STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

PUBLIC UTILITIES COMMISSION
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TO PARTIES OF RECORD IN RULEMAKING 11-05-005

This is the proposed decision of Administrative Law Judge (ALJ) Anne E. Simon. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Anne E. Simon at aes@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ STEVEN KOTZ for
Karen V. Clopton, Chief
Administrative Law Judge

KVC:lil

Attachment

Decision **PROPOSED DECISION OF ALJ SIMON** (Mailed 10/7/2011)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	Rulemaking 11-05-005 (Filed May 5, 2011)

DECISION IMPLEMENTING PORTFOLIO CONTENT CATEGORIES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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APPENDIX A

DECISION IMPLEMENTING PORTFOLIO CONTENT CATEGORIES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

1. Summary

By this decision, the Commission begins implementing the many changes to the renewables portfolio standard (RPS) program made by recent legislation.[1] This decision focuses on new Pub. Util. Code § 399.16, which established three new portfolio content categories for RPS procurement and sets limitations on the use of procurement in each category.

Beginning on December 10, 2011, the effective date of the new statute, investor owned utilities (IOUs) will be required to provide specific information to the Commission in their advice letters seeking approval of RPS procurement contracts that would allow Commission staff to evaluate the categorization of the planned procurement and the value and risk of procurement in those categories to IOU ratepayers. In addition, this decision requires all retail sellers (IOUs), electric service providers, and community choice aggregators) to provide sufficient information for Commission staff to make an after the fact determination of whether a retail seller's claimed RPS procurement actually meets the requirements of the new portfolio content categories.

This decision also confirms the ruling in the Scoping Memo and Ruling of Assigned Commissioner (July 8, 2011) that small and multi-jurisdictional utilities

[1] Senate Bill (SB) 2 (1X) (Simitian), Stats. 2011, ch. 1, enacted in the 2011-2012 First Extraordinary Session of the Legislature, will "go into effect on the 91st day after adjournment of the special session at which the bill was passed." (Gov't. Code § 9600(a).) The 2011-2012 First Extraordinary Session adjourned on September 10, 2011, making SB 2 (1X) effective on December 10, 2011.

are not required to comply with the statutory limitations on procurement in each of the new portfolio content categories. This proceeding remains open.

2. Procedural History

The Order Instituting Rulemaking (OIR) for this proceeding was adopted by the Commission on May 5, 2011. Comments on the OIR were filed by more than 40 parties on May 31; reply comments were filed by 13 parties on June 9, 2011. A prehearing conference was held on June 13, 2011. The Scoping Memo and Ruling of Assigned Commissioner (Scoping Memo) was issued July 8, 2011.

The Scoping Memo noted that SB 2 (1X) makes significant changes to the renewables portfolio standard (RPS) program.[2] The Scoping Memo identified four "highest priority" issues for immediate attention in the Commission's implementation of the new statute. One of these issues is implementing the new RPS procurement portfolio content categories, set forth in new § 399.16, attached as Appendix A.

On July 12, 2011, the Administrative Law Judge's (ALJ's) Ruling Requesting Comments on Implementation of New Portfolio Content Categories for the RPS Program (Ruling) asked parties to comment on the interpretation of the new statutory provisions and to make suggestions about how the Commission should integrate the new portfolio content categories in its administration of the RPS program.

[2] The RPS is codified at Pub. Util. Code § 399.11-399.20. Unless otherwise noted, all further references to sections are to the Public Utilities Code.

Comments were filed on August 8, 2011 by 41 parties.[3] Reply comments were filed on August 19, 2011 by 28 parties.[4] Many commenting parties participated in the development of a "reference proposal" outlining areas of broad consensus and issues these parties consider to be "open" about the interpretation of new § 399.16, which is attached to the comments of several parties.[5]

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[3] Comments were filed by Alliance for Retail Energy Markets (AReM); Arizona Public Service Company (APS); BP Wind Energy North America Inc. (BP); California Municipal Utilities Association (CMUA); California Wastewater Climate Change Group; Calpine Corporation (Calpine); Center for Energy Efficiency and Renewable Technologies (CEERT); Center for Resource Solutions (CRS); City and County of San Francisco (CCSF); Clean Energy Renewable Fuels, LLC (Clean Energy); Coalition of California Utility Employees (CUE); County Sanitation Districts of Los Angeles County (Sanitation Districts); Davenport Newberry Holdings LLC (Davenport); Division of Ratepayer Advocates (DRA); Duke Energy Corporation (Duke Energy); enXco Development Corporation (enXco); Evolution Markets; Green Power Institute (GPI); Iberdrola Renewables, Inc. (Iberdrola) ; Independent Energy Producers Association (IEP); Large Scale Solar Association (LSA); Los Angeles Department of Water and Power (LADWP); LS Power Associates, L.P (LS Power); Marin Energy Authority (Marin Energy); NextEra Energy Resources, LLC (NextEra); Noble Americas Energy Solutions LLC (Noble Solutions); Northwest Energy Systems Company; NV Energy, Inc.; Ormat Technologies Inc. (Ormat); Pacific Gas and Electric Company (PG&E); Powerex Corporation (Powerex); San Diego Gas & Electric Company (SDG&E); Sempra Generation; Shell Energy North America (US), L.P. (Shell); Sierra Club California; SolarReserve, LLC; Southern California Edison Company (SCE); The Utility Reform Network (TURN); TransWest Express LLC (TransWest); Union of Concerned Scientists (UCS); and Western Power Trading Forum (WPTF).

[4] Reply comments were filed by AReM; CMUA; California Wastewater Climate Change Group; Calpine; CCSF; CUE; Sanitation Districts; Davenport; DRA; Duke Energy; Iberdrola; LSA; LS Power; Noble Solutions; NV Energy; PG&E; PacifiCorp; Powerex; SDG&E; SolarReserve; SCE; Solar Alliance, California Solar Industries Association, Vote Solar (jointly; collectively, Solar Alliance); TURN; TransWest; UCS; and WPTF.

[5] The Reference Proposal Outlining Areas of Broad Consensus and Open Issues ("Reference Proposal") lists CUE, DRA, enXco, First Solar, Iberdrola, IEP, LSA, NextEra, PG&E, SDG&E, SCE, TURN, and UCS as parties participating in these discussions.

3. Discussion

3.1. Legislative Background

The RPS program has been the subject of much legislation and many decisions by this Commission.[6] Most recently, Senate Bill (SB) 2 (1X) (Simitian), stats. 2011, ch. 1 was enacted in the First Extraordinary Session of the Legislature.[7] SB 2 (1X) becomes effective December 10, 2011, the 91st day after the end of the special session in which it was enacted.[8]

SB 2 (1X) makes numerous changes to the RPS program, most notably extending the RPS goal from 20% of retail sales of all California investor owned utilities (IOUs), electric service providers (ESPs), and community choice aggregators (CCAs) by the end of 2010, to 33% of retail sales of IOUs, ESPs, CCAs and publicly owned utilities by the end of 2020.[9] SB 2 (1X) also modifies or changes many details of the RPS program, including creating portfolio content categories for RPS procurement.

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[6] The RPS program was initiated by SB 1078 (Sher), Stats. 2002, ch. 516, which set a goal for retail sellers of providing 20 per cent of their retail sales from eligible renewable energy resources by 2017. SB 107 (Simitian), Stats. 2006, ch. 464, accelerated the 20% goal to 2010, as well as making other changes in the RPS program. See also the OIR for this proceeding, at 1, 7.

[7] SB 2 (1X) is substantially similar to SB 722 (Simitian), introduced in the 2009-2010 session of the Legislature but not enacted.

[8] Gov't Code § 9600(a).

[9] The Commission has jurisdiction, for RPS purposes, over the first three groups of retail sellers; it does not have jurisdiction over publicly owned utilities. Pub. Util. Code §§ 399.12(j); 399.30(p).

3.2. Plan of this Decision

This decision is the first of several decisions that will be needed to implement the complex provisions of SB 2 (1X). This decision focuses on new § 399.16, which establishes three new portfolio content categories for RPS procurement and sets limitations on the use of procurement in each category.[10] It proceeds largely in the same order as the statutory sections, although some issues are addressed out of chronological order, when they logically first appear. Consideration of some statutory provisions is deferred to later decisions where they may be grouped with other sections presenting similar issues.

Because SB 2 (1X) becomes effective near the end of 2011, provisions of the RPS statute in effect prior to that time are referred to in this decision as "current" or "prior" provisions or sections; provisions as they will be upon the effective date of SB 2 (1X) are referred to as "new."

Since the principal task of this decision is implementing new statutory provisions, the decision is guided by the basic principles of statutory construction. The California Supreme Court has enunciated clear standards for courts or agencies construing a statute. The Commission must

> look to the statute's words and give them their usual and ordinary meaning. The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the statutory language permits more than one reasonable interpretation, courts

[10] Many parties have adopted the term "bucket" to refer to a portfolio content category; thus, "Bucket 1," "Bucket 2," and "Bucket 3." While this shorthand can be useful, the analysis presented in the parties' comments and carried through in this decision reveals that the portfolio content categories have a more complex structure than can be captured by the "bucket" metaphor. This decision therefore does not use the "bucket" designation.

> may consider other aids, such as the statute's purpose, legislative history, and public policy. . . .
>
> Where more than one statutory construction is arguably possible, our policy has long been to favor the construction that leads to the more reasonable result. This policy derives largely from the presumption that the Legislature intends reasonable results consistent with the apparent purpose of the legislation.[11]

Although the courts remain the ultimate arbiters of statutory meaning, they accord deference to the Commission's reasonable interpretation of statutes. (*Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, 410; *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1090-1091.)

This decision also of necessity sets basic parameters for some of the administrative processes necessary to implement the new statutory requirements. Because retail sellers have ongoing RPS procurement and compliance obligations, practical questions such as what information IOUs must provide in their advice letters and how compliance with the portfolio content requirements can be shown must be addressed in the near term, though issues will continue to arise and require resolution as implementation of SB 2 (1X) proceeds.[12] The Commission's approach to these regulatory issues is outlined as it applies to each portfolio content category.

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[11] *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.

[12] In the current RPS program, retail sellers submit semi-annual compliance reports, but their final compliance reports for a compliance year are not required until the CEC has completed its verification process for that year. D.06-10-050. New § 399.15 makes significant changes to the compliance periods and targets for retail sellers. The Commission will address the process of adjusting compliance reporting requirements to

Footnote continued on next page

Finally, some issues that are not in the text of new section 399.16, but are necessary to the implementation of the new provisions, are also addressed, such as the former requirement for "delivery" of RPS-eligible resources to California.

3.3. Repeal of "Delivery" Requirement for RPS Eligibility

SB 107 set certain requirements for the RPS eligibility of generation facilities and generation, including a requirement that electricity must be "delivered" in order to be RPS-eligible.[13] SB 2 (1X) eliminates the "delivery" requirement for RPS eligibility by amending Pub. Res. Code § 25471 to remove the references to delivery.[14] The California Energy Commission (CEC) is responsible for administering both the current and the new RPS eligibility requirements. (See current § 399.13 and new § 399.25.) The CEC's implementation of the RPS eligibility rules is set forth in its *Renewables Portfolio Standard Eligibility Guidebook* (*Eligibility Guidebook*).[15]

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the new statutory scheme, including the new portfolio content categories, in later decisions implementing SB 2 (1X). At this time, the CEC has not indicated how it will include the new provisions in its verification process.

[13] These requirements are found in the Public Resources Code, in current Pub. Res. Code § 25471(a) and current Pub. Res. Code § 25741(b)(2).

[14] New Pub. Util. Code § 399.21, added by SB 2 (1X), amends and renumbers current § 399.16, which authorizes the use of renewable energy credits (RECs) for RPS compliance under certain conditions. New § 399.21 makes a conforming change to eliminate the requirement in current § 399.16(a)(3) that the electricity associated with a REC must be "delivered to a retail seller, the Independent System Operator, or a local publicly owned electric utility."

[15] The current edition of the *Eligibility Guidebook* is the fourth edition (January 2011), found at http://www.energy.ca.gov/2010publications/CEC-300-2010-007/CEC-300-2010-007-CMF.PDF.

