

Decision **PROPOSED DECISION OF ALJ SIMON** (Mailed 9/10/2010)

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 08-08-009
(Filed August 21, 2008)

**DECISION REVISING RULES FOR THE RENEWABLES PORTFOLIO
STANDARD PURSUANT TO SENATE BILL 695**

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**DECISION REVISING RULES FOR THE RENEWABLES PORTFOLIO
STANDARD PURSUANT TO SENATE BILL 695****1. Summary**

This decision implements new Pub. Util. Code § 365.1, which requires among other things that, once the Commission has begun the process of reopening direct access transactions, the Commission must ensure that electric service providers (ESPs) are subject to the same requirements of the renewables portfolio standard (RPS) program as are the three large investor-owned utilities (IOUs).

Section 365.1 expressly exempts community choice aggregators (CCAs) from its requirements and does not address small and multi-jurisdictional utilities (SMJUs). Consequently, this decision does not address RPS program requirements as they apply to CCAs or SMJUs.

This decision reviews RPS program requirements for ESPs and the three large IOUs and concludes that almost all significant RPS requirements currently apply equally to large IOUs and ESPs. The decision adds to the RPS obligations of ESPs the filing of RPS procurement plans for Commission approval, in compliance with instructions from the assigned Commissioner or assigned Administrative Law Judge in this proceeding or its successor. This decision also concludes that any limit on the use of tradable renewable energy credits (TRECs) for RPS compliance that applies to the large IOUs applies to ESPs. Any limit on the price an IOU may pay for TRECs, however, applies only to IOUs.

2. Procedural Background

Public Utilities Code Section 365.1¹ was enacted by Senate Bill (SB) 695 (Kehoe), Stats. 2009, ch. 337. SB 695 provides, among other things, for the phased and limited reopening of direct access transactions in the service territories of the three large utilities.² The statute also requires that once the Commission has begun the process of reopening direct access, the Commission shall equalize certain program requirements between the three large utilities and "other providers." The statute provides that the Commission shall:

... ensure that other providers are subject to the same requirements that are applicable to the state's three largest electrical corporations under any programs or rules adopted by the commission to implement the resource adequacy provisions of Section 380, the renewables portfolio standard provisions of Article 16 (commencing with Section 399.11), and the requirements for the electricity sector adopted by the State Air Resources Board pursuant to the California Global Warming Solutions Act of 2006 (Division 25.5 (commencing with Section 38500) of the Health and Safety Code). This requirement applies notwithstanding any prior decision of the commission to the contrary.

§ 365.1(c)(1).

¹ Unless otherwise noted, all further references to sections refer to the Public Utilities Code.

² See § 365.1(b). California's three large IOUs are Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (SCE).

The phrase "other providers" is explained in the statute.³ It includes electric service providers (ESPs), but expressly excludes community choice aggregators (CCAs). The statute does not address small utilities and multi-jurisdictional utilities (SMJUs). Consequently, this decision does not address renewables portfolio standard (RPS) program requirements for CCAs or SMJUs.

The Commission took the initial steps to implement § 365.1 in Decision (D.) 10-03-022, by setting the initial conditions for the limited resumption of direct access. That decision triggered the equality of treatment mandate of § 365.1(c)(1). In D.10-03-021, the Commission stated that it would implement § 365.1(c)(1) with respect to the RPS program by undertaking a comprehensive review of RPS program requirements in this proceeding, Rulemaking (R.) 08-08-009.

On March 25, 2010, the assigned Administrative Law Judge (ALJ) in this proceeding issued the Administrative Law Judge's Ruling Requesting Briefs on Revising Requirements of the Renewables Portfolio Standard Program pursuant

³ Section 365.1(a) provides:

For purposes of this section, 'other provider' means any person, corporation, or other entity that is authorized to provide electric service within the service territory of an electrical corporation pursuant to this chapter, and includes an aggregator, broker, or marketer, as defined in Section 331, and an electric service provider, as defined in Section 218.3. 'Other provider' does not include a community choice aggregator, as defined in Section 331.1, and the limitations in this section do not apply to the sale of electricity by 'other providers' to a community choice aggregator for resale to community choice aggregation electricity consumers pursuant to Section 366.2.

to SB 695. The ruling asked parties to identify, with citation to the relevant ordering paragraphs of Commission decisions or resolutions:

- RPS program requirements that should be reviewed;
- proposed revisions to those requirements; and
- reasons for the proposed revisions.

