BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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COMMENTS OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E) ON THE PROPOSED DECISION SETTING COMPLIANCE RULES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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I. INTRODUCTION AND BACKGROUND

Pursuant to Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission (the "Commission"), San Diego Gas & Electric Company ("SDG&E") hereby submits these comments concerning the proposed *Decision Setting Compliance Rules for the Renewables Portfolio Standard Program* (the "PD") issued in the above-captioned proceeding.

The PD implements changes to the Renewables Portfolio Standard ("RPS") program resulting from adoption of Senate Bill ("SB") x1 2 ("SB 2").[1/] Specifically, the PD implements changes to the rules for retail sellers' compliance with the RPS program and sets the parameters for retail sellers to report to the Commission on their compliance with RPS requirements.[2/] SDG&E commends the Commission for the thoughtful and comprehensive analysis reflected in the PD. The PD successfully resolves several critical outstanding issues related to implementation of the new RPS framework and provides clear guidance regarding RPS

1/ Senate Bill x1 2 (Stats. 2011, Ch. 1).
2/ PD, p. 2.

compliance. SDG&E generally supports the proposals set forth in the PD and, in particular, supports the PD's conclusions regarding forward banking of procurement in the new compliance framework. The proposed banking rules are logical and equitable, and will preserve significant value for utility ratepayers. By utilizing the full value of procurement that exceeds compliance period targets, ratepayers avoid the cost of additional unnecessary procurement.

While SDG&E strongly supports the PD, it offers below limited proposed modifications intended to (i) ensure that implementation of the 14% safe harbor is consistent with SB 2; (ii) clarify the requirements related to short-term contracting; (iii) clarify, to the extent a retail seller seeks to use renewable energy credits ("RECs") to satisfy a prior deficit, what REC requirements apply; and (iv) clarify the relationship between the June 1 annual RPS compliance report deadline and the availability of transaction data included in the Western Renewable Energy Generation Information System ("WREGIS") administered by the California Energy Commission ("CEC").

II.
DISCUSSION

A. The PD Should be Modified to Allow Retail Sellers to Include Banked Pre-2011 Procurement in the 14% Safe Harbor Calculation

SB 2 establishes a "safe harbor" for retail sellers with a procurement deficit under the prior RPS program. Specifically, new § 399.15(a) provides that "[f]or any retail seller procuring at least 14 percent of retail sales from *eligible renewable energy resources* in 2010, the deficits associated with any previous renewables portfolio standard shall not be added to any procurement requirement pursuant to this article."[3/] The PD correctly acknowledges that the 14% showing contemplated in new § 399.15(a) is required *only* where an RPS-obligated LSE has

[3/] Emphasis added. All statutory references herein are to the Public Utilities Code unless otherwise noted.

a deficit in a compliance year prior to January 1, 2011.[4/] The PD errs, however, in determining that the 14% calculation does not include retail sellers' banked procurement.[5/] This conclusion contravenes the plain language of SB 2 and is contrary to the public interest.

The PD offers no statutory support for its conclusion that banked procurement must be excluded from the 14% calculation beyond reliance on the claim by The Utility Reform Network ("TURN") that "there is no indication that SB 2(1X) intended to allow the use of banked procurement for this purpose."[6/] This claim is incorrect; the plain language of SB 2 establishes that banked procurement is among the "eligible renewable energy resources" that may be used to calculate the 14% safe harbor. Under new § 399.15(a), a retail seller making the 14% showing must demonstrate that it procured "at least 14 percent of retail sales *from eligible renewable energy resources* in 2010." (Emphasis added). Apart from the percentage value, this language mimics the prior (pre-SB 2) § 399.11(a), which required retail sellers to "attain a target of generating 20 percent of total retail sales of electricity in California *from eligible renewable energy resources* by December 31, 2010." (Emphasis added). Similarly, the new § 399.11(a) requires retail sellers to "attain a target of generating 20 percent of total retail sales of electricity in California *from eligible renewable energy resources* by December 31, 2013, and 33 percent by December 31, 2020 . . ."

Thus, under new § 399.15(a) a retail seller must demonstrate satisfaction of the 14% procurement requirement in exactly the same manner that it demonstrates compliance with either the 20% or 33% procurement requirements. In other words, under both the 20% and 33% RPS programs, a retail seller could satisfy the requirement to attain a specified percentage of total retail sales "from eligible renewable energy resources" through a combination of actual

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[4/] *See* PD, p. 19.
[5/] *Id.* at p. 21.
[6/] *Id.*

procurement and banked procurement. Therefore, it is logical to conclude that a retail seller can demonstrate that it attained 14% of total retail sales "from eligible renewable energy resources" through a combination of actual procurement and banked procurement. Since the 14% showing relates to the 2010 compliance year, the relevant procurement bank for purposes of the 14% showing is the procurement bank available in 2010.

