Union of Concerned Scientists
Citizens and Scientists for Environmental Solutions

June 6, 2013

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 regarding the second 15-day language changes for the Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities.

Sincerely,

Laura Wisland
Senior Energy Analyst, UCS
2397 Shattuck Avenue, Ste. 203
Berkeley, CA 94704
510-843-1872
lwisland@ucsusa.org

COMMENTS OF THE UNION OF CONCERNED SCIENTISTS ON SECOND 15-DAY LANGUAGE CHANGES FOR THE ENFORCEMENT PROCEDURES FOR THE RENEWABLES PORTFOLIO STANDARD FOR LOCAL PUBLICLY OWNED ELECTRIC UTILITIES

The Union of Concerned Scientists ("UCS") submits these comments in response to the second 15-day language changes to the Enforcement Procedures for the Renewables Portfolio Standard ("RPS") for Local Publicly Owned Electric Utilities ("POUs") Proposed Regulations, which were released by the California Energy Commission ("Commission") on May 22, 2013.

In general, UCS strongly supports the work conducted by the Commission to develop these rules, and supported the proposed regulations. UCS strongly supports the adoption of a linear procurement assumption for the 2017-2020 compliance period as a necessary modification to the regulations in order to reflect the legislature's intent to establish equivalent procurement standards for both retail sellers and POUs. Furthermore, UCS supports the most recent modification that restored the banking provisions to the Commission's original proposal, which now appropriately reflect the plain intent of the statutory language.

Section 3204 – RPS Procurement Requirements

Section 3204 of the draft regulations establishes total RPS 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). For the 2014-2016 compliance period, the draft regulations require the POUs to maintain a procurement level equivalent to 20 percent of retail sales through 2015 and increase to 25 percent by 2016. The first set of 15-day changes made to the draft regulations, posted April 19, 2013, would require the POUs to assume a procurement trajectory equivalent to that of the retail sellers for the 2017-2020 compliance period, which is cumulatively equal to 27 percent of 2017 retail sales, 29 percent of 2018 retail sales, 31 percent of 2019 retail sales, and 33 percent of 2020 retail sales. [1] The second 15-day changes do not change the RPS procurement requirements from those established by the first 15-day changes.

The Legislature intended, in enacting SB 2 (1x), to establish equivalent procurement requirements for all electricity providers that reflect "reasonable progress," as measured by *actual procurement quantities*, throughout each compliance period. The evidence of this legislative intent is made clear by the use of the exact same words to define the procurement obligations for each of the three compliance periods for both retail sellers and POUs. For the purposes of these comments UCS identifies, in the table below[2], the identical statutory language that structures the compliance periods for the POUs (left-hand column) and the retail sellers (right-hand column).

[1] *See* CPUC Decision 11-12-020.

[2] Public Utilities Code sections 399.30(c)(1)-(2) and 399.15(b)(2)(B), emphasis added.

399.30(c)(1)-(2), relevant language highlighted in **bold**:	399.15(b)(2)(B), relevant language highlighted in **bold**:
(1) The quantities of eligible renewable energy resources to be procured for the compliance period from January 1, 2011, to December 31, 2013, inclusive, are equal to an average of 20 percent of retail sales. (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.**	(2)(B) 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 achieves 25 percent of retail sales by December 31, 2016, and 33 percent of retail sales by December 31, 2020.**

The identical language defining the first (2011-2013) compliance period has guided both the Commission and the CPUC to establish an equivalent 2011-2013 procurement obligation for both POUs and retail sellers. However, several POUs have tried to make the case that interpreting identical language should not lead to the same result for the second and third compliance periods. For example, the Los Angeles Department of Water and Power ("LADWP") argues that because the "express authority for POUs is a POU's governing board, while for IOUs it is the CPUC" the POUs should have the ability to adopt significantly lower procurement obligations for the second and third compliance periods.[3] This argument makes no sense. UCS does not disagree with LADWP that the express authority for POUs is a POU's governing board. As the express authorities over themselves, the POUs have a responsibility to adopt and implement RPS programs that conform to the statutory requirements set forth in Public Utilities Code section 399.30, which include quantitative evidence of reasonable procurement progress in each of the intervening years of a compliance period. The clear legislative requirement to structure procurement obligations in the same way for POUs and retail sellers is part of the POUs' obligation.