Under the current "delivery" rules, Commission approval of a utility's RPS procurement transaction with RPS-eligible generators interconnected to the Western Electricity Coordinating Council (WECC) transmission system outside California requires documentation that the CEC has reviewed the structure of the transaction and decided that it meets the "delivery" requirement for RPS eligibility. (See, e.g., Resolution (Res.) E-4390, Appendix A.) This requirement must change, since it is based on the SB 107 "delivery" requirement.

Some parties argue that the repeal of the "delivery" requirement for RPS eligibility is effective as soon as SB 2 (1X) is effective.[16] Others assert that the "delivery" requirement remains in effect until the CEC removes it from the *Eligibility Guidebook*.[17] Although it is true that the CEC's *Eligibility Guidebook* provides guidance for how to meet the "delivery" requirement and for verification that it has been met, the legal requirement for "delivery" as provided by SB 107 ceases to exist once its repeal by SB 2 (1X) goes into effect on December 10, 2011. Therefore, independent of the CEC's *Eligibility Guidebook*, this Commission's authority to require a demonstration that an RPS procurement transaction filed for review by the Commission meets the "delivery" requirement ends when the repeal goes into effect.[18]

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[16] These include CMUA, PG&E, Sempra, and UCS. IEP agrees but believes that changes to the *Eligibility Guidebook* are also required.

[17] These include CEERT, DRA, Marin Energy, and Noble Solutions (which argues that the appropriate date is the latest of the SB 2 (1X) effective date, this Commission's implementation decision, and CEC's revision of the *Eligibility Guidebook*).

[18] The CEC will follow its own procedures to make any changes to the *Eligibility Guidebook* that it determines are appropriate to implement its responsibilities under SB 2 (1X), and nothing in this decision is intended to prejudge the outcome of the CEC's review and revision of its *Eligibility Guidebook*.

TURN and SCE suggest that this change to the RPS eligibility requirements allows parties (i.e., buyers and sellers) to RPS contracts approved by the Commission prior to December 10, 2011 to ignore or cease to enforce the delivery provisions in those contracts. Other parties assert that contracts approved by the Commission prior to December 10, 2011 should not be affected by the elimination of the delivery requirement.[19]

The statutory change, without more, does not alter a contract approved by the Commission. The terms and conditions of any RPS contract approved by the Commission remain in effect, including the delivery requirements, unless and until amended by the parties. Because any change to the approved delivery structure may have value and price implications for ratepayers, the IOUs must submit any such amendments for approval by the Commission. Any contract amendments changing the delivery structure approved under the prior "delivery" requirement may be submitted directly to the Commission, without needing prior CEC approval, at any time after December 10, 2011.

The Commission does not review or approve the RPS procurement contracts of ESPs and CCAs. Accordingly, changes to the delivery structure in their contracts may also be made without Commission review. If, after December 10, 2011, an ESP or a CCA makes changes to a contractual delivery structure set up prior to that date, it must be prepared to present documentation and explanation of the changes if requested to do so by Energy Division staff to facilitate a compliance determination.[20]

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[19] These include DRA, GPI, Iberdrola, IEP, Ormat, and PG&E.

[20] As a general matter, ESPs and CCAs must provide relevant compliance documentation to Energy Division staff. D.06-10-019, D.06-10-050, D.11-01-026.

The impact of the repeal of the "delivery" requirement for RPS eligibility on the new portfolio content categories is discussed more fully below.

3.4. Section 399.16(b): RPS Portfolio Content Categories

The three portfolio content categories created by SB 2 (1X) are set out in new § 399.16(b). Each category includes criteria by which inclusion in the category is to be evaluated. The categories apply in terms to "eligible renewable energy resource electricity products" that meet the criteria for one of the categories. In response to the Ruling, parties propose a variety of interpretations of this phrase, some focusing on the procurement transaction;[21] some focusing on the generation source;[22] some on how the electricity products should be delivered to a retail seller;[23] and some on the products themselves.[24]

Examining these proposals leads to the conclusion that the phrase "eligible renewable energy resource electricity products" describes the analytically important elements of each portfolio content category. As long as the portfolio content criteria are understood to apply to RPS-eligible generators and generation (as all parties agree), the "product" is simply "that which meets the criteria for this category or subcategory."[25] One RPS procurement contract can thus either sell one "product," or provide for the sale of different "products" meeting different portfolio content category criteria, as long as the criteria are

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[21] These include BP, Calpine, DRA, GPI, Iberdrola, IEP, LS Power, Noble Solutions, Ormat, Sanitation Districts, TURN, and UCS.

[22] These include PG&E, Shell, and WPTF.

[23] These include LADWP and SCE.

[24] These include AReM, CEERT, NV Energy, and TransWest.

[25] In § 399.16(b)(1) and § 399.16(b)(3), more than one set of criteria is provided.

clearly differentiated and the information necessary for Energy Division staff's evaluation of IOUs' contracts (including upfront showing of portfolio content category) is provided.

As will become evident from the discussion below, implementing the new portfolio content categories will require all participants in the RPS market to acquire and provide more information about their transactions than has been needed in the current program. The additional information is necessary for both the "upfront showing" when an IOU seeks Commission approval of an RPS procurement contract, as well as to inform a subsequent "compliance determination" by this Commission for all retail sellers.

IOUs[26] will be required to make an upfront showing related to the categorization of each procurement transaction that will allow the Commission to evaluate value to ratepayers, price reasonableness, and facial consistency with portfolio content category rules and requirements for each transaction.[27] This upfront showing will need to be sufficiently detailed and reliable to justify a finding that the IOU may recover its costs for the contract. SDG&E urges that

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[26] Imposing such requirements on IOUs whose contracts we approve is based on our responsibility to protect ratepayers from unreasonable costs, including those that may arise from RPS procurement. See D.11-01-026, at 19; D.07-11-025, at 26. This responsibility to IOU ratepayers, however, does not alter the statutory requirements for the portfolio content *categories,* which apply equally to all retail sellers.

[27] IOUs are required to do this because the Commission approves their contracts and is required to ensure just and reasonable rates. (The Commission generally does not review the contracts of mult-ijurisdictional utilities. See D.08-05-029; See also Section 399.17, discussed below.) All retail sellers should maintain similar documentation, because in making its compliance determinations, the Commission may need to review the way the transaction was characterized and paid for when it was initiated.

cost recovery be allowed even if the procurement turns out not to meet the criteria of the portfolio content category presented to the Commission initially. SDG&E's position is reasonable, however, only if enough information is presented upfront for the Commission to be reasonably sure that the portfolio content category is correctly characterized. This is likely to require that the IOUs provide additional information in their advice letters seeking approval of RPS procurement contracts, so that the Commission and stakeholders may assess the risks involved with the contract and the range of value to ratepayers the contract may provide.

A subsequent compliance determination by Commission staff will require all retail sellers to provide to Energy Division staff documentation adequate to demonstrate that procurement that occurred in fact meets the criteria of the portfolio content category in which the procurement is claimed. For those categories in which multiple criteria must be satisfied, the retail seller's showing for the compliance determination must meet all relevant criteria, set forth by the statute and implemented in this decision.[28]

The upfront showing by IOUs and the after the fact compliance determination made by Commission staff will be important components of

[28] The determination by the Commission of compliance with specific RPS procurement requirements is different from the Commission's enforcement of the overall RPS percentage procurement targets. The Commission's enforcement of RPS targets is based on the CEC-verified total RPS-eligible generation of each retail seller. (D.06-10-050.) The Commission determines compliance with specific procurement requirements (e.g., portfolio content categories, portfolio content category usage limits, requirements for use of short-term contracts (see D.07-05-028; new section 399.13(b)) based on the compliance spreadsheets and supporting information provided by each retail seller. (D.06-10-050.)

administration of the portfolio content categories. It is likely that modifications to Energy Division's advice letter template and RPS compliance spreadsheet will be required. The complete requirements will be developed by Energy Division staff; some may also be reflected in future decisions. In this decision, preliminary—but real—direction is given to retail sellers and Energy Division staff on how to structure such showings and determinations.

Because of the complexity of the new portfolio content categories, it is critical that sellers of RPS-eligible electricity know what they are selling; that buyers know what they are buying; and that the Commission is able to evaluate the portfolio content claims of retail sellers. The fundamental structure of an RPS procurement transaction must be accessible to all participants in a reasonably transparent and intelligible form. To that end, and as elaborated with respect to each category below, it is reasonable to adopt two basic, if somewhat colloquially expressed, tenets for the process of determining compliance with the portfolio content categories.

The first tenet is: "What you buy is what you have." For example, if a buyer enters into a contract for firmed and shaped electricity that meets the criteria of § 399.16(b)(2), below, upon successful completion of the transaction, the buyer has potential RPS credit for procurement in that portfolio content category associated with the buyer's contract.[29]

The second is: "What you have is what you retire for RPS compliance." If the buyer of the firmed and shaped electricity retires in the Western Renewable Energy Generation Information System (WREGIS) the renewable energy credits

[29] If the procurement ultimately does not meet the criteria of the claimed category, a different problem is presented. See the discussion of § 399.16(a)(3), below.

(RECs) for that transaction, the buyer may then claim those megawatt-hours (MWh) in the § 399.16(b)(2) portfolio content category.[30] If, however, the original buyer sells the RECs from that transaction prior to retiring them for RPS compliance, then the buyer of the RECs may retire the RECs for RPS compliance pursuant to § 399.16(b)(3). The seller of the RECs then has nothing to retire for RPS compliance, since the RECs, not the electricity without the RECs, are what count for RPS compliance. (D.08-08-028.)

These adaptations of the familiar "what you see is what you get" idea provide greater market certainty, as buyers and sellers can count on the stability of their transactions for RPS compliance purposes. These tenets also provide a clear path for evaluating the value to ratepayers of particular types of transactions.

3.4.1. Section 399.16(b)(1): Interconnected to a California Balancing Authority Scheduled Without Substitution, and Dynamically Transferred Energy

Procurement in this first portfolio content category is intended to constitute the majority of new RPS procurement through 2020 and beyond. (See § 399.16(c), discussed more fully below.) Parties have identified three separate criteria within § 399.16(b)(1)(A), in addition to the separate criterion set out in § 399.16(b)(1)(B).[31]

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[30] RPS compliance is counted in RECs. WREGIS denominates RECs by MWh; WREGIS calls the RECs in its system WREGIS Certificates. (*Eligibility Guidebook* at 6.)

[31] A number of parties participated in discussions that led to the development of the "RPS Product Matrix" in the Reference Proposal, which is attached to the comments of several parties. While this matrix does not necessarily reflect the views of any party, it makes the useful differentiation of the three distinct criteria within § 399.16(b)(1)(A).

3.4.1.1. Section 399.16(b)(1)(A)

Section 399.16(b)(1)(a) sets out:

> (1) Eligible renewable energy resource electricity products that meet . . . the following criteria:
>
> (A) Have a first point of interconnection with a California balancing authority, have a first point of interconnection with distribution facilities used to serve end users within a California balancing authority area, or are scheduled from the eligible renewable energy resource into a California balancing authority without substituting electricity from another source. The use of another source to provide real-time ancillary services required to maintain an hourly or subhourly import schedule into a California balancing authority shall be permitted, but only the fraction of the schedule actually generated by the eligible renewable energy resource shall count toward this portfolio content category. . . .

3.4.1.1.1. California Balancing Authority

Each of the three criteria in this part of § 399.16(b)(1) refers to "a California balancing authority." As defined in § 399.12(d), this term requires that such a California balancing authority has "control over a balancing authority area *primarily located* in this state." (emphasis added.)[32] The simplest method of determining whether a balancing authority area is primarily located in California

[32] Section 399.12(d) provides in full:

> California balancing authority" is a balancing authority with control over a balancing authority area primarily located in this state and operating for retail sellers and local publicly owned electric utilities subject to the requirements of this article and includes the Independent System Operator (ISO) and a local publicly owned electric utility operating a transmission grid that is not under the operational control of the ISO. A California balancing authority is responsible for the operation of the transmission grid within its metered boundaries which may not be limited by the political boundaries of the State of California.

is, as most parties suggest, whether more than 50% of the load served by the balancing authority is located within the political boundaries of California.[33] Five balancing authorities currently meet this test: California Independent System Operator (CAISO), Balancing Authority of Northern California (formerly SMUD), Imperial Irrigation District, LADWP, and Turlock Irrigation District.[34]

Some parties urge that a mechanism be set up now to allow other balancing authorities to qualify as "California balancing authorities" under the test enunciated in this decision at some time in the future. This is not a priority task in this initial stage of implementing SB 2 (1X). Energy Division staff is authorized to develop a method for making this determination if it appears to be necessary in the future.

