

ALJ/AES/vm2

**PROPOSED DECISION**

Agenda ID #13388  
Ratesetting  
12/4/2014

Decision PROPOSED DECISION OF ALJ SIMON (Mailed 10/16/2014)

**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 SETTING ENFORCEMENT RULES FOR THE RENEWABLES  
PORTFOLIO STANDARD PROGRAM, IMPLEMENTING ASSEMBLY  
BILL 2187, AND DENYING PETITIONS FOR MODIFICATION OF  
DECISION 12-06-038**

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**DECISION SETTING ENFORCEMENT RULES FOR THE RENEWABLES  
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BILL 2187, AND DENYING PETITIONS FOR MODIFICATION OF  
DECISION 12-06-038**

**Summary**

This decision completes the rules for retail sellers' compliance with the renewables portfolio standard (RPS) program under the mandates of Senate Bill 2 (1X) (Simitian), Stats. 2011, ch. 1, as supplemented by Assembly Bill (AB) 2187 (Bradford), Stats. 2012 ch. 604. This decision:

- Specifies the process by which retail sellers may request a waiver of enforcement of their RPS procurement obligations;
- Specifies the process by which retail sellers may request a reduction in their RPS portfolio balance requirements;
- Continues the current penalty amount of \$50 per renewable energy credit (REC) of shortfall in a retail seller's RPS procurement obligation;
  - Applies the \$50/REC penalty amount to a retail seller's shortfalls in meeting both procurement quantity requirements (PQR) and portfolio balance requirements (PBR) in a compliance period;
  - Sets the total penalty amount for a shortfall in RECs needed to meet both a retail seller's PQR and PBR as 1.5 times \$50/REC;
- Revises the cap on total potential penalties for a retail seller's failure to meet RPS procurement obligations to take account of (1) the new multi-year compliance periods in the RPS program, and (2) the differences in size between

California's three large investor-owned electric utilities (IOUs)<sup>1</sup> and the other retail sellers with RPS procurement obligations by:

- Setting the penalty cap for the large IOUs at \$75 million for the first RPS compliance period (2011-2013); \$75 million for the second compliance period (2014-2016); \$100 million for the third compliance period (2017-2020); and \$25 million for each annual compliance period, beginning in 2021; and
  - Setting the penalty cap for all other retail sellers based on a proportion of their RPS procurement obligation for a compliance period: 50% of the retail seller's PQR for the compliance period multiplied by the penalty amount of \$50/REC.
- Confirms the rules for retail sellers' reports to the Commission on their compliance with RPS requirements to the enforcement rules specified in this decision;
  - Sets a process for revision of the RPS compliance reporting documents to implement this decision;
  - Requires the Director of Energy Division, in consultation with the parties, to develop an updated citation program<sup>2</sup> that reflects the compliance and enforcement requirements set out in Decision (D.) 12-06-038 and this decision;
  - Implements AB 2187 to change the date governing the use of RPS-eligible energy without regard to portfolio balance requirements by electric service providers.

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<sup>1</sup> They are Pacific Gas & Electric Company, Southern California Edison Company, and San Diego Gas and Electric Company.

<sup>2</sup> The prior RPS citation program was set up through Resolution E-4257 (November 2, 2009).

- Denies two petitions for modification of D.12-06-038.

This proceeding remains open.

### **1. Procedural History**

The Order Instituting Rulemaking (OIR) for this proceeding was adopted by the California Public Utilities Commission (Commission) on May 5, 2011. The Scoping Memo and Ruling of Assigned Commissioner (Scoping Memo) was issued July 8, 2011. The Scoping Memo noted that Senate Bill (SB) 2 (1X) makes significant changes to the renewables portfolio standard (RPS) program.<sup>3</sup> The Scoping Memo identified four "highest priority" issues for immediate attention in the Commission's implementation of the new RPS statute. One of them is "implementing the most urgent new compliance rules and resolving initial "seams" issues between compliance rules for the 20% RPS program and new 33% RPS program compliance rules set by SB 2 (1x)." (Scoping Memo at 3.) In Decision (D.) 12-06-038, the Commission implemented the most urgent new rules and resolved most of the "seams" issues.

In D.12-06-038, the Commission identified certain issues that would require additional development of the record prior to a final determination of the compliance and enforcement rules. On January 1, 2013, Assembly Bill (AB) 2187 (Bradford), Stats. 2012, ch. 604, became effective. Implementation of this legislation was made part of the work on compliance and enforcement rules in this proceeding. (Second Amended Scoping Memo and Ruling of Assigned Commissioner (January 9, 2013) at 4.)

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<sup>3</sup> The RPS is codified at Pub. Util. Code § 399.11-399.32. Unless otherwise noted, all further references to sections are to the Public Utilities Code.

On September 27, 2013, the Administrative Law Judge's (ALJ) Ruling Requesting Comments on Compliance and Enforcement Issues in the Renewables Portfolio Standard Program (Comment Ruling) was issued. Comments were filed on October 25, 2013.<sup>4</sup> Reply comments were filed on November 12, 2013.<sup>5</sup>

On February 21, 2013, BVES, California Pacific Electric Company (CalPeco), and PacifiCorp filed the Joint Petition of BVES, a Division of Golden State Water Company, California Pacific Electric Company, LLC, and PacifiCorp for Modification of D.12-06-038 (small and multi-jurisdictional utilities (SMJU) Petition). The SMJU Petition requests that the Commission revise the method for calculating excess RPS-eligible procurement that can be carried from one compliance period into later compliance periods by SMJUs. No responses to the SMJU Petition were filed.

Finally, on January 17, 2014, the Petition for Modification of D.12-06-038 by the Alliance for Retail Energy Markets and Shell Energy North America (US), L.P. (electric service provider (ESP) Petition) was filed. The ESP Petition seeks to modify D.12-06-038 to extend the period of time within which certain renewable

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<sup>4</sup> Comments were filed by 3 Phases Renewables, ConEdison, Solutions, EDF Industrial Power Services, and Tiger Natural Gas (jointly; collectively, Joint ESPs); Alliance for Retail Energy Markets (AREM); Bear Valley Electric Service (BVES); California Municipal Utilities Association and Southern California Public Power Agency (jointly; collectively, CMUA); California Wastewater Climate Change Group; Calpine Corporation (Calpine); Green Power Institute (GPI); Marin Energy Authority (MEA); Noble Americas Energy Solutions LLC (Noble Solutions); Pacific Gas and Electric Company (PG&E); PacifiCorp; San Diego Gas & Electric Company (SDG&E); City and County of San Francisco (San Francisco); Shell Energy North America (US) L.P. (Shell); Southern California Edison Company (SCE); Southern California Public Power Agency (SCPPA); TransWest Express LLC (TransWest); Union of Concerned Scientists, Large Scale Solar Association, and Sierra Club of California (jointly; collectively, UCS).

<sup>5</sup> Reply comments were filed by AREM; BVES; CMUA; GPI; ESP; PG&E; SDG&E; SCE; The Utility Reform Network (TURN); and UCS.

energy credits (RECs) may be retired to count for RPS compliance. PacifiCorp and SCE each filed a response to the ESP Petition on February 18, 2014.

## **2. Discussion**

### **2.1. Introduction**

The RPS program has been the subject of much legislation and many decisions by this Commission.<sup>6</sup> The wide-ranging revisions to RPS compliance requirements and the RPS compliance reporting process made by SB 2 (1X) were identified by the Commission and substantially implemented in D.12-06-038.

This decision largely follows the course set in D.12-06-038, resolving the issues the Commission characterized as appropriate for later decision. This decision is also informed by the experience of Energy Division staff and the parties in implementing the new compliance process set out in decisions implementing SB 2 (1X).

The overall approach of this decision is to preserve or adapt the existing RPS enforcement mechanisms to the extent possible, and to the extent that they are consistent with the mandates of SB 2 (1X). The Commission's experience with the RPS program over the past decade points to the conclusion that ratepayers, retail sellers, and RPS market participants generally will be better served by stability and continuity in the administration of compliance and enforcement in the RPS program than by wide-ranging revision of the

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<sup>6</sup> The RPS program was initiated by Senate Bill (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. SB 2 (1X) made extensive changes to many aspects of the RPS program, including extending the RPS procurement goal to 33% of retail sales of electricity statewide by 2020. See also the OIR for this proceeding, at 17.

fundamental enforcement structures, while appropriately incorporating the changes to the RPS requirements made by SB 2 (1X).

The sections of SB 2 (1X) most relevant to this decision are set out in Appendix A.

## **2.2. Implementation of Assembly Bill 2187**

AB 2187 amends Section 399.16(c) by adding a new subsection (4), set out in full in Appendix A. This change allows ESPs to treat their RPS procurement contracts executed before January 14, 2011, in the same way that contracts of other retail sellers executed before June 1, 2010 are treated for purposes of the portfolio balance requirements of Section 399.16(c).

The Commission has already determined that procurement from RPS contracts signed prior to June 1, 2010 “is simply outside the portfolio balance requirements; it neither counts nor does not count in any particular portfolio content category.” (D.12-06-038 at 29 (citing D.11-12-052).) The change made by AB 2187, therefore, extends this treatment to RPS procurement from contracts signed prior to January 14, 2011 – for ESPs only.

AB 2187 made no change to Section 399.16(d), which allows contracts of all retail sellers executed prior to June 1, 2010 to “count in full toward the procurement requirements established in this article [i.e., the RPS statute, Sections 399.11-399.32],” under certain conditions.<sup>7</sup> Applying general principles of statutory construction to the language of AB 2187 therefore leads to the

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<sup>7</sup> The application of this section was discussed in Section 3.3.2.3 and Ordering Paragraphs 12-14 of D.12-06-038.

conclusion that AB 2187 did not make any change to the “count in full” provisions of Section 399.16(d).<sup>8</sup>

Further, response to a question posed by the ALJ’s Comment Ruling, both Noble Solutions, the sponsor of the legislation that became AB 2187, and The Utility Reform Network (TURN), which supported it, inform the Commission that it was not the intention of those who suggested or wrote the legislation to apply the January 13, 2011 date to Section 399.16(d).<sup>9</sup> While this is to be expected, given the unambiguous language of the provisions, the Commission appreciates the clarity added by the parties’ comments on this section.<sup>10</sup>

### **2.3. Implementation of nforcement equirements of Senate Bill 2 (1X)**

SB 2 (1X) provides a revised framework for RPS enforcement, to go along with its revised requirements for RPS procurement and compliance. While the statute carries forward the RPS program’s historical emphasis on compliance, SB 2 (1X) simplifies many aspects of RPS enforcement. The multi-year compliance periods through 2020 not only allow better planning by retail sellers than the prior annual compliance periods, but also render obsolete the Commission’s prior complex enforcement rules designed in part to deal with the short annual compliance timeframe (e.g., allowing retail sellers to incur a certain percentage of their annual procurement obligation as a deficit without

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<sup>8</sup> See, e.g., *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal. 4<sup>th</sup> 381, 387:

The statute’s plain meaning controls the court’s interpretation unless its words are ambiguous.

<sup>9</sup> Noble Solutions Opening Comments at 17; TURN Reply Comments at 5.

<sup>10</sup> To promote clarity and economy of language usage, whenever this decision refers to Section 399.16(c), it means”, Section 399.16(c) as amended by AB 2187 and implemented in this decision,” unless otherwise specified.

explanation; allowing “earmarking” of deliveries from contracts signed in one year but anticipated in future years to make up deficits in prior years. (*See* D.03-06-071, OP 22; D.06-05-037 at 24-26; D.12-06-038 at 12-14.) By expressly prohibiting the carryover of procurement deficits in Section 399.15(b)(9), SB 2 (1X) eliminates the uncertainty and complexity that attended the prior statutory requirement that procurement deficits could be carried forward, but must be made up within three years of the year in which they were incurred.<sup>11</sup> This simplification in turn allows the disposition of a waiver of a retail seller’s procurement quantity requirement (PQR) pursuant to Section 399.15(b)(5) to establish finality for the relevant compliance period.<sup>12</sup>

SB 2 (1X) also modifies the procedural framework for RPS enforcement. The prior enforcement system handled all relevant determinations under the rubric of “penalties.” As set out in D.03-06-071, the retail seller<sup>13</sup> would report its RPS procurement for the annual compliance period, check that number against its compliance targets, and calculate a presumptive penalty if there was a shortfall. The retail seller would then present its justifications for the shortfall, in the context of asking the Commission for a reduction or deferral of the presumptive penalty amount.<sup>14</sup>

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<sup>11</sup> *See* prior Section 399.14(a)(2)(C) (originally enacted by SB 1078, revised by SB 107); D.06-10-050 at 19.

<sup>12</sup> Analogous finality is established with respect to the portfolio balance requirement (PBR) reduction. *See* section 2.3.2., below.

<sup>13</sup> This decision referred only to the three large IOUs. The same process was extended to all retail sellers in D.06-10-019 (ESPs and community choice aggregators (CCAs)) and D.08-05-029 (small and multi-jurisdictional utilities (SMJUs)).

<sup>14</sup> The possible justifications included:

*Footnote continued on next page*

Under SB 2 (1X), by contrast, the locus of a retail seller's justification for failure to meet RPS procurement requirements is its request for a waiver of PQR, not its opposition to the imposition of a penalty.<sup>15</sup> The heavy lift of justification takes place in the retail seller's demonstration that it has met one or more of the listed conditions and "has taken all reasonable actions under its control... to

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- Automatic deferral of annual shortfall of up to 25% of incremental procurement requirements;
  - Insufficient response to a utility's request for offers;
  - Contracts already executed will provide future deliveries sufficient to satisfy current year deficits;
  - Inadequate public goods funds to cover above-market contract costs;
  - Seller non-performance;
  - Elevation of bid prices due to lack of effective competition;
  - Deferral would promote ratepayer interests and overall RPS procurement objectives.

D.03-06-071 at 49-53.

<sup>15</sup> Sections 399.15(b)(5) and 399.15(b)(8) provide, respectively (emphasis added):

5) The commission shall waive enforcement of this section if it finds that the retail seller has demonstrated any of the following conditions are beyond the control of the retail seller and will prevent compliance . . .

8) If a retail seller fails to procure sufficient eligible renewable energy resources to comply with a procurement requirement pursuant to paragraphs (1) and (2) and fails to obtain an order from the commission waiving enforcement pursuant to paragraph (5), the commission shall exercise its authority pursuant to Section 2113.

The same is true for the request for a reduction of PBR, since the request incorporates the conditions in Section 399.15(b). Section 399. 16(e) provides (emphasis added):

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.

achieve full compliance.” The penalty would then follow upon the retail seller’s failure to obtain an order waiving enforcement.<sup>16</sup>

Mindful of this background, we take up the particulars of the enforcement process under SB 2 (1X).

### **2.3.1. Waiver of Procurement Quantity Requirements**

The mandatory reasons for the Commission to grant a waiver of PQR are set out in Section 399.15(b)(5). The process for submission and determination of a waiver request is not specified in the statute. The process should draw on the Commission’s ordinary practices and procedures and the processes that are already in place for the RPS program, with the specific requirements of SB 2 (1X) included as required.

#### **2.3.1.1. Process for Requesting Waiver**

In setting the process for requesting a waiver, it is important to remember, as pointed out in D.12-06-038, that the request cannot be decided by the Commission until after the submission by the California Energy Commission (CEC) of its RPS Verification Report for Retail Sellers (Verification Report) for the compliance period.<sup>17</sup> Only after the Verification Report is available will it be clear whether, and to what extent, a retail seller has fallen short in fulfilling its PQR obligation.

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<sup>16</sup> As SDG&E points out, the Commission’s enforcement authority is not limited to penalties. See section 2.4., below, for a discussion of the place of penalties in RPS enforcement.

<sup>17</sup> D.12-06-038 at 80. The CEC’s RPS procurement verification process is described in the CEC *Renewables Portfolio Standard Eligibility Guidebook* (7<sup>th</sup> ed., April 2013; rev. November 2013), available at <http://www.energy.ca.gov/renewables/documents/index.html#rps>.

### 2.3.1.1.1 Initiating Waiver Request

AReM suggests that the waiver process should begin with confidential informal discussions between the retail seller and Energy Division staff, potentially leading to an agreement between staff and the retail seller on compliance. (AReM Opening Comments at 10.) This proposal would make the RPS enforcement process a private negotiation between Energy Division staff and the retail seller. The Commission has never taken this approach to RPS enforcement. (*See generally* D.03-06-071, D.03-12-065, D.06-10-050.) The language of SB 2 (1X) does not justify taking an informal approach now. The new statutory language is consistent with a formal decision-making process, not an informal one.<sup>18</sup>

Moreover, the waiver request is of obvious importance both to the retail seller – which may be subject to a penalty if its waiver request is unsuccessful and to the administration of the RPS program. This importance reinforces the direction of the statutory language, and leads to the conclusion that the waiver request process should be a formal process, on the record, with a decision made by the Commission, as many parties suggest.<sup>19</sup>

The easiest way to initiate this process would be by a motion in the then-current RPS proceeding. Such a motion must be filed not earlier than when the retail seller’s final compliance report for the compliance period is filed, and

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<sup>18</sup> Section 399.15(b)(5) provides that “the commission shall waive enforcement of this section if it finds the retail seller has demonstrated any of the following conditions.”

