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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	))))	R.11-05-005

COMMENTS OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION ON THE PROPOSED DECISION IMPLEMENTING PORTFOLIO CONTENT CATEGORIES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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SUMMARY OF CMUA'S RECOMMENDATIONS

1. **The Treatment of Unbundled Renewable Energy Credits ("REC") in the First Portfolio Content Category:** The legal error in the PD should be corrected to allow unbundled RECs that are generated by renewable energy resources that meet the physical requirements of portfolio content category 1 to remain eligible as portfolio content category 1 resources.

2. **Pipeline Biomethane:** The PD correctly concludes that, pursuant to the statutory language, units fueled by pipeline biomethane are eligible to count toward the requirements of the first portfolio content category so long as the other physical requirements of the statute are met and the fuel is an eligible renewable fuel source. This position should be included in the Conclusions of Law.

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In accordance with Rule 14.3 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure, and *the Proposed Decision Implementing Portfolio Content Categories for the Renewables Portfolio Standard Program* ("PD"), dated October 7, 2011, the California Municipal Utilities Association ("CMUA") respectfully submits these Comments on behalf of its members.

I. INTRODUCTION

CMUA is a statewide organization of local public agencies in California that provide electricity, water, and telecommunications service to California consumers. CMUA membership includes publicly-owned electric utilities ("POUs") that operate electric distribution and transmission systems. In total, CMUA members provide electricity to approximately 25-30 percent of the population in California.

CMUA and its members supported the establishment of a 33% Renewable Portfolio Standard ("RPS"), and its members are charged with its implementation through numerous provisions of SB (1X) 2. CMUA members' boards and city councils act as legislative and ratemaking bodies for their relevant communities, and are charged with ensuring that the

implementation of the RPS can be achieved consistent with reasonable cost limitations as specified in California Public Utilities Code section 399.30(d)(3).[1] Essential to meeting the RPS goals of SB (1X) 2 in a cost-effective manner is commercial flexibility, which should be facilitated and encouraged so long as the statutory language and intent are not violated. On a key issue, CMUA argues herein that the PD errs in that it misconstrues the statute when it proposes to forbids any renewable energy credits ("RECs") from applying in portfolio content categories 1 or 2 simply because the REC has been separated from the delivered energy. So long as the resource attributes that underlie the REC meet the portfolio content category requirements for portfolio content category 1 or 2, the associated REC must qualify for portfolio content category 1 or 2 as well.

Consistent with its theme that all practical and cost effective RPS implementation tools must be pursued, and consistent with the statutory language, CMUA supports the PD's conclusions that there is no statutory bar to counting generation from pipeline biomethane in portfolio content category 1.

II. COMMENTS

A. The PD Errs by Misconstruing SB (1X) 2 to Eliminate RECs Associated with Resources the Meet the Criteria of Portfolio Content Category 1 from Eligibility Simply Because the REC and the Underlying Energy are Unbundled.

The PD commits legal error in its unlawful restriction of the use of unbundled RECs associated with portfolio content category 1-eligible resources. To analyze the issue of unbundled RECs that qualify for portfolio content category 1, the language of the statute must govern. "As always, we begin with the words of a statute and give these words their ordinary

[1] Unless otherwise specified, all statutory references are to the California Public Utilities Code.

meaning."[2] If the statutory language is clear and unambiguous, then we need go no further.[3] The PD errs immediately in its discussion of this issue by commencing its analysis without due regard to the wording of the relevant statutory provision.

Section 399.16 clearly contemplates that RECs may be associated with multiple portfolio content categories. Section 399.16(b)(3) includes in portfolio content category 3 "eligible renewable energy resource electricity products, or any fraction of the electricity generated, including unbundled renewable energy credits, that do not qualify under the criteria of paragraphs (1) and (2)."

This last phrase, "*that do not qualify under the criteria of paragraphs (1) and (2),*" applies to the entirety of the forgoing language "eligible renewable energy resource electricity products, or any fraction of the electricity generated, including unbundled renewable energy credits," and modifies it as such. It also clearly contemplates that there are types of unbundled renewable energy credits that ***do*** qualify for content categories 1 and 2, otherwise the final phrase would be superfluous. An interpretation of statutory language the renders a key phrase of the directly applicable statutory provision irrelevant, is not favored by settled rules of statutory construction.[4] This provision must be read to account for the result, expressed by the Legislature, that unbundled RECs may fall within or without of the first portfolio content category depending on the underlying characteristics of the renewable resources. No other reading of this phrase makes sense, nor is it consistent the plain meaning of the language, which the Commission and POUs are compelled to honor and implement. Only the interpretation that