3.4.1.1.2. First Point of Interconnection with Transmission

The first substantive criterion in section 399.16(b)(1)(A) is that the RPS-eligible generator must "[h]ave a first point of interconnection with a California balancing authority." This is most readily understood as the generator having its first point of interconnection with the transmission system of the WECC within the metered boundaries of a California balancing authority. The

[33] Only Calpine, Northwest Energy Systems, and Ormat disagree.

[34] CEC provides a useful map showing all balancing authorities with any California load in the *Map of ISO and Non-ISO Balancing Areas in California,* found at http://www.energy.ca.gov/maps/serviceareas/iso_non-iso_service_areas.html. This map therefore includes more balancing authorities than the statutory "California balancing authorities." See PG&E Comments at 8.

first point of interconnection is, physically and electrically, the point at which the gen-tie from the generation facility connects to the transmission network.[35]

3.4.1.1.3. First Point of Interconnection with Distribution Facilities

The second criterion is that the RPS-eligible generator must "have a first point of interconnection with distribution facilities used to serve end users within a California balancing authority area." This criterion distinguishes interconnection at the distribution level from interconnection at the transmission level.

3.4.1.1.4. Scheduled into a California Balancing Authority Without Substituting Electricity

The third criterion in section 399.16(b)(1)(A) requires that the electricity produced by an RPS-eligible generation facility must be:

> scheduled from the eligible renewable energy resource into a California balancing authority without substituting electricity from another source. The use of another source to provide real-time ancillary services required to maintain an hourly or subhourly import schedule into a California balancing authority shall be permitted, but only the fraction of the schedule actually generated by the eligible renewable energy resource shall count toward this portfolio content category.

As GPI observes, this criterion is more restrictive than the prior "delivery" requirement. *Compare* the text above *with* the *Eligibility Guidebook* at 37, n.61 (4th ed. Jan. 2011).

[35] See, e.g., Reference Proposal; CEERT Opening Comments.

This criterion contains several components that make it more complex than the other criteria in § 399.16(b)(1), as TURN, PG&E, and SCE point out. These components include:

- without substituting electricity from another source
- real-time ancillary services
- hourly or subhourly import schedule
- fraction of the schedule generated by the RPS-eligible generator

3.4.1.1.4.1. Import Schedule

Parties agree that the transmission schedule from the RPS-eligible generator into a California balancing authority must be hourly. If, as UCS, NextEra, and Sempra suggest, subhourly scheduling of RPS-eligible electricity into California balancing authorities becomes common, this section will be unaffected, since subhourly scheduling is necessarily included within hourly. The statute also specifies that the hourly or subhourly schedule is an "import" schedule. The necessary implication of this language is that the electricity is generated outside the metered boundaries of a California balancing authority.

3.4.1.1.4.2. Ancillary Services

"Real-time ancillary services," which are permitted under the statute if needed to "maintain an hourly or subhourly import schedule," are different from substitute energy. Real-time ancillary services are provided by the host balancing authority (i.e., the balancing authority where the RPS-eligible generator is interconnected) to maintain the import schedule if variations occur

on an hourly or subhourly basis.[36] Unlike substitute electricity, the ancillary services are not the electricity that is actually scheduled.

3.4.1.1.4.3. Without Substituting Electricity from Another Source

The core substantive requirement within these components is that the electricity must be scheduled "from the eligible renewable energy resource into a California balancing authority without substituting electricity from another source." That is, the schedule must be from the RPS-eligible generator, not from "another source" providing generation that will actually be used in place of ("substituting" for) the RPS-eligible generator's output to meet the schedule.[37] Parties disagree about whether scheduling electricity from an RPS-eligible generation facility that is *not* the RPS-eligible generator with whom the retail seller has a procurement contract meets the criteria for this category.[38] Although parties urging the acceptance of such scheduling in this category provide plausible policy reasons for their proposal, it is not supported by the statutory language. The language plainly says, "without substituting electricity from another source." It does not say, "another non-renewable source."[39]

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[36] See Iberdrola comments at 8-9; Powerex comments at 6.

[37] See, e.g., opening comments of Powerex (at 2), TransWest (at 6), and TURN (at 3).

[38] CMUA, IEP, NV Energy, and SolarReserve argue that such scheduling should meet the criteria for this category; DRA, Duke Energy, LADWP, and PG&E disagree.

[39] Duke Energy and SolarReserve argue that scheduling from off-site storage of renewable generation should also meet this criterion. The Commission is currently examining issues related to energy storage in R.10-12-007. Until the Commission has set a more general framework for storage, it is premature to speculate on how storage will fit into the portfolio content regime set by SB 2 (1X). To the extent that there are basic issues of the RPS eligibility of storage resources, those issues are properly considered by the CEC.

3.4.1.1.4.4. Fraction Actually Generated

By stipulating that "only the fraction of the schedule actually generated by the eligible renewable energy resource shall count toward this portfolio content category," the statute provides that real-time ancillary services may not be counted toward the retail seller's RPS compliance requirements. Reprising the argument about third-party renewable resources, some parties argue that ancillary services sourced from RPS-eligible resources should not be subtracted from the scheduled amount of generation that is ultimately imported. The statutory text does not support this view. Analogously to the proscription of substitute energy from "another source," this component directs that only the fraction of the schedule generated by the RPS-eligible generator may count. That is, the fraction of the schedule generated by the RPS-eligible generator with which the retail seller has a procurement contract is what counts for RPS compliance.

Some parties seek to allow electricity from on-site storage of an RPS-eligible generator's own generation to be counted in this portfolio content category.[40] This effort appears to be unnecessary. If the RPS-eligible generator with on-site storage has its first point of interconnection within a California balancing authority, all of its output to meet its contract (however characterized) would count toward this category. If the RPS-eligible generator does not have its first point of interconnection within a California balancing authority, but adds electricity from its own storage to meet its schedule, then the electricity is not from "another source" and no (or fewer) real-time ancillary services are needed

[40] SolarReserve, as well as Duke Energy and PG&E, make this argument.

to maintain the schedule, and thus are not subtracted from the "fraction of schedule actually generated by the eligible renewable generation resource."

3.4.1.1.5. Firm Transmission

Another issue in the interpretation of this criterion is whether firm transmission rights are necessary in order to ensure that the RPS-eligible energy is "scheduled from the eligible renewable energy resource into a California balancing authority without substituting electricity from another source." The Commission first looked at firm transmission in the RPS context in D.10-03-021. Following on that decision, the Ruling asked parties to comment on the role of firm transmission in the new portfolio content categories.

As AReM, enXco, PG&E, and UCS point out, the statutory procurement structure provided by § 399.16 is different from that of D.10-03-021. Parties are in agreement that holding firm transmission rights is not a necessary element of meeting the new criterion of scheduling into a California balancing authority without substituting energy from another source.

However, including firm transmission as an element of procurement meeting this criterion may provide greater value. As Davenport, enXco, and Powerex point out, it is commercially advantageous for a generation facility to have firm transmission rights when negotiating the terms of the sale of its RPS-eligible energy to a California retail seller, since the likelihood of curtailment due to transmission constraints is substantially reduced. Firm transmission is likely to have an influence on the price and terms of the transaction and on the likelihood that the procurement will ultimately meet the criteria for § 399.16(b)(1). With respect to a compliance determination, the existence of a firm transmission arrangement may simplify the retail seller's task in showing

that procurement claimed to meet this criterion actually did so, and may simplify the task of Energy Division staff in evaluating such claims.

In view of the new requirements of the portfolio content categories and particularly the criterion of scheduling into a California balancing authority without substituting energy from another source, development of the role of firm transmission in classifying RPS procurement, discussed in D.10-03-021, as modified by D.11-01-025, is no longer necessary. The Commission's direction to Energy Division, in Ordering Paragraph (OP) 26 of D.10-03-021, to investigate and provide recommendations to the Commission about firm transmission, has been overtaken by events. Energy Division staff is relieved of this responsibility.[41]

3.4.1.2. Upfront Showing and Compliance Determination

Unlike firmed and shaped procurement, discussed below, transactions in the section 399.16(b)(1)(A) group, in which the electricity is scheduled to a California balancing authority without substitution, requires a transmission path from the renewable generating facility to the California balancing authority in real time. While many parties (e.g., LADWP, NextEra, PG&E, and SDG&E) suggest that the combined use of WREGIS and e-Tags can document that this criterion has been met, this may not in fact be possible at this time.[42] First,

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[41] It is not necessary to modify D.10-03-021 or D.11-01-025 in this regard. Energy Division may simply stop working on the role of direct transmission as explained in D.10-03-021, and is not required to produce any recommendations.

[42] Although parties refer to e-Tags as "NERC e-Tags," the North American Electric Reliability Council (NERC) has transferred the e-Tag system to the North American Energy Standards Board (NAESB). NAESB's e-Tag information may be found at http://www.naesb.org/weq/weq_jiswg_etag_1.8.asp. This decision will refer to "e-Tags."

WREGIS collects renewable facility generation data on a monthly basis,[43] but the parties agree that the schedule for this criterion is no longer than hourly. Some parties propose that monthly aggregation nevertheless should be used as the basis for this criterion.[44] Others[45] argue that monthly aggregation would result in overstating the quantity of generation meeting this criterion, because, as TransWest explains, "it would not be possible to ensure that only the renewable energy scheduled for that hour and produced in that same hour would be credited." (Reply comments at 2-3).

Further, it is unclear whether e-Tags can be used to demonstrate that specific RPS-eligible generation was delivered to a particular California balancing authority. Although enXco and Iberdrola state that e-Tags often carry information identifying the generator, PacifiCorp points out that it is not *required* that the generator's balancing authority provide such generator-specific information on the e-Tag. (PacifiCorp Reply comments at 4.) Thus, PacifiCorp reasons, relying on e-Tags for hourly data on specific renewable generators is likely to result in missing a significant, but unknowable, quantity of information. PacifiCorp also points out that e-Tags lack the controls to provide authoritative information about the title to the renewable energy, in particular when title is established or transferred. (*Id*.)

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[43] WREGIS Operating Rules (December 2010) at 28. The WREGIS Operating Rules may be found at http://www.wregis.org/uploads/files/854/WREGIS%20Operating%20Rules%20v%2012%209%2010.pdf.

[44] These include CMUA, LADWP, NextEra, PG&E, and Shell.

[45] Including CUE, Iberdrola, Powerex, TransWest, and UCS.

We therefore agree with SCE that ". . . the reality is that there is currently no system that, in the near term, can gather all of the data necessary to operationalize and document the product categorization language" for this criterion. (SCE comments at 5.) Parties suggest several solutions to this real problem. PG&E and SDG&E propose that, since monthly aggregation is what is available through WREGIS, that is what should be used to determine compliance with this category. UCS asserts that the hourly determination must be made, whether or not there is an "automated" way to do so. SCE suggests that each retail seller retain information from WREGIS, e-Tags, transmission schedules, and generation facility metering data in an "auditable" form, presumably available to Energy Division staff, so that staff could go through the vast amount of data from disparate sources that SCE states would be necessary.

PG&E's suggestion is not viable. The statutory criterion is maintenance of an hourly schedule. It is not consistent with the statute nor with this Commission's responsibilities under the RPS program to substitute a time period more than 700 times longer than the statutory criterion when determining compliance with this portfolio content category.

SCE's proposal that the retail seller retain all records so that scarce Commission personnel can at some point try to make sense of those documents, is likewise not workable. Using "auditable" records as the basis for compliance determinations when it is extraordinarily unlikely that actual auditing will be possible, is essentially giving up on determining compliance.

The current functionalities of WREGIS and e-Tags were not designed with SB 2(1X) in mind, and cannot provide information by which the Commission could determine with a high level of confidence that RPS procurement could or did meet the statutory requirements of section 399.(b)(1)(A). Therefore, in this

decision the Commission provides guidance for the upfront showing of portfolio content classification of IOUs' planned procurement and for the administration of the after the fact compliance determination of portfolio content category classification. It is apparent, however, that effective and efficient administration of the portfolio content mandates of SB 2 (1X) will require modifying existing systems or developing new ones.