Briefs were filed on May 3, 2010 by the Alliance for Retail Energy Markets (AReM); PG&E; SDG&E; Shell Energy North America (US), L.P. (Shell Energy); and SCE. Reply briefs were filed on May 13, 2010 by AReM; PG&E; Shell Energy; SCE; and The Utility Reform Network (TURN).⁴

3. Discussion

3.1. Previous Commission Decisions

In D.05-11-025, the Commission delineated its approach to implementing RPS program requirements for ESPs, CCAs, and SMJUs. The Commission explained that, because the guidance provided by the RPS statute was ambiguous, the Commission would exercise its discretion to provide a framework for RPS compliance by ESPs, CCAs, and SMJUs. The Commission determined that ESPs, CCAs, and SMJUs would meet the basic requirements of the RPS program, but the Commission would allow them some latitude in the manner in which they met these requirements. As a result, the Commission:

... will be exercising its authority over ESPs, CCAs, and small and multi-jurisdictional utilities in five basic areas:

⁴ By e-mail to the ALJ on April 14, 2010, SCE requested that the schedule set in the ALJ's briefing ruling be extended by two weeks to allow more time for SCE personnel familiar with RPS issues to work on the brief. No party opposed this request, and several parties supported it. The ALJ granted the request by e-mail dated April 15, 2010.

1) requiring meeting the 20% goal; 2) adding at least 1% of retail sales in renewable sales per year; 3) reporting progress toward these goals to the Commission; 4) utilizing flexible compliance mechanisms; and 5) being subject to penalties.

D.05-11-025 at 10-11.

The Commission also noted some of the differences among the different types of RPS-obligated retail sellers. The Commission observed that it has limited authority over ESPs and CCAs.

This Commission has less overall control over how ESPs and CCAs operate than we do over how utilities operate. Also, to the extent we consider ESP and CCA operations, our concerns about their operations differ somewhat from our concerns about the operations of the investor-owned utilities. In the context of the RPS program, our primary concern is to ensure that ESPs and CCAs do in fact reach the goal of 20% renewable energy by 2010. [footnote omitted]. We are, however, somewhat less concerned about the details of how they get there.

Therefore, we do not believe it is reasonable to require these entities to be subject to the exact same steps for RPS implementation purposes as the utilities we fully regulate. We also do not believe that it is necessarily reasonable to subject ESPs and CCAs to the same RPS process requirements as each other, simply because they are not utilities. . . . [W]e are sensitive to the particular requirements and pressures of each type of entity and do not necessarily want to impose a 'one size fits all' RPS regulatory scheme.

Similar reasoning exists for the small and multi-jurisdictional utilities.

Id. at 12-13.

The Commission implemented this approach for ESPs and CCAs in D.06-10-019, and for SMJUs in D.08-05-029. In D.06-10-019, the Commission affirmed that ESPs were subject to the same flexible compliance rules as the large utilities (Ordering Paragraph (OP) 5) and had the same reporting and

verification obligations (OP 6).⁵ The Commission rejected the suggestion that ESPs should have different RPS annual procurement targets (APT) and incremental procurement targets from the investor-owned utilities (IOUs) (at 10-11). The Commission adhered to the view expressed in D.05-11-025 that it was not necessary for ESPs to submit annual RPS procurement plans for Commission approval (at 12-13). The Commission noted that, because we do not regulate ESP rates, there is no need for reasonableness review of ESPs' contracts (at 13). ESPs are required, however, to submit their RPS procurement contracts to the Director of Energy Division when requested to do so, in order to facilitate review of ESPs' RPS reporting and compliance (OP 7).

