BEFORE THE CALIFORNIA ENERGY COMMISSION

California Energy Commssion
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Rulemaking to Establish Enforcement Procedures for Renewables Portfolio Standard for Publicly Owned Electric Utilities	**Docket No. 13-RPS-01**

COMMENTS ON THE 15-DAY CHANGES TO THE *PROPOSED REGULATIONS FOR ENFORCEMENT PROCEDURES FOR THE RENEWABLE PORTFOLIO STANDARD FOR LOCAL PUBLICLY OWNED ELECTRIC UTILITIES* OF THE M-S-R PUBLIC POWER AGENCY

On April 19, 2013, the California Energy Commission (Commission or CEC) released proposed changes to the February 2013 draft of the *Enforcement Procedures for the Renewable Portfolio Standard for Local Publicly Owned Electric Utilities* (Proposed Regulations).[1] The M-S-R Public Power Agency[2] offers these comments on the April 19 Changes (Proposed Revisions). The revisions set forth some significant changes to the originally Proposed Regulations regarding the implementation of Senate Bill (SB) X 1-2 (2011) and the creation of enforcement procedures for the renewable portfolio standard (RPS) for publicly owned electric utilities (POUs).[3]

[1] The Notice of Proposed Action (NOPA packet) included the Initial Statement of Reasons (ISOR), the Supporting Materials for the Economic and Fiscal Impact Statement and Assessment, and the POU Cost Analysis, as well as the February 2013 draft of the Proposed Regulations.

[2] 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.

[3] On April 16, the M-S-R Public Power Agency (M-S-R) submitted written comments regarding the February 1 Proposed Regulations (http://www.energy.ca.gov/portfolio/pou_rulemaking/documents/comments/45-day/MSR_45_day_comments.pdf). These comments address the Proposed Revisions, and do not restate the legal positions set forth in the April 16 comments; but M-S-R urges the Commission to further review the positions and analysis set forth in the April 16 Comments and revise the Proposed Regulations accordingly.

I. Introduction

M-S-R continues to be appreciative of this Commission's commitment to developing enforcement procedures for the RPS for POUs that carry out the clear direction of SBX1-2 and recognize the Legislature's intent contained therein. Coordination with all of the entities that have been charged with implementing the RPS – including the governing boards of local publicly owned electric utilities and the California Public Utilities Commission (CPUC) – as well and defining this Commission's own role vis-à-vis the RPS and POU programs is no mean feat. Staff has worked diligently to develop the regulation, and M-S-R appreciates the undertaking that this has been.

Nearly two dozen parties submitted written comments to this Commission regarding the February 1 draft of the Proposed Regulations, many with differing views. The Proposed Revisions reflect some of the range of those comments. M-S-R believes that the April 19 changes make needed modifications to the Proposed Regulations, but the original language in section 3204(a)(3) of the February 2013 Proposed Regulations should be retained, rather than adopting changes that would impose linear procurement targets for the intervening years of the third compliance period.

II. The RPS Procurement Requirement for Intervening Years of the Third Compliance Periods was Correctly Reflected in the February 2013 Proposed Regulations.

The Proposed Revisions would revise the procurement targets for the intervening years of the third compliance period to require incremental procurement targets. M-S-R believes that this change is unnecessary, unwarranted, and unlawful under the statute. As set forth in the February 2013 Proposed Regulations, the procurement target requirements in section 3204 for the second compliance period is required to be no less than the sum of 20% of a POU's 2014 retails sales, 20% of its 2015 retails sales, and 25% of its 2016 retail sales. For the third compliance period, POUs are required to procure no less than 25% of 2017 retail sales, 25% of 2018 retail sales, 25% of 2019 retail sales, and 33% of 2020 retail sales. These procurement targets accurately reflect the mandates in Public Utilities Code (PUC) section 399.30(c)(2) and should not be changed.

The Commission has now proposed, for the first time since the beginning of the pre-rulemaking and rulemaking process, revisions to the procurement target for the third compliance period that would require an incremental increase in each of the intervening years of the third compliance period. This revision appears to be based on feedback from stakeholders seeking to impose the CPUC-like procurement targets on POUs. The stakeholders that advocate for such an approach fail to recognize not only the legal distinctions between the CPUC's role versus that of this Commission, but also the extent to which the Legislature granted discretionary authority to the POUs in SBX1-2 to make the determination of reasonable progress during the intervening years of compliance periods two and three.