In the interim, SCE's proposal should be used to develop a method for retail sellers to demonstrate to the Commission that they have and can provide useful information from the data that would show compliance with this criterion. The burden of demonstrating compliance (or likelihood of compliance) with the disparate criteria for this portfolio content category may be large. Retail sellers must be prepared to carry that burden both in upfront showings for contract approval and in providing documentation for compliance determinations.

For approval of contracts meeting the criteria of section 399.16(b)(1)(A), IOUs must make an upfront showing that includes at least:

- The RPS-eligible generator has its first point of interconnection with the WECC transmission system within the boundaries of a California balancing authority; or
- The RPS-eligible generator has its first point of interconnection with the distribution system within the boundaries of a California balancing authority; or
- If the criterion of hourly scheduling into a California balancing authority without substitution of electricity is being used, that substitution of electricity from another source is unlikely to occur, whether because the transmission arrangements are sufficiently reliable or for some other documented reason.

Compliance determinations are similar for all retail sellers, requiring documentation that the criteria for this category were met. Any retail seller

claiming generation in this category must be prepared to show, in a Commission RPS compliance filing, that:

- The RPS-eligible generator has its first point of interconnection with the WECC transmission system within the boundaries of a California balancing authority for the entire time of the generation claimed; or
- The RPS-eligible generator has its first point of interconnection with the distribution system within the boundaries of a California balancing authority for the entire time of the generation claimed; or
- If the criterion of hourly scheduling into a California balancing authority without substitution of electricity is being used, that the retail seller can know, for any scheduling hour for which procurement in this category is claimed, the following information:
  - how much RPS-eligible energy was generated;
  - how much generation was scheduled;
  - how much generation was delivered;
  - how much of the scheduled delivery was provided by ancillary services;
  - that none of the energy scheduled into the California balancing authority was substitute energy.

Such a demonstration is required in addition to the reports retail sellers provide to the CEC for verification of the generation. Energy Division staff may also require the retail seller to analyze all relevant information for a sample of the hours claimed in this category.

The Director of Energy Division is authorized to develop a methodology for both the upfront showing and the compliance determinations demonstration, which may or may not include all elements listed above, and/or additional elements. Energy Division staff are further authorized to consult with the parties, CEC staff, and WREGIS staff to develop a more comprehensive and long-term approach to this compliance determination.

3.4.2. Section 399.16(b)(1)(B) Dynamic Transfer

A separate criterion for this portfolio content category is that the RPS-eligible generation facility providing the electricity "[h]as an agreement to dynamically transfer electricity to a California balancing authority." The term "dynamic transfer" refers to a range of methods by which a balancing authority receiving electricity generated in another balancing authority area may provide some or all of the functions and services typically provided by the balancing authority in which the generation facility is interconnected. (D.10-03-021 at 32-34.) As several parties point out, the actual dynamic transfer arrangement is made between the balancing authorities, not the generator and the buyer.[46] The statutory direction should therefore be understood to mean that a retail seller claiming that generation meets this portfolio content criterion must demonstrate that the generation claimed for RPS compliance is covered by a dynamic transfer agreement that was in operation at the time the generation occurred. Because the techniques and protocols for dynamic transfer are evolving[47], it is most reasonable to read this criterion broadly, as applying to those arrangements accepted by a California balancing authority as providing for dynamic transfer.

[46] AReM, LADWP, NV Energy, SCE, and Shell address this point.

[47] See, e.g., comments of SCE and TransWest. See also Res. E-4393 (April 15, 2011), approving an RPS procurement contract whose terms require that the generator's first point of interconnection with the transmission system will be with the CAISO balancing authority area, or that the energy will be dynamically transferred to the CAISO balancing authority area.

3.4.2.1. Upfront Showing and Compliance Determination

As discussed above, a demonstration that procurement can be classified in this portfolio content category is required at more than one stage of the RPS procurement and compliance process. For utilities that require Commission approval of their RPS procurement contracts, the advice letter seeking approval must provide appropriate documentation of the dynamic transfer agreement, that the generation is included within the scope of the agreement, and that the agreement will be in operation at the time of the generation covered under the contract. At the stage of compliance determination, all retail sellers claiming generation under this criterion must be able to demonstrate that the dynamic transfer mechanism was in place and effective at the time of the generation claimed, and that the generation was actually dynamically transferred. Such a demonstration is required in addition to the report that retail sellers provide to the CEC for verification of generation.

The Director of Energy Division is authorized to review the development of dynamic transfer methods and make any changes necessary to incorporate changing dynamic transfer methods into the showings required of retail sellers seeking approval of procurement of, or claiming RPS credit for, generation meeting this criterion of the § 399.16(b)(1) portfolio content category.

3.4.3. Characterization of "Unbundled Renewable Energy Credits"

Parties sharply disagree about whether "unbundled renewable energy credits" originally associated with electricity that would meet the criteria of section 399.16(b)(1), are also included in this category.[48]

SB 2 (1X) does not define the term "unbundled renewable energy credits." Throughout the history of the RPS program, a REC has been understood, consistent with its statutory definition (both currently and in SB 2 (1X)), as embodying the renewable and environmental attributes associated with the production of electricity from an eligible renewable energy resource. As CRS reminds us, the REC carries the renewable value *and* the RPS compliance value; once a REC has been separated from the RPS-eligible energy with which it was originally associated, the underlying energy may not be counted for RPS compliance.

In the RPS program, the term "unbundled RECs" has consistently been understood to mean "RECs sold separately from the RPS-eligible generation originally associated with the RECs."[49] This is also the usage in other states and

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[48] AReM, CMUA, California Wastewater Climate Change Group, Calpine, CEERT, CCSF, Sanitation Districts, Duke Energy, Evolution Markets GPI, IEP, LADWP, Noble Solutions, NV Energy, Ormat, PG&E, Powerex (in some circumstances), SDG&E, Sempra, Shell, Solar Alliance, SCE, and WPTF argue for inclusion; APS, CUE, DRA, enXco, Iberdrola, LSA, TURN (in some circumstances), TransWest, and UCS argue that unbundled RECs do not belong in this category.

[49] See, e.g., D.03-06-071; the staff white paper, "Renewable Energy Certificates and the California Renewables Portfolio Standard Program" (REC white paper) (April 20, 2006), found at http://www.cpuc.ca.gov/word_pdf/REPORT/55606.doc; D.06-01-019; D.08-08-028; and D.10-03-021 (where the terminology used was "tradable RECs").

the industry in general.[50] It is not reasonable to believe that the Legislature would have intended to change the well-established meaning of this term without making explicit that it was doing so, either through a definition in new § 399.12, or through a description in a relevant substantive section. Therefore, our analysis of the place of unbundled RECs in the portfolio content categories is based on the established understanding of the term as denoting RECs that are separated from the electricity from which they were originally associated.

In considering this issue, it is necessary to give meaning to every part of the statute, and to ensure that interpretation of each part is consistent with the statute as a whole. (*Latkins v. Watkins Associated Industries* (1993), 6 Cal.4th 644, 658-659.) Looking at the structure of § 399.16, it is clear that the portfolio content categories have fixed boundaries.[51] Section 399.16(c) sets minimum and/or maximum percentages of RPS procurement from each portfolio content category for each compliance period. These required allocations are central to the purpose of the section, since they prescribe the actual percentages of procurement for RPS compliance. The language used is express and exclusive: "not less than;" 'not more than;" "not subject to the limitations of."[52] These limitations on the use of procurement in each category for RPS compliance do not make sense, and could

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[50] See, e.g., Comments of Evolution Markets Inc. on Proposed Decision of ALJ Simon on Rulemaking to Implement the California Renewables Portfolio Standard Program (April 15, 2009), at 4 (filed in R.06-12-012):

> Adopting the standard market term "unbundled REC" or simply "REC" will conform the terminology in California with the other states and provinces in the WECC.

[51] This point is made by, among others enXco, SCE, TransWest, TURN, and UCS.

[52] In §§ 399.16(c)(1),(2), and (3), respectively.

not be administered, unless there are bright lines separating the portfolio content categories.

Unbundled RECs, as TURN points out, are identified as belonging in § 399.16(b)(3) and are mentioned only in § 399.16(b)(3). The statutory text itself, therefore, places unbundled RECs in that portfolio content category. Since the categories are separate, that is where unbundled RECs belong. There is no reason, textual or otherwise, to believe that the Legislature specifically identified unbundled RECs as belonging in § 399.16(b)(3), but really intended some of them to belong in § 399.16(b)(1).[53]

Parties advance a variety of policy arguments to support their assertions that unbundled RECs that were originally associated with generation from generators with a first point of interconnection within a California balancing authority, or generation scheduled into California without substitute energy, or dynamically transferred to a California balancing authority, should be considered to be in the first category. Although policy arguments can not supplant the plain meaning of the statute, discussed above, we review these arguments briefly because of the importance of this issue in the implementation of SB 2 (1X).

Proponents of this view argue that the generation identified in § 399.16(b)(1) meets many of the objectives of the statute, as set out in § 399.11,

[53] In its reply comments, SDG&E cites a comment in the committee report of the Senate Energy, Utilities, and Communications Committee (February 15, 2010) for the proposition that unbundled RECs are properly classified in any of the three portfolio content categories. That committee report, however, does not use terminology consistent with the of § 399.16(b)(2) and § 399.16(b)(3) as enacted, so it can not support the view advanced by SDG&E.

and is given a high RPS compliance value by § 399.16(c)(1). They argue that, in order to carry through this high valuation, the unbundled RECs originally associated with electricity meeting the criteria for this category should also count in this category.

This argument fails to take account of the nature of an unbundled REC. Once a REC is unbundled, the underlying electricity with which it was originally associated may not be used for RPS compliance; it is the REC that carries the compliance value.[54] The unbundled REC may be sold (more than once) before it is retired for RPS compliance. Parties assume that unbundled RECs that could be counted in § 399.16(b)(1) would command a premium in the market, because they could count in this preferred category for compliance.[55] But, if implemented, that interpretation of the statutory categories could lead to the repeated sale of RECs at premium prices. This would simply drive up the cost to ratepayers (or indeed for any customers of retail sellers) and unnecessarily increase the costs of complying with the state's RPS goals without providing any additional value, since the electricity can be consumed only once and the REC can be retired for RPS compliance only once.

This scenario would not be a good deal for ratepayers. It is also not consistent with the statutory provision for RPS procurement cost limitation set out in § 399.15(c). It is not reasonable to infer that the Legislature intended to allow the new portfolio content categories to result in the unlimited trading of unbundled RECs at a premium price, while at the same time expressly

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[54] This is the case both conceptually and practically. WREGIS, the core of the RPS tracking and verification system, records and tracks RECs.

[55] See, e.g., CMUA and NV Energy.

instructing the Commission to set cost limitations on utilities' RPS procurement costs.

A secondary argument for treating unbundled RECs as part of the § 399.16(b)(1) category is that unbundled RECs originally associated with RPS-eligible distributed generation (DG) on the customer side of the meter should count in this category because of the high value of DG in implementing RPS policy and providing for RPS compliance without additional investment in expensive transmission projects.[56]

This argument in favor of unbundled RECs from DG does not take into account the Legislature's actions with respect to customer-side DG, most saliently Assembly Bill 920 (Huffman), Stats. 2009, ch. 376. This statutory revision to the net energy metering program makes clear that sales of surplus electricity from customer-side DG to the interconnected utility are sales of energy and RECs together. (§ 2827(h)(5)(A); D.11-06-016 (setting the net surplus compensation rate).) Thus, there is no question that such sales meet the criterion in § 399.16(b)(1) for generation with a first point of interconnection to the distribution system.

