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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.	Rulemaking 11-05-005 (Filed May 5, 2011)

COMMENTS OF THE CALIFORNIA WIND ENERGY ASSOCIATION ON PROPOSED DECISION SETTING COMPLIANCE RULES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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I. Introduction

Pursuant to the California Public Utilities Commission's ("Commission") Rule of Practice and Procedure 14.3, the California Wind Energy Association ("CalWEA") respectfully submits these comments on the *Proposed Decision of Administrative Law Judge Simon Setting Compliance Rules for the Renewables Portfolio Standard Program* ("Proposed Decision").

As an initial matter, CalWEA notes that the Proposed Decision appears to place a great deal of emphasis on the need to ensure that retail sellers are able to obtain value from "sunk" renewables portfolio standard ("RPS") procurement costs. For example, the Proposed Decision concludes that the January 1, 2011 statutory limitation on accumulation of excess procurement can be ignored for purposes of banking excess procurement from contract signed prior to June 1, 2010 in order to "preserve the value for RPS compliance" of such procurement even though this approach will result in an asymmetric impact on the RPS market: pre-2011 RPS procurement shortfalls will be erased for those retail sellers that meet the 14% of retail sales in 2010

threshold,[1] while pre-2011 excess RPS procurement will be carried forward and applied against the new RPS procurement obligations.[2] Likewise, the Proposed Decision would enable the banking of unbundled RECs across compliance periods despite the statute's clear requirement that "in no event" should unbundled RECs be counted as excess procurement.[3]

CalWEA supports efforts to promote a cost-effective RPS program. While resolving apparent conflicts in a manner that ensures that retail sellers are able to obtain value from "sunk" RPS procurement costs may result in some limited cost savings, CalWEA encourages the Commission to focus its RPS cost containment efforts on those areas that are likely to yield much more significant cost savings, and to avoid interpretations that create cost "savings" by compromising the integrity of the RPS goals and circumventing legislative intent. As an example of more meaningful cost-saving reforms, CalWEA has previously encouraged the Commission in this proceeding to consider the extremely high costs of transmission upgrades that are required to provide renewable projects with "full capacity" status under the California Independent System Operator Corporation ("CAISO") tariff.[4] CalWEA renews here its recommendation that the Commission should encourage the CAISO to (1) revise the methodology and assumptions used in its interconnection study processes to reflect more reasonable system conditions, and (2) address major transmission constraints in its transmission planning process, where the Federal Energy Regulatory Commission has authorized the CAISO to plan for "policy-driven upgrades" to promote the achievement of state policy goals.[5]

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[1] Proposed Decision at 19-22.
[2] *Id.*at 30-31.
[3] *Id.* at 46-48, 60-65.
[4] *See* Letter from Nancy Rader, CalWEA Executive Director, to Commissioners, dated November 3, 2011, and included in an ex parte notice filed in R. 11-05-005 on the same date.
[5] *Id.*

Additionally, based upon its review of the Proposed Decision, CalWEA recommends that the Commission should:

A. Pursue expeditiously supplemental comments on enforcement and compliance to establish the standards to be applied to requests for relief from RPS procurement obligations and identify associated interim reporting requirements; and

B. Modify the Proposed Decision to ensure that renewable energy certificate ("REC") retirement rules and the calculation of excess procurement are consistent with the statutory restrictions on banking of unbundled RECs.

Each of these recommendations is addressed in further detail below.

II. ARGUMENT

A. The Commission Should Pursue Expeditiously Supplemental Comments On Enforcement And Compliance To Establish The Standards To Be Applied To Requests For Relief From RPS Procurement Obligations And Identify Associated Interim Reporting Requirements

The Proposed Decision correctly concludes that a failure to meet the minimum required portfolio content category 1 percentage in a given compliance period results in noncompliance with a statutory RPS procurement obligation.[6] However, the Proposed Decision determines that it is premature to determine the consequences of such a failure at this time "because further work is required, with participation of the parties, to specify the details of both the process for requesting a reduction of the Section 399.16(c)(1)[7] requirements and the standards for evaluating such a request."[8] The Proposed Decision also encourages the assigned Commissioner and Administrative Law Judge "to seek additional comment on enforcement issues."[9]

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[6] Proposed Decision at 58 ("Failing to meet the Section 399.16(c)(1) requirements leads to noncompliance with an RPS obligation.").
[7] All Section references herein are to the California Public Utilities Code unless otherwise specified.
[8] Proposed Decision at 58.
[9] *Id.* at 76.

