

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



FILED

02-21-12

04:59 PM

Order Instituting Rulemaking to Continue) Rulemaking 11-05-005
Implementation and Administration of California) (Filed May 5, 2011)
Renewables Portfolio Standard Program.)
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**SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E)
REPLY COMMENTS ON RULING REQUESTING SUPPLEMENTAL
COMMENTS ON REPORTING AND COMPLIANCE REQUIREMENTS
FOR THE RENEWABLE PORTFOLIO STANDARD PROGRAM**

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February 21, 2012

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**I.
INTRODUCTION**

In accordance with the Rules of Practice and Procedure of the California Public Utilities Commission (the “Commission”) and the *Administrative Law Judge’s Ruling Requesting Supplemental Comments on Reporting and Compliance Requirements for the Renewables Portfolio Standard Program* dated February 1, 2012 (the “ALJ Ruling”), San Diego Gas & Electric Company (“SDG&E”) hereby submits these reply comments in response to the ALJ Ruling.

The ALJ Ruling solicits comments regarding new reporting and compliance requirements for the Renewable Portfolio Standard (“RPS”) program established by Senate Bill (“SB”) 2 (1X) (“SB 2”).^{1/} SDG&E responds herein to certain proposals made by parties in their comments on the ALJ Ruling. Specifically, SDG&E urges the Commission to reject the proposals of the Utility Reform Network (“TURN”) related to (i) enforcement of the product category procurement requirements set forth in Public Utilities Code Section § 399.16(c);^{2/} (ii) limitations placed on § 399.16(e) product category reduction requests; and (iii) modification of

^{1/} SB 2 (1X) (Stats. 2011, Ch. 1).

^{2/} All statutory references herein are to the Public Utilities Code unless otherwise noted.

confidentiality rules applicable to RPS procurement data. SDG&E also urges rejection of the proposal of the Alliance for Retail Energy Markets (“AReM”) regarding imposition of a “payments requirement” in connection with grant pursuant to §399.16(e) of a reduction in product category procurement requirements. Given the applicable page limitation, SDG&E does not provide a point-by-point response to all proposals made by parties in their comments on the ALJ Ruling. SDG&E’s silence regarding a given proposal should not be interpreted as agreement.

II. DISCUSSION

A. The Commission Should Reject TURN’s Proposals Regarding Enforcement of Product Category Procurement Requirement, the Timing of Product Category Reduction Requests and Modification of Confidentiality Rules Applicable to RPS Procurement Data

(i) Enforcement of § 399.16(c) Product Category Procurement Requirements

In its comments in response to the ALJ Ruling, TURN addresses a hypothetical scenario set forth in the ALJ Ruling in which a retail seller satisfies its overall procurement requirement for a given compliance period, as established pursuant to § 399.15(b), but fails to achieve the product category procurement requirements established in § 399.16(c).^{3/} TURN observes that “[t]he Commission must treat the limitations imposed by § 399.16(c)(1) as independent of the targets established pursuant to § 399.15(b).”^{4/} It proposes that retail sellers be permitted to receive RPS compliance credit for procurement during a compliance period only if the § 399.16(c) procurement limits are satisfied, and suggests that this outcome may be accomplished

^{3/} See ALJ Ruling, Question 6.

^{4/} *Opening Comments of The Utility Reform Network on the Administrative Law Judge’s Ruling Requesting Supplemental Comments on Reporting and Compliance Requirements on the Renewables Portfolio Standard Program*, filed February 10, 2012 in R.11-05-005 (“TURN Comments”), p. 5; *see also Opening Comments of the Division of Ratepayer Advocates in Response to Administrative Law Judge’s Simon’s [sic] Ruling Requesting Supplemental Comments on Reporting and Compliance Requirements for the Renewables Portfolio Standard Program*, filed February 10, 2012 in R.11-05-005 (“DRA Comments”), p. 4.

by “reducing total eligible procurement [during a compliance period] by the amount necessary to ensure that procurement in the first product category equals no less than 50% of the adjusted total.”^{5/} It claims further that to the extent a deficit exists between the adjusted total and the § 399.15(b) overall procurement target, the retail seller would be subject to potential penalties.^{6/}

As a threshold matter, SDG&E notes that it agrees with the conclusion that the product content requirement imposed pursuant to § 399.16(c) is independent of the overall procurement targets established pursuant to § 399.15(b), and is separately enforceable. It disagrees, however, with TURN’s suggestion that the appropriate method of enforcing the § 399.16(c) requirements is to deprive ratepayers of the value of the RPS generation procured under Commission-approved power purchase agreements (“PPAs”). It also notes that TURN is too quick to assume that penalties are the enforcement mechanism that must apply in the event of a § 399.15(b) procurement shortfall.