<sup>19</sup> GPI, PG&E, SCE, SDG&E, and UCS propose the formal filing and service of a waiver request. AReM and Noble Solutions urge submission of the request only to the Director of Energy Division; BVES, PacifiCorp, Shell, and the Joint ESPs suggest submission of the request to Energy Division, with service on the service list of the existing RPS proceeding, much like compliance reports now are treated.

not later than 30 days after the transmission of the CEC's Verification Report for the compliance period to the Commission.<sup>20</sup>

Since the Commission will decide the waiver request on the basis of the retail seller's procurement as verified by the CEC, the waiver request must ultimately be based on the information in the Verification Report. A retail seller that files a waiver request prior to transmission of the Verification Report must file and serve any supplemental or revised information based on the Verification Report not later than 30 days after the Verification Report is transmitted to the Commission. If no supplementation is needed, a retail seller in this circumstance must file and serve a statement to that effect, also not later than 30 days after the transmission of the Verification Report.

Filing within the existing RPS proceeding will promote efficiency in considering the request because the record in the RPS proceeding will be immediately available, without needing any extra transactions required to bring (perhaps substantial) parts of the RPS proceeding into a new, separate application proceeding on the waiver request.<sup>21</sup> Because of the significance of a request for a waiver to the goals and administration of the RPS program, parties to the RPS proceeding should be notified and allowed to file comments on the waiver request, as urged by GPI, PG&E, SDG&E, San Francisco, and UCS. Using

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<sup>20</sup> In D.12-06-038, OP 39, the Commission required merely that a request for a waiver of PQR be filed at the time the retail seller submits its annual report for the last year of the compliance period for which it seeks the waiver, and left it to a subsequent decision to specify the details. We do so here.

<sup>21</sup> It is unlikely that there would not be an existing RPS proceeding at any time that it would be relevant for a retail seller to file a request for a waiver. If there is not an ongoing RPS proceeding, the retail seller may file a motion in whatever proceeding includes RPS procurement and/or compliance issues. Only as a last resort should a separate application be filed.

the existing RPS proceeding as the venue for the waiver will also make serving the waiver request, as well as the request, simpler and more efficient.<sup>22</sup>

**2.3.1.1.2. Preconditions for Consideration  
of Waiver Request**

**2.3.1.1.2.1. Complete Account of Deficiency  
to be Waived**

A retail seller requesting a waiver must present in the waiver request a complete account of the PQR deficiency for which it seeks the waiver. That is, the retail seller must specify the number of RECs for which it seeks the waiver, and must specify the statutory condition(s) that the retail seller believes will justify the waiver. If the retail seller asserts that more than one statutory condition applies, it must specify whether each condition applies to the entire amount, or to a specific portion, of the deficiency. If the retail seller will seek a waiver of some of the deficiency on the basis of one condition, and some of the deficiency on the basis of another condition, it must specify the number of RECs subject to waiver pursuant to each condition.

For the first compliance period only, an additional element may enter into the retail seller's account of a deficiency. In D.12-06-038, the Commission set criteria and methods for retail sellers to "close the books" on their RPS obligations for 2010 and earlier years. (D.12-06-038, OPs 1- 11.) Retail sellers having procurement deficits from years prior to 2011 are required to make up the deficits not later than the end of the first compliance period (December 31, 2013).

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<sup>22</sup> The Director of Energy Division may, but is not required to, develop uniform formats for the presentation of required information in requests for waiver of PQR requirements, as well as requests for reduction of PBR requirements, discussed below. Energy Division staff may work with the parties to develop such new tools, if it appears to the Director of Energy Division that they could improve the efficiency and transparency of the RPS enforcement process.

How should the Commission treat a request for waiver of a PQR deficiency when the retail seller's procurement obligation for the first compliance period includes a prior deficit that must be made up? AReM and UCS argue that pre-2011 procurement obligations are not covered by the waiver provisions. PG&E and SDG&E assert that the prior deficits have been made part of the procurement that is required to be completed by the end of the first compliance period. Thus, they argue, the waiver provisions should be applied to prior deficits as well.

Because the Commission required that prior deficits be made up in the first compliance period, those deficits are in effect part of the first compliance period procurement obligations of those retail sellers. They should not be subject to different treatment from the rest of a retail seller's first compliance period obligations. Therefore, if a retail seller with a prior deficit seeks a waiver for the first compliance period, the waiver may apply without distinction to procurement obligations to satisfy a prior deficit under D.12-06-038, the same way as to procurement obligations not related to a prior deficit.

The Commission will not consider a waiver request that does not provide the appropriate specificity of number of RECs at issue and statutory condition(s) under which the waiver request is being made.

#### **2.3.1.1.1.2. All Available Retired RECs Applied**

In order for a waiver request to be considered, the retail seller requesting a waiver must demonstrate that it has applied all available RECs retired for RPS compliance to the PQR obligation for which it seeks the waiver.<sup>23</sup> This is a

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<sup>23</sup> This position is advanced by AReM, GPI, Noble Solutions, PG&E, and SCE; with some qualifications, it is supported by Joint ESPs, Shell, and UCS. SDG&E comments that, since it

*Footnote continued on next page*

necessary precondition for consideration of the waiver request. Otherwise, a retail seller could hold on to retired RECs to use as excess procurement to be applied in a subsequent compliance period, while seeking to have enforcement waived in the current compliance period.

Retaining retired RECs while seeking a PQR waiver would not be consistent with the statute's focus on orderly increases in RPS procurement through each compliance period, as implemented by the Commission in D.11-12-020. Nor would it be fair to other retail sellers that have complied with their current RPS procurement obligations, even if doing so leaves them with fewer RECs to apply to compliance in a later compliance period.

A review of the interaction of the procurement quantity requirements set out in § 399.15(b) and the portfolio balance requirements set out in § 399.16(c) is useful in considering this requirement.<sup>24</sup> In D.12-06-038, the Commission determined that a retail seller must meet both of these requirements, and that they are independently enforceable. (D.12-06-038, OP 24.).

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would obviously be in the retail seller's interest to apply all available RECs, there is no need to make a rule about it.

<sup>24</sup> A note on the use of the term "portfolio balance requirement" is in order. The RPS statute uses the term "portfolio content categories" in Section 399.16(b), which defines the different categories. It uses the term "product content requirements" in Section 399.16(c), to refer to the content of the three portfolio content categories, for purposes of setting minimum and maximum percentages of each category of procurement. It uses the term "procurement content requirement" in § 399.16(e), authorizing a retail seller to seek a reduction in the percentage requirement. In D.11-012-052, the Commission used the term "portfolio balance requirements" to refer to the procurement percentage requirements set out in § 399.16(c).

This decision continues the use of the single term, "portfolio balance requirements" (PBR), to refer to the requirements stated in § 399.16(c) and implemented in D.11-12-052, as well as the reduction process set out in § 399.16(e). This usage is consistent with the statute's characterization of the goal of the requirements in § 399.16(c) as necessary "in order [for retail sellers] to achieve a balanced portfolio. . ." and helps to retain focus on the portfolio, i.e., the totality of RPS procurement, of each retail seller.

In the context of a PQR waiver, however, further attention is required. Because § 399.16(c) provides that “all retail sellers shall meet the following requirements for all procurement credited towards each compliance period,” the PBR acts as a screen or sieve through which the RECs applied to a retail seller’s RPS procurement obligations must pass. Thus, RECs applied to the PQR in order to fulfill the condition that no available retired RECs are being held out for use in later compliance periods, must be applied in accordance with the PBR requirements for the compliance period for which the PQR waiver is sought.<sup>25</sup>

This requirement would mean that, in order for its waiver request to be considered, a retail seller must demonstrate:

1. All RECs carried forward as excess procurement from a prior compliance period have been applied to the current compliance period for which the PQR waiver is sought.
2. No RECs are being carried forward, as excess procurement that can be applied in any subsequent compliance period, from the current compliance period for which the waiver is being sought.
3. All currently available retired RECs have been applied to the current compliance period for which the PQR waiver is sought, within the restrictions on procurement content set by Section 399.16(c), if relevant.<sup>26</sup>
4. After all RECs have been applied in accordance with the three prior steps, the retail seller still has a PQR deficit for which it seeks a waiver.<sup>27</sup>

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<sup>25</sup> UCS makes this point, in a slightly different way, in its Comments.

<sup>26</sup> Retail sellers subject to §§ 399.17 and 399.18 are not required to comply with the portfolio content requirements of § 399.16.

<sup>27</sup> The first two elements will not contain Category 3 RECs, which may not be carried forward into later compliance periods. (D.12-06-038, OP 20.) The third will contain Category 3 RECs, within the limits discussed below.

Walking through how this might work in practice:

- Since there is no limit on the proportion of RECs from Category 1 that may be applied to PQR, all Category 1 RECs retired for RPS compliance are available to be applied in the current compliance period and must be applied up to the retail seller's total PQR obligation.
- Category 2 RECs retired for RPS compliance are available up to the balance of RECs that are not required to be Category 1. *E.g.*, if at least 65% of PQR must be from Category 1 RECs, a maximum of 35% of PQR could be obtained from Category 2 RECs. All available Category 2 RECs must therefore be applied up to that maximum (or the total of all the Category 2 RECs retired by the retail seller, if below the maximum allowable amount).
- Category 3 RECs retired for RPS compliance are required to be applied up to the PBR limit on Category 3 RECs for the compliance period for which the waiver is sought (or the total of all the Category 3 RECs retired by the retail seller, if below the maximum allowable amount).
- RECs retired for RPS compliance that are from contracts signed prior to June 1, 2010 by IOUs and CCAs, and prior to January 14, 2011 by ESPs – which are not part of the PBR system – must be applied up to the amount of the PQR deficit, if they are available.<sup>28</sup>

If these conditions are not met, the retail seller should not file a waiver request. If a waiver request is filed without a demonstration that these conditions have been met, the Commission will not consider the waiver request.<sup>29</sup>

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<sup>28</sup> See D.12-06-038, OP 12; § 399.16(c)(4).

<sup>29</sup> The requirements set out above apply to RECs retired for RPS compliance. A retail seller could also have RECs in its active subaccount at the Western Renewable Energy Generation Information System (WREGIS) that have not been retired for RPS compliance. Though such RECs are not required to be retired to meet the “all available retired RECs” precondition, holding RECs in its active WREGIS subaccount could require explanation from the retail seller

*Footnote continued on next page*

### **2.3.1.2. Consideration of Waiver Request**

#### **2.3.1.2.1. Burden of Proof**

The statutory conditions clearly require the retail seller requesting a waiver to demonstrate that it is warranted. The Commission uses the "preponderance of the evidence" standard to define the burden of proof in most circumstances. (*See* D.14-06-007 for a recent discussion.) That is the appropriate standard to use for waiver requests, as well.<sup>30</sup>

#### **2.3.1.2.2. Evidentiary Hearings**

Although the Commission's decision on a waiver request will be based on factual determinations about whether the retail seller has demonstrated that it meets the conditions for a waiver, evidentiary hearings would not necessarily be required. PG&E, SDG&E, and the Joint ESPs point out that there are variety of ways the retail seller could make the required showings, for example, submitting verified declarations. The retail seller could request an evidentiary hearing (EH), and the ALJ would decide whether a hearing was necessary, as is the usual practice in Commission proceedings. The parameters of any EH on a waiver request will be set in the ordinary course by the ALJ at the time a hearing is determined to be needed.

#### **2.3.1.2.3. Necessary Showings**

The determination of a waiver request is necessarily specific to the particular waiver request and will be based on the factual showings and legal arguments that are relevant to the merits of the waiver request. Because the

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in its demonstration that it took all reasonable actions under its control to avoid a PQR deficiency. See section 2.3.1.2.3., below.

<sup>30</sup> Parties did not specifically address this issue, possibly because it is not open to serious debate in this context.

circumstances of each waiver request will be different, decisions on waiver requests will be made by the Commission on a case by case basis.

A retail seller must show, by a preponderance of the evidence, each element necessary to establish that it has met the relevant statutory condition or conditions that it claims justify waiver of its PQR deficiency. Where the statute differentiates among retail sellers, the retail seller must show that it has met all the statutory requirements that apply to its designation.<sup>31</sup>

Three elements must be demonstrated for all conditions that a retail seller could assert to justify a waiver:

1. The condition(s) justifying the waiver must be beyond the control of the retail seller. (Section 399.15(b)(5).) This requires the retail seller to demonstrate that any and all conditions it asserts to justify a waiver are, or were, beyond its control.
2. The condition(s) must “prevent compliance.” At a minimum, the retail seller must demonstrate the connection between the condition(s) it asserts and the number of RECs attributable to each of these conditions in its PQR deficiency. It is not sufficient simply to show that a condition justifying a waiver occurred. The retail seller must also account for the RECs it did not obtain due to the occurrence of the condition(s) it identifies.
3. All reasonable actions under the retail seller’s control “to achieve full compliance” have been taken. (§ 399.15(b)(7).) The statute specifies that these required actions are “as set forth in paragraph (5).”

The required actions set forth in § 399.15(b)(5) are allocated to the conditions that a retail seller may assert to justify a waiver. In summary form, they are:

- Section 399.15(b)(5)(A) presents the condition of inadequate transmission capacity. It requires a retail seller that owns transmission lines, but not other retail sellers, to demonstrate that:
  - It has taken all reasonable measures in its control to construct new transmission lines or upgrade existing transmission lines that will transmit RPS-eligible generation; and
  - It has taken all reasonable operational measures to maximize cost-effective deliveries of RPS-eligible generation in advance of the availability of new transmission.
- Section 399.15(b)(5)(B) presents two separate conditions relating to RPS procurement: 1) "permitting, interconnection, or other circumstances that delay procured" RPS-eligible projects; 2) an insufficient supply of RPS-eligible generation available to the retail seller. Any retail seller requesting a waiver based on either of these conditions must demonstrate that:
  - It has prudently managed portfolio risks;
  - It has sought to develop at least one of: its to RPS-eligible generation; or energy storage to integrate RPS-eligible generation;
  - It has procured an appropriate minimum margin of procurement over the minimum necessary for RPS compliance;
  - It has taken reasonable measures under its control to procure cost-effective distributed generation and allowable unbundled RECs.
- Section 399.15(b)(5)(C) presents the condition of "unanticipated curtailment of eligible renewable energy

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<sup>31</sup> See discussion of § 399.15(b)(5)(A), below.

resources necessary to address the needs of a balancing authority.” It does not include any specific affirmative obligations of a retail seller asserting the existence of that condition. The three general requirements discussed above, however, continue to apply to the retail seller’s demonstration to justify a waiver based on this condition.

Demonstrating that it has taken all relevant affirmative steps related to avoiding or preventing the occurrence of the condition(s) for waiver it asserts, is a necessary part of a retail seller’s overall demonstration that a waiver should be granted.

#### **2.3.1.2.4. Partial Waivers**

The statute uses the directory language that the Commission “shall waive enforcement” if it finds that a retail seller has made the necessary demonstration, as described in detail above, of the statutory condition(s) it asserts to justify a waiver. But what is the result if a retail seller makes the required demonstration, but only as to part of the deficiency claimed? For example, a retail seller has a deficit of 1,000 RECs. It claims a waiver for the entire deficiency on the basis of § 399.15(b)(5)(C), “unanticipated curtailment of eligible renewable energy resources necessary to address the needs of a balancing authority.” The evidence provided by the retail seller, however, shows that 900 megawatt-hours (MWh) of its contracted generation were curtailed.

The statute is silent about this situation, and the parties have not addressed it. It is reasonable to conclude that the Commission should waive enforcement as to the 900 RECs for which the retail seller provides an adequate demonstration (including any relevant affirmative showings). The Commission should not, however, waive enforcement as to any quantity of RECs in its deficit for which the retail seller does not make the required demonstration. As to those RECs, the retail seller would continue to be subject to enforcement action.

The possibility that the Commission would grant a partial waiver does not, however, relieve a retail seller of its responsibility to give a complete account of the deficiency it seeks to have waived in its waiver request, as set forth in Section 2.3.2.2.2.1. above. If the retail seller knows that it cannot produce evidence that will demonstrate that it is entitled to a waiver for all the RECs in its PQR deficiency, it should seek a waiver only for those RECs for which it will be able to produce appropriate evidence.