In addition, LADWP makes the case that because section 399.15(b)(2)(C) says "…Retail seller shall not be required to demonstrate a specific quantity of procurement for any individual intervening year," this means that POUs are also not required to make any quantitative procurement progress within the second and third compliance periods, beyond reaching 25

[3] Comments of the LADWP, May 6, 2013, p.6.

percent by 2016 and 33 percent by 2020.[4] Again, this argument falls flat. LADWP is correct that the law does not require each utility to reach a specific procurement level in any year within a compliance period. For example, a POU cannot be penalized for failing to reach 31 percent renewables in 2019. The law provides flexibility in terms of the rate at which a utility achieves a cumulative procurement target throughout the multiple years of a compliance obligation. However, the law is clear that *quantities* of procurement (not qualitative actions) are what should be measured by the phrase "reasonable progress": "The **quantities** of eligible renewable energy resources to be procured for all other compliance periods **reflect reasonable progress in each of the intervening years**…"[5]

UCS believes that the Commission's revision to the third compliance period obligation, which now assumes a linear procurement trajectory between 2017 and 2020 equivalent to the retail sellers' RPS obligation for the same timeframe, is not only reasonable and justified but necessary to conform with the clear legislative intent in the law. Therefore UCS urges the Commission to adopt the language in Section 3204 as currently drafted.

Section 3206 – Optional Compliance Measures

<u>Excess procurement: POUs are required by statute to abide by the same banking rules as retail sellers.</u>

The second 15-day changes to the draft regulations reversed a troubling and unsubstantiated modification to the banking rules that was proposed through the first set of 15-day changes. This change to the banking rules would have established a substantially different banking policy between POUs and retail sellers, and encouraged POUs to focus procurement on shorter-term contracts, which do little to promote the development of new renewable energy resources.

The optional compliance rules, including the banking rules for POUs, are contained in Public Utilities Code section 399.30(d). Each flexibility provision in this section is one sentence long and references other sections of the statute which describe the provisions in more detail. Section 399.30(d)(1) allows POUs to bank certain types of excess procurement: "Rules permitting the utilities 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*)

Section 399.13(a)(4)(B), which describe the banking rules "as allowed for retail sellers" says:

> 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*

[4] *Id*., pp.6-7.
[5] PU Code section 399.30(c)(2) (emphasis added).

> *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*)

Allowing certain types of RPS procurement to be carried from one compliance period to another creates flexibility for utilities to procure more electricity than they may need in a given compliance period. Any electricity from an eligible contract procured in one compliance period that a utility does not need to satisfy its RPS obligation can be carried forward to satisfy a future compliance obligation, rather than be sold to another utility for use in the present compliance period.

The principle behind why certain types of RPS contracts should not be eligible for banking rests on the reality that not all RPS procurement provides an equal amount of environmental value and ratepayer value to the RPS program. California's RPS program was created to provide several environmental and economic benefits, including resource diversity, air quality improvements, greenhouse gas emission reductions, and job creation. None of these benefits can be achieved unless the RPS program promotes the development of new renewable generation resources and displaces older, dirtier fossil resources. To build new renewable energy resources, developers almost always need a long-term contract (at least ten years or more) to secure necessary financing. Therefore, since new renewable energy projects increase the amount of clean generation on the electricity system, contracts that most directly promote the development of new renewable energy resources deliver the highest amount of environmental value to the RPS program. These new resources help reduce the amount of electricity generated from fossil fuels, which in turn reduces greenhouse gasses and criteria air pollutants. This is one of the most important reasons why Public Utilities Code Section 399.13(a)(4)(B) allows utilities to over-procure and bank renewable energy in the form of long-term contracts, but does not provide that similar flexibility to utilities that focus procurement on short-term contracts.

Another reason why the banking rules appropriately restrict eligibility to long-term contracts is the long-term price stability, or hedging value, they provide to ratepayers. Long-term contracts fix the price of electricity over the life of a contract - a valuable certainty that utilities and their ratepayers do not enjoy from natural gas contracts. This ratepayer hedging value reduces the need for utilities to pay for expensive hedging instruments to protect themselves from exposure to volatile fossil fuel prices.

