STATE OF CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities	Docket No. 13-RPS-01

JOINT COMMENTS OF THE UTILITY REFORM NETWORK, THE COALITION OF CALIFORNIA UTILITY EMPLOYEES, THE CALIFORNIA WIND ENERGY ASSOCIATION, THE NATURAL RESOURCES DEFENSE COUNCIL AND THE LARGE-SCALE SOLAR ASSOCIATION ON THE ADOPTION OF REGULATIONS ESTABLISHING ENFORCEMENT PROCEDURES FOR THE RENEWABLES PORTFOLIO STANDARD FOR LOCAL PUBLICLY OWNED UTILITIES

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The Utility Reform Network (TURN), the Coalition of California Utility Employees, the California Wind Energy Association, the Natural Resources Defense Council, and the Large-scale Solar Association (*hereafter* "Joint Parties") submit these comments on the adoption of regulations establishing enforcement procedures for the Renewables Portfolio Standard (RPS) for Local Publicly Owned Utilities (POUs). The Joint Parties limit these comments to issues raised by the April 19th modifications.

The Joint Parties urge the Commission to conform to the statutory language and requirements established by the California Public Utilities Commission (CPUC). Specifically, the Commission must do the following:

- Adopt procurement targets for the second compliance period (2014-2016) based on the 'linear trend' rather than the far weaker 'stair-step' approach.

- If the second compliance period targets are not brought into alignment with the 'linear trend' approach, the rules should limit banking of excess quantities to those in excess of the 'linear trend' targets.

- Prohibit any quantities associated with procurement under short-term contracts from being eligible for carryover to the next compliance period.

These changes are needed to comply with state law and to ensure critical RPS program requirements are uniform for retail sellers and POUs.

I. THE SECOND COMPLIANCE PERIOD PROCUREMENT TARGETS MUST BE ADJUSTED TO REFLECT REASONABLE PROGRESS

In enacting SBx2 (Simitian), the Legislature intended to adopt equivalent renewable procurement targets for both POUs and retail sellers. These targets require the POU or retail seller to demonstrate a cumulative quantity of procurement by the end of each multi-year compliance period. The total quantities are intended to be a function of both the final year target **and** the assumption of "reasonable progress in each of the intervening years"(PU Code §399.30(c)(2)).

The Commission's own initial statement of reasons acknowledges that the statutory requirements require the establishment of procurement targets that assume "reasonable progress" during the intervening years:

> Specifically, SB X1_2 requires the governing board of a POU take the following actions, unless otherwise exempted by the law…The governing board of a POU shall ensure that 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 eligible renewable energy resources achieves 25 percent of the POU's retail sales by December 31, 2016, and 33 percent of the POU's retail sales by December 31, 2020.[1]

Although the proposed rules have been modified to adopt the 'linear trend' approach for the third compliance period (2017-2020), the targets for the second compliance period (2014-2016) remain based on a 'stair-step' approach that would allow (and effectively encourage) POUs to maintain only a 20% renewable portfolio through 2015. The proposed rules effectively delete any "reasonable progress" requirement for the second compliance period. Given the Commission's acknowledgement that "reasonable progress" requires using the linear trend during the third compliance

[1] Initial Statement Of Reasons: Proposed Regulations Enforcement Procedures For The Renewables Portfolio Standard For Local Publicly Owned Electric Utilities, page 4.

period, there is no reasonable basis for ignoring this requirement during the second period.

The proposed rules are fundamentally inconsistent with the CPUC's recent decision (D.11-12-020) addressing the meaning of the "reasonable progress" provision as it applies to retail sellers. The CPUC explicitly rejected a 'stair-step' approach on the basis that it "would require no progress in the intervening years of a compliance period. This proposal is not consistent with the statutory standard of showing reasonable progress in intervening years and is not adopted."[2] Instead, the CPUC adopted the 'linear trend' approach on the basis that it represents "the most sensible approach to setting quantitative targets that represent retail sellers' 'reasonable progress' for the 'intervening years' of a compliance period."[3]

The difference between these two approaches during the second compliance period is as follows:

	2014	2015	2016	2014-2016 Average
CEC (stair-step)	20%	20%	25%	21.7%
CPUC (linear trend)	21.7%	23.3%	25%	23.3%

In the Initial Statement of Reasons, the Commission attempts to justify the weaker POU procurement targets as follows:

> Public Utilities Code section 399.30 (c)(2) does not require a specific amount of procurement in each of the intervening years but provides flexibility with the goal of reaching the procurement target by the end of the compliance period. Moreover, procuring an increasing quantity of electricity products during each intervening year of a compliance period does not guarantee that a POU will meet its required procurement target by the end of a compliance period. A POU that makes reasonable progress by procuring increasing quantities of electricity products during each of the intervening years may nevertheless come up short in

[2] D.11-12-020, page 15.
[3] D.11-12-020, page 14.