### **2.3.1.3. Additional Reporting Requirements**

If the Commission grants a waiver, whether complete or partial, it will establish additional reporting requirements for the retail seller, as set out in § 399.15(b)(6). Those reporting requirements are best determined by the Commission at the time it grants the waiver, when extensive information about the retail seller's RPS procurement situation will have been presented. No work by Commission staff on a format for any additional reporting or proposed contents of such reports is needed in advance of the Commission's granting of a waiver request.

### **2.3.2. Reduction of Portfolio Balance Requirements**

SB 2(1X) introduces the use of portfolio content categories to classify and differentiate among types of RPS procurement. (§ 399.16(a)(c).<sup>32</sup> The statute requires retail sellers to meet particular percentages of procurement from each category, in each compliance period. (§ 399.16(c).) *See generally*, D.11-12-052,

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<sup>32</sup> *See* D.11-12-052, the decision implementing these new provisions. The terminology adopted in D.11-12-052 will be used here: Category 1 for procurement described in § 399.16(b)(1); Category 2 for procurement described in § 399.16(b)(2); and Category 3 for procurement described in § 399.16(b)(3).

implementing the portfolio balance requirements. In D.12-06-038, the Commission concluded that the PBR is an independent, and independently enforceable, RPS procurement obligation. (OP 24; §§ 3.6, 3.9.2.)

Section 399.16(e) allows a retail seller to “apply to the commission for a reduction of a procurement content requirement of subdivision (c).”<sup>33</sup> Parties offer differing interpretations of the scope of this provision, which applies only to RECs from contracts signed on or after June 1, 2010 for IOUs and CCAs and on or after January 14, 2011 for ESPs.<sup>34</sup>

Some parties assert that the Commission is authorized to grant reductions with respect to procurement in any category.<sup>35</sup> SDG&E helpfully refers to this point of view as allowing the Commission to grant a “reallocation” of RECs among the three procurement categories. UCS argues that the statute does not grant the Commission general authority to reallocate, but only, and specifically, to reduce a portfolio balance requirement.

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<sup>33</sup> Section 399.16(e) provides in full:

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.

<sup>34</sup> IOUs subject to § 399.17 (currently, PacifiCorp and CalPeco) or § 399.18 (currently, Bear Valley) are not subject to the PBR requirements. They therefore have no need to seek a reduction in PBR, and are simply outside the discussion in this section.

<sup>35</sup> These include CMUA, Joint ESPs, Noble Solutions, PG&E, SDG&E, and Shell.

Section 399.16(e) was added to SB 722 (the predecessor to SB 2 (1X))<sup>36</sup> on the last day of consideration of SB 722, at the same time that a number of other changes were made to the enforcement provisions of Section 399.15(b).<sup>37</sup> Section 399.16(e) provides that a retail seller may seek a “reduction” of a PBR requirement as set out in Section 399.16(c). The most natural reading of this provision is to use the ordinary meaning of “reduction,” which is “the act of making something smaller in size, amount, number, etc.”<sup>38</sup>

Making a reduction has a definite direction, i.e., toward smaller. “Reduction” is therefore not the same as “change.” Although it would have been possible for the legislative language to authorize the Commission to “change” or “alter” a portfolio balance requirement, the language used in Section 399.16(e) is “reduce.” Basing the interpretation of this provision on its plain language, we conclude that only a request by a retail seller to make a PBR smaller is authorized by the statute. In practice, this means that only a request to reduce the minimum amount of procurement that meets the criteria of Section 399.16(b) (Category 1, as

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<sup>36</sup> See discussion in D.11-12-052 at 32-33 on the relationship between SB 722 and SB 2(1X).

<sup>37</sup> The text may be found at [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_0701-0750/sb\\_722\\_bill\\_20100831\\_amended\\_asm\\_v90.pdf](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0701-0750/sb_722_bill_20100831_amended_asm_v90.pdf). The Commission takes official pursuant to Rule 13.9, of all versions of SB 722 and of SB 2 (1X), as well as all legislative reports on both bills. (See *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062 n.5.) The drafting and legislative history of SB 722 may be accessed at [http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=sb\\_722&sess=0910&house=B&author=simitian](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_722&sess=0910&house=B&author=simitian). The drafting and legislative history of SB 2 (1X) may be accessed at [http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=sbx1\\_2&sess=PREV&house=B&author=simitian](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sbx1_2&sess=PREV&house=B&author=simitian). No party points to any discussion of § 399.16(e) in the legislative history, and we have found none.

<sup>38</sup> Merriam-Webster Dictionary (Online), <http://www.merriam-webster.com/dictionary/reduction>. The Commission takes official notice of this meaning pursuant to Rule 13.9.

the term is established in D.11-12-052) may be considered by the Commission, since only Category 1 has a minimum percentage requirement.

Some parties extend the “reallocation” idea to propose that, even if a reduction is allowed only with respect to Category 1, the Commission should either require or allow a retail seller to use any of its RECs in Category 2 (essentially, RECs from firming and shaping transactions) and Category 3 (primarily unbundled RECs) to make up a shortfall in Category 1 RECs.<sup>39</sup> Other parties argue that, for various reasons, the Commission should not require or allow a “make-up” of a Category 1 shortfall with RECs falling into other portfolio content categories.<sup>40</sup>

The fundamental argument presented for allowing such “make-up” is that it would allow a retail seller to meet its PQR obligations despite a PBR shortfall. However, the statutory importance of the PBR as a screen for RECs applied to a retail seller’s PQR counsels against allowing what would in effect be the transmutation of Category 3 RECs into Category 1 RECs for purposes of meeting the PQR. Thus, under the statutory scheme, as explained in this decision, a retail seller could obtain a reduction in its Category 1 obligation, but it would not be able to apply RECs from another statutory procurement content category to any Category 1 shortfall.

Before turning to the process for seeking a reduction in PBR, we note that the determination of a request for reduction in PBR is committed to the Commission’s discretion, unlike the mandatory nature of the determination of

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<sup>39</sup> These include Noble Solutions, PG&E, SCE, and SDG&E.

<sup>40</sup> These include AReM, Joint ESPs, and Shell.

waivers of enforcement of PQR. The second sentence of Section 399.16(e) provides (emphasis added):

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.

There is no discussion of this difference in language between the two processes in the legislative history, and parties did not comment on it. The most reasonable way to read this language is that it builds in the likelihood that the retail seller will not completely fail to procure Category 1 RECs, but will have some amount of shortfall, for which it may seek a reduction in its PBR obligation.

#### **2.3.2.1. Process for Seeking a Reduction of PBR**

The method for seeking and demonstrating the basis for a reduction in (Category 1) PBR is fundamentally analogous to that for a waiver of PQR, as noted by most parties.<sup>41</sup> As with the process for requesting a waiver, the request for a PBR reduction cannot be decided by the Commission until after the submission of the CEC's Verification Report for the compliance period. Only after the transmission of the Verification Report will it be clear whether, and to what extent, a retail seller has fallen short in its PBR obligations.

##### **2.3.2.1.1. Initiating Reduction Request**

Like a request for a waiver of enforcement on a PQR deficiency, the process for requesting a reduction in PBR should be a formal process, on the record, with a decision by the Commission on the reduction request. The reduction request should similarly be made by motion in the then-current RPS

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<sup>41</sup> These include AReM, GPI, Joint ESPs, Noble Solutions, PG&E, SDG&E, Shell, and UCS.

proceeding.<sup>42</sup> Such a motion must be filed not earlier than when the retail seller's final compliance report for the compliance period is filed, and not later than 30 days after the transmission of the CEC's Verification Report for the compliance period to the Commission.

PG&E and SDG&E make the sensible suggestion that a retail seller should be able to submit a consolidated request for both PQR waiver and a PBR reduction in one motion, rather than two. The retail seller must, however, provide all the information necessary for each request in full. The Commission will be able to resolve the two requests that are presented together if complete information is provided.

Since the Commission will decide the reduction request on the basis of the retail seller's procurement as verified by the CEC, the reduction request, like a request for a PQR waiver, must ultimately be based on the information in the Verification Report. A retail seller that files a reduction request prior to transmission of the Verification Report must file and serve any information that must be supplemented or revised on the basis of the Verification Report not later than 30 days after the Verification Report. If no supplementation is needed, a retail seller in this circumstance must file and serve a statement to that effect, also not later than 30 days after the transmission of the Verification Report.

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<sup>42</sup> AReM, GPI, Joint ESPs, Noble Solutions, PG&E, SDG&E, Shell, and UCS properly point out that there is no reason for the process for submitting a reduction request to be different from that for a waiver request.

### **2.3.2.1.2. Preconditions for Considerations of Reduction Request**

#### **2.3.2.1.2.1. Complete Account of Deficiency**

A retail seller requesting a PBR reduction must present in the reduction request a complete account of the PBR shortfall for which it seeks the reduction. That is, the retail seller must specify the number of Category 1 RECs for which it seeks the reduction, and must specify the statutory condition(s) that the retail seller believes will justify the reduction. If the retail seller asserts that more than one statutory condition applies, it must specify whether each condition applies to the entire amount, or to a specific portion, of the shortfall. If the retail seller will seek a reduction of some of the shortfall on the basis of one condition, and some on the basis of another condition, it must specify the number of RECs subject to reduction pursuant to each condition.

The Commission will not consider a reduction request that does not provide the appropriate specificity of number of RECs at issue and statutory condition(s) under which the request for reduction is being made.

#### **2.3.2.1.1.2. All Available Retired RECs Applied**

As with a waiver request, in order for a reduction request to be considered, the retail seller must demonstrate that it has applied all available RECs that have been retired for RPS compliance to the PBR obligation for which it seeks the waiver.<sup>43</sup> This is a necessary precondition for consideration of the reduction request, as it is for a waiver request. Without such a condition, a retail seller could hold on to retired Category 1 RECs to be used as excess procurement to be

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<sup>43</sup> Joint ESPs suggest that this should not be an across-the-board requirement, but that a case by case evaluation should apply. UCS properly points out that the only logical way to administer the reduction request is to have this requirement. AReM, Noble Solutions, PG&E, SCE, and Shell also support this requirement.

applied in a subsequent compliance period, while seeking to have its PBR in the current compliance period reduced.

In practice, this requirement would mean that, in order to have its reduction request considered, a retail seller must demonstrate:

1. All Category 1 RECs carried forward as excess procurement from a prior compliance period have been applied to the current compliance period for which reduction is sought.
2. No Category 1 RECs are being carried forward, as excess procurement that can be applied in any subsequent compliance period, from the current compliance period for which the waiver is being sought.
3. All Category 1 RECs retired for RPS compliance in the compliance period have been applied to the current compliance period.
4. After all RECs have been applied in accordance with these three steps, the retail seller still has a PBR shortfall for which it seeks a reduction.<sup>44</sup>

In addition, for any reduction request submitted for procurement obligations in the third compliance period (2017-2020) or later compliance periods, a retail seller may not ask the Commission to reduce its Category 1 obligation below 65%. The Commission is prohibited from making such a reduction by the last sentence of § 399.16(e):

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<sup>44</sup> The requirements set out above apply to RECs retired for RPS compliance. A retail seller could also have RECs in its active subaccount at the WREGIS that have not been retired for RPS compliance. Though such RECs are not required to be retired to meet the “all available retired RECs” precondition, holding RECs in its active WREGIS subaccount could require explanation from the retail seller in its demonstration that it took all reasonable actions under its control to avoid a PBR shortfall.

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.

If all these conditions are not met, the retail seller should not file a reduction request. If a reduction request is filed without a demonstration that these conditions have been met, the Commission will not consider the request.

### **2.3.2.2. Consideration of Reduction Request**

#### **2.3.2.2.1. Burden of Proof**

The same, ordinary, “preponderance of the evidence” standard that applies to waiver requests applies to reduction requests.

#### **2.3.2.2.2. Evidentiary Hearings**

The place of evidentiary hearings in a reduction request is the same as for waiver requests. Although the Commission's decision on a reduction request must be based on factual determinations about the conditions for a reduction, EH would not necessarily be required, just as they might not be required for a waiver request. The retail seller seeking a reduction may request an EH, and the ALJ would decide whether a hearing was necessary, as is the usual practice in Commission proceedings. The parameters of any EH on a reduction request will be set in the ordinary course by the ALJ at the time a hearing is determined to be needed.

#### **2.3.2.2.3. Necessary Showings**

The requirements for a reduction request are, by the terms of § 399.15(c), those set out in § 399.15(b)(5). Thus the two processes are structurally the same. The determination of a reduction request is necessarily specific to the particular reduction request and will be based on the factual showings and legal arguments that are relevant to the merits of the request. Because the circumstances of each

reduction request will be different, decisions on such requests will be made by the Commission on a case by case basis.

A retail seller must show, by a preponderance of the evidence, each element necessary to establish that it has met the relevant statutory condition or conditions that it claims justify reduction of its PBR percentage. Three elements must be demonstrated for all conditions that a retail seller could assert to justify a reduction:

1. The condition(s) justifying the reduction must be beyond the control of the retail seller. (Section 399.15(b)(5).) This requires the retail seller to demonstrate that any and all conditions it asserts to justify a reduction are, or were, beyond its control.
2. The condition(s) must “prevent compliance.” At a minimum, the retail seller must demonstrate the connection between the condition(s) it asserts and the number of RECs in its PBR deficiency. It is not sufficient simply to show that a condition justifying a reduction occurred. The retail seller must also account for the RECs lost to it due to the occurrence of the condition(s) it identifies.
3. The retail seller has taken the required actions that are allocated in Section 399.15(b)(5) to the conditions that may be asserted to justify a reduction.

Demonstrating that it has taken all relevant affirmative steps related to the condition(s) for reduction it claims is a necessary part of a retail seller’s overall demonstration that a reduction should be granted.

Shell, supported by PG&E, argues that enforcement of PBR requirements should be accompanied by an obligation for Energy Division staff to provide “interim feedback” on retail sellers’ procurement plans. As an initial matter, it is not clear what value such “feedback” could have. A retail seller’s compliance with its RPS procurement obligations is determined only on the basis of its final

compliance report for a compliance period, as updated after the CEC's Verification Report has been transmitted to the Commission, not on the basis of the informal opinion of Energy Division staff.

Moreover, RPS procurement and compliance requirements are directed to retail sellers; each retail seller is obligated to comply with its own responsibilities under the RPS program. Any challenges in carrying out those responsibilities are for the retail seller – not Commission staff – to solve. While Energy Division staff have provided assistance to retail sellers and RPS market participants since the beginning of the RPS program, and undoubtedly will continue to do so as they are able, they are staff to the Commission, not to any retail seller. Requiring staff to provide compliance advice to retail sellers not only takes valuable time that could be spent on staff responsibilities, but has the potential to create the appearance of unfairness and favoritism in RPS enforcement. This is inconsistent with the Commission's commitment to the fair, efficient, and transparent administration of the RPS program.

#### **2.3.2.2.4. Partial Reductions**

The Commission may reduce a PBR if the retail seller demonstrates that it has met all the statutory condition(s) it asserts to justify a reduction. The Commission should not, however, provide a reduction in PBR as to any quantity of RECs in its PBR shortfall for which the retail seller does not make the required demonstration. As to those RECs, the retail seller would not be allowed a reduction.

The possibility that the Commission would grant a partial reduction does not, however, relieve a retail seller of its responsibility to give a complete account of the deficiency it seeks to have reduced in its reduction request, as set forth in Section 2.3.2.1.2.1, above. If the retail seller knows that it cannot produce

evidence that will demonstrate that it is entitled to a reduction for all the RECs in its PBR shortfall, it should seek a reduction only for those RECs for which it will be able to produce appropriate evidence.

An additional reason for a partial reduction in PBR could arise if, for any compliance period after 2016, a reduction of the full amount claimed by the retail seller would result in reducing the Category 1 obligation below 65%. Since a reduction below 65% after 2016 is prohibited by § 399.16(e), any reduction granted by the Commission for the third compliance period, or any later compliance period, would have to stop at 65% of the retail seller's PQR.

### **2.3.3. PBR/PQR Relationship**

As discussed in § 3.6.2 of D.12-06-038, there is no necessary or automatic relationship between a PBR shortfall and a PQR deficiency. Table 5 in that decision presents a precise demonstration of this. To review for purposes of this decision, analogous but more simplified tables, directed only to this issue, are presented in Appendix B.

To the extent that both a PQR waiver and a PBR reduction need to meet the same criteria (set in § 399.15(b)(5)), it is likely, though not inevitable, that if a PBR reduction is warranted, a PQR waiver would be justified as well. Each must be determined on its own merits, however, to the extent the retail seller makes the necessary demonstrations. It is possible that only a partial PQR waiver would be allowed after a PBR reduction, depending on whether the Category 1 shortfall constitutes the total PQR deficiency, or the deficiency exceeds the shortfall in Category 1 RECs.