In D.07-05-028, the Commission implemented § 399.14(b), governing the use of short-term contracts for RPS compliance, with respect to all RPS-obligated retail sellers.⁶ The Commission established rules and conditions for the use of short-term RPS contracts by all categories of retail sellers.⁷

⁵ The large utilities are PG&E, SCE, and SDG&E.

⁶ Section 399.14(b) provides:

The commission may authorize a retail seller to enter into a contract of less than 10 years' duration with an eligible renewable energy resource, if the commission has established, for each retail seller, minimum quantities of eligible renewable energy resources to be procured either through contracts of at least 10 years' duration or from new facilities commencing commercial operations on or after January 1, 2005.

⁷ The Commission allowed the use of short-term RPS procurement contracts with generators that entered into commercial operation prior to January 1, 2005 if the retail seller also signs in the same year 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, for energy deliveries equivalent to at least 0.25% of the retail seller's prior year's retail sales.

In D.10-03-021, which among other things authorizes the use of tradable renewable energy credits (TRECs) for RPS compliance, the Commission set forth an extensive set of rules for the TREC market and for the integration of TRECs into the reporting and compliance obligations of retail sellers.⁸ These rules are the same for ESPs and large utilities, with two temporary exceptions. The decision imposes a temporary limit on the large utilities' use of TRECs for RPS compliance that does not apply to ESPs. D.10-03-021 also sets out a temporary limit on the amount of money any utility could pay for a TREC. After two petitions for modification of D.10-03-021 were filed⁹, the Commission issued D.10-05-018, which stayed D.10-03-021. On August 25, 2010, Commissioner Peevey's proposed decision (PD) modifying D.10-03-021, authorizing the use of TRECs for RPS compliance, and lifting the stay of D.10-03-021 imposed by D.10-05-018, was mailed for comment. The alternate PD of Commissioner Grueneich, denying the petitions for modification and lifting the stay imposed by D.10-05-018, was mailed for comment October 25, 2010.

3.2. Statutory Framework

Section 365.1 makes no changes to the language of the other principal statutory provisions about the treatment of ESPs in the RPS program. Section 399.12(g)(3) includes ESPs as retail sellers for purposes of the RPS program and

⁸ TREC transactions may also be referred to as renewable energy credit (REC) only transactions.

⁹ They are the Joint Petition of Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company for Modification of Decision 10-03-021 (April 12, 2010) and the Petition of the Independent Energy Producers Association for Modification of Decision 10-03-021 Authorizing Use of Renewable Energy Credits for RPS Compliance (April 15, 2010).

directs the Commission to determine the manner of ESP participation in the RPS program, subject to the same terms and conditions as utilities.¹⁰ Section 380(e), which directs the establishment of resource adequacy requirements, also states:

Each load-serving entity shall be subject to the same requirements for resource adequacy and the renewables portfolio standard program that are applicable to electrical corporations pursuant to this section, or otherwise required by law, or by order or decision of the commission.

The limits of this Commission's jurisdiction to regulate the business of ESPs, including ESPs' rates and terms of service, are set out in § 394(f).¹¹

¹⁰ Section 399.12(g) provides:

'Retail seller' means an entity engaged in the retail sale of electricity to end-use customers located within the state, including any of the following: . . .

- (3) An electric service provider, as defined in Section 218.3, for all sales of electricity to customers beginning January 1, 2006. The commission shall institute a rulemaking to determine the manner in which electric service providers will participate in the renewables portfolio standard program. The electric service provider shall be subject to the same terms and conditions applicable to an electrical corporation pursuant to this article. Nothing in this paragraph shall impair a contract entered into between an electric service provider and a retail customer prior to the suspension of direct access by the commission pursuant to Section 80110 of the Water Code.

¹¹ Section 394(f) provides:

Registration with the commission [by an ESP] is an exercise of the licensing function of the commission, and does not constitute regulation of the rates or terms and conditions of service offered by electric service providers. Nothing in this part authorizes the commission to regulate the rates or terms and conditions of service offered by electric service providers.

