include the rule or rule revision and all reports, analyses, findings, and any other information upon which the POU relied in adopting the rule or rule revision. The Executive Director may request additional information from the POU, ~~or solicit information from the public in order to make a determination.~~ ~~Failure of the Executive Director to make such determination within 120 days of receipt of the complete request for review shall not be deemed a determination that such rule or rule revision is consistent with the requirements of Public Utilities Code section 399.30.~~

B. The RPS Procurement Requirements for Intervening Years of the Compliance Period Correctly Reflect the Statutory Requirements.

The procurement target requirements set forth in section 3204 accurately reflect the mandates in PUC section 399.30(c)(2). The Commission has properly proposed that the RPS procurement requirements for the second compliance period be the sum of 20% of a POU's 2014 retail sales, 20% of its 2015 retail sales, and 25% of its 2016 retail sales. Likewise, the third compliance period requirement of 25% of 2017 retail sales, 25% of 2018 retail sales, 25% of 2019 retail sales, and 33% of 2020 retail sales, is a reasonable and appropriate interpretation of the statutory requirement.

The Proposed Regulations acknowledge not only the “lumpy” nature of renewable procurement, but the fact that acquisition of renewable energy projects may include a long lead time that could span nearly an entire compliance period. Further, it recognizes that quantitative annual targets are not required by the statute, nor do they guarantee that a POU will meet its compliance target at the end of the compliance period.⁹ There is no statutory support for a prohibition against the proposed interpretation, and despite the fact that the CPUC has taken a somewhat different approach with regard to its oversight of retail sellers, this does not invalidate the appropriate interpretation applied by the CEC for POU's. The statute does not require this Commission to adopt the same requirements that the CPUC has adopted for retail sellers, and in fact, this Commission cannot lawfully do so since there are provisions of the statute that are not applicable to the POU's, but that the CPUC must consider when administering the RPS for retail sellers.

C. Portfolio Content Categories Should be Clearly Defined and Recognize Electric Grid Operational Constraints.

The CEC's overall role in the context of a POU's RPS program is to determine compliance at the end of the compliance period. Accordingly, it is imperative that the definitions set forth in the regulations be clear and concise, but also consistent with the manner in which the electricity sector operates. Both current and future renewable energy projects and transactions are significantly impacted by the definitions of the PCCs, and any ambiguity within these

⁹ ISOR, p. 19.

provisions would be detrimental to both the POU affected, as well as the overall market. M-S-R believes that the Commission should provide the POUs with a greater degree of certainty regarding the resources that are scheduled into a balancing authority that will be counted for the balancing requirements under PCC 1 and PCC 2. It is imperative that utilities retain the ability to schedule the delivery of all resources in an economic and efficient manner, and not be subject to after-the-fact determinations that would invalidate the ability to use these legitimate resources to meet the balancing requirements.

D. Unbundled RECs Should Retain Their Original Portfolio Content Category Designation.

Unbundled RECs should retain their original PCC categorization, and not be relegated to PCC 3 unless they fail to meet the requirements of PCC 1 or PCC 2. The Proposed Regulations would place all unbundled RECs into PCC 3, even if they came from a PCC 1 resource. This interpretation is not consistent with the clear meaning of the statute. The language in PUC section 399.30 defines PCC 3 to include “eligible renewable energy resource electricity products, or any fraction of the electricity generated, including unbundled renewable energy credits, that do not qualify under the criteria of paragraph (1) or (2).” There is nothing in this language that would support calling out *all* unbundled RECs as PCC 3. Instead, the clear statutory interpretation would require unbundled RECs that otherwise meet the PCC 1 or PCC 2 criteria to maintain their original PCC status.¹⁰ This is a significant issue due to the difference in the value of a PCC 1 or PCC 2 resource, verses a PCC 3 product. Section 3203(c) should be revised to read:

(c) Portfolio Content Category 3

(1) ~~All~~ Unbundled renewable energy credits and other electricity products procured from eligible renewable energy resources located within the WECC transmission grid that do not meet the requirements of either Portfolio Content Category 1 or Portfolio Content Category 2 fall within Portfolio Content Category 3.

¹⁰ The rules of statutory interpretation require that the words in a statute be given their “ordinary meaning” (Hoechst Celanese Corp. v. Franchise Tax Bd., 25 Cal. 4th 508, 519 (2001) (citing *Wilcox v. Birtwhistle*, 21 Cal.4th 973, 977 (1999)), and “if the language is clear and unambiguous,” there is no need to further review or attempt to interpret it. *Id.* (citing *Lungren v. Deukmejian*, 45 Cal.3d 727, 735 (1988)).

E. Historic Carryover Provisions Should Not Apply 36-Month REC Retirement Requirement Retroactively.

The Proposed Regulations properly recognizes the significant investments that some utilities have made in renewable resources prior to the passage of SBX1-2, and outlines the manner in which a POU can carry-over historic RPS-eligible procurement prior to the implementation of the new 33% RPS mandate. Section 3206(a)(5) represents a reasonable recognition of past RPS procurement decisions, and indeed recognizes the early actions of POUs that made significant investments in emerging renewable projects prior to the adoption of SBX1-2. As proposed, after netting the RPS procurement (inclusive of the annual procurement target increase) from the period 2004 to 2010, as long as the net of that calculation results in an annual procurement target for 2010 that is no less than 20%, that historic procurement can be carried over to the 33% program, into any compliance period. The Proposed Regulations, however, also require that the POU demonstrate that the RECs were retired through WREGIS or the Commission's Interim Tracking System (ITS).

While this section accurately recognizes the pre-June 2010 generation, it does not recognize the differences between the pre-SBX1-2 RPS and the current structure. The retroactive imposition of the 36-month retirement requirement for RECs needlessly restricts the ability of the utility to utilize this provision. This is especially problematic in light of the fact that POUs were not required to participate in either WREGIS or the ITS, so therefore would not have been required to submit documentation regarding the retirement of those RECs. Rather than apply the current 36-month restriction to the RECs that can be carried over, the regulations should require that any RECs not already retired be retired within a reasonable amount of time following the effective date of the regulations to be used for historic carryover purposes moving forward.

III. CONCLUSION

M-S-R appreciates the opportunity to address the Commission on this very important issue. With the revisions addressed herein, the Proposed Regulations sets forth a viable framework that balances the Commission's desire to provide the POUs with guidance regarding factors to be addressed in a compliance obligation determination, and recognition of the various

roles and authorities granted to the Commission, as well as to the POU's and their governing boards. M-S-R urges the Commission to make that changes outlined above, and to ensure that the rules for enforcement of the RPS recognize the requirements of PUC sections 399.11, *et seq.*, without impeding the authority of local governing boards. M-S-R also supports the comments submitted by NCPA and CMUA, as noted in footnote 4, above.

Dated: April 16, 2013

Respectfully submitted,



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