### **2.3.4. Other Reasons for Waiver or Reduction**

Parties have different views on whether the reasons the Commission must grant a waiver (or may grant a reduction), set out in § 399.15(b)(5), as applied

also by § 399.16(e), are the exclusive reasons the Commission may grant a waiver or reduction. A number of parties argue that the statutory list of conditions describe the circumstances in which a waiver or reduction is mandatory, but they do not prevent the Commission from finding that other conditions exist that will justify a waiver or reduction.<sup>45</sup> TURN and UCS assert that the statutory list of conditions is both mandatory and exclusive, noting that SB 2 (1X) does not include any express authorization for the Commission to grant a waiver or reduction for any additional or optional reasons.

As UCS notes, the statutory conditions provide a reasonable degree of flexibility by including a wide variety of circumstances as possible bases for a waiver or reduction. The past decade of experience with procurement, and procurement problems, in the RPS program is encapsulated in these conditions. Almost all circumstances that legitimately prevent compliance, including GPI's catch-all "act of God," will present themselves as one of the conditions listed in the statute, even if they arise from a unique circumstance.

The requirement that a retail seller must show that it took all reasonable steps to avoid the outcome of failing to attain its PQR or procure within its PBR allows the retail seller to show exactly what it did, and why those actions did not work, to avert the procurement deficit. In this demonstration, the retail seller will have the opportunity to bring out a number of circumstances that show the efforts it made, which of course will also show the nature of the problems the retail seller faced.

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<sup>45</sup> AReM, CMUA, Joint ESPs, Noble Solutions, PG&E, SDG&E, SCE, and Shell make this argument in various forms.

The large IOUs each urge that exceeding the procurement expenditure limitation (PEL) required by § 399.15(c) should be one of the conditions for granting a PQR waiver, even though it is not specified in § 399.15(b)(5). § 399.15(f) provides a mechanism for the Commission to allow a utility to cease procuring RPS-eligible resources if the Commission finds that certain conditions are met.

The IOUs' suggestion conflates the permissive authorization to cease procuring if the PEL is exceeded (and other conditions are met) with the mandatory requirements of the waiver. Since the Commission has not yet issued a decision setting out the methods for implementing § 399.15(f), it is not possible to determine whether an IOU has exceeded its PEL. Further, the PEL process, not the PQR waiver process, will have to determine whether an IOU is authorized to cease procuring RPS-eligible resources. The PEL process and the PQR waiver processes should be considered separately.

## **2.4. Penalties**

### **2.4.1. Historic RPS Penalty Program**

Early in the RPS program, the Commission delineated the rules and processes for the imposition of monetary penalties when a retail seller failed to attain its RPS procurement targets. *See* D.03-06-071; D.03-12-065; and D.06-10-050. This system had four primary characteristics:

1. Monetary penalties were to be assessed on the basis of dollars per MWh of RPS procurement shortfall;
2. A presumptive penalty amount could be calculated by multiplying the MWh of shortfall reported by the retail seller in its annual compliance report by the \$/MWh penalty amount;
3. There was a cap on the total penalty amount that could be assessed for any one year's shortfall;

4. The Commission would provide any retail seller that might be subject to a penalty with notice and an opportunity to demonstrate reasons that a penalty should not be imposed.<sup>46</sup>

In the initial RPS decision, the Commission set the penalty amount at \$50/MWh, and the annual penalty cap at \$25 million/year. (D.03-06-071 at OP 23.) In D.03-06-071, the Commission recognized that it has authority to impose sanctions other than penalties under § 2113, as SCE and SDG&E reiterate in response to the Comment Ruling. However, the RPS program has maintained penalties as the sole enforcement consequence throughout the program to date, with the same penalty amounts and penalty cap set in D.03-06-071.

#### **2.4.2. Penalty Program Under SB 2(1X)**

##### **2.4.2.1. Penalties**

###### **2.4.2.1.1. Penalty Amount**

Most parties urge the Commission to keep the penalty amount of \$50/ REC<sup>47</sup> that has been used since the inception of the RPS program.<sup>48</sup> SDG&E points to the particularly important interest in stability and regulatory certainty with respect to the penalty amount.

BVES, CMUA, SCE, and SCPPA argue that the penalty amount should be variable, depending on a number of factors. The factors they suggest include the

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<sup>46</sup> This step would occur only after allowing for any permissible deferral to a later compliance period of a procurement shortfall, under the rather complex rules for deferrals in the RPS program prior to SB 2 (1X). See D.12-06-038 at 12-14 for a summary of the prior rules.

<sup>47</sup> The penalty amount was originally expressed as cents/kWh (D.03-06-071, OP 23), although it was generally discussed as \$/MWh. With the advent of the REC as the unit of accounting for RPS compliance, the penalty amount is expressed as \$/REC.

<sup>48</sup> They include AReM, Joint ESPs, Noble Solutions, PG&E, SDG&E, Shell, TURN, and UCS.

market price of a “renewable premium;” the nature of the current noncompliance in relation to the size of the retail seller; and whether the retail seller is behaving in good faith or has a history of noncompliance.<sup>49</sup>

As AReM points out, basing the penalty amount on a complex and potentially contested calculation of a “renewable premium” or “market price” of RECs, or some other variable market element, would only add complexity to an already complex RPS compliance and enforcement process. It could also encourage retail sellers to try to calculate whether they would be financially better off by paying the penalty, rather than by meeting their RPS procurement obligations. Such an incentive, if created, would be contrary to the purpose of the RPS enforcement system, which is to encourage compliance, in part by providing “clear consequences for . . . inaction” by retail sellers. (D.03-06-071 at 52, as cited by PG&E. *See also* TURN Reply Comments at 8.) As PG&E sums up, “the existing \$50/MWh presumptive penalty amount has proved to provide an appropriate incentive for compliance.” (Opening Comments at 21.)

The suggestion by BVES and CMUA that the penalty amount should vary by some measure of the retail seller’s good faith efforts to comply is not consistent with the enforcement framework of SB 2 (1X).<sup>50</sup> The statutory

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<sup>49</sup> SCE additionally argues that the drafting history of the part of SB 722 that became Section 399.15(b) shows that the Legislature did not intend to require that penalties be imposed for failure to meet RPS procurement obligations. (SCE Comments at 11.) The language to which SCE points, however, does not support this view. The final version of § 399.15(b)(8) requires the Commission to “exercise its authority pursuant to § 2113.” This is the same language used in prior § 399.14(e), which was the basis for the penalty regime set up by D.03-06-071. As UCS and TURN point out, nothing in SB 2 (1X) as adopted suggests that the Legislature intended to make significant changes to the Commission’s enforcement process (as contrasted to the major changes made to the RPS procurement and compliance requirements).

<sup>50</sup> SCE proposes a variant on this idea: that penalties be imposed only upon a finding that the retail seller acted unreasonably.

provisions for waiver of enforcement on PQR and reduction of PBR direct the Commission to consider a range of factors that focus heavily on whether the retail seller took all actions within its control that would have helped it comply. It is at the stage of deciding on a request for waiver or reduction that the Commission will consider in some detail the behavior of the retail seller, not at the time a penalty is imposed for any deficits that may remain after a decision on the waiver or reduction request.

Most parties agree that the consistency and certainty provided by maintaining the penalty amount at \$50/REC is valuable for retail sellers and other entities involved in the RPS market. We agree. Any penalty will be assessed after a thorough review of the retail seller's circumstances and efforts, or after a retail seller declines to seek a waiver or reduction and accepts the amount of any deficiency shown in its final verified compliance report. There is no need to create a complex process to determine a variable penalty amount. The penalty for a PQR deficiency or a PBR shortfall is \$50/REC for all compliance periods, beginning with the 2011-2013 compliance period.

#### **2.4.2.2. Penalty if Both PQR Deficiency and PBR Shortfall Exist**

SDG&E reiterates the argument, rejected in D.12-06-038, that the Commission cannot take enforcement action on a PBR shortfall. Without revisiting this argument, we note that it is difficult to see why the Legislature created a mechanism for requesting a reduction in PBR if there were to be no enforcement consequences for a failure to meet those requirements.

Parties have proposed a variety of ways to deal with the potential penalties if a retail seller has both a PQR shortfall that was not waived, and a PBR Category 1 requirement that was not reduced. Several parties urge the

Commission not to “double penalize” a retail seller for both a PQR deficiency and a failure to meet its minimum percentage of procurement in Category 1.<sup>51</sup> PG&E and SCE suggest that the Commission should not penalize both a PQR deficiency and a PBR imbalance if the two shortfalls are driven by the same facts. Noble Solutions proposes that a PBR shortfall should be penalized, while a simultaneous PQR deficiency should not be.<sup>52</sup> GPI proposes that the penalty for a PBR imbalance should be half that of a PQR shortfall.

The parties raise legitimate concerns about devising a fair penalty structure when the relationship between PQR and PBR is potentially complex. As discussed in Sections 2.3.1 and 2.3.2, above, a retail seller’s compliance efforts will be thoroughly reviewed in the course of the Commission’s consideration of whether to grant a PQR waiver and/or a PBR reduction. After those decisions have been made, only the penalty calculation will remain. Taking the parties’ concerns into account, it is reasonable to develop a penalty regime in which a retail seller that has a PQR deficit that is not waived and a PBR Category 1 shortfall that is not reduced will not be penalized by paying \$50/REC twice, once for each deficiency. Instead, adapting the proposals of GPI, PG&E, and SCE, the

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<sup>51</sup> These include AReM, CMUA, Joint ESPs, PG&E, and SCE.

<sup>52</sup> Noble Solutions also proposes a complex method of dealing with PBR shortfalls. This proposal has two parts. One, supported by CMUA, would “net” any penalty for a PBR shortfall against the amount paid for RPS procurement that was ultimately classified differently from the retail seller’s expected category. The other would allow the retail seller to pay a penalty or make “in-kind” payment by procuring additional Category 1 resources within a year. This suggestion of making up a shortfall in a later year harks back to the prior system of carrying forward deficits, to be made up in later years. § 399.15(b)(9) expresses the Legislature’s rejection of this approach going forward under the new requirements of SB 2 (1X).

penalty amount to be assessed will be 1.5 times \$50/REC, for each REC that is part of both the PQR deficit and the PBR shortfall.<sup>53</sup>

#### 2.4.2.3. Penalty Cap

There is much less agreement among the parties about whether the Commission should retain the current penalty cap of \$25 million/year for each retail seller than there is about retaining the penalty amount at \$50/REC. Parties also offer a range of proposals for revising the penalty cap.

The penalty cap was part of the original decision setting the RPS program elements. (D.03-06-071, at 51; OP 23.)<sup>54</sup> That decision considered only the situation of the three large IOUs. Over time, the Commission, taking account of new legislative requirements, integrated ESPs, CCAs, and SMJUs into the RPS procurement, compliance, and enforcement rules. *See* D.05-11-025 (basic parameters for ESPs, CCAs, and SMJUs); D.06-10-019 (full implementation for ESPs and CCAs); D.08-07-025 (full implementation for SMJUs). In completing the implementation of the RPS rules for all retail sellers, the Commission noted that any concerns about the appropriateness of the penalty cap could be addressed in the context of contesting the assessment of the presumptive penalty amount — since that was the occasion for the retail seller to bring forth all explanations and extenuating circumstances to reduce or negate the imposition of a penalty.<sup>55</sup>

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<sup>53</sup> For example, if a retail seller had a Category 1 shortfall of 500 RECs and had fully applied its available Category 2 and Category 3 RECs, and had a PQR deficit of 500 RECs, the penalty amount would be  $1.5 * \$50 * 500$  [RECs] = \$37,500.

<sup>54</sup> Proposed by TURN, the cap was not among the most controversial aspects of D.03-06-071. Nor was it discussed in D.03-12-065, the decision on the request for rehearing of D.03-06-071 filed by the large IOUs. Because no penalties were imposed prior to the end of 2010, the cap does not have any history of practical application to which the Commission can refer in evaluating the parties' current proposals.

<sup>55</sup> D.06-10-019 at 15, 21; D.08-05-029 at 37. *See* also D.06-10-050 at 37.

In designing the enforcement process to implement SB 2 (1X), however, the questions raised by parties about the penalty cap cannot be deferred to litigation about the penalty amount, since the key determinations now will be made in the decisions on requests for waivers of PQR or reductions of PBR. The penalty cap, like the penalty amount, is not subject to adjustment once a retail seller has a PQR deficit that has not been waived in full, and/or a PBR shortfall that has not been reduced to zero.

#### **2.4.2.3.1. Small Retail Sellers**

The main focus of party comments is whether the penalty cap should remain at a fixed dollar amount, or should vary according to the retail sales of each retail seller. Parties also differ about whether the current \$25 million/year cap should be expanded to cover an entire compliance period. In considering these arguments, the Commission maintains the central focus of the RPS compliance and enforcement process on encouraging compliance with RPS procurement obligations and program goals. The consequences of noncompliance must be meaningful, but in the service of the goal of achieving compliance.

The core of the issue of varying the size of the penalty cap is whether it is fair to smaller retail sellers to have a penalty cap that is larger (in some cases, many times larger) than their total RPS procurement obligation, translated into dollar terms at \$50/REC. For those retail sellers, there is effectively no penalty cap at all.<sup>56</sup>

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<sup>56</sup> For these purposes, there is no distinction among ESPs, CCAs, and SMJUs. All are significantly smaller than the three large IOUs in terms of retail sales, and thus, in terms of the number of RECs in their RPS procurement obligations.

Most commenters urge the Commission to set a penalty cap that is proportional in some way to retail sales.<sup>57</sup> They argue that the current cap is a relatively small proportion of the RPS obligation of the large IOUs, while it is either a large proportion of the RPS obligation of the largest other retail sellers, or larger than the entire RPS obligation of most other retail sellers.

An example from the publicly available compliance reports for the first compliance period (2011-2013) is instructive.<sup>58</sup> MEA reports a PQR for the compliance period of 373,225 RECs.<sup>59</sup> Turning this PQR into dollars at the penalty amount of \$50/REC, MEA's entire PQR for the first compliance period works out to the equivalent of \$18,661,250. A penalty cap of \$25 million for the compliance period would be about one-third greater than the total RPS procurement obligation; a penalty cap of \$75 million for the compliance period would be more than four times greater.

Noble Solutions and PG&E contend that having the same penalty cap for all retail sellers is necessary to preserve a level playing field for RPS compliance purposes and to ensure that all retail sellers are subject to the same requirements, terms, and conditions for the RPS program as required by § 365.1, as implemented by D.11-01-026.<sup>60</sup>

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<sup>57</sup> These include AReM, BVES, CMUA, GPI, Joint ESPs, MEA, PacifiCorp, SCPPA, and Shell.

<sup>58</sup> The public versions of all retail sellers' unverified compliance reports for the first compliance period have been compiled by Energy Division staff and are available on the Commission's web site, at <http://www.cpuc.ca.gov/PUC/energy/Renewables/index.htm>.

<sup>59</sup> This report is chosen for use as an example because it is available in unredacted form on the Commission's web site, at <http://www.cpuc.ca.gov/PUC/energy/Renewables/index.htm>. The use of this example should not be construed to be an acceptance or endorsement by the Commission of the values reported by MEA.

<sup>60</sup> It is important to note that in D.11-01-026, the Commission determined that Section 365.1 expressly exempts CCAs from its requirements and does not address SMJUs.

*Footnote continued on next page*

The argument that a “cap” that is larger than the largest possible actual penalty exposure of a retail seller is unfair (and ineffective) is persuasive. For retail sellers other than the three large IOUs, the penalty cap should be set as a percentage of their total RPS procurement obligation for the compliance period at issue.

The Joint ESPs recommend a formula based on comparing the average retail sales of the three large IOUs in the compliance period to the retail sales of the smaller retail seller at issue. It is, however, not reasonable to set the penalty cap in such a way that a smaller retail seller would have to await calculation of the retail sales of the large IOUs before it could estimate its own penalty cap. Rather, the penalty cap for these retail sellers should be set at a uniform percentage figure, applied to each retail seller’s RPS procurement obligation.

Because the parties focus their comments on the structure of the penalty cap, not its implementation, the comments do not provide a wide range of suggestions for implementing a percentage-based cap. Considering the concepts advanced by the parties, and taking into account the experience with the RPS program to date, it is reasonable to set the penalty cap for all retail sellers other than PG&E, SCE, and SDG&E at 50% of the retail seller’s PQR for the compliance period, expressed in dollars. Thus, the formula would be:

$$\text{PQR (in RECs)} * 0.5 * \$50/\text{REC}.$$

Applying this formula to a hypothetical example, the penalty cap for a retail seller with a PQR for the compliance period of 100,000 RECs would be:

$$100,000 \text{ [RECs]} * 0.5 * \$50/\text{REC} = 50,000 \text{ [RECs]} * \$50 = \$2,500,000.$$

This approach creates a penalty cap that is meaningfully a cap. It is not so small as to provide an incentive for a retail seller to be tempted to “buy out” its RPS procurement obligations by just paying a penalty up to the amount of the cap, nor so large as to provide no protection to smaller retail sellers. This formula can also apply without change to compliance periods of varying lengths, since it is based on each retail seller’s PQR for the compliance period. The cap will apply to all compliance periods: 2011-2013; 2014-2016; 2017-2020; and annually for 2021 and later years.