The lack of change to the language of these related statutory sections provides the basis for the arguments made by AReM and Shell Energy that the Commission's analysis in D.05-11-025 and D.06-10-019 regarding ESP participation in the RPS program is fundamentally unaffected by § 365.1(c)(1). AReM and Shell Energy assert that § 365.1 does not change the Commission's authority to determine the manner of ESP participation in the RPS program, as set out in § 399.12(g)(3) and interpreted in D.05-11-025 and D.06-10-019. AReM and Shell Energy note that the requirements the Commission has actually imposed on ESPs and the large utilities are largely the same, and argue that § 365.1 provides no mandate for the Commission to abandon the balance it has previously struck.

SCE and SDG&E each point out that a fundamental rule of statutory construction is to give effect to the plain meaning of statutory language. They argue that § 365.1 both reiterates prior statutory language about ESPs having the "same requirements" as the large utilities and directs the Commission to implement it "notwithstanding any prior decision. . . to the contrary," thus clearly requiring the Commission to change its prior approach to ESPs. TURN also advances this analysis of the statute's impact.

The position of AReM and Shell Energy that § 365.1 has no practical effect is not viable. The Legislature stated that the Commission was to implement equalization of the RPS obligations of ESPs and large utilities "notwithstanding" our carefully considered previous decisions. As TURN points out, it would at the least be illogical for the Commission to act as though this last sentence of § 365.1 were meaningless. It is more logical to conclude that the Legislature meant this language to be a direction to the Commission to do something different from what it has done.

In response to this statutory direction, it is not enough simply to assert, as AReM and Shell Energy do, that the Commission struck the right balance in D.05-11-025 and D.06-10-019. It is necessary for the Commission to take a fresh look at RPS requirements, and, if necessary, to make adjustments to equalize responsibilities of ESPs and the three large utilities.

3.3. Review of RPS Program Features

3.3.1. Parties' Proposals

The ALJ's briefing ruling asked parties submitting briefs to provide a list of those elements of the RPS program that should be revised in compliance with the mandate of SB 695. SCE 's brief contains a list of 24 proposed items for changes, ranging from eliminating both the temporary limit on the large utilities' use of TRECs for RPS compliance and the temporary limit on the price any utility may pay for TRECs, imposed in D.10-03-021, to requiring that ESPs have procurement review groups. Of SCE's 24 proposals, three are either proposed or endorsed by at least one other party.¹² Although many of SCE's proposals are discussed in its brief only minimally, or not at all, we will review all the items on SCE's list, and address each party's contributions to those issues.

The other parties' proposals are less far-reaching than SCE's. SDG&E proposes only the elimination of the temporary limits on TREC usage and TREC payments. PG&E urges that any requirements for the use of TRECs that the Commission ultimately adopts should apply equally to utilities and ESPs. PG&E also proposes that ESPs be required to file annual RPS procurement plans with

¹² These are: elimination of the temporary usage limit on TRECs; elimination of the temporary price cap on TRECs; and extension to ESPs of the requirement to file RPS procurement plans.

the Commission. TURN supports the equalization of TRECs usage limits and urges that ESPs be required to file RPS procurement plans.

In their opening briefs, AReM and Shell Energy each argue that no changes to any prior Commission decision are required. In their reply briefs, AReM and Shell Energy support the elimination of the temporary TREC usage limit and price cap.

3.3.2. RPS Procurement Plans

SCE and PG&E, supported by TURN, urge that the requirement that utilities prepare RPS procurement plans, set out in § 399.14(a)(1), be extended to ESPs.

In setting the general RPS compliance framework for SMJUs, ESPs, and CCAs in D.05-11-025, and subsequently when setting the rules for ESPs in D.06-10-019, the Commission focused on the limited nature of its review of ESPs' business activities. We noted in D.05-11-025 that "this Commission does not set rates or rates of return for ESPs, or review their overall procurement plans. . ." (at 12). We implemented that understanding in D.06-10-019, where we stated that "ESPs do not need to seek our advance approval of their RPS procurement plans." (at 12.)