In proposing its § 399.16(c) enforcement mechanism, TURN ignores the clear direction regarding enforcement provided in § 399.16. Unlike § 399.15, which directs the Commission to exercise its enforcement authority pursuant to § 2113 in the event a retail seller fails to satisfy its overall procurement requirement,^{7/} § 399.16 omits mention of § 2113, providing instead that a retail seller may seek a reduction of the § 399.16(c) product content requirement if it is unable to meet the mandate set forth in that section.^{8/} This signifies that the Commission’s first response

^{5/} TURN Comments, pp. 5-6.

^{6/} *Id.* at pp. 5, 6.

^{7/} Pub. Util Code § 399.15(b)(8):

If a retail seller fails to procure sufficient 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.

^{8/} Pub. Util Code § 399.16(e):

to a retail seller's reasonable inability to comply with the provision should be to adjust the procurement content requirement of § 399.16(c) for that retail seller rather than to impose harsh measures such as those proposed by TURN.

TURN's claim that support for its enforcement proposal may be found in D.07-05-028 lacks merit. In D.07-05-028, the Commission established a "minimum quantity" requirement related to use of energy deliveries from RPS contracts of less than 10 years' duration ("short-term contracts") for RPS compliance. The Commission held that in order to use short-term contracts for RPS compliance, RPS-obligated load-serving entities ("LSEs") must secure a minimum quantity of deliveries from contracts of at least 10 years' duration and/or contracts with RPS-eligible generation facilities that commenced commercial operation on or after January 1, 2005 (specifically, energy deliveries equivalent to at least 0.25% of the RPS-obligated LSE's prior year's retail sales).^{9/} The Commission held that an LSE's failure to meet the "minimum quantity" requirement in a given calendar year would preclude the LSE's ability to count generation received under a short-term contract for RPS compliance.^{10/}

TURN argues that the enforcement approach taken in D.07-05-028 establishes precedent for its proposal to deny RPS credit for a portion of Commission-approved RPS generation if it is necessary to do so in order to satisfy the product content requirements of § 399.16(c). Clearly, however, the characteristics of the "minimum quantity" requirement are distinguishable from those of the product content requirement of § 399.16(c). The "minimum quantity" requirement

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 circumstances, reduce the obligation specified in paragraph (1) of subdivision (c) below 65 percent for any compliance obligation after December 31, 2016.

^{9/} D.07-05-028, *mimeo*, Ordering Paragraph 1.

^{10/} *Id.* at Ordering Paragraph 2.

is a simple, straightforward calculation based upon a fixed and readily identifiable figure (prior year retail sales). The requirement is easily achievable, necessitating only that procurement with a calendar year include a concrete (and relatively modest) quantity of specified procurement. The § 399.16(c) product content requirement, on the other hand, is a complex calculation that fluctuates on a real-time basis, with relative percentages of portfolio content shifting as products in different categories are procured. Achieving the exact percentages for portfolio content outlined in § 399.16(c) is far from a simple undertaking, and compliance issues may not present themselves until late in the compliance period. Given the ease of compliance with the “minimum quantity” requirement, the hard line enforcement approach taken in D.07-05-028 may have made sense. In the instant case, however, the difficulty inherent in complying with the requirements of § 399.16(c) makes clear that the same enforcement approach is not warranted.