CalWEA supports the Proposed Decision's suggestion that the Commission seek additional comment on enforcement issues. As the Proposed Decision notes, the RPS procurement quantity obligation and the RPS portfolio balance obligation are independent RPS procurement obligations.[10] Each of these obligations also has a statutory provision allowing retail sellers to seek relief from the Commission for non-compliance.[11] The Proposed Decision concludes that a retail seller's request for relief from either obligation should be made at the end of the applicable compliance period.[12] However, retail sellers need to know now the standards that will be applied to their request so that they can take actions during the compliance period as necessary to satisfy the standard to be applied at the end of the compliance period. Moreover, interim reporting requirements should be established for retail sellers to provide the Commission with (i) information relating to the likelihood that one of the conditions described in Section 399.15(b)(5) will exist, and (ii) the retail sellers' plans to avoid or mitigate those conditions. Accordingly, CalWEA recommends that the Commission pursue expeditiously supplemental comments on enforcement and compliance to establish the standards to be applied to requests for relief from RPS procurement obligations and identify associated interim reporting requirements.

B. The Commission Should Modify The Proposed Decision To Ensure That REC Retirement Rules And The Calculation Of Excess Procurement Are Consistent With The Statutory Restrictions On Banking Unbundled RECs

Section 399.13(a)(4)(B) requires the Commission to establish rules allowing excess procurement accumulated in one compliance period to be applied to a subsequent compliance period, but further instructs that "[i]n no event shall electricity products meeting the portfolio content of paragraph (3) of subdivision (b) of Section 399.16 be counted as excess procurement."

[10] *See id.* at Ordering Paragraph 18.
[11] *See* §§ 399.15(b)(5), 399.16(e).
[12] Proposed Decision at 71-75.

In turn, paragraph (3) of subdivision (b) of Section 399.16 consists of "[e]ligible renewable energy resource electricity products, or any fraction of the electricity generated, including unbundled renewable energy credits, that do not qualify under the criteria of paragraph (1) or (2)."[13] Restated, Section 399.13(a)(4)(B) prohibits the banking of unbundled RECs across compliance periods.

Notwithstanding this statutory limitation on the banking of unbundled RECs, the Proposed Decision adopts two positions that establish events in which unbundled RECs could, in fact, be banked for use in a later compliance period.

First, the Proposed Decision asserts that the general statement in Section 399.21(a)(6) that "[a] renewable energy credit shall not be eligible for compliance with a renewables portfolio standard procurement requirement unless it is retired in [WREGIS] . . . within 36 months" grants retail sellers the right to apply unbundled RECs procured in one compliance period towards their RPS compliance obligations in a subsequent compliance period so long as the unbundled RECs are retired in WREGIS in the later compliance period and within 36 months after the initial energy generation.[14] The Proposed Decision further asserts that establishing an exception to the general 36-month standard that requires unbundled RECs to be used in the compliance period in which they were generated would effectively create a variable time limit for the retirement of unbundled RECs, but that this must not be the intent because it is reasonable to believe that the Legislature would have drafted Section 399.21(a)(6) to make this express if that had been the intended result.[15]

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[13] For ease of discussion, the Proposed Decision refers to this category as "unbundled RECs" – CalWEA adopts the same convention in these comments. *See* Proposed Decision at n. 71.
[14] Proposed Decision at 46-48.
[15] *Id.*

Allowing retail sellers to engage in *de facto* banking by simply choosing to retire unbundled RECs in a later compliance period violates the general restriction on banking of these products set forth in Section 399.13(a)(4). The 36-month requirement in Section 399.21(a)(6) must be satisfied in order for the REC to "be *eligible* for compliance" with a RPS procurement obligation, but this eligibility is not absolute. (Emphasis added). Satisfaction of this requirement does not void the application of other statutory restrictions on eligibility, such as the statutory prohibition on banking of unbundled RECs. The fundamental concept that eligibility for compliance is not absolute is further demonstrated by other portions of the statute. For example, Section 399.16(a) states that "[v]arious electricity products from eligible renewable energy resources located within the WECC transmission network service area shall be *eligible* to comply" with RPS procurement obligations. (Emphasis added). However, the eligibility of these various electricity products does not mean that they can be used for compliance without restriction. For example, these products still must satisfy the portfolio content restrictions set forth in Section 399.16(d). Likewise, while a REC must be retired in WREGIS within 36 months after the energy is generated, unbundled RECs are still subject to the statutory prohibition on banking of these products.