#### **2.4.2.3.2. Large IOUs**

The second issue is the whether the amount of the penalty cap for the three large IOUS should change in response to the change in how compliance periods are measured pursuant to SB 2 (1X). As Noble Solutions and PG&E point out, the penalty cap was established in D.03-06-071 and has been incorporated into the practices of the large IOUs. The question is therefore whether the cap should be set at \$25 million per compliance period, as BVES, PG&E, and SDG&E argue, or be expanded for those compliance periods that are multi-year. PG&E and SDG&E claim that the \$25 million/year cap set in D.03-06-071 should be understood as applying to a compliance period; it is simply that the compliance period at that time was annual. Noble Solutions and GPI assert that, unless the \$25 million/year is multiplied by the number of years in the compliance periods established by SB 2 (1X), the cap will effectively be reduced by a large percentage in the multi-year compliance periods.

It is more reasonable to set the penalty cap for the three large IOUs by multiplying \$25 million by the number of years in the compliance period than to keep the cap at \$25 million no matter how long the compliance period is. This is

consistent with basing the penalty cap for the smaller retail sellers on their PQR for the compliance period.

Thus, the penalty cap for each of the three large IOUs would be \$75 million for the first compliance period; \$75 million for the second compliance period; \$100 million for the third compliance period; and \$25 million for each annual compliance period beginning in 2021.

#### **2.4.2.2.3. Total Penalty Cap**

The penalty caps set in this decision represent the maximum penalty amount that a retail seller subject to the cap would be required to pay for a compliance period. If a retail seller was penalized for both a PQR deficiency and a PBR shortfall, as explained in Section 2.4.2.2., above, the combined penalties would be subject to the cap for that compliance period for that retail seller.

Both ESPs and the large IOUs are covered by a cap on their RPS penalty liability for a compliance period. The caps are each set by a method that is intended to encourage compliance while providing a reasonable limitation on total penalty exposure for each type of retail seller. This approach is consistent with the principles for compliance with § 365.1 set out in D.11-01-026.

#### **2.4.2.2.4. Process for Imposing Penalty**

The process of determining whether to grant (in whole or in part) a request for waiver of PQR or reduction of PBR is the forum in which the Commission determines whether a retail seller has done all that it was reasonable for it to do to avoid the PQR deficiency or PBR shortfall, and the final amount of the PQR deficiency or PBR shortfall. Once the Commission determines that a retail seller still has a PQR deficiency or a PBR shortfall (or both), nothing more remains to be decided in order for the Commission to impose a penalty. The penalty amount

can be calculated and the penalty imposed as part of the Commission's decision on the request for a waiver or reduction.

If a retail seller chooses not to seek a waiver or reduction, then the potential penalty calculation in the retail seller's final verified compliance report will become the basis of the penalty imposed by the Commission. The most direct way for the Commission to impose the penalty in such a situation would be to do so in a decision made on the Commission's own motion. The Commission of course retains the discretion to use any other methods that are reasonable for this purpose.

### **2.4.3. Alternative Compliance Mechanisms**

Although California's RPS program has never used the process referred to as "alternative compliance mechanisms," it is a feature of RPS programs in several other states.<sup>61</sup> As part of the ALJ's Comment Ruling, parties were asked to address both whether the Commission has the authority to institute a similar

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<sup>61</sup> The basic types include:

- Obligated load-serving entities (LSEs) have the option to acquire the renewable energy or make an "alternative compliance payment" at a flat rate that is determined by the state regulatory agency. These payments are typically deposited in a fund that is used for purposes related to the renewable energy mandate. (e.g., Maine, Oregon, and Rhode Island.)
- Obligated LSEs have the option to acquire the renewable energy or make an alternative compliance payment that varies according to the type of generation resource or number of years of noncompliance. These funds are typically deposited in a fund that is used for purposes related to the renewable energy mandate. (e.g., Connecticut, Massachusetts, and Pennsylvania.)
- Obligated LSEs that do not attain their compliance targets pay a penalty that is deposited in a fund that is used for purposes related to the renewable energy mandate. (e.g., Minnesota, Montana, and Washington.)

alternative compliance mechanism in the RPS program as revised by SB 2 (1X), and, if the Commission does have such authority, whether it should indeed create an alternative compliance mechanism for the RPS program.

Parties are divided on whether the Commission has the authority to create an alternative compliance mechanism.<sup>62</sup> As UCS points out, the many changes to the RPS program made in SB 2 (1X) do not include changes to the fundamental structure of the penalty program. This suggests that the Legislature did not see changes to the penalty structure as an important task of the new legislation. Regardless of whether the Commission has the authority to institute an alternative compliance mechanism (a question we do not address and do not decide), we conclude that California's RPS program is not in need of such a mechanism.

SCE proposes a variation on the more conventional alternative compliance mechanisms that would allow for a variety of "remedial measures" other than a penalty. These include additional investment in transmission and distribution (which would be applicable only to a large IOU); purchasing and retiring additional allowances under the Air Resources Board's program to implement the greenhouse gas reductions mandated by AB 32 (Pavley), Stats. 2006, ch.488; and funding activities to support the integration of RPS-eligible generation. These suggested measures would also introduce a new and unnecessary level of complexity to the RPS enforcement regime that is unnecessary, even assuming

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<sup>62</sup> AReM, Joint ESPs, PG&E, Noble Solutions, and SCE assert that the Commission has the necessary authority. UCS and Shell argue that it does not. GPI asserts that alternative compliance payments are contrary to the plan of the RPS program. TURN proposes that the topic should be deferred until it is evident that the current enforcement process is not working.

(which we do not decide) that the Commission would have the authority to order any retail seller to engage in such activities.

After considering the thoughtful contributions of the parties on this topic, it is apparent that the purposes of the alternative compliance mechanisms used in other states are already addressed through California's comprehensive approach to the development of renewable energy resources. Almost all programs in other states use the payments made under the alternative compliance regime to fund activities related to the state's renewable energy mandate, but not otherwise funded.

In California, however, such funds are already available as a matter of state policy, and in more reliable ways than would be realized through uncertain and variable revenues received from alternative compliance payments within the RPS program. Funds to support renewable energy projects are distributed through a variety of programs, including the Electric Program Investment Charge (D.12-05-037); the California Solar Initiative and the Self-Generation Incentive Program (R.12-11-005); and the New Solar Homes Partnership, administered by the CEC (CEC Docket # 06-NSHP-1).<sup>63</sup>

Within the RPS program itself, innovative procurement modes such as the feed-in tariff mandated by § 399.20 and the renewable auction mechanism adopted in D.10-12-048, are already in place. Moreover, as GPI points out, the Commission is still in the process of implementing the complex changes to the RPS program made by SB 2 (1X). There is no reason to add a new and potentially

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<sup>63</sup> Information about this program may be found at <http://www.energy.ca.gov/renewables/06-NSHP-1/>.

complex mechanism to RPS enforcement to do a job that is already being done by so many other programs.

## **2.5. Reporting Requirements**

### **2.5.1. Reporting Potential Penalties**

In the RPS program prior to SB 2 (1X), retail sellers calculated and reported a “presumptive penalty” in their annual compliance reports. (D.03-06-071 at 51, as modified by D.03-12-065; D.06-10-050 at 36-38.) As Noble Solutions points out, reporting a potential penalty is a “best practice” for RPS reporting. Parties generally support some form of continued reporting of the calculated potential penalty, with most commenting parties proposing that the “presumptive” penalty calculation be made in the final report for the compliance period.<sup>64</sup>

AReM, BVES, and SCE propose that a presumptive penalty should be reported only after a decision on a retail seller’s request for a waiver of PQR or reduction of a PBR shortfall. At that point in the process, however, the penalty would be not presumptive, but actual, since the retail seller’s PQR deficit or PBR shortfall will have been finally determined by the Commission in its decision on the request for waiver or for reduction, or both.

It is reasonable to continue the practice of retail sellers calculating a potential penalty amount in their final compliance report for a compliance period. If the potential penalty amount changes as a result of the CEC Verification Report, then the new potential penalty calculation would be

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<sup>64</sup> GPI, Noble Solutions, PG&E, and Shell take this position.

included in the revised compliance report filed and served after the CEC's Verification Report is transmitted to the Commission.<sup>65</sup>

### **2.5.2. Narrative Reporting Elements**

SB 2 (1X) requires retail sellers to include certain new narrative elements in their compliance reports, as set out in § 399.13(a)(3).<sup>66</sup> While retail sellers have provided varying degrees of detail in their reports, parties unanimously state that it is premature for the Commission to require a uniform format for the

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<sup>65</sup> The potential penalty calculation contained in a retail seller's final verified compliance report will become the basis of the penalty imposed by the Commission if the retail seller chooses not to seek a waiver of its PQR requirements or a reduction of its PBR requirements.

<sup>66</sup> Section 399.13(a)(3) provides:

The commission shall direct each retail seller to prepare and submit an annual compliance report that includes all of the following:

(A) The current status and progress made during the prior year toward procurement of eligible renewable energy resources as a percentage of retail sales, including, if applicable, the status of any necessary siting and permitting approvals from federal, state, and local agencies for those eligible renewable energy resources procured by the retail seller, and the current status of compliance with the portfolio content requirements of subdivision (c) of Section 399.16, including procurement of eligible renewable energy resources located outside the state and within the WECC and unbundled renewable energy credits.

(B) If the retail seller is an electrical corporation, the current status and progress made during the prior year toward construction of, and upgrades to, transmission and distribution facilities and other electrical system components it owns to interconnect eligible renewable energy resources and to supply the electricity generated by those resources to load, including the status of planning, siting, and permitting transmission facilities by federal, state, and local agencies.

(C) Recommendations to remove impediments to making progress toward achieving the renewable energy resources procurement requirements established pursuant to this article.

narrative elements of the reports.<sup>67</sup> This view is reasonable, since only now has one compliance period been completed. It is advisable, however, for the Director of Energy Division to work with the parties to make the narrative elements of the compliance reports as complete and helpful to the Commission as possible.

### **2.5.3. Comments on Compliance Reports**

Parties may comment on the final compliance reports submitted by retail sellers, as well as on any updated compliance reports submitted after the CEC Verification Report for the compliance period, as proposed by GPI and San Francisco. On the other hand, since the compliance reports for intervening years are not definitive for compliance purposes, a party wishing to comment on any compliance report or reports submitted for any intervening year should file a motion requesting leave to do so, in accordance with the current practice.

### **2.5.4. Changes to Required Reporting Formats**

In D.12-06-038, the Commission instructed the Director of Energy Division, in consultation with the parties, to develop reporting formats and processes that were appropriate to carry out the requirements of that decision in the implementation of SB 2 (1X). The Commission also authorized the Director of Energy Division to request that retail sellers supply any additional or supplemental information necessary to make retail sellers' reports as useful and informative as possible. Energy Division staff, with the assistance of the parties, has carried out that mandate.

This decision will require additions and changes to the existing RPS reporting tools. We again instruct the Director of Energy Division, in

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<sup>67</sup> AReM, BVES, GPI, MEA, Noble Solutions, PacifiCorp, PG&E, SDG&E, Shell, and SCE agreed on this point.

consultation with the parties, to develop the appropriate reporting tools to allow retail sellers to report accurately their RPS obligations and their compliance status.

## **2.6. Citation Program**

In Resolution (Res.) E-4257 (November 2, 2009), the Commission set up a citation program to provide sanctions for retail sellers that fail to file timely, complete, and accurate reports on their RPS procurement and compliance, or fail to respond in a timely and accurate manner to staff requests for information related to RPS compliance reports. Although the citation program has functioned smoothly, the specific language in Res. E-4257 tracks the nomenclature of the prior RPS program.

Almost all parties agree that the citation program should simply be brought up to date, conforming to the language and requirements of SB 2 (1X).<sup>68</sup> BVES suggests adding distinctions for inadvertent versus intentional errors, and first-time versus repeat violators. CMUA recommends an even more complex new structure, incorporating the severity of the infraction, prior offenses, and the size of the retail seller.

There is no reason to make extensive changes to a citation program that almost all parties agree has met its objectives and is working as designed. The more elaborate suggestions of BVES and CMUA are not consistent with the concept of a citation program, which is to provide quick, simple, small, and sure penalties for specified violations.

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<sup>68</sup> These include AReM, GPI, Joint ESPs, PacifiCorp, Noble Solutions, PG&E, SCE, SDG&E, and Shell. BVES suggests adding distinctions for inadvertent versus intentional errors, and first-time versus repeat violators.

The Director of Energy Division should therefore, in consultation with the parties, prepare a resolution for consideration by the Commission that updates the existing citation program to conform to the language and requirements of D.12-06-038 and this decision and is consistent with the citation appeal process adopted in Res. ALJ-299 (June 26, 2014).

### **3. SMJU Petition for Modification of D.12-06-038**

A group of IOUs identifying themselves as the California Association of Small and Multi-Jurisdictional Utilities (SMJUs)<sup>69</sup> filed the Petition of the California Association of Small and Multi-Jurisdictional Utilities for Modification of Decision 12-06-038 (SMJU Petition) on February 21, 2013. No responses to the SMJU Petition were filed. The SMJU Petition was filed within one year of the effective date of D.12-06-038 (June 21, 2012). Thus, it meets the timeliness requirement of Rule 16.4(d).<sup>70</sup>

The SMJU Petition seeks to modify the Commission's implementation of § 399.13(a)(4)(B)<sup>71</sup> in D.12-06-038. The SMJUs ask the Commission to revisit the

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<sup>69</sup> They are Bear Valley, CalPeco, and PacifiCorp.

<sup>70</sup> Rule 16.4(d) provides:

Except as provided in this subsection, a petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition.

<sup>71</sup> Section 399.13(a)(4)(B) provides:

[The Commission shall adopt. . .] rules permitting retail sellers to accumulate, beginning January 1, 2011, excess procurement in one compliance period to be applied to any subsequent compliance period. The rules shall apply equally to all retail sellers. In determining the

*Footnote continued on next page*

analysis and rules for excess procurement set out in § 3.7.3 and OP 30 of D.12-06-038, in which the Commission explicitly considered the situations of the SMJUs and applied the rules for excess procurement to their situations. In particular, the SMJUs ask the Commission to:

- Change the method of calculating excess procurement that can be carried forward from one compliance period to a later compliance period, so that all Category 3 RECs in excess of an SMJU' s current compliance obligation (PQR) may be carried forward, and
- Apply this changed method to all three SMJUs.<sup>72</sup>  
The SMJUs assert that

the . . . current rules for calculating excess procurement. . . must be modified to harmonize the limitation on counting [Category] 3 RECs as "excess procurement" with the statutory language explicitly granting the . . . [SMJUs] the discretion to use [Category] 3 RECs to meet any or all of their RPS procurement obligations.<sup>73</sup>

The special RPS procurement rules for the SMJUs allow them to use RPS procurement to count for RPS compliance "notwithstanding any procurement

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quantity of excess procurement for the applicable compliance period, the commission shall deduct from actual procurement quantities, the total amount of procurement associated with contracts of less than 10 years in duration. In no event shall electricity products meeting the portfolio content of paragraph (3) of subdivision (b) of § 399.16 be counted as excess procurement.

<sup>72</sup> The Commission's analysis in D.12-06-038 determined that, since Bear Valley is connected to a California balancing authority, no separate treatment of its excess procurement situation was warranted. (D.12-06-038 at 71-72.)

<sup>73</sup> SMJU Petition at 2.

content limitation in § 399.16.” (§ 399.17(b)<sup>74</sup>; § 399.18(b)<sup>75</sup>.) The limitations in § 399.16, in turn, require retail sellers to meet certain requirements for the proportion of RECs from Categories 1, 2, and 3 as “procurement credited towards each compliance period.” (§ 399.16(c).) Thus, the SMJUs are not required to meet these proportional requirements in fulfilling their RPS procurement obligations for each compliance period.

The SMJUs argue that, because they may use procurement from any category, without limitation, to meet their PQRs, the calculation of the number of RECs that can be carried forward as excess procurement should be based on their total PQR, rather than the limitation on Category 3 RECs found in § 399.16(c). If that is done, they assert, “only those [Category] 3 RECs that exceed the RPS procurement quantity requirement should be excluded from counting as excess.”<sup>76</sup> This in turn could allow more RECs from Category 1 or 2 (for Bear Valley) or Category 3 (not acquired from third-party sellers)<sup>77</sup> to be available as excess procurement that could be applied in later compliance periods.