The statute also affirms the Commission's direction in D.05-05-011 and D.07-01-018 that the RECs originally associated with electricity from a DG system that is consumed on-site belong to the system owner. (§ 2827(h)(5)(A).) These RECs may be used to support the system owner's product claims (in

[56] See, e.g., comments of AReM, Sanitation Districts, and California Waste Water Climate Change Group.

accordance with the requirements of § 399.25 and CEC rules), but they may also be sold as unbundled RECs.[57]

Thus, the statute specifically recognized that the sale of RECs associated with the on-site use of electricity from an RPS-certified DG facility is different from the sale by the system owner of both enery and RECs to a retail seller. In considering the role of such unbundled RECs, it is also important to recognize that the on-site consumption of the electricity from the DG system has already produced an RPS benefit: it reduces the total retail sales of the interconnected utility, and thus reduces the amount of RPS-eligible procurement the utility requires. (See D.05-05-011 at 9.) Conferring an additional value on the unbundled RECs by considering them to meet the "first point of interconnection to distribution system" criterion is not warranted by any statutory language or Commission decision.[58]

3.4.4. Pipeline Biomethane

TURN and Clean Energy disagree about whether generation using pipeline biomethane as fuel would meet the criteria in section 399.16(b)(1). TURN argues that generation from an RPS-eligible generation facility that uses pipeline biomethane (i.e., methane made from renewable sources and transported in the gas pipeline system) as part of its fuel should not count in this

[57] All CEC requirements for RPS eligibility and verification must be met. See D.10-03-021 at 21-24.

[58] This interpretation of SB 2 (1X) does not indicate any diminution of this Commission's consistent support for DG. (See, e.g., R.08-03-008 and R.10-05-004 implementing the California Solar Initiative; Application (A.) 10-03-010, setting a net surplus compensation rate; and R.11-09-011, addressing interconnection issues for DG.) It merely implements new statutory requirements.

category, even if the generation facility is directly interconnected within a California balancing authority area. TURN argues that such generation merely reproduces the pollution and greenhouse gas emissions of natural gas-fueled generation. Clean Energy, on the contrary, asserts that such generation meets all the requirements for RPS eligibility and of this category.

It is not necessary to determine whether the use of pipeline biomethane does or does not further certain environmental goals. For purposes of classifying RPS procurement into the appropriate portfolio content category, the CEC's determination of RPS eligibility is the definitive first step. If a generation facility that the CEC certifies as RPS-eligible is using a fuel that the CEC finds is RPS-eligible, and the facility is directly interconnected with the transmission or distribution system in a California balancing authority area, or has its electricity output scheduled into a California balancing authority without substitution of electricity from another source, or is dynamically transferred, the facility's output could be classified as meeting the criteria for section 399.16(b)(1).[59]

3.4.5. Upfront Showing and Compliance Determination for Section 399.16(b)(1)

The portfolio content category should depend on the transaction by which the retail seller claiming RPS credit acquired the RECs. If the RECs are acquired with the RPS-eligible energy from a generator with a first point of interconnection with a California balancing authority with which the RECs are

[59] CEC staff is currently taking public comment on possible revisions to the pipeline biomethane eligibility provisions. See Notice of Staff Workshop re: Pipeline Biomethane (August 26, 2011), found at http://www.energy.ca.gov/portfolio/notices/2011-09-20_Biomethane_Workshop_Notice_Revised.pdf.

associated, that transaction meets the criteria for this portfolio content category. If the RECs are acquired separately, no matter what the source of their originally associated electricity, the unbundled RECs fall under § 399.16(b)(3). The portfolio content category that RECs from a particular RPS procurement transaction fall into should not depend on tracing the history of the RECs (which may be freely sold) through a variety of transactions. If, for example, the RECs are acquired in a firmed and shaped energy transaction that meets the criteria discussed below, those RECs fall under § 399.16(b)(2). This methodology can be fairly and transparently applied to all RPS procurement and allows both the upfront showing (for Commission approval) of utility contracts and the compliance determination of portfolio content categories for all retail sellers to be made simply and efficiently.

3.5. Section 399.16(b)(2) Firmed and Shaped Transactions Providing Incremental Energy

This section of the statute is more complex than its relatively simple expression suggests. Firming and shaping provides flexibility in managing and delivering RPS procurement from generation facilities not located in California balancing authority areas. This flexibility, however, makes it more difficult to characterize firming and shaping transactions in a way that can be applied uniformly and reliably across a range of transactions. The two key terms used in this category, "firmed and shaped," and "incremental," are not defined in SB 2 (1X). The best method for characterizing transactions in this category is therefore practical, rather than abstract, drawing on the range of suggestions made by the parties.

3.5.1. Firmed and Shaped

As PG&E notes, the term "firmed and shaped" does not have a generally accepted definition within the industry. Many different commercial arrangements can be described using this term.[60] In the REC White Paper, Commission staff provided descriptions of firming and shaping.[61] In the fourth edition of its *Eligibility Guidebook*, the CEC described several possible configurations of firming and shaping transactions.[62]

SCE proposes that the REC White Paper be used as the basis for interpreting the "firmed and shaped" portfolio content category. Several parties assert that the CEC's description in the 4th edition of its *Eligibility Guidebook* should be adopted as the meaning of "firmed and shaped" in SB 2 (1X).[63]

While they are each instructive, neither of these prior efforts fully serves the purpose of implementing this new portfolio content category. The REC White Paper discussion is at a high level of generality that necessarily does not take account of the developments in the renewable energy industry in the past five years. The CEC's description of firmed and shaped transactions emerged to address the "delivery" element of RPS eligibility under the law prior to SB 2 (1X).

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[60] Examples are provided by CMUA, DRA, Iberdrola, and SCE, among others.

[61] These are provided at A-2. The REC White Paper may be found at http://docs.cpuc.ca.gov/word_pdf/REPORT/55606.doc.

[62] See *Eligibility Guidebook* at 37, n.61 (4th ed. Jan. 2011), found at http://www.energy.ca.gov/2010publications/CEC-300-2010-007/CEC-300-2010-007-CMF.PDF.

[63] These include AReM, CEERT, CMUA, Shell, and WPTF.

It was not, and could not have been, intended to describe a portfolio content category of new § 399.16.[64]

Parties have both described firmed and shaped transactions and made proposals for interpreting the statutory requirements. Parties agree that this category applies to RPS-eligible generation located outside the boundaries of a California balancing authority area. There is also broad agreement, reflected in the Reference Proposal, that the scheduling of substitute electricity in a firmed and shaped transaction should be longer than hourly but within a calendar year of the RPS-eligible generation.

SB 2 (1X) provides both more precise requirements in new § 399.16(b) and stricter usage limitations in new § 399.16(c) than those used in the implementation of SB 107. It is reasonable to interpret this more prescriptive statutory scope as narrowing the range of transactions that would meet the criteria of § 399.16(b)(2).

In order to meet the requirements of the statute in a way that is both reasonably transparent and commercially reasonable, firmed and shaped transactions should be seen as fundamentally providing substitute energy in the same quantity as the contracted-for RPS-eligible generation, in order to fulfill the

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[64] The CEC staff has recently proposed revisions to the CEC *Eligibility Guidebook* that would eliminate the current section on "delivery," including the discussion of firmed and shaped deliveries. See Notice of Staff Workshop re: Guideline Revisions for RPS Implementation and Renewable Energy Program, Attachment A (Summary of Revisions to the RPS Eligibility Guidebook and Overall Program Guidebook) (Guidelines Revision Notice) (September 23, 2011), at 2; http://www.energy.ca.gov/portfolio/notices/index.html. This staff proposal is merely preliminary, but it suggests that the CEC's prior description of firming and shaping may not be maintained in its implementation of SB 2 (1X).

scheduling into a California balancing authority of the RPS-eligible generation, which can be set in a manner that meets the timing and quantity requirements of the retail seller. As a practical matter, the original RPS-eligible generation is consumed elsewhere, typically but not necessarily close to the generator.

From the perspective of an RPS procurement transaction, this general characterization of a firmed and shaped transaction necessitates three commercial elements:[65]

1. the buyer's simultaneous purchase of energy and associated RECs from the RPS-eligible generation facility without selling the energy back to the generation;
2. the availability of the purchased energy to the buyer (i.e., the purchased energy must not in practice be already committed to consumption by another party);
3. the acquisition of the substitute energy at the same time as acquisition of the RPS-eligible energy, or at least prior to submission of the contract for the firmed and shaped transaction for Commission approval.

However, in order to count in this category, a firmed and shaped transaction must also provide "incremental electricity" that is "scheduled into a California balancing authority area."

3.5.2. Incremental

Parties suggest several possible readings of the "incremental" requirement. PG&E, SCE, and SDG&E propose that "incremental" should be interpreted to mean "procured at any time after June 1, 2010." This argument is based on §§ 399.16(c) and (d), which accord different portfolio content treatment to

[65] See comments of LSA, NextEra, TransWest, TURN, and UCS.

contracts signed before or after that date.[66] Several parties, including AReM, CEERT, CMUA, IEP, and UCS propose that "incremental" should be interpreted to mean "not in the portfolio of the retail seller prior to the firmed and shaped transaction."

The utilities provide no justification for reading §§ 399.16(c) and (d) into § 399.16(b) (2), and none is apparent. The June 1, 2010 date is expressly tied to the limitations on the use of procurement in each portfolio content category for RPS compliance. If the same date were intended to provide the meaning of "incremental," it is logical to think that it would be included in § 399.16(b)(2), or at least cross-referenced. The absence of any textual connection between the phrase "incremental electricity" and the June 1, 2010 date renders the utilities' proposed reading unconvincing.

The proposal to interpret "incremental" in a way closer to its ordinary meaning is more persuasive. The interpretation does not need to be as formal as NextEra's "but for" causal approach; finding that the substitute energy is newly procured by the retail seller as a part of the firming and shaping transaction is sufficient.

Several parties argue that firmed and shaped deals can meet the criteria of this category by "tagging" RECs to any substitute energy identified by the retail seller.[67] This view is in part a hold-over from the procurement practices sanctioned by the CEC's interpretation of the "delivery" requirement under SB 107. (See *Eligibility Guidebook*, 4th edition, at 32-34.) The practice of "tagging"

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[66] These sections are discussed more fully, below, and will also be addressed in later decisions implementing SB 2 (1X).

[67] These include AReM, CMUA, PG&E, SCE, Shell Energy, and WPTF.

is incompatible with both the requirement that electricity be acquired to substitute for the RPS-eligible generation and the requirement that "incremental electricity" be scheduled into a California balancing authority. Accordingly, the "tagging" approach can not be carried forward into the administration of § 399.16(b)(2).

3.5.3. Additional Proposals

Several parties propose additional criteria for the "firmed and shaped" portfolio content category. DRA, Sierra Club California, TURN, and UCS assert that ratepayers will not benefit from firmed and shaped transactions unless those transactions provide relatively long-term price stability, as compared to the potential volatility of fossil fuel market prices. DRA, TURN, and UCS propose two elements to address this concern:

- contracts for substitute energy must be at least five years long;
- contracts for substitute energy must be at a fixed price, not indexed to fossil fuel-generation market prices.

CCSF raises concerns about a long minimum length for the substitute energy contract because CCAs have limited ability to recover contract costs if customers return to bundled service. (Reply comments at 6.) SCE argues that a requirement as significant as a five-year minimum length of the substitute energy contract can not simply be read in to the statute; if the Legislature had intended to have such a specific requirement, it would have included it.

All three large utilities argue that they meet the goals of price stability by submitting for Commission approval hedging plans for their entire portfolios. Thus, PG&E asserts, enforcing price stability at the level of individual firmed and shaped RPS contracts is unnecessary and inefficient.

Although the concern about price stability is a valid one, it does not rise to being a defining criterion for inclusion in this portfolio content category. Rather, this concern and issues of value to ratepayers, determination of compliance, ease of administration, and similar issues are more appropriately addressed in Energy Division's review of utilities' advice letters seeking approval of RPS procurement contracts that will be counted in the "firmed and shaped" portfolio content category.

TURN makes the additional proposal that any substitute electricity must be provided by generation from the same WECC subregion as the RPS-eligible generator. This proposal includes element both of value to ratepayers, by controlling the complexity of firmed and shaped transactions, and category definition (by restricting the source of substitute energy). While interesting and potentially useful, this proposal is not well enough developed at this stage of this proceeding to be acted on by the Commission.

In sum, a transaction that meets the criteria of section 399.16(b)(2) will have the three commercial elements identified above and will utilize substitute energy that is newly procured by the retail seller for the firming and shaping transaction.