> reaching the 25 percent target by the end of 2016. Similarly, a POU that takes reasonable actions to increase its procurement during the second compliance period, but does not necessarily increase the quantities of electricity products procured during each of the intervening years, may ultimately meet the 25 percent target by the end of 2016. In contrast, the "reasonable progress" parameters used by the CPUC presume retail sellers are procuring increasing quantities of electricity products during each intervening year of a compliance period…. 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). In addition, staff determined that, in part because the POUs had not been subject to the steadily increasing annual procurement targets applied to retail sellers in 2004–2010, reasonable progress for the POUs would not necessarily follow a linear progression.[4]

This explanation is unsupported by the law, the facts and basic logic. The Commission suggests that there is no reason to implement the "reasonable progress" requirement because a target in an intervening year does not guarantee that the POU will meet the final year target. In making this statement, the Commission presumes that the final year target in each compliance period represents the most important (or perhaps only) demonstration of overall progress. This presumption is mistaken. The Legislature adopted multi-year targets based on the assumption that cumulative (or average) procurement is the most important demonstration of true progress.

By focusing exclusively on the importance of the final year target, the Commission fails to recognize the fact that any POUs exceeding the 'stair-step' targets and demonstrating actual "reasonable progress" in the second compliance period would end up with excess compliance that can be banked and applied towards the next compliance period. In other words, a POU actually satisfying the "reasonable progress" standard between 2014 and 2016 would gain a windfall of excess compliance that could be used to reduce its compliance obligation in the subsequent period. A POU satisfying the basic legal requirements for "reasonable progress" in one period should not be rewarded with

[4] Initial Statement Of Reasons: Proposed Regulations Enforcement Procedures For The Renewables Portfolio Standard For Local Publicly Owned Electric Utilities, page 19.

relaxed obligations in a subsequent period.

Given the huge supply of renewable energy available in the California market, it is hard to fathom the basis for adopting the weakest possible targets for the POUs and not requiring any increase beyond 20% until 2016. The impact on the development of new renewable generation will be significant. For the second compliance period (2014-2016), the reduction from an average of 23.3% to 21.7% is equivalent to almost 500 MW of new solar capacity.[5]

The Commission provides a weak rationale for deviating from the CPUC determinations. It is not reasonable for two state agencies to review the exact same statutory language and reach opposite conclusions. As a result, the procurement targets for the second compliance period violate state law. The Commission should modify the second compliance period targets to adopt the 'linear trend' approach approved by the CPUC.

II. IF THE SECOND COMPLIANCE PERIOD TARGETS ARE NOT MODIFIED, POUS SHOULD BE LIMITED TO BANKING ANY PROCUREMENT IN EXCESS OF THE LINEAR TREND APPROACH

If the Commission refuses to modify the procurement targets for the second compliance period (contrary to the recommendation of the Joint Parties), the "reasonable progress" requirement could be incorporated into the restrictions on carryover of excess procurement between the second and third compliance period. By limiting carryover to procurement that exceeds the linear trend targets, the Commission could ensure that POUs do not unfairly benefit from the lower 'stair-step' procurement target in the second compliance period.

[5] Assumes a 25% capacity factor for new solar operating in all years of the compliance period. The use of solar capacity is intended to provide a measure of the impact on intermittent resource development.

Under the proposed rules, a POU that procures renewable energy consistent with the CPUC-adopted 'linear trend' targets applicable to retail sellers during the second compliance period would receive carryover credit equal to up to 5% of retail sales.[6] This carryover could be applied against the 2017-2020 targets and effectively reduce their overall impact. It is unreasonable for a POU to receive this quantity of carryover for procuring the same percentages of renewable energy required as a minimum benchmark for Investor-Owned Utilities, Electric Service Providers, and Community Choice Aggregators.

The Commission could address this issue by modifying proposed Section 3206(a)(1)(E)(4)(2), which governs the carryover provisions applicable to the second compliance period, to limit any carryover to procurement in excess of the 'linear trend' targets adopted by the CPUC. This limitation would preserve carryover opportunities for POUs exceeding the 'linear trend' while preventing poorer performing POUs from accumulating unjustified excesses eligible for carryover.

III. IT IS EXPLICITLY ILLEGAL FOR POUS TO COUNT SHORT-TERM CONTRACT QUANTITIES TOWARDS THE CALCULATION OF ANY EXCESS COMPLIANCE ELIGIBLE FOR BANKING

The Commission's original version of the POU enforcement rules included a prohibition on counting, as excess procurement, any quantities associated with contracts less than 10 years in duration (*hereafter* "short-term contracts"). The April 19th modifications delete this requirement without any accompanying explanation.[7] In light of the clear statutory language and prior interpretations of the relevant provisions, this modification is plainly illegal and must be rescinded prior to the adoption of final regulations.

[6] This calculation is based on a POU procuring the 'linear trend' average of 23.3% in each of the three years and carrying over all excess relative to the 21.7% average in the proposed rules.

The prohibition on banking short-term contracts by retail sellers is found in PU Code §399.13(a)(4)(B).[8] The application of these requirements to POUs can be found in §399.30(d)(1).[9] Given the requirement that the restrictions on banking excess procurement be applied "in the same manner as allowed for retail sellers", there is no basis for providing any differential treatment for POUs as part of the RPS rules.