As explained in D.12-06-038, the rules for excess procurement are not governed by § 399.17 or 399.18. The statutory instructions for permitting excess procurement are set out in § 399.13(a)(4)(B). That section provides, among other things, that the excess procurement rules “shall apply equally to all retail sellers.” There is no reference to the special procurement rules for SMJUs. Nor do §§ 399.17 or 399.18 include any reference to special rules for the use of excess

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<sup>74</sup> Currently includes CalPeco and PacifiCorp.

<sup>75</sup> Currently includes only Bear Valley.

<sup>76</sup> SMJU Petition at 9.

<sup>77</sup> See D.12-06-038, § 3.7.3.

procurement by SMJUs. It is reasonable to conclude that the Legislature intended to extend maximum flexibility to the SMJUs in their RPS procurement, as set out in §§ 399.17 and 399.18. But there is no statutory support for the SMJUs' view that this special treatment should extend past the bounds set out in those sections, to allow the SMJUs maximum opportunities for carrying over excess procurement.

Nor is it necessary for the Commission to create such an extension of the rules for SMJUs in order for them to be able to comply with their RPS procurement obligations. Their exemption from PBR requirements gives SMJUs great flexibility in procuring to meet their PQR in each compliance period. Although the proposal in the Petition may present a rational way of maximizing the availability of excess procurement for SMJUs, nothing in SB 2 (1X) or the Commission's implementation of the RPS program requires the Commission to provide SMJUs with more options for the use of excess procurement than are provided to other retail sellers. "All retail sellers," as provided by § 399.13(a)(4)(B), must accommodate to the limitations that SB 2 (1X) has set on the availability of excess procurement for RPS compliance.

The SMJU Petition is therefore denied.

#### 4. **AReM/Shell Petition for Modification of D.12-06-038**

The Petition for Modification of D.12-06-038 by the Alliance for Retail Energy Markets and Shell Energy North America (US), L.P. (ESP Petition) was filed January 17, 2014. On February 18, 2014, SCE and PacifiCorp each filed responses to the ESP Petition, supporting the modification sought.

The ESP Petition seeks modification of the Commission's implementation of § 399.21(a)(6)<sup>78</sup> in D.12-06-038, OP 23.<sup>79</sup> The ESP Petition asserts that the direction in D.12-06-038 that RECs must be retired within 36 months of the date of the associated RPS-eligible generation conflicts with an earlier determination by the Executive Director on February 18, 2011 (Executive Director's Letter).<sup>80</sup>

The Executive Director's Letter granted an extension of the requirements of OP 10 of D.11-01-025 that RECs associated with RPS-eligible generation in 2008 must be retired for RPS compliance by the end of 2010.<sup>81</sup> Responding to a request

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<sup>78</sup> Section 399.21(a)(6) provides:

A renewable energy credit shall not be eligible for compliance with a renewables portfolio standard procurement requirement unless it is retired in the tracking system established pursuant to subdivision (c) of Section 399.25 by the retail seller or local publicly owned electric utility within 36 months from the initial date of generation of the associated electricity.

<sup>79</sup> OP 23 of D.12-06-038 provides:

In order to count for compliance with the California renewables portfolio standard, any renewable energy credit retired for compliance on or after January 1, 2011 by a retail seller as defined in Public Utilities Code Section 399.12(j) must be retired within 36 months of the initial date of the associated generation.

<sup>80</sup> ESP Petition at 3.

<sup>81</sup> OP 10 of D. 11-01-025 provides:

In order to be used for compliance with the California renewables portfolio

*Footnote continued on next page*

made by PG&E, the Executive Director granted an extension to February 28, 2011 to retire RECs associated with RPS-eligible generation in 2008.

The ESP Petition requests a modification to D.12-06-038 that would provide an exception to the 36-month rule for retirement of RECs, for those RECs associated with generation in 2008 and retired in January and February 2011. The ESP Petition claims that such a modification is necessary to conform the implementation of SB 2 (1X) in D.12-06-038 to the REC retirement date extension granted by the Executive Director's Letter in February 2011.<sup>82</sup>

Before considering the merits of any arguments made for modification of a prior decision, the Commission must determine that a petition for modification complies with the requirements of Rule 16.4 of the Commission's Rules of Practice and Procedure, including the requirement that a petition for modification must be filed "within one year of the effective date of the decision proposed to be modified." (Rule 16.4(d).)

"If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the date of the decision." (Rule 16.4(d).) Since the ESP Petition was filed more than a year after

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standard, renewable energy credits may be retained in active sub-accounts in the Western Renewable Energy Generation Information System for no more than three compliance years (inclusive of the year in which the electricity associated with the renewable energy credits was generated) after the electricity associated with the renewable energy credits was generated before being transferred to the Western Renewable Energy Generation Information System retirement sub-account of a load-serving entity obligated under the California renewables portfolio standard.

<sup>82</sup> Although the REC retirement rule stated in D.11-01-025, above, is couched differently from the rule in Section 399.21(a)(6) and implemented in OP 23 of D.12-06-038, in the circumstances presented by the ESP Petition, the two rules have the same result.

the effective date of D.12-06-038, it must explain why it “could not have been presented” within the one-year timeframe.

The ESP Petition asserts that the issue it presents “went unrecognized until the Final 20% Closing Report Templates were issued [by Energy Division staff] on November 14, 2013.”<sup>83</sup> Petitioners claim that they could not have been expected to file a petition for modification before Commission staff sent to the parties a document that applied OP 23 of D.12-06-038.<sup>84</sup>

This argument confuses the actions of Commission staff in implementing a Commission decision with the responsibility of a party to a Commission proceeding to comply with procedural requirements in seeking modification of a Commission decision. The ESP Petition asserts, in the passive voice, that the “issue went unrecognized until the Final 20% Closing Report templates were issued on November 14, 2013.” (at 3.) Notably, the ESP Petition does not claim that the issue could not have been recognized prior to issuance by Energy Division staff of the Final 20% Closing Report template. Indeed, such a claim could not validly be made.

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<sup>83</sup> ESP Petition at 3. The templates discussed in the ESP Petition were sent to retail sellers as part of the implementation of OP 1 of D.12-06-038, mandating an accounting by retail sellers of their RPS procurement deficits for years prior to 2011.

<sup>84</sup> ESP Petition at 6.

The directives about REC retirement that the ESP Petition claims to be conflicting, and therefore to require modification of D.12-06-038, have existed and been available to compare among D.11-01-025, the Executive Director's Letter, and D.12-06-038, since D.12-06-038 became effective in June 2012. These elements may be summarized as follows:

1. D.11-01-025 required that RECs for RPS compliance must be retired within three calendar years of the date of the associated RPS-eligible generation, inclusive of the year of generation. (D.11-01-025, OP 10.)<sup>85</sup>
2. The Executive Director's letter dated February 18, 2011 allowed an extension, so that RECs to be used for RPS compliance that are associated with RPS-eligible generation in 2008 could be retired not later than February 28, 2011.
3. D.12-06-038 implemented the new REC retirement rules put in place by SB 2 (1X) to require that RECs retired after January 1, 2011 to be used for RPS compliance, must be retired not more than 36 months from the date of the associated RPS-eligible generation. (D.12-06-038, OP 23.)

It is therefore plain that the issue presented by the ESP Petition was fully developed, and present on the face of the relevant documents, at the time the Commission issued D.12-06-038. Any party concerned about the implications of the asserted different timing rules for retirement of RECs associated with RPS-eligible generation in 2008 could have brought the issue to the Commission's attention at any time after the Commission adopted D.12-06-038. The petitioners did not do so until early in 2014. As petitioners candidly state, they waited until after Energy Division staff, as the result of extensive work and consultation with the parties, produced and provided to the parties the Energy Division staff's

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<sup>85</sup> For RECs associated with RPS-eligible generation in 2008, this retirement date would be December 31, 2010.

template for the Final 20% Closing Report that must be filed by all retail sellers. (See OPs 1-9 of D.12-06-038.)

This course of action is not sufficient to constitute a reason the ESP Petition “could not have been presented” within a year of the effective date of D.12-06-038. Petitioners are in effect arguing that they are under no obligation to understand or protect their legal rights in this proceeding until Commission staff dots the RPS compliance *i*'s and crosses the reporting *t*'s for them. But any reasonable reading of the underlying documents would have revealed, at any time since D.12-06-038 was issued, the apparent conflict petitioners now present to the Commission as only recently made evident.

The ESP Petition could have been filed within one year of the effective date of D.12-06-038, but was not. Pursuant to Rule 16.4(d), the Commission exercises its authority to summarily deny the ESP Petition.

## **5. Next Steps**

The Director of Energy Division should promptly, in consultation with the parties, revise the RPS compliance and reporting spreadsheet to incorporate the requirements of this decision.

The Director of Energy Division should promptly, in consultation with the parties, develop an updated citation process for violations of RPS reporting rules that will conform to the requirements of D.12-06-038 and this decision, and present the new citation program to the Commission for approval by resolution.

The Director of Energy should, in consultation with the parties, propose improvements to the methods parties use and the information they provide for the narrative elements of their compliance reports. The Director of Energy Division should evaluate the results of such improvements and propose such

further changes as may be needed to increase the clarity and value of the narrative elements of the compliance reports.

## **6. Comments on Proposed Decision**

The proposed decision of ALJ 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 and Procedure. Comments were filed on \_\_\_\_, by \_\_\_\_, and reply comments were filed on \_\_\_\_ by \_\_\_\_.

## **7. Assignment of Proceeding**

Carla A. Peterman is the assigned Commissioner and Anne E. Simon is the assigned ALJ for this portion of this proceeding.

### **Findings of Fact**

1. The CEC verifies RPS procurement claims in its Verification Report, which is transmitted to this Commission after it is adopted by the CEC.

2. The word "reduction" means "the act of making something smaller in size, amount, number, etc."

3. The current \$25 million/year limit on the total penalty amount that can be paid by a retail seller is greater than the total RPS procurement obligation (calculated at \$50/REC) of many retail sellers other than PG&E, SCE, or SDG&E.

4. Public Utilities Code Section 399.16(e) prevents the Commission from reducing a retail seller's obligation for procurement meeting the requirements of Section 399.16(c)(1) to below 65 per cent, for any compliance obligation after December 31, 2016.

5. The Petition for Modification of Decision 12-06-038 by the Alliance for Retail Energy Markets and Shell Energy North America (US), L.P. was filed on January 17, 2014, more than one year after the effective date of D.12-06-038, which was June 21, 2012.

6. The citation program instituted by Res. E-4257 (November 2, 2009) uses nomenclature and requirements that are particular to the RPS program as it was prior to the revisions made by SB 2 (1X).

### **Conclusions of Law**

1. AB 2187 requires that RECs from contracts executed by ESPs prior to January 14, 2011 should be treated the same way as RECs from contracts executed by IOUs and CCAs prior to June 1, 2010, for purposes of compliance with the portfolio balance requirements of Section 399.16(c).

2. AB 2187 makes no changes to Section 399.16(d).

3. In order to promote consistency with statutory requirements and the fair and efficient administration of the RPS program, the process for a retail seller to request a waiver of its procurement quantity requirements or a reduction of its portfolio balance requirements should be a formal process on the record of a Commission proceeding.

4. In order to promote the fair and efficient administration of the RPS program, a retail seller should make a request for waiver of procurement quantity requirements or reduction of portfolio balance requirements by filing and serving a motion in the Commission proceeding that addresses RPS procurement and compliance at the time the motion is filed. In the event that no separate RPS proceeding exists at that time, the motion should be filed in any proceeding that includes RPS compliance in its scope.

5. In order to promote the fair and efficient administration of the RPS program, a retail seller requesting both a waiver of procurement quantity requirements and a reduction of portfolio balance requirements may make both request in one motion, so long as the motion and supporting documentation, if any, fully meets the requirements set by this decision for each type of request.

6. In order to promote the fair and efficient administration of the RPS program, a retail seller's motion for waiver of procurement quantity requirements or reduction of portfolio balance requirements should be filed and served not earlier than when the retail seller's final compliance report for the compliance period is filed, and not later than 30 days after the transmission to this Commission of the Verification Report.

7. In order to promote the fair and efficient administration of the RPS program, any supplementation of a retail seller's motion for waiver of procurement quantity requirements or reduction of portfolio balance requirements that is necessitated by the findings of the CEC's RPS Verification Report for the compliance period for which the waiver is sought should be filed and served not later than 30 days after the transmission to this Commission of the Verification Report.

8. Because the findings of the CEC's Verification Report is necessary in order to determine a retail seller's compliance with RPS procurement requirements, the Commission cannot resolve a retail seller's request for waiver of procurement quantity requirements or reduction of portfolio balance requirements before the Verification Report has been adopted and transmitted to the Commission.

9. In order to promote the fair and efficient administration of the RPS program, parties to the proceeding in which a request for waiver of portfolio quantity requirements or reduction of portfolio balance requirements is filed should be allowed to file comments on the waiver request.

10. The Commission should apply its ordinary "preponderance of the evidence" standard as the burden of proof for a retail seller requesting a waiver of procurement quantity requirements or reduction of portfolio balance requirements.

11. Because the facts and circumstances may differ in each request for waiver of procurement quantity requirements or request for reduction of portfolio balance requirements, it is appropriate for the Commission to make a case-by-case determination of the merits of each request for waiver of procurement quantity requirements or request for reduction of portfolio balance requirements.

12. In order to promote the fair and efficient administration of the RPS program, a retail seller should be allowed to request an evidentiary hearing on its request for a waiver of procurement quantity requirements or reduction of portfolio balance requirements; whether any such request will be granted should be decided by the presiding officer in the proceeding in which the request for a waiver is filed.

13. In order to comply with statutory requirements and promote the fair and efficient administration of the RPS program, a retail seller should be required to demonstrate, by a preponderance of the evidence, each and every element necessary to establish that it has met the relevant statutory condition or conditions that would justify its request for a waiver of its procurement quantity requirements or its request for a reduction of its portfolio balance requirements.

14. In order to comply with statutory requirements and promote the fair and efficient administration of the RPS program, a retail seller seeking a waiver of its procurement quantity requirements or a reduction of its portfolio balance requirements should be required to demonstrate, by a preponderance of the evidence, that it has taken all reasonable actions under its control to achieve full compliance with its RPS procurement quantity requirements.

15. In order to comply with statutory requirements for RPS procurement, a retail seller may credit RECs toward its RPS procurement obligations only to the

extent that the RECs credited meet the portfolio balance requirements of Section 399.16(c).

16. In order to promote consistency with statutory requirements and the fair and efficient administration of the RPS program, a retail seller should not be able to obtain a waiver of PQR requirements unless in its waiver request it identifies both the total number of RECs for which waiver is sought and the reasons for granting the waiver, with the number of RECs sought to be waived for each stated reason clearly identified.

17. In order to promote consistency with statutory requirements and the fair and efficient administration of the RPS program, a retail seller should not be able to obtain a waiver of PQR requirements unless it shows in its waiver request that it has applied to RPS compliance in the compliance period for which the waiver is sought all RECs in its RPS retirement account in WREGIS that meet the RPS portfolio balance requirements for that compliance period.

18. In order to promote the fair and efficient administration of the RPS program, the Commission should be able to grant to a retail seller a partial waiver of its PQR requirements, to the extent that the retail seller demonstrates that some, but not all, of the RECs constituting the deficiency in PQR meet the statutory requirements for a waiver, as implemented in this decision.

19. In order to promote consistency with statutory requirements and the fair and efficient administration of the RPS program, a finding by the Commission that an IOU has exceeded its RPS procurement expenditure limitation, as established pursuant to Section 399.15(c), should not automatically result in the granting of a waiver of procurement quantity requirements for that IOU.

20. In order to comply with statutory requirements and promote the fair and efficient administration of the RPS program, the Commission should establish

additional reporting requirements for any retail seller to which it has granted a partial or complete waiver of PQR at the time the partial or complete waiver is granted.

21. It is reasonable to use the ordinary meaning of the term “reduction” in interpreting the scope of Section 399.16(e), allowing a retail seller to request a reduction of a portfolio balance requirement.

22. In applying the ordinary meaning of the term “reduction” to the statutory scheme for seeking a reduction in portfolio balance requirements, the Commission should allow a request for reduction of portfolio balance requirements only as to the requirements created by Section 399.16(c)(1), because those are the only requirements that can be reduced.

23. In order to conform to statutory requirements and promote the fair and efficient administration of the RPS program, a retail seller should be allowed to request a reduction of its portfolio balance requirements by requesting that the Commission reduce the minimum percentage of Category 1 RECs it is required to apply to RPS compliance for the compliance period for which the reduction is requested.

24. The decision to grant a request for reduction of portfolio balance requirements, in whole or in part, is committed to the Commission’s discretion by Section 399.16(e).