3.5.4. Upfront Showing and Compliance Determination for Section 399.16(b)(2)

Utilities seeking Commission approval of contracts in this category must supply sufficient information for Energy Division staff to review the proposed contract and make a reasoned evaluation of the terms of the contract, the value to

ratepayers, and the projected cost over the life of the contract.[68] The Director of Energy Division is authorized to require utilities to submit any information relevant to evaluating procurement contracts involving firmed and shaped transactions.

Any retail seller seeking to count RPS procurement in this category must be able to provide information to Energy Division staff from which staff can determine compliance with the criteria for this category. For example, staff must be able to determine that the substitute energy scheduled into a California balancing authority is "incremental" as defined in this decision, or subsequent Commission decisions or legislative enactments. The Director of Energy Division is authorized to require retail sellers to submit any information relevant to making compliance determinations for the "firmed and shaped" portfolio content category.[69]

3.6. Section 399.16(b)(3) Unbundled RECs and Electricity that does not Qualify Order Sections 399.16(b)(1) or (2)

This portfolio content category contains three elements:

1. "[e]ligible renewable energy resource electricity products. . .that do not qualify under the criteria of paragraph (1) or (2);"

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[68] These elements are basic to the Commission's evaluation of RPS procurement contracts. New § 399.15(c) requires the Commission to establish RPS procurement cost limitations for utilities. The implementation of a cost containment process may result in new or additional methods for evaluating contracts submitted for Commission approval.

[69] See new § 399.13(a)(3)(A), which requires each retail seller to submit an annual compliance report that includes, among other things, "the current status of compliance with the portfolio content requirements of subdivision (c) of Section 399.16. . ."

2. "any fraction of the electricity generated" that does not qualify under the criteria of paragraph (1) or (2); and

3. "unbundled renewable energy credits".

The first two elements of this category are difficult to characterize. If an RPS procurement transaction does not qualify under paragraph (1) or (2), that means that the transaction does not include electricity that is:

- from an RPS-eligible generation facility that has its first point of interconnection with a California balancing authority;
- scheduled from an RPS-eligible generation facility into a California balancing authority without substituting electricity from another source;
- dynamically transferred to a California balancing authority; or
- firmed and shaped, providing incremental electricity scheduled into a California balancing authority.

The most natural reading of this strongly negative criterion (i.e., "does not qualify") is that it is intended to cover a quantity of RPS-eligible generation that was intended to meet a particular criterion, but for some reason, did not do so. One example might be a firmed and shaped transaction, where some of the substitute electricity is not scheduled in the calendar year of the RPS-eligible generation.

"Any fraction of the electricity generated" may be understood to apply to electricity that is scheduled into a California balancing authority without substituting electricity from another source, but is generated in excess of the schedule. Contrary to the suggestion of Powerex, such overgeneration can not be transported back into § 399.16(b)(1) by accounting for it as equivalent to ancillary services required at a later point to maintain the hourly or subhourly import schedule from that generation facility. The original overgeneration and the later under-generation are separated in time, by definition greater than an

hourly schedule. Moreover, credit for the overgeneration does not fit the definition of ancillary services, which are determined by balancing authorities.[70] But this "fraction" of the electricity generated does meet this criterion of this category, and would be considered in it.

As discussed in section 3.4.3., above, unbundled renewable energy credits are readily definable and are expressly situated in this category.

3.6.1. Exceptional Department of Water Resources (DWR) contracts

There is one very limited exception to the classification of unbundled RECs. During the energy crisis, pursuant to authority granted by Water Code § 80000 et seq., DWR entered into a number of long-term contracts for customers of California's utilities. In Application (A.) 00-11-038, this Commission subsequently distributed the DWR contracts to be administered by the three large utilities, with the utilities' customers receiving the energy from the contracts.

In three of its contracts, DWR procured energy from RPS-eligible wind farms in California, but expressly did not also buy the RECs associated with that energy. Two of the contracts (with Cabazon Wind Partners LLC and Whitewater Hill Wind Partners LLC) are assigned to SDG&E. One, with Mountain View Power Partners, is assigned to SCE. The customers of both SDG&E and SCE are receiving electricity generated by California RPS-eligible wind facilities, but

[70] In its Glossary of Terms and Acronyms, CAISO provides a definition of ancillary services that identifies the central role of the balancing authority. It may be found at http://www.caiso.com/Pages/Glossary.aspx?FilterField1=Letter&FilterValue1=A&&&View=%7b02340A1A-683C-4493-B284-8B949002D449%7d.

because DWR did not buy the RECs, the utilities (and thus their ratepayers) are not receiving credit toward RPS compliance.

Both SDG&E and SCE have sought to buy RECs from these facilities and "reunite" the RECs with the underlying generation that their customers receive from the DWR contracts.[71] As discussed above, once the electricity and the RECs are separated, the RECs are "unbundled" and the underlying electricity may not be used for RPS compliance. It is generally not possible to reattach RECs that have been unbundled from the energy with which they are originally associated.

In this unique and limited circumstance, however, SDG&E and SCE should be allowed to acquire the RECs separately from the energy but receive RPS compliance credit as though they had been purchased together. Neither the utilities nor their ratepayers had any part in DWR's decision to buy only the electricity and not the RECs; neither the utilities nor their ratepayers should be disadvantaged by the assignment to them of these DWR contracts.

We note two elements that confine this determination within narrow boundaries. First, there are no other DWR contracts from the energy crisis that are like these three, so this circumstance will never recur. Second, making this one-time exception will have no lasting impact on the administration of § 399.16. Because SDG&E's advice letters and SCE's application demonstrate that all the contracts at issue were signed prior to June 1, 2010, they would be subject to the special rule set forth in new § 399.16(d), discussed below, that allows

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[71] SDG&E sought Commission approval for purchases of RECs from Cabazon Wind and Whitewater Hill via Advice Letters 2118-E (Oct. 28, 2009), 2188-E-A (June 2, 2011), and 2118-E-B (June 2, 2011). SCE sought Commission approval for both a novation of the Mountain View contract and purchase of RECs in A.09-09-015. Both utilities' requests are currently pending.

procurement from such contracts to count for RPS compliance without regard to the usage limitations on each portfolio content category.

3.6.2. Rules for unbundled RECs

As explained in D.10-03-021, RECs can be unbundled from the RPS-eligible generation with which they were originally associated and sold separately. In that case the transaction is a transaction for unbundled RECs. This is the case both in the framework of D.10-03-021 and the framework of new § 399.16. Regardless of whether the original generation and RECs would have counted in the "bundled" category under D.10-03-021, or in another portfolio content category under new § 399.16 if the RECs had been retired for RPS compliance without being transferred, once they are unbundled and transferred, the RECs are by definition unbundled RECs, subject to the rules of that portfolio content category.

In addition, some rules for the use of unbundled RECs set forth in D.10-03-021, as modified by D.11-01-025, are not affected by new § 399.16(d) and continue in force.[72] These include:

1. The temporary price cap of $50.00/REC, which will expire December 31, 2013. (OP 19.)
2. The prohibition on unbundling RECs from the first three years of a contract that is for unbundled RECs only if that contract has been earmarked to apply to a shortfall in a retail seller's annual procurement target. (OP 16.)
3. The prohibition on unbundling RECs from the first three years of a contract that is *not* for unbundled RECs only if that contract has been

[72] The Commission may reexamine these and other rules in later decisions that continue the implementation of SB 2 (1X).

> earmarked to apply to a shortfall in a retail seller's annual procurement target. (OP 14.)

Further, the new portfolio content categories do not disturb the overarching tenet that once RECs have been unbundled and sold separately from the RPS-eligible electricity with which they were originally associated, the electricity may not be used for RPS compliance. (OP 12, 13; new § 399.25(b), (c).)

3.6.3. Upfront Showing and Compliance determination for Section 399.16(b)(3)

In making an upfront showing in an advice letter seeking approval of a contract for unbundled RECs, an IOU must show (for contracts signed prior to December 31, 2013) that the levelized price does not exceed $50/REC. The IOU must also provide sufficient information for the Commission to determine that the RECs sought to be purchased were originally associated with RPS-eligible generation.

Because it is difficult to predict in advance all the characteristics of RPS procurement that does not qualify under the other portfolio content categories, an IOU's upfront showing for approval of such procurement contracts must be sufficient for the Commission to determine that the electricity was generated by an RPS-eligible facility. The upfront showing must also describe the procurement with enough particularity that the Commission can determine that it is likely not to meet the criteria of either section 399.16(b)(1) or section 399.16(b)(2).

For compliance determinations for unbundled REC purchases, all retail sellers must provide information allowing the Commission to determine that the unbundled RECs claimed for RPS compliance were retired in WREGIS for RPS compliance "within 36 months from the initial date of generation of the associated electricity," as required by new section 399.15(a)(6).

For compliance determinations for procurement meeting either of the other criteria in section 399.16(b)(3), the retail seller must provide enough detail of the transactions so that the portfolio content category classification may be properly determined.

3.7. Section 399.16(c) Usage Limitations

This section sets out the practical application of the portfolio content categories. It provides limitations on using RPS procurement in each of the three portfolio content categories for each compliance period. For the first portfolio content category, the statute sets minimum procurement percentages. For section 399.16(b)(3), its sets maximum percentages. Section 399.16(b)(2) is treated as residual. Numerically, these limitations are straightforward. The only aspect of this section relevant to this decision is the application of the percentage limitations only to "the eligible renewable energy resource electricity products associated with contracts executed after June 1, 2010."[73] This proviso must be read in conjunction with § 399.16(d).

3.8. Section 399.16(d) Contracts Prior to June 1, 2010

This section sets a special rule for "[a]ny contract or ownership agreement originally executed prior to June 1, 2010."[74] It is reasonable to read this phrasing

[73] The Director of Energy Division is authorized to make any changes necessary to reporting formats in order to provide for accurate and accessible reporting by retail sellers of contracts subject to the usage limitations on the new portfolio content categories. This subject may be revisited in later decisions implementing SB 2 (1X).

[74] Parties in general refer to § 399.16(d) as a "grandfathering" provision, but this locution is not much more helpful to understanding than the statutory phrase itself. This decision will instead describe the specific actions or consequences that attach to the statutorily-created class of contracts signed prior to June 1, 2010.

as applying to any RPS procurement transaction that was signed prior to June 1, 2010, as long as it meets the three additional criteria set out in the statute.[75]

The direction that such transactions "shall count in full towards the procurement requirements established pursuant to this article. . ." is the subject of some controversy. Many parties argue that it means that no restrictions or conditions on procurement set by SB 2 (1X) apply to such contracts.[76] Others, including DRA, LSA, TURN, and UCS, insist that some restrictions do apply to these contracts.

AReM argues that the reach of this section should be extended, at least for ESPs, to cover contracts signed in the same time period as allowed by D.11-01-026 (i.e., contracts signed prior to January 13, 2011). AReM asserts that the Commission's decision should be honored in the transition to the SB 2 (1X) regime, because ESPs relied on it in organizing their RPS compliance. SCE and TURN argue that the statutory provisions must apply equally to all retail sellers.

AReM's position must be rejected. The Legislature has the power, though it does not often exercise it, to enact a civil (not criminal) law that will reach and change the legal effect of actions taken in the past. *In re Marriage of Bouquet*, 16 Cal.3d 583, 586-88 (1976). The Legislature's direction in SB 2 (1X) is clear that only contracts signed prior to June 1, 2010 may be given such special treatment. This is express in § 399.16(d) itself. In § 399.16(c), the Legislature provides that

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[75] The details of reporting and compliance determinations necessary to implement this provision will be addressed in a subsequent decision.

[76] These include AReM, DRA, CMUA, Iberdrola, IEP,MEA, Noble Solutions, Shell, and WPTF.

the new portfolio content categories (and thus the accompanying limitations on their use) apply to contracts signed after June 1, 2010. This determination is within the authority of the Legislature, and there is no ambiguity in these directions that would require interpretation or harmonization with D.11-01-026.

We recognize that there may be complex issues of interpretation with respect to other implications of new § 399.16(d), for example, the limitations on applying excess procurement from one compliance period to a subsequent compliance period (new § 399.13(a)(4)(B).). We leave these questions to subsequent decisions on compliance and procurement more generally. For the sake of clarity and simplicity, in this decision we address the significance of § 399.16(d) in the context of the portfolio content requirements of § 399.16.