Moreover, TURN fails to reconcile its proposal with the requirements of § 399.13(g) and § 399.16(c). TURN proposes that in order to ensure satisfaction of § 399.16(c), the Commission simply ignore for RPS compliance purposes RPS-eligible procurement delivered under Commission-approved contracts in order to force the product category percentages to conform to percentages set forth in § 399.16(c). Under § 399.13(g), however, “[p]rocurement and administrative costs associated with contracts entered into by an electrical corporation for eligible renewable energy resources pursuant to this article and approved by the commission are reasonable and prudent *and shall be recoverable in rates.*” (Emphasis added). Thus, adoption of TURN’s proposal could result in ratepayers absorbing the cost of Commission-approved RPS procurement, but failing to receive the benefit of such procurement. Similarly, the plain language of § 399.16(c) precludes adoption of TURN’s proposal. As DRA correctly points out,

§ 399.16(c) requires that “*all* procurement credited towards a compliance period must be considered when evaluating compliance with product content categories.”^{11/}

Finally, TURN’s assertion that penalties would be appropriate in the event of a retail seller’s failure to satisfy § 399.15(b) overall procurement target is premature. As SDG&E has previously explained, imposition of penalties is only one method of enforcement available to the Commission under § 399.15, and imposition of penalties is not an automatic outcome in the event of an RPS procurement deficit.^{12/} Section 399.15(b)(8) provides that the Commission may undertake enforcement action pursuant to § 2113 only *after* a retail seller has been given the opportunity under § 399.15(b)(5) to seek waiver of enforcement. Moreover, § 2113 does not limit the Commission’s enforcement option solely to imposition of penalties. This issue is currently being considered by the Commission in the context of its *Administrative Law Judge’s Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewable Portfolio Standard Program*.^{13/}

(ii) Timing of § 399.16 Reduction Requests

As noted above, § 399.16(e) provides that a retail seller may seek a reduction of the § 399.16(c) procurement requirement if it cannot meet the requirement due to conditions beyond its control as provided in § 399.15(b)(5). In its opening comments on the ALJ Ruling, SDG&E proposed that investor-owned utilities (“IOUs”) be permitted to make a § 399.16(e) waiver request, if necessary, (i) as part of the annual compliance reports for intervening years or for the final year of a compliance period; and/or (ii) after the RPS Procurement Verification Report

^{11/} DRA Comments, p. 5, citing § 399.16(c) (“In order to achieve a balanced portfolio, all retail sellers shall meet the following requirements for *all* procurement credited toward each compliance period.” [Emphasis added]).

^{12/} *San Diego Gas & Electric Company Opening Comments on July 15, 2011 Ruling Requesting Comments on New Procurement Targets and Certain Compliance Requirements for the Renewable Portfolio Standard Program*, filed August 30, 2011 in R.11-05-005, pp. 26-27.

^{13/} Issued July 15, 2011 in R.11-05-005.

issued by the California Energy Commission (“CEC”) is complete if the CEC RPS Procurement Verification Report shows any discrepancy with the IOU’s CPUC compliance report.^{14/} By contrast, TURN asserts that “[b]ecause §399.16(e) explicitly refers to §399.15(b)(5), any request for a reduction in product category requirements should be made as part of an overall request for an enforcement waiver (pursuant to §399.15(b)(5)),” and further that “[t]he Commission should not provide retail sellers with separate opportunities to seek both an enforcement waiver and a modification to the product category requirement.”^{15/} Finally, TURN argues that waiver requests under §399.16(e) must be made at the end of each compliance period.^{16/}

TURN improperly conflates the two separate waiver processes established under § 399.16(e) and § 399.15(b)(5). While both waiver mechanisms rely on the same criteria (*i.e.*, the criteria set forth in § 399.15(b)(5)), the statute provides no indication that the Legislature intended to limit the IOUs’ ability to seek an adjustment to its § 399.16(c) product content requirements to those situations where the IOU was *also* seeking waiver of its §399.15(b) overall procurement requirement. Indeed, as TURN acknowledges, it is possible that an IOU could achieve satisfaction of its §399.15(b) overall procurement requirement, while failing to satisfy its § 399.16(c) product content requirements.^{17/} Thus, the notion that a § 399.16(e) waiver request *must* be made in concert with a § 399.15(b)(5) waiver request makes little sense. To the extent, as TURN concedes, the requirement imposed by § 399.16(c) is independent of the targets established pursuant to § 399.15(b),^{18/} it is logical to conclude that the waiver mechanism relevant to each section are, similarly, independent of each other.

^{14/} SDG&E Comments, pp. 6-7.

^{15/} TURN Comments, p. 5.