The California Supreme Court has observed that "[i]f there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs. Where the statute is clear, courts will not interpret away clear language in favor of an ambiguity that does not exist."[7/] There exists no ambiguity in SB 2 regarding the calculation of the 14% safe harbor. By using language to articulate the 14% safe harbor provision that exactly mirrors the language used to articulate the overall 33% procurement requirement, the Legislature signified its intent that resources available to calculate compliance in each instance be identical.

The PD ignores this straightforward statutory construction, however, and offers a policy argument to support its finding that the 14% safe harbor must be calculated based on actual procurement. It observes that "the safe harbor provision provides a potentially large benefit to retail sellers," and determines that "it is reasonable to conclude that the Legislature did not intend this benefit to be too easily available."[8/] SDG&E notes as a threshold matter that the plain language of the RPS statute obviates the need to construe Legislative intent through consideration of policy arguments. Moreover, it notes that the purpose of the 14% safe harbor was to acknowledge the significant obstacles to achieving the 20% RPS mandate faced by retail sellers rather than to confer a "benefit" upon them.

[7/] *Lennane v. Franchise Tax Board*, 9 Cal. 4th 263, 268 (1994).
[8/] PD, p. 20.

From its earliest implementation of the RPS program, the Commission has recognized that banking of excess procurement promoted the policy goals of the RPS legislation by creating an incentive for early procurement and smoothing out "lumpiness" in procurement of renewable generation.[9/] The PD's exclusion of banked procurement from the 14% safe harbor calculation would contravene this view, unreasonably penalizing retail sellers for undertaking procurement early in the RPS program implementation and for the inherent lumpiness of renewable generation procurement, all to the detriment of ratepayers. It is contrary to the plain language of the statute and would not serve the public interest to exclude banked procurement from the 14% safe harbor calculation. Accordingly, the PD should be amended to provide that to the extent a retail seller seeks to rely upon the 14% safe harbor to avoid carry-forward of a pre-2011 deficit, it may include procurement banked through the 2010 compliance period in its 14% calculation.

B. The PD Should be Modified to Clarify the Requirements Related to Short-Term Procurement

The PD authorizes, pursuant to § 399.13(b), use of short-term contracts (*i.e.*, contracts with a duration of less than 10 years) for RPS compliance, provided that the retail seller enters into a minimum quantity of long-term contracts (*i.e.*, contracts of at least 10 years' duration).[10/] The minimum quantity proposed in the PD is 0.25% of the prior year's retail sales (in the case of Compliance Period 1) or the prior Compliance Period's retail sales (in the case of Compliance Periods 2 and 3). SDG&E supports this proposed minimum quantity calculation, but notes that for Compliance Periods 2 and 3, the procurement quantity will be significantly higher than for Compliance Period 1 inasmuch as the minimum quantity to be procured for Compliance Period 2 and 3 represents 0.25% of procurement for a three-year period rather than a one-year period.

[9/] *See* D.03-03-06-071, *mimeo*, p. 44.
[10/] PD, pp. 31-45.

In order to avoid creating a major obstacle to short-term procurement, which can in certain instances provide significant ratepayer benefits, SDG&E requests that the PD be revised to clarify that retail sellers may undertake short-term procurement at any time during a compliance period, and may make their showing regarding satisfaction of the minimum quantity requirement at the conclusion of the compliance period. In other words, retails sellers should not be required to satisfy the minimum threshold requirement as a prerequisite to short-term procurement. If a retail seller elects to undertake short-term procurement during a compliance period and then fails, by the end of the compliance period, to satisfy the minimum quantity requirement, it would not receive RPS credit for the short-term procurement. It would be the retail seller's obligation to manage its procurement process effectively; it (or its shareholders) would bear the risk of its failure to do so.

In addition, SDG&E raises an issue that was not squarely addressed by commenting parties and is not discussed in the PD, but that may warrant further consideration by the Commission, either in the context of the PD or in a subsequent phase of the proceeding. Specifically, retail sellers that are very close to achieving compliance with the relevant RPS target in a compliance period may require short-term procurement as a bridge to future deliveries, but may <u>not</u> have a need to enter into new contracts for long-term procurement. For example, if an unexpected maintenance issue or drastic change in resource availability creates a temporary decline in generation during a compliance period, the most economic method of ensuring compliance with RPS goals would be to procure short term replacement generation. The need for such short term generation does not necessarily mean that the retail seller also needs to procure long term contracts in order to reach its compliance goals.

The short-term procurement requirement proposed in the PD is based on the retail seller's signing of new long-term contracts in the year in which it signs short-term contracts, rather than on deliveries under an existing contract. If there is a need for short-term deliveries in a compliance period in the absence of a parallel need for new long-term contracts (because future needs have been met by previous long term contracting) the retail seller may be forced to enter into a surplus long-term contract in order to satisfy the requirements for signing a short-term contract. This issue (with its associated ratepayer burden) would be resolved by allowing the minimum quantity requirement to be satisfied by showing that the requirement is met through deliveries from long-term contracts rather than (or even as an alternative to) execution of new long-term contracts.