In the second 15-day changes, the Commission appropriately reversed its previous proposal to allow POUs to bank short-term contracts for several legal and practical reasons. First, the statute clearly prohibits retail sellers from banking procurement associated with contracts of

less than ten years.[6] Public Utilities Code Section 399.30(d)(1) only gives the POUs the authority to adopt banking rules if they are applied "*in the same manner* as allowed for retail sellers pursuant to Section 399.13." (*emphasis added*) The use of the phrase "in the same manner as allowed for retail sellers" clearly requires the POUs to adopt the same banking restrictions as those imposed by the retail sellers.

Recent comments in this proceeding submitted by the California Municipal Utilities Association ("CMUA") to justify special banking rules for the POUs are not convincing. In its May 6, 2013 comments, CMUA argues that since the statute places no restrictions on POUs' ability to enter into short-term contracts, the statute should therefore place no restriction on the POUs' ability to bank short-term contracts.[7] This argument runs counter to both meaning and intention of the statute as such an interpretation would lead to quite different banking rules for POUs and retail sellers, despite the statutory requirement that POU rules be developed "in the same manner" as those developed for retail sellers.[8] There is no legal relationship between the authority to procure contracts of any length and the ability to bank some of those contracts from one compliance period to another. It is false to claim that since "no such [short-term contracting] limitation is applicable to POUs," no banking limitations should be applied to POUs.[9] Section 399.30(d)(1), the section of statute allowing POUs to bank excess procurement, only authorizes the practice as long as the rules are developed "in the same manner as allowed for retail sellers pursuant to Section 399.13."

CMUA also states that there is a practical reason why banking limitations should not apply to POUs. CMUA states that "POUs have and will likely continue to use short-term contracts for portfolio content category (PCC) 3 and, to a lesser extent, PCC2 electricity products."[10] First, by itself, that statement is not a compelling reason to allow POUs to bank excess short-term contracts from one compliance period to another. The amount of procurement that utilities may use to meet compliance requirements is restricted by Public Utilities Code section 399.16; the restrictions on PCC2 and PCC3 procurement become more stringent in each subsequent compliance period. The rules established in Section 399.16, not the banking restrictions, will determine the extent to which the POUs rely on PCC2 and PCC3 procurement.

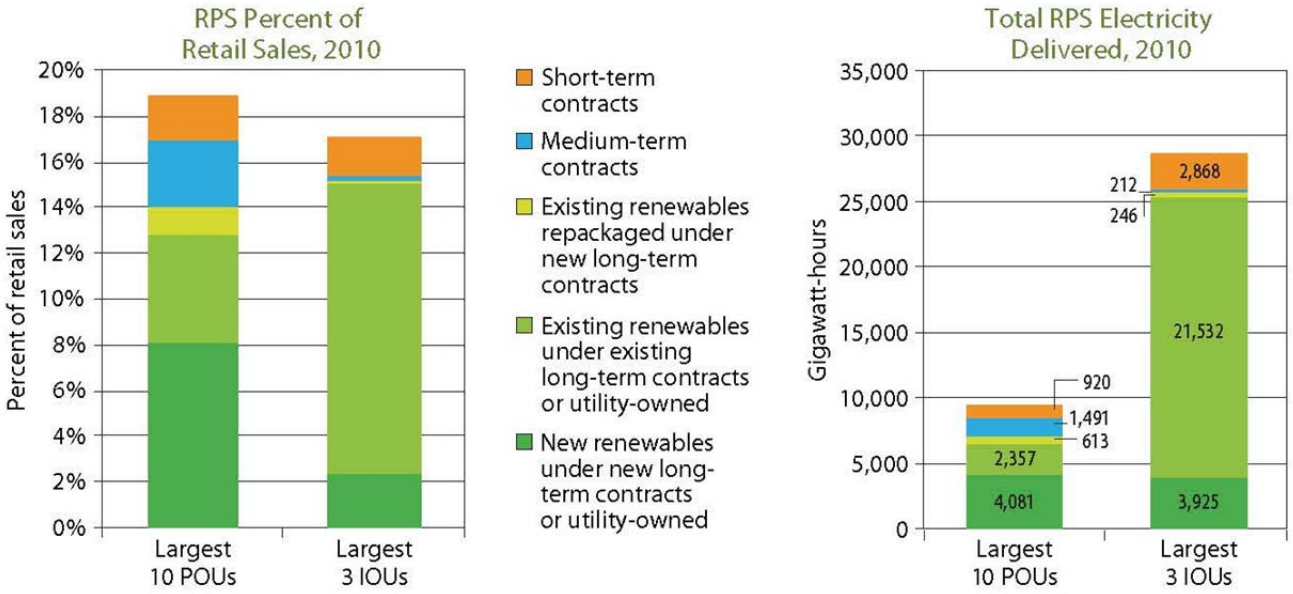
In addition, CMUA provides no evidence that a reliance on long-term contracts is a problem for POUs. In its own analysis – *The Clean Energy Race: How to California's Public Utilities Measure Up?* – UCS found the great majority of procurement from 2003-2010 conducted by the ten largest POUs in California was in the form of long-term contracts.[11] An analysis of the ten largest POUs obviously does not establish a thorough understanding of all of California's POUs, but it does provide a sense of how procurement is achieved for the great majority of electricity

