California Energy Commission
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BEFORE THE CALIFORNIA ENERGY COMMISSION

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

NORTHERN CALIFORNIA POWER AGENCY COMMENTS ON THE APRIL 19, 15-DAY CHANGES TO THE PROPOSED REGULATIONS FOR ENFORCEMENT PROCEDURES FOR THE RENEWABLE PORTFOLIO STANDARD FOR LOCAL PUBLICLY OWNED ELECTRIC UTILITIES

The Northern California Power Agency[1] (NCPA) provides these comments to the California Energy Commission (Commission) on the changes to the *Proposed Regulations for Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* (Proposed Regulation), noticed for a 15-day comment period on April 19, 2013 (15-Day Changes), in Rulemaking 13-RPS-01.[2]

NCPA appreciates all of the efforts that this Commission has put into developing the Proposed Regulations and the Commission's recent decision to delay consideration of the final regulation until the agency has had ample opportunity to review and assess the feedback submitted by stakeholders, as the regulatory process is better served by this modest delay.

[1] NCPA members include the cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah, as well as the Bay Area Rapid Transit District, Port of Oakland, and the Truckee Donner Public Utility District. Plumas-Sierra Rural Electric Cooperative is an associate member of NCPA.

[2] On March 1, the Commission issued the Notice of Proposed Action (NOPA), Initial Statement of Reasons (ISOR), the Supporting Materials for the Economic and Fiscal Impact Statement and Assessment, and the POU Cost Analysis.

On April 16, 2013, NCPA submitted comments to this Commission on the Proposed Regulations that were part of the March 1, 2013 Notice of Proposed Rulemaking.[3] NCPA does not reiterate the legal and evidentiary arguments set forth in those comments, but rather limits these comments to the revisions proposed in the 15-Day Changes. However, NCPA urges the Commission to review the recommendations contained in the April 16 NCPA Comments, and revise the Proposed Regulations consistent with the conclusions set forth therein.

I. THE 15-DAY CHANGES

NCPA supports the proposed changes that:

(1) acknowledge the past practices and existing laws when establishing procedures for retiring allowances for historic carryover, and

(2) recognize the procurement practices of publicly owned utilities (POUs) and removes the restriction associated with contracts that may be used to calculate excess procurement.

However, the proposal to alter the interim procurement targets for the third compliance period is not supported by either the law or the record in this proceeding, and should be revised. NCPA urges the Commission to strike the proposed revisions to section 3204(a)(3) of the Proposed Regulations.

II. PROCUREMENT TARGETS FOR THE THIRD COMPLIANCE PERIOD SHOULD NOT INCLUDE INCREMENTAL INCREASES IN THE INTERVENING YEARS.

The proposed revision to the procurement targets for the intervening years of the third compliance period should be rejected. The 15-Day Changes err in requiring incremental increases in the procurement requirements for the third compliance period; this change is not supported by the express statutory language, and all arguments to the contrary ignore this imperative legal distinction. The RPS procurement requirement originally proposed in section 3204 should be retained for several reasons, including the fact that:

[3] http://www.energy.ca.gov/portfolio/pou_rulemaking/documents/comments/45-day/NCPA_45_day_comments.pdf.

- The Proposed Regulations properly recognized the reasonable progress requirement set forth in 399.30;
- The statute authorizes the local governing boards of the POUs to determine reasonable progress;
- It is improper and contrary to the express provisions of SBX1-2 for this Commission to defer to conclusions reached by the CPUC.

As originally proposed, the procurement targets for the intervening years of the second and third compliance periods properly reflected a floor of no less than the prior compliance period standard, but also required the POU to acquire **at least** 25% RPS by 2016 and **at least** 33% RPS by 2020, as mandated by California Public Utilities Code (PUC) section 399.30(c). As the ISOR correctly concludes, the need to reach 25% by 2016 and 33% by 2020 will require POUs to either procure increasing amounts of renewable energy during the intervening years, or rely on long term planning commitments that are intended to result in the necessary RPS procurement.[4] Either way, POUs will be progressing towards the required amounts or risk failure in attaining their RPS mandate. SBX 1-2 does not mandate a numerical calculation or require minimum procurement requirements during the intervening years of the second and third compliance periods, and accordingly, the Proposed Regulations should not impose any such targets.