^{16/} *Id.* at p. 5; *see also* *Comments of the Alliance for Retail Energy Markets on Administrative Law Judge’s Ruling Requesting Supplemental Comments on Reporting and Compliance Requirements on the Renewables Portfolio Standard Program*, filed February 10, 2012 in R.11-05-005 (“AReM Comments”), p. 7.

^{17/} *See* TURN Comments, pp. 5-6.

^{18/} *See id.* at p. 5; *see also* DRA Comments, p. 4.

TURN's argument regarding the timing of reduction requests made under § 399.16(c) is equally flawed. The plain language of the provision offers no basis for the claim that requests made under §399.16(e) are prohibited until the end of each compliance period. As a practical matter, the IOUs must have the ability to seek reduction of § 399.16(c) product content requirements both retroactively and in advance of a compliance period deadline. The Commission has previously made clear that it expects the IOUs to “bring us their concerns and problems along with reasonable proposed solutions in time for us to respond and allow this [RPS] program to succeed.”^{19/} In accordance with this direction, it has been SDG&E's long-standing practice to communicate regularly with the Commission regarding RPS compliance matters and to raise compliance concerns in a timely fashion. Rather than waiting until the end of the compliance period to seek necessary adjustment, the IOUs should be free to raise concerns and seek solutions, which may in some instances include waiver pursuant to § 399.16(e), in real time rather than after the fact, as TURN proposes.

(iii) Modification of Confidentiality Rules

In connection with its reporting requirements proposals, TURN proposes revision of the Commission's existing rules regarding confidential protection of RPS procurement data. TURN asserts, for example, that the Commission should end the practice of keeping historical procurement and compliance data confidential.^{20/} SDG&E notes that the revision of the rules established in D.06-06-066, *et seq.* is outside the scope of the instant proceeding. Accordingly, revisions proposed by TURN to the confidentiality rules must be raised in A.05-06-040 or other appropriate Commission proceeding and cannot be considered here.

^{19/} D.06-05-039, *mimeo*, pp. 19-20.

^{20/} TURN Comments, p. 2.

B. The Commission Should Reject AReM’s Proposal to Impose a “Payments Requirement” on a Retail Seller Granted a §399.16(e) Reduction

In its discussion regarding grant of product content requirement waivers under § 399.16(e), AReM claims that in certain instances, “the terms and conditions imposed on any retail seller that is granted a waiver may need to include the imposition of a payments requirement that reflects what the entity would have had to pay to achieve full RPS compliance.”^{21/} It asserts that this is necessitated by § 399.15(b)(9)’s prohibition on carrying procurement deficits (*i.e.*, shortfalls in reaching the overall procurement target established in § 399.15(b)) forward into subsequent compliance periods. AReM fails, however, to offer meaningful support this claim or to explain the relevance of § 399.15(b)(9)’s prohibition on carry-forward of procurement deficits to the adjustment of product content requirements pursuant to § 399.16(e).

Grant of a product content requirement waiver pursuant to § 399.16(e) does not signify the existence of a § 399.15(b) procurement deficit. As discussed above, the need for adjustment of product category procurement requirements may exist in the absence of an overall procurement shortfall. Thus, AReM’s claim that § 399.15(b)(9) justifies imposition of a “payments requirement” for adjustment of product content requirements pursuant to § 399.16(e) is inapposite. AReM’s proposal amounts to a penalty for seeking waiver under § 399.16(e) – an outcome clearly not contemplated in the provision, and one that would defeat the purpose of grant of a waiver. Plainly, § 399.16(e) does not contemplate a penalty, fee or other payment for reduction of the product content requirements. Accordingly, AReM’s proposal for a “payments requirement” associated with grant of a § 399.16(e) reduction request must be rejected.

^{21/} AReM Comments, p. 7.

**III.
CONCLUSION**

SDG&E appreciates the opportunity to provide these comments and supports the Commission's efforts to expeditiously implement the numerous changes SB 2 makes to the California RPS program.

Respectfully submitted this 21st day of February, 2012.

/s/ Aimee M. Smith

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AFFIDAVIT

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

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

Executed this 21st day of February, 2012, at San Diego, California

/s/ Hillary Hebert

Hillary Hebert
Partnerships and Programs Manager
Origination and Portfolio Design Department