The parties' consensus reads the "count in full" instruction to mean that the limitations on the use of procurement in each of the three portfolio content categories do not apply to procurement from contracts signed prior to June 1, 2010, as long as the three qualifying conditions are met. While this is generally an accurate reading of the statute, one caveat must be supplied. The general exemption from the usage limitations in new § 399.16(c) applies only to RECs retired for RPS compliance from the originally contracted procurement. If any RECs from a contract signed prior to June 1, 2010, are unbundled and sold separately after June 1, 2010, the underlying energy may not be used for RPS compliance; and the unbundled RECs will be counted in accordance with the limitations on § 399.16(b)(3), as set out in § 399.16(c)(2). This follows from the statutory language, which applies only to a "contract or ownership agreement *originally executed* prior to June 1, 2010." (emphasis added.) A contract signed after that date, even if conveys RECs originally part of a contract signed prior to June 1, 2010, is not covered by § 399.16(d).

3.9. Section 399.16(e)

This section provides an option for a retail seller to ask the Commission to relieve it of some of the requirements of new § 399.16(c). This section is more appropriately considered with other issues of RPS compliance, and will not be addressed in this decision.

3.10. Application of § 399.16 to Small and Multi-Jurisdictional Utilities

Pursuant to new §§ 399.18(b)[77] and 399.17(b)[78], small and multi-jurisdictional utilities (SMJUs) are not subject to the limitations on the use of procurement in each portfolio content category. This decision affirms the Scoping Memo's uncontested ruling on that point. (Scoping Memo, Ruling Paragraph 8.)

This exemption does not, however, affect the portfolio content category itself of SMJUs' RPS procurement transactions. Thus, if a small utility buys unbundled RECs, those unbundled RECs are subject to the rules for that

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[77] This section applies to utilities that either have 30,000 or fewer customer accounts and have issued a certain number of RPS solicitations, or have 1,000 or fewer customer accounts and are not connected to any transmission system or CAISO. The first condition applies to the Bear Valley Electric Service unit of Golden State Water Company. The second applied to Mountain Utilities. Mountain Utilities has since been acquired by the Kirkwood Meadows Public Utility District. (D.11-06-032.) Mountain Utilities is therefore no longer a retail seller for RPS purposes.

[78] This section applies to utilities (or their successors) having fewer than 60,000 California customers and either serving retail end-use customers outside of California or being located outside the CAISO and receiving the majority of their electricity from generation sources outside California. The first condition applies to PacifiCorp. The second applies to California Pacific Energy Company, the successor to the California assets of Sierra Pacific Power Company. (D.11-02-015; D.11-04-030.)

portfolio content category; but when the small utility retires those RECs for RPS compliance, it may use them without regard to the limitations in § 399.16(c)(2).

3.11. Next Steps

The implementation of new § 399.16 will require, as emphasized throughout this decision, work by Energy Division staff, in consultation with the parties and with collaborative staff at the CEC, to revise and update this Commission's processes for reviewing and approving utility advice letters for RPS procurement and for prescribing, reviewing, and evaluating documentation of RPS procurement compliance by all retail sellers. This is a substantial undertaking that is likely to require more than one iteration. The Director of Energy Division is encouraged to set priorities for this effort promptly, and to begin the work as soon as practicable.[79]

As set out in the Scoping Memo, the Commission must now set targets for the new RPS compliance periods prescribed by SB 2(1X). Important issues about compliance and enforcement under the new SB 2(1X) rules, as well as about the "seams" between the old and new RPS regimes, have been raised in party comments and will be addressed in subsequent Commission decisions.

4. Comments on Proposed Decision

The proposed decision of ALJ Anne E. Simon in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice

[79] The fact that the first compliance period runs until the end of 2013 provides a little time for the development of compliance tools. RPS procurement, however, proceeds apace, with the large utilities having already developed their short lists from their 2011 RPS procurement solicitations.

and Procedure. Comments were filed on _____ and reply comments were filed on _____.

5. Assignment of Proceeding

Mark J. Ferron is the assigned Commissioner and Anne E. Simon is the assigned ALJ for this portion of this proceeding.

Findings of Fact

1. There are currently five California balancing authorities for RPS purposes: CAISO, Balancing Authority of Northern California, Imperial Irrigation District, LADWP, and Turlock Irrigation District.

2. WREGIS aggregates information about RPS-eligible generation on a monthly basis.

3. WREGIS does not currently have a functionality that would allow tracking of the new portfolio content categories created by new § 399.16.

4. Firmed and shaped transactions using substitute electricity are one method to schedule electricity into a California balancing authority from a generation facility located outside the boundaries of a California balancing authority.

5. Electricity from a generation facility located outside the boundaries of a California balancing authority may be scheduled into a California balancing authority on an hourly or subhourly basis without the substitution of energy from another source.

6. Electricity from a generation facility located outside the boundaries of a California balancing authority may be scheduled into a California balancing authority through an arrangement for dynamic transfer from the balancing authority in which the generation facility is interconnected to a California balancing authority.

7. Information about the specific generation facility providing generation recorded on the e-Tag is not a required element of e-Tags.

8. Once a REC is separated from the renewable generation with which it was originally associated, the electricity with which the REC was originally associated is not RPS-eligible.

9. Procurement contracts signed by DWR with Cabazon Wind Partners LLC and Whitewater Hill Wind Partners LLC and assigned by the Commission to SDG&E purchased electricity from wind farms interconnected to a California balancing authority, but did not procure the RECs associated with the generation.

10. A procurement contract signed by DWR with Mountain View Power Partners purchased electricity from wind farms interconnected to a California balancing authority, but did not procure the RECs associated with the generation.

Conclusions of Law

1. SB 2 (1X) goes into effect on December 10, 2011.

2. Upon the effective date of SB 2 (1X), the Commission's authority to require a demonstration that an RPS procurement transaction meets the "delivery" requirement for RPS eligibility under current RPS law lapses.

3. The repeal of the delivery requirement for RPS eligibility does not affect existing contractual delivery requirements.

4. Because any change to the delivery structure of an IOU's RPS contract approved prior to December 10, 2011 may have value and price implications for ratepayers, any IOU seeking to amend the delivery structure of such a contract should submit the amendment for Commission approval.

5. In order to keep the list of California balancing authorities that meet the requirements of new § 399.12(d) up to date, the Director of Energy Division should be authorized to develop a method for updating the list in the future, should that prove necessary.

6. In order to provide value to ratepayers and promote the fair and efficient administration of the RPS program, IOUs should be required to make an upfront showing of the new portfolio content category or categories of procurement in contracts submitted for Commission approval.

7. In order to ensure that RPS procurement complies with the new portfolio content requirements and promote the fair and efficient administration of the RPS program, all retail sellers should be required to provide documentation to Energy Division staff demonstrating that RPS procurement properly belongs in the portfolio content category in which it is claimed for RPS compliance.

8. Because the criteria for portfolio content categories set out in new § 399.16 are different from the criteria for unbundled and REC-only transactions stated in D.10-03-021, the investigation of the role of firm transmission required by OP 26 of D.10-03-021, as modified by D.11-01-025, is no longer necessary.

9. Because new types of information will be necessary to evaluate retail sellers' compliance with the procurement requirements of the new portfolio content categories, the Director of Energy Division should be authorized to develop methods for evaluating compliance with the new portfolio content categories and to require retail sellers to provide necessary information, as determined by the Director of Energy Division, for such evaluation.

10. Because new types of information will be necessary to evaluate the value to ratepayers of IOUs' procurement that meets the requirements of the new portfolio content categories, the Director of Energy Division should be

authorized to develop methods for evaluating the value to ratepayers of IOUs' procurement meeting the requirements the new portfolio content categories and to require IOUs to provide necessary information, as determined by the Director of Energy Division, for such evaluation at the time an IOU seeks Commission approval of an RPS procurement contract.

11. Because dynamic transfer transmission arrangements are evolving, the Director of Energy Division should be authorized to review the development of dynamic transfer methods and incorporate any such developments into the information retail sellers must provide for compliance with the new portfolio content categories.

12. Procurement from contracts signed on or after June 1, 2010 may be counted in the portfolio content category described in Pub. Util. Code § 399.16(b)(1), as effective December 10, 2011, if the generation facility from which the electricity is procured is certified as eligible for the California RPS and has its first point of interconnection to the WECC transmission grid within the metered boundaries of a California balancing authority area, so long as the renewable energy credits originally associated with the electricity have not been unbundled and transferred to another owner, and all other procurement requirements for compliance with the California RPS are met.

13. Procurement from contracts signed on or after June 1, 2010 may be counted in the portfolio content category described in Pub. Util. Code § 399.16(b)(1), as effective December 10, 2011, if the generation facility from which the electricity is procured is certified as eligible for the California RPS and has its first point of interconnection with the electricity distribution system used to serve end user customers within the metered boundaries of a California balancing authority area, so long as the renewable energy credits originally

associated with the electricity have not been unbundled and transferred to another owner, and all other procurement requirements for compliance with the California RPS are met.

14. Procurement from contracts signed on or after June 1, 2010 may be counted in the portfolio content category described in Pub. Util. Code § 399.16(b)(1), as effective December 10, 2011, if the generation facility from which the electricity is procured is certified as eligible for the California RPS and the generation from that facility is scheduled into a California balancing authority without substituting electricity from any other source, so long as all the renewable energy credits originally associated with the electricity have not been unbundled and transferred to another owner, and all other procurement requirements for compliance with the California RPS are met; and provided that, if another source provides real-time ancillary services required to maintain an hourly or subhourly import schedule into the California balancing authority only the fraction of the schedule actually generated by the generation facility from which the electricity is procured may count toward this portfolio content category.

15. Procurement from contracts signed on or after June 1, 2010 may be counted in the portfolio content category described in Pub. Util. Code § 399.16(b)(1), as effective December 10, 2011, if the generation facility from which the electricity is procured is certified as eligible for the California RPS and the generation from that facility is scheduled into a California balancing authority pursuant to a dynamic transfer agreement between the balancing authority where the generation facility is interconnected and the California balancing authority into which the generation is scheduled, so long as the renewable energy credits originally associated with the electricity have not been unbundled

and transferred to another owner, and all other procurement requirements for compliance with the California RPS are met.

16. Procurement from contracts signed on or after June 1, 2010 may be counted in the portfolio content category described in Pub. Util. Code § 399.16(b)(2), as effective December 10, 2011, if the generation facility from which the electricity is procured is certified as eligible for the California RPS and the generation from that facility is firmed and shaped with substitute electricity scheduled into a California balancing authority within the same calendar year as the generation from the facility eligible for the California RPS, and if the substitute electricity provides incremental electricity, if the following conditions are met, so long as the renewable energy credits originally associated with the electricity have not been unbundled and transferred to another owner, and all other procurement requirements for compliance with the California RPS are also met:

- the buyer simultaneously purchases energy and associated RECs from the RPS-eligible generation facility;
- the energy purchased from the RPS-eligible generation facility is available to the buyer (i.e., the purchased energy must not in practice be already committed to consumption by another party);
- the buyer acquires the substitute energy at the same time as it acquires the RPS-eligible energy.

17. Procurement from contracts signed on or after June 1, 2010 may be counted in the portfolio content category described in Pub. Util. Code § 399.16(b)(3), as effective December 10, 2011, if either of the following conditions is met, so long as all other procurement requirements for compliance with the California RPS are met:

- The procurement consists of unbundled renewable energy credits originally associated with generation eligible under the California renewables portfolio standard; or
- The procurement consists of any generation eligible under the California renewables portfolio standard that does not quality to be counted in either the portfolio content category described in Pub. Util. Code § 399.16(b)(1), as effective December 10, 2011, or the portfolio content category described in Pub. Util. Code § 399.16(b)(2), as effective December 10, 2011.

18. In the unique and limited circumstance of the contracts signed by DWR during the energy crisis with Cabazon Wind Partners LLC and Whitewater Hill Wind Partners LLC, SDG&E should be allowed an exception to the general rules about unbundled RECs in order to acquire the RECs separately from the energy but receive RPS compliance credit as though they had been purchased together.