A. The Authority to Set Procurement Targets in the Intervening Years Vests with the POU Local Governing Boards.

As NCPA has noted throughout this proceeding, in SBX1-2 the Legislature adopted a single, state-wide RPS mandate for retail sellers and POUs. However, in doing so, the Legislature also recognized and preserved the different governance structures under which the IOUs and POUs operate, and granted POU governing boards considerable discretion in the manner in which the RPS was to be implemented in several regards. This does not mean that the POUs can define their own compliance period procurement targets, redefine the portfolio content categories, or otherwise adopt different balancing requirements than what is set forth in the statute. However, as it pertains to setting interim targets for the second and third compliance periods, the statute provides the POU governing board – and not this Commission – the authority to make that determination. If the regulations set a procurement trajectory, this Commission is

[4] ISOR, pp. 18-19.

usurping the role of the local governing board in this regard, replacing its judgment as to what is reasonable, in the place of the local governing board. This is contrary to the express grant of authority to the POU set forth in PUC section 399.30(b)(2), which provides:

> (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 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 local governing board shall require the local publicly owned electric utilities to procure not less than 33 percent of retail sales of electricity products from eligible renewable energy resources in all subsequent years."

The California Public Utilities Commission (CPUC) adopted procurement targets for retail sellers in D.11-12-020 consistent with the authority granted to that agency under PUC section 399.15(b)(2)(B). Notably, that section provides that:

> "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 . . . "

Contrast this language with 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. Accordingly, TURN's claims that there is "no material difference between the language establishing procurement target for POUs and retail sellers," is factually incorrect and its argument based on that theory is legally flawed. Likewise, PG&E's claims that "the Commission should adopt the same formulas for calculating the RPS procurement requirements for POUs that the CPUC has adopted for retail sellers" and that "the two agencies should not interpret the same statutory language differently where there is no compelling reason to distinguish POUs from other [LSEs]" (PG&E, p. 2) completely ignores the authority the statute

expressly grants to this Commission and to the governing boards of the POUs. Indeed, the different grant of authority set forth in SBX 1-2 is a very compelling reason.

B. Adopting the CPUC-like Procurement Targets is Not Appropriate for Public Power

The RPS procurement requirement originally proposed in section 3204 should be retained. NCPA understands that other interests have taken the position that this Commission must use the intervening procurement targets adopted by the CPUC in Decision (D.) 11-12-020. This position is not supported by the law. The RPS procurement requirement originally proposed in section 3204 should be retained. PG&E, SCE, TURN, and Union of Concerned Scientists and Large-Scale Solar Association (UCS/LSA) allege that the Proposed Regulations were flawed because they did not adopt a straight line trajectory of procurement targets for the intervening years of the second and third compliance periods. However, the only support these parties offer for this position is that what was set forth in the Proposed Regulations is not the same as the provisions already adopted by the CPUC. TURN notes that because it "is not reasonable for two state agencies to review the exact same statutory language and reach opposite conclusions," that this Commission's conclusion "violate[s] state law" and this "Commission should modify the targets to adopt the 'linear trend' approach approved by the CPUC."[5] USC/LSA erroneously states that this Commission's rules "must be consistent with the **rules adopted by the CPUC**."[6] This statement is wrong; that is *not* what SBX 1-2 requires. The statute requires the CEC to adopt – in some instances – rules that are consistent with specific provisions of Public Utilities Code sections 399.11, et seq. Nowhere in the statute is this Commission required to comply with the *CPUC's interpretation* of those provisions. Indeed, had the Legislature contemplated that the two programs would be exactly the same, there would be only one agency charged with implementation of the RPS, and the provisions applicable to retail sellers and POUs would not be separated out in the statute. SBX 1-2 is replete with references to the authority granted to the local governing boards of POU, as well as the CEC, and the provisions – while *almost identical* – are not the same.

[5] TURN, p. 6.

[6] USC/LSA, p. 3.

These same parties allege that this Commission must demonstrate or justify why it has "deviated" from the CPUC's determinations.[7] Again, these statements fail to recognize the important legal distinctions between the authority of the CPUC and the authority of the CEC as expressly set forth in the statute. These parties would have this Commission unlawfully abdicate its authority under that statute to the CPUC. Furthermore, the provision at issue here – the determination of RPS procurement targets for the intervening years of a compliance period for POUs – are not even vested with this Commission, but rather with the local governing boards of the POUs as set forth in PUC section 399.30(b)(2).[8] This Commission is charged with implementing enforcement procedures for the POUs, and must adhere to the provisions of 399.30 when doing so.