In written comments, several parties advocated for the linear increase in the procurement target. However, their rationale for the proposed revision was legally flawed, and contrary to the express provisions of SBX1-2. Parties such as SCE, PG&E, UCS/LSA, and TURN all opined that this Commission must adopt what the CPUC has adopted. USC/LSA goes so far as to state that this Commission's rules "must be consistent with the **rules adopted by the CPUC**."[4] However, if the Commission were to do so, it would be violating the authorizing legislation, which provides that certain provisions in the POUs' RPS programs must be **consistent with the statute**; consistency with the SBX1-2 is **not** the same as the CPUC's interpretation of the statute. Nor is it proper for this Commission to relinquish its authority under the statute merely because a sister agency has made a different finding. This latter point is especially salient given the fact that the two agencies are reviewing and interpreting distinctly different statutory provisions.

As it pertains to procurement targets in the intervening years of both the second and third compliance periods, the Legislature has granted considerable authority to the POU governing boards. This is clearly seen when reviewing the controlling provisions of SBX1-2. The Legislature grants specific authority to the local governing board of the POU to set its procurement targets. PUC section 399.30(b)(2) states that:

> (b) The **governing board shall implement procurement targets** for a local publicly owned electric utility . . .
>
> > (2) The quantities of eligible renewable energy resources to be procured for all other compliance periods reflect reasonable progress in each of the intervening

[4] USC/LSA, p. 3.

> 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 . . .".

For retail sellers, PUC section 399.15(b)(2)(B), requires the CPUC to make a determination regarding reasonable progress:

> "In establishing quantities for the compliance period from January 1, 2011, to December 31, 2013, inclusive, **the commission shall** require procurement for each retail seller equal to an average of 20 percent of retail sales. For the following compliance periods, the quantities shall reflect reasonable progress in each of the intervening years sufficient to ensure that the procurement of electricity products from eligible renewable energy resources . . ."

Accordingly, the CPUC adopted procurement targets for retail sellers[5] as directed by the statute. The same rules do not govern POU procurement targets. Procurement targets for the POUs must be viewed in light of the provisions of PUC section 399.30(b) quoted above, which directs the **governing board of the POU** to set procurement targets that "reflect reasonable progress in each of the intervening years" of the second and third compliance periods. This distinction is crucial, and completely nullifies TURN's claims that there is "no material difference between the language establishing procurement target for POUs and retail sellers"[6] and PG&E's assertion that "the Commission should adopt the same formulas for calculating the RPS procurement requirements for POUs that the CPUC has adopted for retail sellers."[7]

As originally proposed in the February 2013 Proposed Regulations (and reflected in the pre-rulemaking drafts of the regulation), the procurement targets for compliance period three was legally valid, was based on sound public policy, and recognized many different factors that are embodied in the statute.

First of all, the statute imposes specific procurement targets for the end of each compliance period. These targets are not ambiguous in any way; had the Legislature intended to have a quantitative procurement target for the intervening years, they would have specifically set those targets in the statute, rather than direct the local governing board to ensure reasonable progress.

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[5] See D.11-12-020.

[6] TURN, p. 5.

[7] PG&E, p. 2.

Second, the Legislature adopted a clear mandate for each of the intervening years of the first compliance period. This is telling in that had the Legislature intended to do the same for the second and third compliance periods, it would have so stated.

Third, the Legislature specifically adopted multi-year compliance periods. The fundamental purpose of a multi-year compliance period is to allow entities the flexibility to develop procurement strategies that best meet their individual needs, as long as those strategies result in the mandated level of renewable procurement at the end of the second and third compliance periods. Assigning specific procurement targets to those intervening years would negate any such flexibility, and indeed, could thwart the development of larger projects that require a greater resource commitment up-front.

Fourth, and closely related to the notion of a multi-year compliance period, is the fact that renewable procurement is necessarily "lumpy" by nature. Allowing entities to develop long term strategies to address this variability and incorporate that into their procurement plans is crucial to the success of the program, explicitly recognized in the legislation, and contemplated in the progress information the POUs are required to submit to the CEC under section 3207.