As the RPS program has developed, it has become clear that the RPS procurement plan is more than simply a permission slip issued by the Commission for the large utilities to undertake procurement to meet their RPS obligations. The procurement plan is also a tool for the retail seller, providing the opportunity to analyze current and future RPS needs in a structured and

consistent way.¹³ Moreover, an RPS procurement plan provides important information to the Commission and to the public about the progress a retail seller is making in attaining the important public policy goals set by the RPS program.

We therefore, agree with PG&E, TURN, and SCE that submitting an RPS procurement plan is a requirement that should apply to ESPs as well as the three large IOUs. These procurement plans must comply with all applicable statutory requirements (e.g., § 399.14(a)(3)). In addition, as with the large utilities, supplemental information requirements for ESP procurement plans for a particular year, if any, will be set by the assigned Commissioner and/or assigned ALJ.

SCE asserts that all the information beyond that expressly described in § 399.14(a)(3)¹⁴ that is now required in the large IOUs' procurement plans for

¹³ Since ESPs as a group procured RPS-eligible resources for less than 2.5% of their retail sales in 2008 (as shown by their RPS compliance reports), this function of the RPS procurement plan may be particularly relevant to them.

¹⁴ Section 399.14(a)(3) provides:

- (3) Consistent with the goal of procuring the least-cost and best-fit eligible renewable energy resources, the renewable energy procurement plan submitted by an electrical corporation shall include all of the following:
 - (A) An assessment of annual or multiyear portfolio supplies and demand to determine the optimal mix of eligible renewable energy resources with deliverability characteristics that may include peaking, dispatchable, baseload, firm, and as-available capacity.
 - (B) Provisions for employing available compliance flexibility mechanisms established by the commission.

Footnote continued on next page

2010 should be eliminated by the Commission. If not eliminated, SCE argues, this information should also be required of ESPs.¹⁵ No other party takes SCE's position. As TURN notes, SCE's extensive list is less a proposal for equalization than a request for wholesale changes to RPS procurement planning.

The information SCE proposes to eliminate is information that the assigned Commissioner, in a scoping ruling, determined would be useful in analyzing the utilities' RPS procurement plans for 2010.¹⁶ Such a ruling is issued annually to structure the utilities' RPS procurement plan submissions for the coming year. The information required to be included in the procurement plans can and does vary from year to year (always including at least those elements specified in § 399.14(a)(3)), depending on requests of the utilities and the needs of the RPS program. Some elements of this information may be appropriate for ESP procurement plans in a particular year; some may not be.¹⁷

The decision as to what supplemental information, if any, to require in the annual procurement plans of utilities and of ESPs, beyond the information

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- (C) A bid solicitation setting forth the need for eligible renewable energy resources of each deliverability characteristic, required online dates, and locational preferences, if any.

¹⁵ SCE objects to: procurement plan overview; workplan to reach 20% by 2010 and 33% by 2020; evaluation criteria for contracts; and the submission of transmission ranking cost reports.

¹⁶ Amended Scoping Memo and Ruling of Assigned Commissioner Regarding 2010 RPS Procurement Plans (November 2, 2009).

¹⁷ For example, SCE urges that ESPs be required to "discuss and justify their plans for utility-owned generation," and to prepare transmission ranking cost reports. ESPs, however, own neither generation nor transmission.

required by statute, rests with the assigned ALJ and/or assigned Commissioner in R.08-08-009 or its successor. We will not interfere with their discretion to determine what supplemental information to require in RPS procurement plans, and whether the supplemental information is applicable only to IOUs, only to ESPs, or to both groups of retail sellers. In sum, equalizing the procurement plan requirement as between ESPs and the large utilities by requiring ESPs to submit procurement plans does not necessitate changing the long-standing method of requiring what is stated in statute along with determining the supplemental content, if any, of each annual RPS procurement plan.

Like the contents of RPS procurement plans, the method of submission, consideration, and approval of RPS procurement plans is set annually. The decision as to how RPS procurement plans of ESPs should be submitted and approved also rests with the assigned ALJ and/or assigned Commissioner in R.08-08-009 or its successor.