The Proposed Decision tries to limit the application of the statutory prohibition on banking solely to those unbundled RECs that have been retired in WREGIS for compliance in a given compliance period.[16] However, this is not consistent with the text of Section 399.13(a)(4)(B), which describes procurement of unbundled RECs without any reference to whether those RECs have been retired in WREGIS. If the Legislature had intended to limit the prohibition on banking to those unbundled RECs that were retired for compliance in a given compliance period, it is reasonable to believe that Section 399.13(a)(4)(B) would have been

[16] *Id.*

written as follows (changed language in italics): In no event shall electricity products meeting the portfolio content of paragraph (3) of subdivision (b) of Section 399.16 *and retired in WREGIS for the applicable compliance period* be counted as excess procurement. Accordingly, the Commission should revise the Proposed Decision to clarify that unbundled RECs must be retired for compliance purposes in the same compliance period in which they are generated, or before the end of their 36-month life,[17] whichever comes sooner.

Second, the Proposed Decision adopts the Alliance for Retail Energy Market's ("AReM") proposal to implement the statutory restriction on banking unbundled RECs by subtracting from total procurement in a given compliance period only those unbundled RECs that exceed the quantity of unbundled RECs that may be credited towards compliance pursuant to the portfolio content limitations set forth in Section 399.16(c)(2).[18] However, this approach is not consistent with the broad prohibition on banking of unbundled RECs set forth in Section 399.13(a)(4)(B). The statutory prohibition on banking of unbundled RECs is stated in the broadest terms possible: *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.[19] Contrary to this mandate, the Proposed Decision would establish an event in which unbundled RECs would be counted as excess procurement.

This outcome is demonstrated by the quantitative example presented in Table 6 of the Proposed Decision. In this example, the retail seller has a RPS procurement quantity obligation of 2,500 MWh. The retail seller procures 1,000 MWh from "grandfathered" contracts, 900 MWh of long-term portfolio content category 1 product, 100 MWh of short-term portfolio

[17] Section 399.21(a)(6) provides that a REC must be retired in the tracking system within 36 months from the initial date of generation of the associated electricity. To remain consistent with this provision, the Commission should clarify that the 36-month deadline continues to apply to the use of unbundled RECs within a compliance period.
[18] Proposed Decision at 60-65.
[19] Section 399.13(a)(4)(B) (emphasis added).

content category 1 product, 400 MWh of long-term portfolio content category 2 product, and 600 MWh of long-term unbundled RECs (i.e., portfolio content category 3 product). In this example, the retail seller is unable to meet its RPS procurement quantity obligation if the unbundled RECs are removed – i.e., the retail seller has no excess procurement if the unbundled RECs are not counted. Thus, the excess procurement consists of unbundled RECs because there would be no excess procurement but for the unbundled RECs. However, Section 399.13(a)(4) requires that "in no event" will unbundled RECs be counted as excess procurement. The Proposed Decision contravenes Section 399.13(a)(4) because it would establish an event in which unbundled RECs would be counted as excess procurement. Therefore, the Commission should revise the Proposed Decision to clarify that unbundled RECs will be subtracted from total procurement in a given compliance period for purposes of calculating excess procurement in such compliance period.

III. CONCLUSION

For the foregoing reasons, the Commission should adopt the recommendations set forth in these comments.

Respectfully submitted,

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Appendix A: Proposed Findings Of Fact And Conclusions Of Law

I. The following Conclusions of Law in the Proposed Decision should be changed as set forth below (additions in underline, deletions in ~~strikethrough~~):

Conclusion of Law 18. Retail sellers should be allowed to count for RPS compliance only renewable energy credits that have been retired for RPS compliance not more than 36 months from the original date of the generation with which the REC is associated; provided that, to ensure that there is no event in which unbundled RECs are considered excess procurement, retail sellers should be allowed to count for RPS compliance only those unbundled RECs that have been retired for RPS compliance in the same compliance period in which they are generated, or before the end of their 36-month life, whichever comes sooner.

Conclusion of Law 23. In calculating excess procurement in one compliance period that may be applied to a later compliance period, retail sellers should subtract from the total quantity of renewable energy credits they retire in that compliance period, all renewable energy credits associated with contracts signed after June 1, 2010 meeting the criteria of Section 399.16(b)(3) ~~that are more than the number allowed under the limitation set out in Section 399.16(c)(2)~~.

VERIFICATION

I, Nancy Rader, am the Executive Director of the California Wind Energy Association. I am authorized to make this Verification on its behalf. I declare under penalty of perjury that the statements in the foregoing copy of *Comments of the California Wind Energy Association on Proposed Decision Setting Compliance Rules for the Renewables Portfolio Standard Program* are true of my own knowledge, except as to the 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 that the foregoing is true and correct.

Executed on May 14, 2012 at Berkeley, California.

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Nancy Rader

Executive Director, California Wind Energy Association