This limitation is fully consistent with the CPUC's determination of this issue in D.12-06-038 which states that:

> Retail sellers as defined in Public Utilities Code Section 399.12(j) may not carry over from one compliance period to a subsequent compliance period any excess megawatt-hours of expected generation from contracts for compliance with the California renewables portfolio standard that are more than 10 years in duration in order to meet the requirements set in this decision for counting procurement from contracts of less than 10 years in duration signed after June 1, 2010 for compliance with the California renewables portfolio standard.[10]

The CEC's initial statement of reasons, which remains unchanged, explains that

> Public Utilities Code section 399.13(a)(4)(B) establishes limitations on excess procurement for retail sellers, including a prohibition on counting PCC 3 procurement as excess procurement and a prohibition on counting procurement under contracts of less than 10 years of duration as excess procurement. The limitations of Public Utilities Code section 399.13 (a)(4)(B) should apply equally to POUs to ensure the rules for excess procurement for retail sellers are applied in the same manner to POUs.[11]

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[7] Proposed Section 3202(a)(2)(A), Section 3206(a)(1).

[8] Public Utilities Code §399.13(a)(4)(B) directs the CPUC to adopt "rules permitting retail sellers to accumulate, beginning January 1, 2011, excess procurement in one compliance period to be applied to any subsequent compliance period. The rules shall apply equally to all retail sellers. In determining the quantity of excess procurement for the applicable compliance period, the commission **shall** deduct from actual procurement quantities, the total amount of procurement associated with contracts of less than 10 years in duration. In no event shall electricity products meeting the portfolio content of paragraph (3) of subdivision (b) of Section 399.16 be counted as excess procurement." [emphasis added]

[9] Public Utilities Code §399.30(d) states "The governing board of a local publicly owned electric utility may adopt the following measures: (1) Rules permitting the utility to apply excess procurement in one compliance period to subsequent compliance periods in the same manner as allowed for retail sellers pursuant to Section 399.13." [emphasis added]

[10] Decision 12-06-038, Ordering Paragraph 18.

[11] Initial Statement Of Reasons: Proposed Regulations Enforcement Procedures For The Renewables Portfolio Standard For Local Publicly Owned Electric Utilities, page 30.

Given the explicit, unambiguous statutory language, the treatment of this issue by the CPUC and the explanation provided in the Commission's statement of reasons, it is not possible to understand the basis for deleting this requirement from the proposed regulations. To the extent that the change was based on the comments previously submitted by the California Municipal Utilities Association on this issue, the Joint Parties offer a response to their two primary legal arguments.

CMUA first claims that the restriction is inapplicable because "unlike the CPUC, the CEC does not play a role in approving POU RPS contracts."[12] This claim is incorrect and irrelevant. There is no relationship between the role of the CPUC in approving renewable contracts executed by the investor-owned utilities and the applicability of the banking restrictions outlined in §399.13(a)(4)(B). The banking restrictions constitute an independent provision that is unaffected by the CPUC's review and approval of individual contracts executed by Investor-Owned Utilities. CMUA conveniently omits the fact that these banking restrictions apply to all retail sellers including Electric Service Providers (ESPs) and Community Choice Aggregators (CCAs). The CPUC does not review or approve contracts executed by ESPs and CCAs, yet these entities are subject to the statutory restrictions on the carryover of any quantities associated with short-term contracts.

CMUA's second claim is that the banking restrictions are linked to, and rely upon, other provisions within §399.13 that address the authority of investor-owned utilities to execute short term contracts and the requirement that any retail seller seeking to enter into short-term contracts demonstrate "minimum quantities of eligible renewable energy resources to be procured through contracts of at least 10 years' duration."[13] Because these other provisions do not apply to POUs, CMUA argues that it would be inappropriate to conclude that the banking restrictions in §399.13(a)(4)(B) are relevant. CMUA fails to acknowledge the obvious difference between rules that regulate the

[12] Comments of the California Municipal Utilities Association, April 16, 2013, page 15.

ability of a retail seller to enter into certain types of contracts and rules that regulate the methodology used to calculate the carryover of excess procurement between compliance periods. The fact that §399.30(d)(1) explicitly references the "excess procurement" requirements of §399.13 clearly distinguishes between the "excess procurement" provisions of §399.13 and the numerous other requirements of §399.13 that apply specifically to retail sellers. The Joint Parties agree that the remaining provisions of §399.13 do not empower the Commission to either conduct reasonableness reviews of POU contracts or require advanced approval of POU renewable energy contracts. These issues are not in dispute.

The Commission must recognize that there is no valid legal argument for ignoring the application of these clear limitations to POUs. To the extent that the Commission does not modify the proposed rules to remove the April 19th modifications, the final rules would violate state law and be likely overturned if subject to judicial review.

For these reasons, the Joint Parties respectfully urge the Commission to remove the April 19th modification to this section and preserve the restrictions on the banking of short-term contracts.

[13] Comments of the California Municipal Utilities Association, April 16, 2013, page 15. See Cal. Pub. Util. Code §399.13(b).

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