Some stakeholders also allege that the different procurement targets will detract from the development and procurement of renewable resources. In actuality, the opposite is true. For NCPA members, requiring interim targets represents roughly $20 million in resources targeted towards renewable project investments to be diverted from long-term commitments. Resources that could be used for long term projects would be pulled to make short term investments to meet the targets. This would needlessly interfere with steel-in-the-ground investments.

The statute does not, as these parties allege, require the POUs to meet quantitative procurement targets defined by this Commission during the intervening years of the second and third compliance periods, nor does the statute require the POUs to adhere to a standard or interpretation adopted by the CPUC, or for the Commission to endorse such an interpretation.

C. Rules of Statutory Interpretation Support the Procurement Targets Originally Set Forth in the Proposed Regulations

PG&E offers a flawed analysis of the statutory interpretation. While the utility correctly notes that "identical words used in different parts of the same act are intended to have the same meaning (footnote omitted)," it fails to note that the language at issue is **not** identical.[9]

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[7] UCS/LSA, p. 4, TURN p. 6.

[8] It is also worth noting that the CPUC decision was in itself controversial, and that the IOUs had even argued that "[h]aving straight-line targets for the intervening years . . . is unrealistic and reduces the flexibility they need to make the most effective RPS procurement decisions." (D.11-12-020, p. 13)

[9] PG&E, p. 4.

In fact, the statute specifically calls out the authority of the POU's own local governing board to set the interim targets. UCS/LSA argue that the rules should be the same because the provisions in the statute for POUs and retail sellers include "almost identical" language;[10] it is the difference between the two that is controlling. It is not for this Commission, and certainly not for the CPUC, to set those targets. PG&E, TURN and others, continually proffer the CPUC's earlier-in-time decision as justification – without more – for this Commission to impute the same requirements on POUs. This position is legally untenable.

As demonstrated in the ISOR and in comments filed by the stakeholders throughout the development of the RPS Enforcement Procedures, the statutory references to "consistency" must not be confused or conflated to require identical POU and retail seller programs. Consistent programs are not necessarily going to be exactly the same; an outcome that was fully contemplated by the Legislature in adopting *different* provisions for POU RPS programs verses retail seller programs. Furthermore, the POUs are required to adopt provisions "consistent with" the statutory provisions applied to the retail sellers in several instances, but this does not mean that the CPUC's interpretation of those provisions for the purposes of governing their jurisdictional entities is the same as how the statute should be interpreted for POUs. There is no requirement in the statute for the POUs to adopt the CPUC's interpretation, nor to wait for the CPUC to take action on these issues prior to adopting their own RPS program measures. Furthermore, the CPUC's conclusion in D.11-12-020 is based on application of sections of the statute that are *not* applicable to the POUs, including PUC section 399.15(b)(2)(C), as the ISOR clearly explains.[11] Therefore, while the procurement targets for the intervening years of the compliance period proposed by this Commission may be "inconsistent with the CPUC's recent [D.11-12-020] addressing the meaning of the "reasonable progress" provision as it applies to retail sellers,"[12] that does not mean that this Commission has committed any legal error. In fact, the regulations, as proposed in the March 1 NOPA, correctly interpret the scope of the Commission's authority under the statute and are consistent with the provisions set forth in PUC section 399.30. The Commission's legal analysis set forth in the ISOR is sound and justified.

[10] UCS/LSA, p. 4.

[11] ISOR, pp. 18-20.

[12] TURN p. 4.

TURN's allegation that the analysis is legally flawed is unsupported by any legal reference.[13] Indeed, stakeholders have offered no compelling evidence or legal support for a contrary finding.

Furthermore, even the CPUC has acknowledged that rules applicable to IOUs do not automatically apply to other entities, including CPUC-jurisdictional energy service providers and community choice aggregators. For example, in D.10-03-021 the CPUC established rules regarding the use of tradable renewable energy credits for RPS compliance purposes. In that decision, the Commission declined to adopt the same rules for all retail sellers, noting that it "has different responsibilities with respect to utilities, on the one hand, and ESPs and CCAs on the other. . . . Commission does not set the rates of ESPs or CCAs and has no responsibility to ensure that their charges to their customers are just and reasonable."[14]

The California Supreme Court has clearly articulated rules for statutory interpretation. First, you must "look to the statute's words and give them their usual and ordinary meaning. . . If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. . . ."[15] In this case, conceding that reasonable progress may have more than one interpretation, the purpose of a separate provision in the statute regarding POU RPS, coupled with the legislative history that clearly reflects the Legislature's recognition of the autonomy of the POU local governing boards, fully supports the original conclusion discussed in the ISOR and reflected in the February 2013 Proposed Regulations.