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[2] Hoechst Celanese Corp. v. Franchise Tax Bd., 25 Cal. 4th 508, 519 (2001) (citing Wilcox v. Birtwhistle, 21 Cal.4th 973, 977 (1999)).
[3] *Id.* (citing Lungren v. Deukmejian, 45 Cal.3d 727, 735 (1988)).
[4] Kulshrestha v. First Union Commercial Corp., 33 Cal. 4th 601, 611 (2004). [C]ourts may not excise words from statutes. . . . We assume each term has meaning and appears for a reason. *Id.* (citing Delaney v. Superior Court, 50 Cal. 3d 785, 798 (1990)).

allows for unbundled RECs to fall into content categories 1, 2, or 3, uses the ordinary meaning of the words provided in the statute. Had the Legislature intended to disallow unbundled RECs from portfolio content categories 1 and 2, they could have easily done so. However, they did not, and therefore, it is unlawful for the Commission to attempt to change the clear meaning of the statutory language.

Instead of basing its conclusions on the plain meaning of the statute, the PD veers immediately into contextual arguments and policy concerns,[5] and therein commits legal error in their reliance on these arguments rather than the clear statutory language. Yet, these arguments are also not compelling. The PD is correct that there should be a "bright line" between the categories,[6] it simply sets the wrong "bright line." The proper line, as defined in the statute, tracks resources in portfolio content categories 1 or 2 based on their characteristics, whether unbundled or not, and everything else goes in portfolio content category 3. There should be no confusion about which portfolio content category an unbundled REC belong in with this "bright line," because it can be traced (in the REC) clearly back to the underlying resource.

The argument made that trading RECs creates upward pressure on prices is not supported.[7] Indeed, the opposite is the case. The PD seems to misconstrue the fundamental nature of a REC. A REC is simply an instrument that reflects that a MWh of eligible renewable energy was generated at a specific time and place. Thus, it retains the underlying attributes of the eligible renewable energy resource until it is used for compliance purposes. Whether it may be traded or not does not affect its intrinsic value; indeed, bundled renewable products are also

[5] PD at 30-35.
[6] *Id.* at 32.
[7] *Id.* at 33.

traded among market participants.[8] The PD is incorrect in its description of how a premium portfolio content category 1 REC can increase costs.[9] While such a REC may command a higher price, that premium will not be multiplied or necessarily increased as a REC gets sold and resold. In fact, it may decrease upon a second sale.

If an unbundled REC generated by facilities that otherwise would meet portfolio content category 1 is treated as a portfolio content category 3 resource, this will likely have detrimental effects on consumers. Procurement by POUs and retail sellers has already resulted in procured capacity in California far beyond established planning reserve margins. The California Independent System Operator Corporation ("CAISO") has indicated that because of self-scheduling of renewable resources as price takers, energy prices may be depressed in its markets.[10] Thus, retail sellers and POUs are not likely to value the energy from renewable resources very highly beyond its renewable attributes. Yet, forcing acceptance of the delivered energy as a bundled product will expose the retail seller or POU to the delivered energy price risk inherent in the CAISO's Day Ahead and Real Time markets. In essence, the retail seller or POU will have to include the energy delivery in their schedule, and needlessly pay any price differential between the pricing node at which the generator is located, and the Load Aggregation Point. This is an unnecessary price risk to which the retail seller or POU would have to be exposed and is likely to increase costs for consumers for no purpose since it does not change the nature of the underlying eligible renewable energy resource or its physical characteristics that allow it to qualify for the applicable portfolio content category.

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[8] *See, e.g.*, Draft Resolution E-4429, October 20, 2011 (proposing the approval of a contract between SDG&E and Silicon Valley Power for 350.4 GWhs of RPS-eligible deliveries.).
[9] PD at 33.
[10] California Independent System Operator, Integration of Renewable Resources: Operational Requirements and Generation Fleet Capability at 20% RPS, August 31, 2010.

Finally, allowing unbundled RECs from otherwise portfolio content category 1-eligible resources to count toward portfolio content category 1 requirements clearly meets the many goals of the statute as set forth by the Legislature, in section 399.11, including displacing fossil fuel consumption, reducing air pollution in the state, adding new generation, promoting stable retail rates, and assisting reliable system operation.[11] As specified in Appendix A, the PD should be modified to reflect the clear language of section 399.16 that contemplates that unbundled RECs may qualify for portfolio content categories 1 and 2. These changes should also be reflected in the text of the PD.