It appears that § 399.13(b) would permit this approach. The provision states that "[t]he commission may authorize a retail seller to enter into a contract of less than 10 years' duration with an eligible renewable energy resource, if the commission has established, for each retail seller, *minimum quantities of eligible renewable energy resources to be procured through contracts of at least 10 years' duration*." The provision does not expressly require that contracts be *new* long-term contracts; it is reasonable to conclude that the minimum quantities of eligible renewable energy resources could come from existing long-term contracts. The PD rejects the notion of allowing the minimum quantity requirement to be satisfied through delivered generation, noting that "[s]hifting the minimum quantity requirement to count procurement used for RPS compliance, rather than procurement promised by contracts signed, would significantly change prior rules," and further that this change "is not needed to encourage long-term contracting."[11/] SDG&E agrees with the PD's conclusion that the proposed change is not necessary to ensure long-term contracting, but notes that it could be a solution to the concern

[11/] PD, p. 34.

outlined above, and would effectively protect ratepayers from the potential cost burden of surplus long-term contracting.

C. The PD Should be Modified to Clarify whether Renewable Energy Credits Used to Make up a Prior Deficit Must Comply with pre-SB 2 Requirements

The PD concludes that a retail seller with a prior (pre-2011) deficit may use any RPS-eligible procurement to make up the deficit without regard to portfolio content categories or the requirements for the use of short-term contracts.[12/] SDG&E supports this approach to resolution of procurement deficits. It seeks clarification, however, regarding use of RECs to make up a prior deficit. SB 2 modified the requirements related to use of RECs for RPS compliance by, for example, removing the delivery requirement that existed under the prior (pre-SB 2) § 399.16(a)(3).[13/] To the extent a retail seller intends to use RECs to resolve a pre-2011 procurement deficit, it must understand whether the RECs procured for that purpose must comply with pre-2011 requirements (since the procurement deficit relates to the pre-2011 RPS framework) or may instead comply with the requirements of the SB 2 framework. Accordingly, SDG&E seeks clarification of this issue in the final decision.

D. The PD Should be Modified to Make Clear that the June 1 Filing Deadline for the Annual RPS Compliance Report is Dependent Upon Timely Access to WREGIS Data

The PD proposes that annual RPS compliance reports be submitted on June 1 of the year following the year that is the subject of the report.[14/] It observes that requiring that the annual report be filed on this date will give retail sellers more than two months to review transaction

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[12/] *Id.* at p. 24.

[13/] Prior § 399.16(a)(3) provided that the Commission could authorize use of RECs for RPS compliance, subject to the condition, *inter alia*, that "[t]he electricity is delivered to a retail seller, the Independent System Operator, or a local publicly owned electric utility."

[14/] PD, p. 69.

data included in WREGIS since transactions for a calendar year should be settled in WREGIS by April 1 of the following year. SDG&E does not object to the June 1 filing date for annual RPS reports, but notes that it is dependent upon timely access to WREGIS data. To the extent this access is delayed, filing of the annual report will necessarily be delayed. Accordingly, the PD should be revised to provide discretion to the Energy Division to amend the filing date for annual RPS reports as necessary to respond to delays in availability of WREGIS data.

E. The PD Should be Modified to Avoid Pre-Judging Requests for Confidential Treatment of RPS Data

The PD sets forth process requirements related to (i) preparation of a "closing report" calculating retail sellers' "netted out" positions (*i.e.*, sum of all pre-2011 annual procurement target deficits plus banked procurement); and (ii) calculation of retail sellers' 2010 procurement in order to determine attainment of the 14% safe harbor.[15/] The PD directs the Director of the Energy Division to develop instructions and requirements for performing these calculations, and authorizes him to require the submission of necessary documentation.[16/] The PD finds that "[b]ecause both the closing report and the safe harbor calculation will present information about retail sales and RPS procurement more than one year in the past, there is no need for confidentiality protection."[17/]

SDG&E submits that this finding is premature. It is not yet clear what documentation the Energy Division will require, thus it is too soon to make a judgment regarding confidentiality of the data required. It would be more appropriate to wait until a final determination is made

[15/] *Id.* at pp. 17-19, 22-23.
[16/] *Id.* at pp. 18-19, 22.
[17/] *Id*. at p. 22.

regarding the RPS data to be provided and to allow retail sellers to seek confidential protection at the time they submit the required RPS data, as appropriate, according to the Commission's confidentiality rules.

III.
CONCLUSION

For the reasons set forth above, the PD should be modified in accordance with the discussion herein.

Respectfully submitted this 14th day of May, 2012.

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AFFIDAVIT

I am an employee of the respondent corporation herein, and am authorized to make this verification on its behalf. The matters stated in the foregoing **COMMENTS OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E) ON THE PROPOSED DECISION SETTING COMPLIANCE RULES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM** are true of my own knowledge, except as to matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed this 14th day of May, 2012, at San Diego, California

/s/ Hillary Hebert
Hillary Hebert
Partnerships and Programs Manager
Origination and Portfolio Design Department