D. The Proposed Regulations Contemplate Reasonable Progress

Stakeholder claims that "the Proposed Regulation would not reflect any progress at all in the intervening years . . . and would assume that the POUs make *no additional progress whatsoever* toward the statutory goals in 2014, 2015, 2017, 2018, and 2019" (PG&E p. 3) and that "the regulations effectively delete the 'reasonable progress' requirement from the POU RPS

[13] TURN, p. 5.

[14] Rulemaking 06-02-012, D.10-03-021, p. 48.

[15] *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal. 4th 381, 387-388. See also, e.g., *People v. Canty* (2004) 32 Cal.4th 1266, 1276; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.

program"[16] are simply wrong. Both the statute and the Proposed Regulations require the POUs to submit various reports regarding their RPS programs. As required by PUC section 9507(b)(2), the Commission will review annual reports from the POUs which include information regarding the progress the POU is making towards meeting the RPS. Section 3207(c)(3) of the Proposed Regulations requires the POUs to annually report to the Commission on:

> "Actions taken by the POU demonstrating reasonable progress toward meeting its RPS procurement requirements. The information reported shall include, but not be limited to, a discussion of the following actions taken by the POU during the prior calendar year:
>
> (A) Solicitations released to solicit bid for contracts to procure electricity products from eligible renewable energy resources to satisfy the POU's RPS procurement requirements.
>
> (B) Solicitations released to solicit bid for ownership agreements for eligible renewable energy resources to satisfy the POU's RPS procurement requirements.
>
> (C) Actions taken to develop eligible renewable energy resources to satisfy the POU's RPS procurement requirements, including initiating environmental studies, completing environmental studies, acquiring interests in land for facility siting or transmission, filing applications for facility or transmission siting permits, and receiving approval for facility or transmission siting permits.
>
> (D) Interconnection requests filed for eligible renewable energy resources to satisfy the POU's RPS procurement requirements.

In addition, POUs are also required by 3207(c)(4) to provide "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." Accordingly, reasonable progress is evidenced in the Proposed Regulations, and this Commission will not be uninformed about a POU's progress towards achieving the mandated RPS.

E. Quantifying Interim Procurement Targets is Not Necessary.

SB X1-2 establishes multi-year compliance periods for the first 10 years of the RPS. This deliberate structure was adopted in order to allow utilities the ability to adjust their procurement practices and ramp-up the acquisition of renewable energy products. The procurement targets for each of the first three compliance periods originally set forth in section

[16] TURN, p. 3.

3204(a)(1)-(3) properly set forth a compliance obligation for the second and third compliance periods that is consistent with the statute. Applying the procurement trajectory proposed in the regulation ensures that POUs are held to the required standard, even if procurement during any of the intervening years of the second or third compliance periods falls below 20% or 25% respectively. If, on an annual basis, RPS procurement falls below the 20%/25% standard, the POU will have to procure even more renewable resources in the subsequent years to ensure that the total compliance period obligation is met. The procurement targets outlined in the February 2013 draft of the Proposed Regulations not only complied with the statute, but also recognized the very real limitations that are associated with developing renewable energy resources. The procurement of renewable resources varies over time for myriad reasons, and variations in the availability of renewable resources and the uncertainties in the contracting process make it difficult to adhere to straight-line trajectories. This is especially relevant when renewable energy procurement plans and strategies are highly reliant upon construction of new facilities and not merely the purchase of unbundled RECs. Using a straight-line approach would undermine the flexibility and primary purpose of the multi-year compliance periods established by the statute. This interpretation of the statute is not only reasonable, but it represents sound public policy and recognizes the variances associated with renewable energy procurement that led to the adoption of multi-year compliance period for the first nine years of the new program. TURN's unsubstantiated statement that the "Legislature adopted multi-year targets based on the assumption that cumulative procurement is the most important demonstration of true progress"[17] is antithetical to this position.

The Legislature indeed intended to adopt equivalent renewable procurement targets for both POUs and retail sellers, and did so in SBX1-2. What these stakeholders refuse to acknowledge, however, is that the Legislature did not intend to set quantitative interim targets for each of the intervening years of the second and third compliance period, or those targets would have been specifically set forth in the statute. TURN's assertion that "the total quantities are intended to be a function of both the final year target and the assumption of "reasonable progress

[17] TURN, p. 5.

in each of the intervening years"[18] does nothing to alter the fact that the statute **did not** set any quantitative targets for the intervening years, nor did the Legislature authorize the CEC to do so. As noted herein, the compliance period targets originally proposed in the NOPA package are fully compliant with the provisions of the statute, and indeed, attempting to shoehorn the POUs into a determination made by the CPUC is contrary to the statute. The mere fact that the CPUC has adopted procurement targets for the intervening years does not validate the application of that same outcome to the POUs, especially in light of statutory language to the contrary.