Each ESP must file an RPS procurement plan according to the process, and providing the information required for ESP procurement plans, set forth by the assigned Commissioner or assigned ALJ in R.08-08-009 or its successor.¹⁸ Any ESP filing a procurement plan may claim appropriate confidentiality protection for confidential elements of its procurement plan pursuant to D.06-06-066, as modified by D.07-05-032.

¹⁸ At such time as RPS procurement planning is conducted in the Commission's general procurement planning process, as encouraged by § 399.14(a)(1), the assigned ALJ or assigned Commissioner in that proceeding should review the manner in which RPS procurement planning for ESPs is handled.

Because this decision is issued early in 2011, ESPs should be required to file RPS procurement plans, as set forth above, beginning with the 2011 compliance year.

3.3.3. Limits on TRECs

The parties' briefs focus most intensely on D.10-03-021's temporary limit on the use of TRECs for RPS compliance by the large utilities and the temporary limit on the price any utility can pay for TRECs, as set out in D.10-03-021. That decision defers the resolution of the questions raised about the temporary TRECs limits to this decision.

3.3.3.1. Temporary Limit on TRECs Usage

The temporary limit on the use of TRECs for RPS compliance, as set out in D.10-03-021, applies only to the three large utilities. SCE and SDG&E urge that the temporary limit be eliminated; AReM and Shell support that position in their reply briefs. Whether to keep, eliminate, or change the temporary TRECs usage limit for the large IOUs is not, however, properly addressed in this decision. The Commission's decision on the petitions for modification of D.10-03-021 is the appropriate forum for considering and resolving that question.

After consideration of the parties' arguments about implementation of § 365.1, we agree with PG&E and TURN that any limit on the use of TRECs for RPS compliance should also apply to ESPs. As TURN argues, a limitation (even a temporary one) on what types of procurement may count for RPS compliance should be understood as a rule adopted by the Commission to implement the RPS program. It is thus within the ambit of Commission requirements that § 365.1 intends to reach. The statute's mandate for equalization of those requirements means that any limit on the use of TRECs for RPS compliance

imposed by the Commission on the three large IOUs should apply equally to ESPs.

Therefore, as for the large IOUs, ESPs may use TRECs to satisfy no more than 25% of their APT in any year, beginning with the 2010 compliance year. This limitation is an annual limit on the deliveries used to satisfy an ESP's APT. Like the minimum quantity requirement for bundled contracts, if an ESP acquires more than 25% of APT as TRECs in any year, it may carry over the excess in TRECs for compliance in future years (subject to applicable rules, such as banking of TRECs and any TRECs usage limitation applicable to the later year).

It is also important to recognize the legitimate expectations of the parties to ESPs' RPS contracts that convey RECs and energy but are classified under the definitions adopted in D.10-03-021 as conveying RECs only that were *signed prior to the effective date of this decision*.¹⁹ The temporary limit on the use of TRECs for RPS compliance should not apply to deliveries from such a contract signed prior to the effective date of this decision, if those deliveries would cause an ESP to exceed the 25% usage limit in any year.²⁰ Because the limit would be exceeded,

¹⁹ For ESPs, "signing" is equivalent to "Commission approval" for IOUs. The IOUs' contracts become effective upon Commission approval. The ESPs' contracts, like most private contracts, become effective when signed.

²⁰ This treatment is subject to two caveats. It does not apply if either of the following occurs:

- a. The expiration date of the contract is extended beyond the expiration date existing on January 13, 2011; or
- b. The deliveries allowed under the contract are increased beyond the maximum deliveries identified in the contract as the contract read on January 13, 2011.

Footnote continued on next page

however, no additional TREC deliveries in excess of the usage limit would be allowed to count for RPS compliance in that year.

The temporary limit on TRECs usage set forth here expires December 31, 2013.

3.3.3.2. Temporary Limit on IOU Payments for TRECs

SCE and SDG&E also propose that the temporary limit of \$50.00/TREC on the price any IOU may pay for TRECs imposed by D.10-03-021 be eliminated in this decision. As with the temporary TRECs usage limit, this argument is not appropriately considered in the context of § 365.1.