Furthermore, as this Commission properly concluded in the ISOR, 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.[8] That is not to say that the POUs will not have intervening targets – that will be demonstrated annually to this Commission when the POUs submit their annual reports under the provisions of sections 3207(c)(3) and (4), which requires the POUs to report on all aspects of its RPS program, including "actions taken by the POU demonstrating reasonable progress toward meeting its RPS procurement requirements" and "a description of all actions planned by the POU in the current calendar year to demonstrate progress towards achieving the POU's RPS procurement requirements."

Despite assertions to the contrary, this Commission and the CPUC are not similarly situated as it pertains to setting procurement targets, and while the statutory provisions may contain "almost identical" language,[9] that does not make the requirements the same. As several

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[8] ISOR, p. 19.

[9] UCS/LSA, p. 4.

parties have aptly noted – and has explained in the ISOR[10] – 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 SBX1-2 that are not applicable to the POUs, but that the CPUC must consider when administering the RPS for retail sellers. The Commission has properly defined the compliance period floor for each compliance period and the procurement targets for the interim years of the second and third compliance period. The legal analysis set forth in the ISOR is valid, and no party has provided evidence to the contrary.

III. Historic Carryover

The Proposed Revisions would strike the retroactive application of the 36-month retirement requirement for purposes of calculating historic carryover. M-S-R fully supports this proposed change and believes that is consistent with the intent of the historic carryover position and would not prejudice or otherwise adversely impact the RPS program. As revised, section 3206(a)(5) represents a reasonable recognition of past RPS procurement decisions and early actions of POUs that made significant investments in emerging renewable projects prior to the adoption of SBX1-2. Recognizing the fact that many of the eligible renewable resource may not have been registered with WREGIS or the Commission's Interim Tracking System (ITS) during the 2004 to 2010 timeframe, the changes properly allow POUs a set amount of time moving forward within which to report and retire the necessary RECs. However, the process for reporting and retiring RECs is not fully defined in the RPS Eligibility Guidebook, or in the Proposed Regulations. Additionally, there are some eligible resources with applications for certification pending before the Commission, which certification process must be complete before RECs can be issued. Accordingly, M-S-R believes that it would be beneficial to allow additional time to fully reconcile the requirements for reporting and retiring the relevant RECs – either through WREGIS or the ITS. Additional time is also necessary to ensure that the certification process is completed for the various facilities with pending applications.

[10] ISOR, pp. 18-20.

IV. Changed Terms in Section 3203(b) Should be Defined

The Proposed Revisions revise section 3203(b) to replace the references to "firmed and shaped" with "matched," and replace "substitute" with "incremental." As a practical matter, M-S-R does not believe that changing these terms makes a substantive difference in the transactions at issue. However, these are not the terms that have been traditionally used to describe these kinds of transactions, nor are they generally defined in the Commission's various RPS-related documents (such as the RPS Eligibility Guidebook). In order to avoid any confusion that may ensue and possibly jeopardize the characterization of certain resources as portfolio content category 2, the regulations should contain precise definitions for each of these terms.

V. CONCLUSION

The RPS mandate established by SBX1-2 is an important step for this state. M-S-R's members have been working on implementing the various provisions since the passage of the legislation, even in the absence of a CEC regulation. POUs have also complied with the statutory requirements to timely adopt enforcement procedures. At this time, we are more than two-thirds of the way through the first compliance period; such a significant divergence from the statutory requirements regarding interim compliance targets would severely prejudice some POUs. Given the importance of the Enforcement Procedures, M-S-R appreciates the opportunity to provide these comments to the Commissions, and the Commission's careful and deliberate review of the arguments addressed herein, and especially those matters that will have significant impacts of procurement planning. M-S-R urges the Commission to retain the original procurement targets for the third compliance period set forth in the February 2013 Proposed Regulations. M-S-R also believes that the revisions to the historic carryover REC retirement should be incorporated into the Proposed Regulations, and that it is proper to allow contracts of less than 10-years to be used for purposes of calculating excess procurement.

Finally, 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, and refers the Commission to the arguments and positions set forth therein, rather than repeating them in these comments.

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