B. CMUA Supports the Reasoning of the PD with Respect to the Eligibility of Pipeline Biomethane.

The PD correctly concludes that pursuant to the statutory language, units fueled by pipeline biomethane are eligible to count toward the requirements of the portfolio content category 1 so long as the other physical requirements of the statute are met and the fuel is an eligible renewable fuel source. The Utility Reform Network ("TURN") argues that generation using pipeline biomethane should not count as eligible for portfolio content category 1 because of purported environmental policy considerations associated with natural-gas fueled generation.[12] The PD rejects these arguments, finding as follows:

> It is not necessary to determine whether the use of pipeline biomethane does or does not further certain environmental goals. For purposes of classifying RPS procurement into the appropriate portfolio content category, the CEC's determination of RPS eligibility is the definitive first step. If a generation facility that the CEC certifies as RPS-eligible is using a fuel that the CEC finds is RPS-eligible, and the facility is directly interconnected with the transmission or distribution system in a California balancing authority area, or has it electricity output scheduled into a California balancing authority without substitution of electricity from another source, or is dynamically transferred, the facility's output could be classified as meeting the criteria for section 399.16(b)(1).[13]

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[11] Cal. Pub. Util. Code § 399.11(b)(1)-(9).
[12] PD at 36.
[13] *Id.* (footnote omitted).

CMUA strongly supports this conclusion and the specific language. First and foremost, nothing in the statutory language suggests (or even hints at) a further limitation on the types of resources that are eligible for portfolio content category 1. CMUA fully agrees with the PD that the analysis should end there. To the extent that there is any need to examine additional policy rationales to support this conclusion, they are numerous. First, pipeline biomethane is allowed under existing eligibility rules. Second, pipeline biomethane is a cost-effective tool that will contribute to the replacement of energy from base-load fossil fuel resources, including coal, with a non-fossil, renewable fuel. Third, without the in-basin existing thermal fleet, grid reliability will degrade. The existing thermal fleet is necessary to provide ramping needed to respond to intermittent resources and to provide the resources close to load without which distant renewable resources cannot be delivered. Fourth, pipeline biomethane increases the likelihood that existing resources will continue to be economically viable, thus maintaining jobs. Finally, there *are* environmental benefits from utilizing existing waste fuel. Accordingly, notwithstanding the fact that the PD correctly interprets the statute regarding the applicability and eligibility of these resources, public policy reasons further buttress this position.

CMUA fully supports the PD as drafted on this issue. CMUA believes that the PD should be amended, as specified in Appendix A, to include an additional Conclusions of Law reflecting the PD's discussion of biomethane. These changes should also be reflected in the text of the PD.

III. CONCLUSION

CMUA appreciates the opportunity to submit these opening comments on the PD.

Dated: October 27, 2011

Respectfully submitted,

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Appendix A

Conclusions of Law

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

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

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

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

16. Procurement of eligible renewable energy resource electricity products from contracts signed on or after June 1, 2010 may be counted in the portfolio content category described in Pub. Util. Code § 399.16(b)(2), as effective December 10, 2011, if the generation facility ~~from which~~ producing the electricity ~~is procured~~ is certified as eligible for the California RPS and the generation from that facility is firmed and shaped with substitute electricity scheduled into a

California balancing authority within the same calendar year as the generation from the facility eligible for the California RPS, and if the substitute electricity provides incremental electricity, if the following conditions are met, ~~so long as the renewable energy credits originally associated with the electricity have not been unbundled and transferred to another owner,~~ and all other procurement requirements for compliance with the California RPS are also met:

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

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

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

* * *

21. Procurement from contracts signed prior to June 1, 2010 and meeting the conditions set out in new § 399.16(d) should be counted for RPS compliance without regard to the limitations on use of each portfolio content category established by Pub. Util. Code § 399.16(b), as effective December 10, 2011, provided that, if any RECs from a contract signed prior to June 1, 2010, are unbundled and sold separately after June 1, 2010, the underlying energy should not be used for RPS compliance and the unbundled RECs should be counted in accordance with the limitations on procurement in each~~the~~ portfolio content category of Pub. Util. Code § 399.16(b)~~(3)~~, as set out in Pub. Util. Code § 399.16(c)~~(2)~~.

22. Procurement from contracts signed on or after June 1, 2010 may be counted in the portfolio content category described in Pub. Util. Code § 399.16(b)(1), as effective December 10, 2011, if the generation facility from which the electricity or renewable energy credits are procured has been certified by the California Energy Commission as RPS-eligible, the facility is using pipeline biomethane in accordance with the relevant requirements of the California Energy Commission,

and the facility is directly interconnected with the transmission or distribution system in a California balancing authority area, or has its electricity output scheduled into a California balancing authority without substitution of electricity from another source, or its electricity output is dynamically transferred to a California balancing authority, so long as all other procurement requirements for compliance with the California RPS are met.

VERIFICATION

I am an officer of the California Municipal Utilities Association, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27, 2011 at Sacramento, California.

Dave Modisette
Executive Director
California Municipal Utilities Association