25. In order to promote consistency with statutory requirements and the fair and efficient administration of the RPS program, a retail seller should not be able to obtain a reduction of PBR requirements unless in its reduction request it identifies both the total number of RECs for which reduction is sought and the reasons for granting the reduction, with the number of RECs sought to be reduced for each stated reason clearly identified.

26. In order to promote consistency with statutory requirements and the fair and efficient administration of the RPS program, a retail seller should not be able to obtain a reduction of PBR requirements unless it shows in its reduction request that it has applied to RPS compliance in the compliance period for which the reduction is sought all RECs in its RPS retirement account in WREGIS that meet the criteria set in § 399.16(b)(1) with respect to the portfolio balance requirements (Category 1).

27. In order to comply with statutory requirements and promote the fair and efficient administration of the RPS program, a retail seller should be required to demonstrate, by a preponderance of the evidence, each and every element necessary to establish that it has met the relevant statutory condition or conditions that would justify its request for a reduction of PBR requirements.

28. In order to comply with statutory requirements and promote the fair and efficient administration of the RPS program, a retail seller should be required to demonstrate, by a preponderance of the evidence, that it has taken all reasonable actions under its control to achieve full compliance with its RPS portfolio balance requirements.

29. In order to promote the fair and efficient administration of the RPS program, the Commission should be able to grant to a retail seller a partial reduction of its PBR requirements, to the extent that the retail seller demonstrates that some, but not all, of the RECs constituting the shortfall in PBR meet the statutory requirements for a reduction, as implemented in this decision.

30. In order to comply with statutory requirements and promote the fair and efficient administration of the RPS program, the Commission should not reduce a retail seller's requirement for procurement of Category 1 RECs below 65% of the retail seller's RPS procurement credited toward RPS compliance in that

compliance period, for any compliance period beginning after December 31, 2016.

31. In order to encourage compliance with RPS procurement obligations, promote consistency with statutory requirements, and promote the fair and efficient administration of the RPS program, the Commission should exercise its authority pursuant to Section 2113 to impose penalties on any retail seller that has a PQR deficiency for which a full waiver has not been granted; on any retail seller that has a PBR shortfall for which a reduction of the shortfall to zero has not been granted; and on any retail seller that has both a PQR deficiency for which a full waiver has not been granted, and a PBR shortfall for which a reduction of the shortfall to zero has not been granted.

32. In order to promote regulatory certainty and the fair and efficient administration of the RPS program, any retail seller whose final verified compliance report shows a PQR deficiency and/or a PBR shortfall for the compliance period and which does not file a request for a waiver of PQR requirements and/or a request for reduction of PBR, should be subject to the immediate imposition of penalties, in an amount calculated in accordance with the rules set out in this decision.

33. In order to encourage compliance with RPS procurement obligations, increase regulatory certainty, and promote the fair and efficient administration of the RPS program, the penalty for a PQR deficiency or a PBR shortfall should remain \$50/REC (MWh).

34. In order to increase regulatory certainty and promote the fair and efficient administration of the RPS program, the Commission should assess a penalty of 1.5 times the penalty amount per REC for each REC that is part of both a PQR

deficiency that has not been waived and a PBR shortfall that has not been reduced.

35. In order to encourage compliance with RPS procurement obligations, increase regulatory certainty, and promote the fair and efficient administration of the RPS program, the Commission should institute a limit on the total amount of penalties to be paid by any large IOU (PG&E, SCE, or SDG&E) that is based on scaling up the prior penalty limit of \$25 million per year, so that the penalty limit would be: \$75 million for the first compliance period (2011-2013); \$75 million for the second compliance period (2014-2016); \$100 million for the third compliance period (2017-2020); and \$25 million for each annual compliance period beginning in 2021.

36. In order to encourage compliance with RPS procurement obligations, increase regulatory certainty, and promote the fair and efficient administration of the RPS program, the Commission should institute a limit on the total amount of penalties to be paid by retail seller other than PG&E, SCE, or SDG&E that is based on a percentage of the retail seller's RPS procurement obligation, expressed in dollars per REC.

37. In order to encourage compliance with RPS procurement obligations, increase regulatory certainty, and promote the fair and efficient administration of the RPS program, it is reasonable to set the limit on the total amount of penalties to be paid in one compliance period by any retail seller other than PG&E, SCE, or SDG&E at 50% of the PQR of the retail seller (in RECs), multiplied by the penalty amount of \$50/REC; i.e., penalty limit per compliance period = PQR (in RECs) \* 0.5 \* \$50/REC.

38. In order to encourage compliance with RPS procurement obligations and promote the fair and efficient administration of the RPS program, it is reasonable

to continue the requirement that each retail seller calculate a potential penalty (if any) for the compliance period in its final compliance report for the compliance period, subject to revision if necessary in the revised compliance report filed and served after the CEC's Verification Report is transmitted to this Commission.

39. In order to promote the fair and efficient administration of the RPS program and to enhance the transparency of retail sellers' reports, the Director of Energy Division should be authorized to develop, in consultation with the parties, a uniform format or template for the required narrative elements of compliance reports, at such time as the Director of Energy Division concludes that such uniformity would advance the fair and efficient administration of the RPS program.

40. In order to promote the fair and efficient administration of the RPS program and enhance the transparency of retail sellers' reports, each retail seller should file and serve, in the existing proceeding that has RPS procurement and compliance within its scope, the retail seller's final RPS compliance report for a compliance period, in accordance with instructions from the Director of Energy Division, as well as any updated compliance report within 30 days after the CEC's Verification Report is transmitted to this Commission.

41. In order to promote the fair and efficient administration of the RPS program, any party to the proceeding in which retail sellers' final RPS compliance reports for a compliance period, as well as any updated compliance reports after the CEC's Verification Report is transmitted to this Commission, are filed and served, should be allowed to file and serve comments on such reports.

42. In order to promote the fair and efficient administration of the RPS program, any party on the service list for retail sellers' RPS compliance reports for intervening years in a compliance period, should be allowed to make a

motion in the proceeding from which the service list was drawn, requesting leave to file and serve comments on such reports.

43. In order to promote the fair and efficient administration of the RPS program, the Director of Energy Division should be authorized to develop, in consultation with the parties, any new or revised reporting formats, instructions, and materials that are necessary to ensure that retail sellers as defined by Public Utilities Code Section 399.12(j) will be able to report on their compliance with the California renewables portfolio standard in a complete, timely, and transparent manner.

44. In order to promote the fair and efficient administration of the RPS program, the program authorizing the use of citations to sanction violations of RPS compliance reporting requirements and failures to respond to requests for clarification of reports should be updated to conform to the compliance and enforcement requirements of SB 2 (1X), D.12-06-038, and this decision, as well as to be compatible with the citation appeals process instituted by Res. ALJ-299 (June 26, 2014).

45. Because the requested relief is inconsistent with the statutory structure for the application of excess procurement in one compliance period to any subsequent compliance period, the SMJU Petition for modification of D.12-06-038 should be denied.

46. Because it could have been filed within a year after the effective date of D.12-06-038, but was not, the ESP Petition for modification of D.12-06-038 should be denied.

**O R D E R****IT IS ORDERED** that:

1. Renewable energy credits (RECs) from contracts executed by electric service providers prior to January 14, 2011 will be treated the same way as RECs from contracts executed by investor-owned utilities and community choice aggregators prior to June 1, 2010, for purposes of compliance with the portfolio balance requirements of Public Utilities Code Section 399.16(c).

2. A retail seller as defined in Public Utilities Code Section 399.12(j) that requests a waiver of its procurement quantity requirements for a compliance period under the California renewables portfolio standard (RPS) must make the request by filing and serving a motion in the Commission proceeding that addresses RPS procurement and compliance at the time the motion is filed. In the event that no separate RPS proceeding exists at that time, the retail seller must file and serve the motion in any proceeding that includes RPS compliance in its scope.

3. The motion of a retail seller as defined in Public Utilities Code Section 399.12(j) for a waiver of procurement quantity requirements under the California renewables portfolio standard must be filed and served not earlier than when the retail seller's final compliance report for the compliance period for which the waiver is sought is filed, and not later than 30 days after the transmission to this Commission of the Renewables Portfolio Standard Procurement Verification Report prepared by the California Energy Commission for the compliance period for which the waiver is sought.

4. Any supplementation of the motion of a retail seller as defined in Public Utilities Code Section 399.12(j) for waiver of procurement quantity requirements

that is necessitated by the findings of the Renewables Portfolio Standard Procurement Verification Report (Verification Report) prepared by the California Energy Commission for the compliance period for which the waiver is sought must be filed and served not later than 30 days after the transmission to this Commission of the Verification Report.

5. Any party to the proceeding in which a request for waiver of procurement quantity requirements is filed and served, may file and serve comments on the waiver request, in accordance with instructions provided by the presiding officer in that proceeding.

6. A retail seller as defined by Public Utilities Code Section 399.12(j) may not obtain a waiver of its procurement quantity requirements under the California renewables portfolio standard for a compliance period unless in its waiver request it identifies both the total number of renewable energy credits (RECs) for which waiver is sought and the reasons for granting the waiver, with the number of RECs sought to be waived for each stated reason clearly identified.

7. A retail seller as defined by Public Utilities Code Section 399.12(j) may not obtain a waiver of its procurement quantity requirements under the California renewables portfolio standard (RPS) for a compliance period unless it shows in its waiver request that it has applied to RPS compliance, in the compliance period for which the waiver is sought, all renewable energy credits in its RPS retirement account in the Western Renewable Energy Generation Information System that meet the RPS portfolio balance requirements set out in Public Utilities Code Section 399.16(c) and Decision 12-06-038.

8. Any retail seller as defined by Public Utilities Code Section 399.12(j) requesting a waiver of its procurement quantity requirements under the California renewables portfolio standard for a compliance period has the burden

of proof on each and every element necessary to demonstrate that a waiver is justified. The burden of proof is “preponderance of the evidence.”

9. A retail seller as defined by Public Utilities Code Section 399.12(j) may request an evidentiary hearing on its request for a waiver of procurement quantity requirements under the California renewables portfolio standard. Whether any such request for an evidentiary hearing should be granted will be decided by the presiding officer in the proceeding in which the request for a waiver is filed.

10. In order to obtain a waiver of its procurement quantity requirements under the California renewables portfolio standard, a retail seller as defined by Public Utilities Code Section 399.12(j) must demonstrate, by a preponderance of the evidence, each and every element necessary to establish that it has met the relevant statutory condition or conditions that would justify its request for a waiver of its procurement quantity requirements.

11. In order to obtain a waiver of its procurement quantity requirements under the California renewables portfolio standard, a retail seller as defined by Public Utilities Code Section 399.12(j) must demonstrate, by a preponderance of the evidence, that it has taken all reasonable actions under its control to achieve full compliance with its procurement quantity requirement.

12. A retail seller as defined in Public Utilities Code Section 399.12(j) that demonstrates that some, but not all, of the renewable energy credits constituting the deficiency in its procurement quantity requirement meet the statutory requirements for a waiver, as implemented in this decision, may receive a partial waiver of its procurement quantity requirements, to the extent of its demonstration.

13. A retail seller as defined by Public Utilities Code Section 399.12(j) to which the Commission has granted a partial or complete waiver of its procurement quantity requirements must comply with any additional reporting requirements established by the Commission.

14. A retail seller as defined by Public Utilities Code Section 399.12(j) may request a reduction of its portfolio balance requirements as set forth by Public Utilities Code Section 399.16(c) and Decision12-06-038 by requesting that the Commission reduce the minimum percentage of renewable energy credits meeting the criteria in Public Utilities Code Section 399.16(b)(1) that the retail seller is required to apply to compliance with the California renewables portfolio standard for the compliance period for which the reduction is requested.

15. A retail seller as defined by Public Utilities Code Section 399.112(j) must make a request for reduction of portfolio balance requirements by filing and serving a motion in the Commission proceeding that addresses procurement and compliance under the California renewables portfolio standard (RPS) at the time the motion is filed. In the event that no separate RPS proceeding exists at that time, the motion must be filed in any proceeding that includes RPS compliance in its scope.

16. The motion of a retail seller as defined by Public Utilities Code Section 399.12(j) for reduction of its portfolio balance requirements under the California renewables portfolio standard must be filed and served not earlier than when the retail seller's final compliance report for the compliance period for which the reduction is sought is filed, and not later than 30 days after the transmission to this Commission of the Renewables Portfolio Standard Procurement Verification Report prepared by the California Energy Commission for the compliance period for which the reduction is sought.

17. Any supplementation of the motion of a retail seller as defined by Public Utilities Code Section 399.12(j) for a reduction of its portfolio balance requirements that is necessitated by the findings of the Renewables Portfolio Standard Procurement Verification Report (Verification Report) prepared by the California Energy Commission for the compliance period for which the reduction is sought must be filed and served not later than 30 days after the transmission to this Commission of the Verification Report.

18. Any party to the proceeding in which a request for reduction of portfolio balance requirements under the California renewables portfolio standard is filed may file comments on the waiver request, in accordance with instructions of the presiding officer for the proceeding in which the request is filed.

19. A retail seller as defined by Public Utilities Code Section 399.12(j) may not obtain a reduction of its portfolio balance requirements under the California renewables portfolio standard unless, in its reduction request, it identifies both the total number of renewable energy credits (RECs) for which reduction is sought and the reasons for granting the reduction, with the number of RECs sought to be reduced for each stated reason clearly identified.

20. A retail seller as defined by Public Utilities Code Section 399.12(j) may not obtain a reduction of its portfolio balance requirements under the California renewables portfolio standard (RPS) unless it shows in its reduction request that it has applied to RPS compliance in the compliance period for which the reduction is sought all renewable energy credits in its RPS retirement account in the Western Renewable Energy Generation Information System that meet the criteria set forth in Public Utilities Code Section 399.16(b)(1).

21. Any retail seller as defined by Public Utilities Code Section 399.12(j) requesting a reduction of its portfolio balance requirements under the California

renewables portfolio standard for a compliance period has the burden of proof on each and every element necessary to demonstrate that a reduction is justified. The burden of proof is “preponderance of the evidence.”

22. A retail seller as defined by Public Utilities Code Section 399.12(j) may request an evidentiary hearing on its request for a reduction of portfolio balance requirements. Whether any such request for an evidentiary hearing should be granted will be decided by the presiding officer in the proceeding in which the request for a reduction is filed.

23. In order to obtain a reduction of its portfolio balance requirement under the California renewables portfolio standard, a retail seller as defined by Public Utilities Code Section 399.12(j) must demonstrate, by a preponderance of the evidence, that it has taken all reasonable actions under its control to achieve full compliance with its portfolio balance requirement.

24. A retail seller as defined in Public Utilities Code Section 399.12(j) that demonstrates that some, but not all, of the renewable energy credits constituting the shortfall in its portfolio balance requirement meet the statutory requirements for a reduction, as implemented in this decision, may receive a partial reduction of its portfolio balance requirements, to the extent of its demonstration.

25. A retail seller as defined by Public Utilities Code Section 399.12(j) may not receive a reduction in its requirement for procurement of renewable energy credits meeting the criteria set out in Public Utilities Code Section 399.16(b)(1) to less than 65 % for any compliance period beginning after December 31, 2016.

26. Any retail seller as defined in Public Utilities Code Section 399.12(j) that has a procurement quantity requirement deficiency for which a full waiver has not been granted; any retail seller that has a portfolio balance requirement shortfall for which a reduction of the shortfall to zero has not been granted; and

any retail seller that has both a procurement quantity requirement deficiency for which a full waiver has not been granted, and a portfolio balance shortfall for which a reduction of the shortfall to zero has not been granted, will be subject to penalties.

27. The penalty for a procurement quantity requirement deficiency or a portfolio balance requirement shortfall under the California renewables portfolio standard is \$50 for each renewable energy credit of the procurement quantity requirement deficiency or the portfolio balance shortfall.

28. The penalty for each renewable energy credit (REC) that is part of both a procurement quantity requirement deficiency that has not been waived and a portfolio balance shortfall that has not been reduced is 1.5 times the penalty amount per REC, for each REC that is part of both a procurement quantity requirement deficiency that has not been waived and a portfolio balance shortfall that has not been reduced.

29. The limit on the total amount of penalties for failure to comply with the procurement quantity requirements and/or the portfolio balance requirements of the California renewables portfolio standard that could be paid by any of Pacific Gas and Electric Company, Southern California Edison Company, or San Diego Gas & Electric Company is: \$75 million for the first compliance period (2011-2013); \$75 million for the second compliance period (2014-2016); \$100 million for the third compliance period (2017-2020); and \$25 million for each annual compliance period beginning in 2021.

30. The limit on the total amount of penalties to be paid in one compliance period by any retail seller as defined by Public Utilities Code Section 399.12(j), other than Pacific Gas and Electric Company, Southern California Edison Company, or San Diego Gas & Electric Company, is 50% of the procurement

quantity requirement of the retail seller (in renewable energy credits (RECs)), multiplied by the penalty amount of \$50/REC; i.e., penalty limit per compliance period-procurement quantity requirement (in RECs) \* 0.5 \* \$50/REC.