[6] See Public Utilities Code 399.13(a)(4)(B)
[7] Comments of CMUA, May 6, 2013, p.8.
[8] *See* PU Code Section 399.30(d)(1).
[9] Comments of CMUA, May 6, 2013, p.8
[10] Comments of CMUA, May 6, 2013, pp.8-9.
[11] *The Clean Energy Race: How do California's Public Utilities Measure Up?*, Union of Concerned Scientists, July 2012, available at: www.ucsusa.org/cleanenergyrace.

delivered by POUs, in this case, over 80 percent of the electricity delivered by all the POUs in California. [12]

The image below is Figure 6 from UCS's *Clean Energy Race*, which compares POU procurement to IOU procurement in 2010, broken down by contract length.[13] Short-term contracts are defined as contracts lasting less than 4 years; medium term, 4-9 years; long-term, 10 or more years. Less than 25 percent of the RPS-eligible electricity these POUs delivered in 2010 came from contracts of less than ten years, contracts that would be ineligible for banking. And, over 93 percent of the gigwatt-hours procurement from contracts of less than ten years came from just two POUs.[14]

FIGURE 6. Renewable Energy Investments of the POUs and IOUs by Percent of Retail Sales and Total Electricity Delivered, 2010



It is clear that the statute requires POUs to adhere to the same banking rules as those established for retail sellers. Furthermore, there is no evidence to suggest that prohibiting short-term contract banking poses a practical problem for POUs. UCS therefore urges the Commission to adopt the language in Section 3206(a)(1)(A) as currently drafted.

[12] *See* Updated POU Database as of November r2011, California Energy Commission, http://www.energy.ca.gov/2008publications/CEC-300-2008-005/index.html

[13] UCS, *Clean Energy Race*, p.19, www.ucsusa.org/cleanenerygrace.

[14] For information on the contract lengths of individual POU procurement, see page 18 of The Clean Energy Race, www.ucsusa.org/cleanenergyrace.

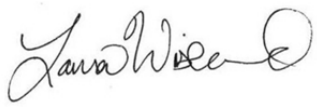
Delay of timely compliance: Standards for using flexible compliance measures should be consistent for all load-serving entities

UCS agrees with the revision made in the first 15-day changes to Section 3206(a)(2) that requires POUs to make a finding that "conditions beyond the control of the POU" exist to delay the timely compliance with RPS procurement requirements, as defined in Section 3204. In its comments on the first 15-day changes, LADWP suggests that this language "creates an unknown standard" and the language should revert back to "reasonable cause."[15]

Using a "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 believes 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 would create an uneven playing field between the retail sellers and the POUs and makes it easier for POUs to justify noncompliance. Therefore, UCS agrees with the present language in Section 3206(a)(2) and urges the Commission to adopt the regulations as drafted.

UCS sincerely appreciates the Commission's effort to develop these rules and the opportunity to submit comments on second set of 15-day changes.

Sincerely,



Laura Wisland
Senior Energy Analyst, UCS

[15] Comments of the LADWP, May 6, 2013, p.16.