19. In the unique and limited circumstance of the contracts signed by DWR during the energy crisis with Mountain View Power Partners, SCE should be allowed an exception to the general rules about unbundled RECs in order to acquire the RECs separately from the energy but receive RPS compliance credit as though they had been purchased together.

20. The ruling of the Scoping Memo that RPS procurement of small and multi-jurisdictional utilities should count for RPS compliance without regard to the limitations on use of each portfolio content category established by Pub. Util. Code § 399.16(b), as effective December 10, 2011, should be confirmed.

21. Procurement from contracts signed prior to June 1, 2010 and meeting the conditions set out in new § 399.16(d) should be counted for RPS compliance without regard to the limitations on use of each portfolio content category established by Pub. Util. Code § 399.16(b), as effective December 10, 2011, provided that, if any RECs from a contract signed prior to June 1, 2010, are

unbundled and sold separately after June 1, 2010, the underlying energy should not be used for RPS compliance and the unbundled RECs should be counted in accordance with the limitations on procurement in the portfolio content category of Pub. Util. Code § 399.16(b)(3), as set out in Pub. Util. Code § 399.16(c)(2).

22. In order to promote effective compliance with the new RPS requirements of SB 2 (1X), this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. A retail seller claiming that procurement for compliance with the California renewables portfolio standard from a procurement contract signed on or after June 1, 2010 counts in the portfolio content category described in Pub. Util. Code § 399.16(b)(1), as effective December 10, 2011, must provide information to the Director of Energy Division sufficient to demonstrate that the generation facility from which the electricity is procured is certified as eligible for the California renewables portfolio standard and either:

    a. has its first point of interconnection to the Western Electricity Coordinating Council transmission grid within the metered boundaries of a California balancing authority area; or

    b. has its first point of interconnection with the electricity distribution system used to serve end users within the metered boundaries of a California balancing authority area; or

    c. the generation from that facility is scheduled into a California balancing authority without substituting electricity from any other source, provided that, if another source provides real-time ancillary services required to maintain an hourly or subhourly import schedule into the California balancing authority only the fraction of the schedule actually generated by the generation

facility from which the electricity is procured may count toward this portfolio content category; or

d. the generation from that facility is scheduled into a California balancing authority pursuant to an agreement between the balancing authority where the generation facility is located and the California balancing authority into which the generation is scheduled.

The retail seller must also demonstrate that the renewable energy credits originally associated with the electricity have not been unbundled and transferred to another owner, and that all other requirements for procurement for compliance with the California renewables portfolio standard are met by the procurement.

2. A retail seller claiming that procurement for compliance with the California renewables portfolio standard from a contract signed on or after June 1, 2010 counts in the portfolio content category described in Pub. Util. Code § 399.16(b)(2), as effective December 10, 2011, must provide information to the Director of Energy Division sufficient to demonstrate that the generation from that facility is firmed and shaped with substitute electricity scheduled into a California balancing authority within the same calendar year as the generation from the facility eligible for the California renewables portfolio standard, and that the substitute electricity provides incremental electricity, if the following conditions are met:

- the buyer simultaneously purchases energy and associated renewable energy certificates (RECs)from the RPS-eligible generation facility;
- the energy purchased from the RPS-eligible generation facility is available to the buyer (i.e., the purchased energy must not in practice be already committed to consumption by another party);
- the buyer acquires the substitute energy at the same time as it acquires the renewables portfolio standard-eligible energy.

The retail seller must also demonstrate that the renewable energy credits originally associated with the electricity have not been unbundled and transferred to another owner, and that all other requirements for procurement compliance with the California renewables portfolio standard are met by the procurement.

3. A retail seller claiming that procurement for compliance with the California renewables portfolio standard from a contract signed on or after June 1, 2010 should be counted in the portfolio content category described in Pub. Util. Code § 399.16(b)(3), as effective December 10, 2011, must provide information to the Director of Energy Division sufficient to demonstrate that either of the following conditions is met, so long as all other procurement requirements for compliance with the California renewables portfolio standard are met:

- The procurement consists of unbundled renewable energy credits originally associated with generation eligible under the California renewables portfolio standard; or
- The procurement consists of any generation eligible under the California renewables portfolio standard that does not quality to be counted in either the portfolio content category described in Pub. Util. Code § 399.16(b)(1), as effective December 10, 2011, or the portfolio content category described in Pub. Util. Code § 399.16(b)(2), as effective December 10, 2011.

4. In submitting any contract for procurement to meet the California renewables portfolio standard to the Commission for approval on or after December 10, 2011, an investor owned utility must provide sufficient information for the Commission to evaluate, without limitation and in addition to any other requirements for information, the following elements: the claimed portfolio content category of the proposed procurement; the risks that the

procurement will not ultimately be classified in the claimed portfolio content category; the value to ratepayers of the procurement as proposed and the value to ratepayers if the procurement is not ultimately classified in the claimed portfolio category.

5. The Director of Energy Division is authorized to require any investor owned utility that has submitted a contract for procurement to meet the California renewables portfolio standard that was signed after June 1, 2010 but was not approved by the Commission prior to December 10, 2011 to provide additional information to allow the Commission to evaluate, without limitation and in addition to any other requirements for information, the following elements: the claimed portfolio content category of the proposed procurement; the risks that the procurement will not ultimately be classified in the claimed portfolio content category; the value to ratepayers of the procurement as proposed and the value to ratepayers if the procurement is not ultimately classified in the claimed portfolio category.

6. The Director of Energy Division is authorized to develop any methods and requirements for information to be provided by investor owned utilities seeking approval of contracts for procurement to meet the California renewables portfolio standard to allow the Commission to evaluate, without limitation, the following elements: the claimed portfolio content category of the proposed procurement; the risks that the procurement will not ultimately be classified in the claimed portfolio content category; the value to ratepayers of the procurement as proposed and the value to ratepayers if the procurement is not ultimately classified in the claimed portfolio content category.

7. The Director of Energy Division is relieved of the obligation imposed by Ordering Paragraph 26 of Decision (D.) 10-03-021, as modified by D.11-01-025, to

investigate and report on the place of firm transmission in procurement for compliance with the California renewables portfolio standard.

8. Any investor owned utility seeking to amend the delivery structure of a contract for procurement for compliance with the California renewables portfolio standard on or after December 10, 2011 must submit the amended contract for Commission approval.

9. The Director of Energy Division is authorized to review the development of dynamic transfer arrangements for transmission of electricity eligible for renewables portfolio standard compliance and incorporate the results of such review into the information retail sellers must provide for compliance with the new portfolio content categories.

10. In order to keep the list of California balancing authorities up to date, the Director of Energy Division is authorized to develop a method for updating the list of California balancing authorities that meet the requirements of new § 399.12(d), should that prove necessary.

11. The general rules about the use of unbundled renewable energy credits for compliance with the California renewables portfolio standard should not be applied in the unique and limited circumstance of the contracts signed by the Department of Water Resources during the energy crisis with Cabazon Wind Partners LLC and Whitewater Hill Wind Partners LLC and assigned to San Diego Gas & Electric Company, which may be allowed to acquire the unbundled renewable energy credits separately from the energy but receive credit for compliance with the California renewables portfolio standard as though they had been purchased together.

12. The general rules about the use of unbundled renewable energy credits for compliance with the California renewables portfolio standard should not be

applied in the unique and limited circumstance of the contracts signed by the Department of Water Resources during the energy crisis with Mountain View Power Partners and assigned to Southern California Edison Company, which may be allowed to acquire the unbundled renewable energy credits separately from the energy but receive credit for compliance with the California renewables portfolio standard as though they had been purchased together.

13. The procurement of small and multi-jurisdictional utilities should count for compliance with the California renewables portfolio standard without regard to the limitations on the use of each portfolio content category established by Pub. Util. Code § 399.16(c), as effective December 10, 2011, so long as all other procurement requirements for compliance with the California renewables portfolio standard are also met.

14. Procurement from contracts signed prior to June 1, 2010, and meeting the conditions set out in Pub. Util. Code § 399.16(d), as effective December 10, 2011, may be counted for compliance with the California renewables portfolio standard without regard to the limitations on the use of each portfolio content category established by Pub. Util. Code § 399.16(c), as effective December 10, 2011, provided that, if any renewable energy credits from a contract signed prior to June 1, 2010 are unbundled and sold separately after June 1, 2010, the underlying energy may not be counted for compliance with the California renewables portfolio standard and the unbundled renewable energy credits must be counted in accordance with the limitations on procurement in the portfolio content category of Pub. Util. Code § 399.16(b)(3), as set out in Pub. Util. Code § 399.16(c), as effective December 10, 2011.

15. Rulemaking 11-05-005 remains open.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

New Section 399.16 of the Public Utilities Code (Enacted by Senate Bill 2 (1X), Stats. 2011, ch. 1) Effective December 10, 2011

399.16. (a) Various electricity products from eligible renewable energy resources located within the WECC transmission network service area shall be eligible to comply with the renewables portfolio standard procurement requirements in Section 399.15. These electricity products may be differentiated by their impacts on the operation of the grid in supplying electricity, as well as, meeting the requirements of this article.

(b) Consistent with the goals of procuring the least-cost and best-fit electricity products from eligible renewable energy resources that meet project viability principles adopted by the commission pursuant to paragraph (4) of subdivision (a) of Section 399.13 and that provide the benefits set forth in Section 399.11, a balanced portfolio of eligible renewable energy resources shall be procured consisting of the following portfolio content categories:

(1) Eligible renewable energy resource electricity products that meet either of the following criteria:

(A) Have a first point of interconnection with a California balancing authority, have a first point of interconnection with distribution facilities used to serve end users within a California balancing authority area, or are scheduled from the eligible renewable energy resource into a California balancing authority without substituting electricity from another source. The use of another source to provide real-time ancillary services required to maintain an hourly or subhourly import schedule into a California balancing authority shall be permitted, but only the fraction of the schedule actually generated by the eligible renewable energy resource shall count toward this portfolio content category.

(B) Have an agreement to dynamically transfer electricity to a California balancing authority.

(2) Firmed and shaped eligible renewable energy resource electricity products providing incremental electricity and scheduled into a California balancing authority.

(3) Eligible renewable energy resource electricity products, or any fraction of the electricity generated, including unbundled renewable energy credits, that do not qualify under the criteria of paragraph (1) or (2).

(c) In order to achieve a balanced portfolio, all retail sellers shall meet the following requirements for all procurement credited towards each compliance period:

(1) Not less than 50 percent for the compliance period ending December 31, 2013, 65 percent for the compliance period ending December 31, 2016, and 75 percent

thereafter of the eligible renewable energy resource electricity products associated with contracts executed after June 1, 2010, shall meet the product content requirements of paragraph (1) of subdivision (b).

(2) Not more than 25 percent for the compliance period ending December 31, 2013, 15 percent for the compliance period ending December 31, 2016, and 10 percent thereafter of the eligible renewable energy resource electricity products associated with contracts executed after June 1, 2010, shall meet the product content requirements of paragraph (3) of subdivision (b).

(3) Any renewable energy resources contracts executed on or after June 1, 2010, not subject to the limitations of paragraph (1) or (2), shall meet the product content requirements of paragraph (2) of subdivision (b).

(d) Any contract or ownership agreement originally executed prior to June 1, 2010, shall count in full towards the procurement requirements established pursuant to this article, if all of the following conditions are met:

(1) The renewable energy resource was eligible under the rules in place as of the date when the contract was executed.

(2) For an electrical corporation, the contract has been approved by the commission, even if that approval occurs after June 1, 2010.

(3) Any contract amendments or modifications occurring after June 1, 2010, do not increase the nameplate capacity or expected quantities of annual generation, or substitute a different renewable energy resource. The duration of the contract may be extended if the original contract specified a procurement commitment of 15 or more years.

(e) A retail seller may apply to the commission for a reduction of a procurement content requirement of subdivision (c). The commission may reduce a procurement content requirement of subdivision (c) to the extent the retail seller demonstrates that it cannot comply with that subdivision because of conditions beyond the control of the retail seller as provided in paragraph (5) of subdivision (b) of Section 399.15. The commission shall not, under any circumstance, reduce the obligation specified in paragraph (1) of subdivision (c) below 65 percent for any compliance obligation after December 31, 2016.

(END OF APPENDIX A)