31. Each retail seller as defined by Public Utilities Code Section 399.12(j) must calculate and report a potential penalty (if any) for a compliance period under the California renewables portfolio standard in its final compliance report for the compliance period, subject to revision if necessary in the revised compliance report filed and served after the Renewables Portfolio Standard Procurement Verification Report prepared by the California Energy Commission for the compliance period is transmitted to this Commission.

32. Any retail seller as defined in Public Utilities Code Section 399.12(j) that reports a potential penalty in its final revised compliance report, filed after the Renewables Portfolio Standard Verification Report prepared by the California Energy Commission for the compliance period is transmitted to this Commission, and does not file a timely motion requesting a waiver of procurement quantity requirements and/or a reduction of portfolio balance requirements, is subject to immediate imposition of a penalty, in an amount calculated in accordance with the rules set out in this decision.

33. Each retail seller as defined by Public Utilities Code Section 399.12(j) must file and serve, in the existing proceeding that has compliance under the California renewables portfolio standard (RPS) within its scope, the retail seller's final RPS compliance report for a compliance period, as well as file any updated compliance report within 30 days after the Renewables Portfolio Standard Procurement Verification Report prepared by the California Energy Commission for the compliance period is transmitted to this Commission.

34. Any party to the proceeding in which retail sellers' final compliance reports for a compliance period under the California renewables portfolio standard, as well as any updated compliance reports after the Renewables Portfolio Standard Procurement Verification Report prepared by the California Energy Commission for the compliance period is transmitted to this Commission, are filed and served, may file and serve comments on such reports, in accordance with instructions from the presiding officer in the proceeding.

35. Any party on the service list to receive compliance reports submitted by retail sellers, as defined by Public Utilities Code Section 399.12(j) for intervening years in a compliance period, may make a motion in the proceeding from which the service list was drawn, requesting leave to file and serve comments on such reports.

36. The Director of Energy Division is authorized to develop, in consultation with the parties, a uniform format or template for the narrative elements of compliance reports required by Public Utilities Code Section 399.13(a)(3)(C), at such time as the Director of Energy Division concludes that such uniformity would advance the fair and efficient administration of the California renewables portfolio standard program.

37. The Director of Energy Division is authorized to develop, in consultation with the parties, any new or revised reporting formats, instructions, and materials that are necessary to comply with this decision and ensure that retail sellers as defined by Public Utilities Code Section 399.12(j) will be able to report on their compliance with the California renewables portfolio standard in a complete, timely, and transparent manner.

38. The Director of Energy Division is authorized to extend for good cause, any deadline set by this decision that is not mandated by statute.

39. The Director of Energy Division is authorized to develop, in consultation with the parties, a revised and updated program authorizing the use of citations to sanction violations of compliance reporting requirements under the California renewables portfolio standard and failures to respond to requests for clarification of reports in order to enable the citation program to conform to the compliance and enforcement requirements of Senate Bill 2 (1X), Decision 12-06-038, and this decision, as well as to be compatible with the citation appeals process instituted by Resolution ALJ-299 (June 26, 2014).

40. The Petition of the California Association of Small and Multi-Jurisdictional Utilities for Modification of Decision 12-06-038, filed on February 21, 2013, is denied.

41. The Petition for Modification of Decision 12-06-038 by the Alliance for Retail Energy Markets and Shell Energy North America (US), L.P., filed January 17, 2014, is denied.

42. Rulemaking 11-05-005 remains open.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

**APPENDIX A**  
**SELECTED RPS STATUTORY SECTIONS**

**Section 399.13(a)(3)**

The commission shall direct each retail seller to prepare and submit an annual compliance report that includes all of the following:

(A) The current status and progress made during the prior year toward procurement of eligible renewable energy resources as a percentage of retail sales, including, if applicable, the status of any necessary siting and permitting approvals from federal, state, and local agencies for those eligible renewable energy resources procured by the retail seller, and the current status of compliance with the portfolio content requirements of subdivision(c) of Section 399.16, including procurement of eligible renewable energy resources located outside the state and within the WECC and unbundled renewable energy credits.

(B) If the retail seller is an electrical corporation, the current status and progress made during the prior year toward construction of, and upgrades to, transmission and distribution facilities and other electrical system components it owns to interconnect eligible renewable energy resources and to supply the electricity generated by those resources to load, including the status of planning, siting, and permitting transmission facilities by federal, state, and local agencies.

(C) Recommendations to remove impediments to making progress toward achieving the renewable energy resources procurement requirements established pursuant to this article.

**Section 399.13(a)(4)(B)**

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

**Section 399.15(a)**

In order to fulfill unmet long-term resource needs, the commission shall establish a renewables portfolio standard requiring all retail sellers to procure a minimum quantity of electricity products from eligible renewable energy resources as a specified

percentage of total kilowatthours sold to their retail end-use customers each compliance period to achieve the targets established under this article. For any retail seller procuring at least 14 percent of retail sales from eligible renewable energy resources in 2010, the deficits associated with any previous renewables portfolio standard shall not be added to any procurement requirement pursuant to this article.

### **Section 399.15(b)**

The commission shall implement renewables portfolio standard procurement requirements only as follows:

(1) Each retail seller shall procure a minimum quantity of eligible renewable energy resources for each of the following compliance periods:

(A) January 1, 2011, to December 31, 2013, inclusive.

(B) January 1, 2014, to December 31, 2016, inclusive.

(C) January 1, 2017, to December 31, 2020, inclusive.

(2) (A) No later than January 1, 2012, the commission shall establish the quantity of electricity products from eligible renewable energy resources to be procured by the retail seller for each compliance period. These quantities shall be established in the same manner for all retail sellers and result in the same percentages used to establish compliance period quantities for all retail sellers.

(B) In establishing quantities for the compliance period from January 1, 2011, to December 31, 2013, inclusive, the commission shall require procurement for each retail seller equal to an average of 20 percent of retail sales. For the following compliance periods, the quantities shall reflect reasonable progress in each of the intervening years sufficient to ensure that the procurement of electricity products from eligible renewable energy resources achieves 25 percent of retail sales by December 31, 2016, and 33 percent of retail sales by December 31, 2020. The commission shall require retail sellers to procure not less than 33 percent of retail sales of electricity products from eligible renewable energy resources in all subsequent years.

(C) Retail sellers shall be obligated to procure no less than the quantities associated with all intervening years by the end of each compliance period. Retail sellers shall not be required to demonstrate a specific quantity of procurement for any individual intervening year.

(3) The commission shall not require the procurement of eligible renewable energy resources in excess of the quantities identified in paragraph (2). A retail seller may voluntarily increase its procurement of eligible renewable energy resources beyond the renewables portfolio standard procurement requirements.

(4) Only for purposes of establishing the renewables portfolio standard procurement requirements of paragraph (1) and determining the quantities pursuant to paragraph (2), the commission shall include all electricity sold to retail customers by the Department of Water Resources pursuant to Division 27 (commencing with Section 80000) of the Water Code in the calculation of retail sales by an electrical corporation.

(5) The commission shall waive enforcement of this section if it finds that the retail seller has demonstrated any of the following conditions are beyond the control of the retail seller and will prevent compliance:

(A) There is inadequate transmission capacity to allow for sufficient electricity to be delivered from proposed eligible renewable energy resource projects using the current operational protocols of the Independent System Operator. In making its findings relative to the existence of this condition with respect to a retail seller that owns transmission lines, the commission shall consider both of the following:

(i) Whether the retail seller has undertaken, in a timely fashion, reasonable measures under its control and consistent with its obligations under local, state, and federal laws and regulations, to develop and construct new transmission lines or upgrades to existing lines intended to transmit electricity generated by eligible renewable energy resources. In determining the reasonableness of a retail seller's actions, the commission shall consider the retail seller's expectations for full-cost recovery for these transmission lines and upgrades.

(ii) Whether the retail seller has taken all reasonable operational measures to maximize cost-effective deliveries of electricity from eligible renewable energy resources in advance of transmission availability.

(B) Permitting, interconnection, or other circumstances that delay procured eligible renewable energy resource projects, or there is an insufficient supply of eligible renewable energy resources available to the retail seller. In making a finding that this condition prevents timely compliance, the commission shall consider whether the retail seller has done all of the following:

(i) Prudently managed portfolio risks, including relying on a sufficient number of viable projects.

(ii) Sought to develop one of the following: its own eligible renewable energy resources, transmission to interconnect to eligible renewable energy resources, or energy storage used to integrate eligible renewable energy resources. This clause shall not require an electrical corporation to pursue development of eligible renewable energy resources pursuant to Section 399.14.

(iii) Procured an appropriate minimum margin of procurement above the minimum procurement level necessary to comply with the renewables portfolio standard to compensate for foreseeable delays or insufficient supply.

(iv) Taken reasonable measures, under the control of the retail seller, to procure cost-effective distributed generation and allowable unbundled renewable energy credits.

(C) Unanticipated curtailment of eligible renewable energy resources necessary to address the needs of a balancing authority.

(6) If the commission waives the compliance requirements of this section, the commission shall establish additional reporting requirements on the retail seller to demonstrate that all reasonable actions under the control of the retail seller are taken in each of the intervening years sufficient to satisfy future procurement requirements.

(7) The commission shall not waive enforcement pursuant to this section, unless the retail seller demonstrates that it has taken all reasonable actions under its control, as set forth in paragraph (5), to achieve full compliance.

(8) If a retail seller fails to procure sufficient eligible renewable energy resources to comply with a procurement requirement pursuant to paragraphs (1) and (2) and fails to obtain an order from the commission waiving enforcement pursuant to paragraph (5), the commission shall exercise its authority pursuant to Section 2113.

(9) Deficits associated with the compliance period shall not be added to a future compliance period.

**Section 399.16(c) (Amendment made by Assembly Bill 2187 shown as underlined)**

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).

(4) For purposes of electric service providers only, the restrictions in this subdivision on crediting eligible renewable energy resource electricity products to each compliance period shall apply to contracts executed after January 13, 2011.

**Section 399.16(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.

**Section 399.16(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.

**Section 399.21(a)(6)**

A renewable energy credit shall not be eligible for compliance with a renewables portfolio standard procurement requirement unless it is retired in the tracking system established pursuant to subdivision (c) of Section 399.25 by the retail seller or local publicly owned electric utility within 36 months from the initial date of generation of the associated electricity.

**(END OF APPENDIX A)**

**APPENDIX B**

**Sample Calculations of Portfolio Quantity Requirement Deficiency and Portfolio  
Balance Requirement Shortfall**

## PBR Example in the format of Table 5 from D.12-06-038

Row		Column A		
	Compliance Period 1	Quantity of RECs	Percentage Amounts	Notes & Calculations
1	Procurement Quantity Requirement (PQR)	3,000		
2	Excess Procurement RECs applied to PQR not subject to PBR			
3	Retired RECs from contracts executed prior to June 1, 2010	500		
4	<b>Procurement Classification of Post-2010 RECs (Subject to PBR requirements)</b>	2500		$(A5 + A6 + A7)$
5	PCC 1 RECs Retired	1,200	48%	$A5 / (A5 + A6 + A7)$
6	PCC 2 RECs Retired	800	32%	$A6 / (A5 + A6 + A7)$
7	PCC 3 RECs Retired	500	20%	$A7 / (A5 + A6 + A7)$
8	Total RECs Subject to the PBR	2,500	100%	$(A5 + A6 + A7)$
9	<b>Portfolio Content Category Limits</b>			
10	Category 1 Minimum	1,250	50%	$(A5 + A6 + A7) * 50%$
11	Category 1 Shortfall	50		
12	Category 3 Maximum	625	25%	$(A5 + A6 + A7) * 25%$
13	Ineligible Category 3	0		$A12 - A7^{86}$
14	<b>Results</b>	Retail Seller is out of compliance with minimum Portfolio Balance requirements (399.16©(1) and subject to enforcement by the Commission.		

<sup>86</sup> If the Category 3 Maximum is greater than the amount of PCC 3 RECs retired then no PCC 3 RECs are excluded from the portfolio balance requirement calculation and A13 equals zero.

PQR Example in the format of Table 5 from D.12-06-038

<b>Row</b>		<b>Column A</b>	
	<b>Compliance Period 1</b>	<b>Quantity of RECs</b>	<b>Notes &amp; Calculations</b>
<b>1</b>	<b>Procurement Quantity Requirement (PQR)</b>	<b>3,000</b>	
<b>2</b>	<b>RECs from contracts executed prior to June 1, 2010</b>		
3	Retired RECs from contracts executed prior to June 1, 2010	500	
4	Excess Procurement of RECs from contracts executed prior to June 1, 2010 applied to PQR	0	
<b>5</b>	<b>RECs from contracts executed after to June 1, 2010</b>		
6	PCC 1 RECs Retired	1,250	
7	Excess Procurement of PCC 1 RECs applied to PQR	0	
8	PCC 2 RECs Retired	700	
9	Excess Procurement of PCC 1 RECs applied to PQR	0	
10	PCC 3 RECs Retired	500	
11	<b>Total RECs Retired and Applied to the PQR</b>	2,950	( A3 + A4 + A6 + A7 + A8 + A9 + A10)
12	<b>PQR Shortfall</b>	50	A1 - A11
13	<b>Results</b>	Retail Seller is out of compliance with minimum Portfolio Quantity requirements (399.13(a)(4)(B)) and subject to enforcement by the Commission.	

(END OF APPENDIX B)

## APPENDIX C

**Informal Summary of Process for Obtaining Waiver of Procurement Quantity Requirements or Reduction in Portfolio Balance Requirements<sup>87</sup>****Initiating Waiver or Reduction Request:**

- File motion in then-current RPS proceeding.
  - With or after final compliance report for compliance period, up to 30 days after transmission of CEC Verification Report
  - If filed prior to transmission of Verification Report, file supplemental or revised information within 30 days after Verification Report.
  - If no supplementation is needed, file statement to that effect, within 30 days after transmission of Verification Report.
- **Complete Account of Deficiency**
  - Specify the number of RECs for which waiver or reduction is sought, and specify the statutory condition(s) that justify the waiver or reduction.
  - If more than one statutory condition is relied on, specify whether each condition applies to the entire amount of the waiver or reduction sought.
  - If seeking waiver or reduction as to some RECs on the basis of one condition, and as to some RECs on the basis of another condition, specify number of RECs subject to each condition.
  - For the first compliance period only, a waiver request applies without distinction to prior deficit under D.12-06-038 or and current procurement obligations.
- **All Available Retired RECs Applied:**
  - Demonstrate that:
    - All RECs carried forward as excess procurement from a prior compliance period have been applied to current compliance period.
      - For PBR reduction request, applies to Category 1 RECs only.
    - No RECs are being carried forward as excess procurement that can be applied in any subsequent compliance period
      - For PBR reduction request, applies to Category 1 RECs only.
    - All currently available retired RECs have been applied to the current compliance period for which the waiver or reduction is sought

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<sup>87</sup> This summary is provided for ease of reference only. It is not a substitute for, and does not modify or supersede, the requirements set out in the Ordering Paragraphs of this decision.

- For PBR reduction request, applies to Category 1 RECs only
    - For PQR waiver only, RECs retired for RPS compliance that are from contracts signed prior to June 1, 2010 by IOUs and CCAs, and prior to January 14, 2011 by ESPs – which are not part of the PBR system – must be applied up to the amount of the PQR deficit, if they are available
  - After all RECs have been applied in accordance with these steps, the retail seller still has a PQR deficit or PBR shortfall for which it seeks a waiver or reduction.
- **Burden of proof:**
  - "Preponderance of the evidence"
- **Evidentiary hearings:**
  - Retail seller may request an evidentiary hearing
  - ALJ decides whether a hearing is necessary, and if needed, ALJ will determine parameters at that time.
- **Necessary showings**
  - Demonstrate three elements for all conditions to justify waiver or reduction
    - (1) Conditions are, or were, beyond its control.
    - (2) The connection between the condition(s) and number of RECs attributable to each condition relied on. Account for RECs lost to retail seller due to the occurrence of the condition(s) it identifies.
    - (3) All reasonable actions under the retail seller's control "to achieve full compliance" have been taken.
  - Where the statute differentiates among retail sellers, show fulfillment of all statutory requirements that apply to the retail seller's designation.
- **Partial waivers or reductions:**
  - May be granted if retail seller demonstrates justification as to only some portion of RECs for which waiver or reduction is requested.
- **Requirements applicable to waiver only or reduction only:**
  - For waivers of PQR, additional reporting requirements will be established by the Commission at time of granting waiver in whole or in part.
  - For reductions of PBR, Commission may not reduce Category 1 minimum procurement percentage below 65% for any compliance period after December 31, 2016.

**(END OF APPENDIX C)**