III. The 36-Month Restriction on REC Retirement for Historic Carryover is Properly Revised in the 15-Day Changes.

The 15-Day Changes revise the Proposed Regulations to strike the provision that would have required all POUs to have retired RECs used for historic carryover within 36-months of generation of the resource. NCPA supports this change. While section 3206(a)(5) represents a reasonable recognition of past RPS procurement decisions and early actions of POUs that resulted in significant investments in renewable resources, the retroactive application of the 36-month retirement restriction would have essentially nullified the applicability of this provision. The 15-Day Changes properly strike this requirement. POUs may have eligible RECs from resources that were not previously tracked in either WREGIS or the Commission's Interim Tracking System (ITS). These resources can still be verified as eligible, and the RECs that are associated with the generation from those facilities can still be tracked and verified by the CEC; removing the needless retroactive application of the 36-month restriction is proper. The retroactive imposition of the 36-month retirement requirement for RECs would essentially have prohibited POUs from using this provision since POUs were not required to participate in either WREGIS or the ITS, and therefore would not have been required to submit documentation regarding the retirement of those RECs.

As currently proposed, rather than requiring all of the RECs to have been retired within 36-months of generation, POUs must submit all of their applicable claims 30 calendar days after the effective date of the regulation, and retire and report all of the applicable procurement to the

[18] TURN, p. 3.

Commission within that same time period. While there is clearly a need to submit the relevant information in a timely manner, including claims for retirement, the 30 days proposed is too restrictive. Engaging in this process is going to require a fair amount of report gathering and paperwork. For some, facility certification is still pending at the CEC since before October 2012, so the registration process is still not complete. Additionally, there is no fully defined process that details how the RECs to be used for historic carryover are to be "retired and reported," as required in the revised language. Once the process has been set out, both the CEC and the POUs will need to work together to ensure the RECs are properly tracked and verified in WREGIS or the ITS. Accordingly, even with the recognition that the registration and verification process should be completed in a concise and timely manner, 30 days does not present sufficient time to complete this process. NCPA proposes that the time be extended to 90-days after the effective date of the regulation, and at a minimum, allow at least 30 days after the CEC has approved the certification of facilities that are still awaiting final approval from the Commission. This modest delay will allow both the Commission and the POUs adequate time to complete the retirement and reporting process.

IV. It is Reasonable to Remove the Restriction on Contracts of Less than 10 Years for Calculating Excess Procurement

The 15-Day Changes would alter section 3206(a)(1) to remove the prohibition on using electricity products associated with contracts of less than 10 years when calculating the amount of resources eligible to be carried over as excess procurement. As more fully set forth in the comments submitted by the California Municipal Utilities Association (CMUA), the fundamental differences in traditional procurement practices between POUs and retail sellers warrant different consideration on the applicability of this provision. NCPA supports the rationale raised in CMUA's comments and the legal conclusion that the restriction should be removed.

V. Conclusion

As more fully discussed herein, the Commission should retain the procurement targets set forth in the February 2013 draft of the Proposed Regulations for the third compliance period, and strike the proposed change that would require a Commission determined quantitative

procurement target for each of the intervening years of that compliance period. Furthermore, NCPA urges the Commission to consider further revising the Proposed Regulations to:

1. Include specific references to the authority granted to POUs and their governing board in the enabling legislation;

2. Strike the references to the Commission's determination regarding the applicability of POU optional compliance mechanisms adopted pursuant to Public Utilities Code section 399.30(d); and

3. Strike the provisions of Public Utilities Code section 399.15(d) from the requirements in section 3206(a)(5) regarding cost limitations for procurement expenditures.

Dated this 6th day of May, 2013.

Respectfully submitted,

C. Susie Berlin, Esq.
LAW OFFICES OF SUSIE BERLIN
1346 The Alameda, Suite 7, #141
San Jose, CA 95126
Phone: 408-778-8478
E-mail: berlin@susieberlinlaw.com

Attorneys for the:
NORTHERN CALIFORNIA POWER AGENCY