The temporary TREC price limit for IOUs presents a fundamentally different question from the usage limit. With respect to the application of § 365.1, the temporary price limit is not an RPS program requirement. Rather, it is a method to protect IOU ratepayers from paying for TRECs at excessive prices in the early stages of the TREC market. As TURN notes, this approach is consistent with the statutory provision of cost containment mechanisms for RPS procurement that apply only to IOUs. Moreover, this Commission's general responsibility to ensure just and reasonable rates for IOU ratepayers does not extend to the customers of ESPs. (See § 394(f).) As a matter of RPS program administration, protecting IOU ratepayers from excessive prices for TRECs does not also require limiting the prices ESPs may choose to pay for TRECs. There is

If either of these changes is made to the contract, all deliveries after the effective date of the contract amendment that are incremental to the deliveries in the original contract will be treated according to the then-applicable classification of transactions for renewable energy credits only and bundled transactions.

thus neither a statutory nor a practical need to impose any limit on payments for TRECs on ESPs.

3.3.4. Reporting and Compliance

As the Commission made clear in D.05-11-025, all RPS-obligated retail sellers have the same obligations to meet their RPS APT and to report to the Commission on their progress in meeting RPS goals.²¹ The Commission set out the rules for reporting in D.06-10-050 and Energy Division staff has implemented them by developing, with input from the parties, reporting tools. There is no dispute that ESPs must submit their compliance reports in accordance with these rules and procedures, just as the large IOUs and all other RPS-obligated retail sellers must. Thus, there is no inequality of RPS reporting or compliance obligations to adjust.

IOUs report to the Commission on the status of new renewable generation projects that are under contract to them, but have not yet been constructed. This allows the Commission to assess, among other things, the likelihood that new RPS projects will actually be built and deliver energy to meet RPS requirements. SCE asserts that either eliminating this requirement for IOUs or, alternatively, requiring ESPs also to provide such status reports would aid in equalizing RPS "reporting and compliance" obligations. These status reports, however, are provided by utilities to allow the Commission to track contracts as part of our review and approval of utilities' contracts. Since the Commission does not

²¹ In D.06-10-019, the Commission rejected the suggestion that ESPs should be allowed to calculate their APTs differently than the utilities do. (at 10-11.)

similarly review and approve ESPs' contracts, similar status reports are not required.²²

SCE also suggests that the Commission's posting on its web site of information on the status of new RPS generation projects should include ESPs, not just IOUs. The web site posting on project status is created by Commission staff for the convenience of parties and the public; it is not a requirement imposed on the utilities. The posting of information developed by staff is in the sound discretion of the Director of Energy Division. Nothing is required of the utilities in relation to it, so there is nothing to equalize between utilities and ESPs.

If and when any additional reporting is required of any retail sellers, Commission staff has authority to develop appropriate reporting measures.²³

3.3.5. RPS Contracts and the Contracting Process

SCE also makes 11 proposals related to solicitations and contracts for RPS-eligible resources. As Shell Energy notes, many of these proposals bear little relationship to the actual needs of the RPS program or the participation of ESPs in it. In most of these proposals, SCE advocates elimination of the obligation for the large IOUs; only as a fall-back does it advocate equalization of the obligation for ESPs. The Commission will not consider eliminating elements of the RPS

²² SCE made a similar proposal that was considered and rejected in the Assigned Commissioner's Ruling with Final Document Addressing Process Issues Relative to RPS Compliance Reports (November 20, 2008), at B4.

²³ See D.06-10-050, OP 3; see also, Administrative Law Judge's Ruling Adopting Standardized Reporting Format, Setting Schedule for Filing Updated Reports and Addressing Subsequent Process (March 12, 2007), at 5-7.

program in this decision, which addresses equalizing the existing RPS obligations of ESPs and the large utilities.

SCE asserts that the Commission should require ESPs to solicit long-term contracts of 10-year, 15-year, and 20-year terms, as utilities do. ESPs, like all retail sellers, may not use RPS-eligible procurement from short-term contracts with existing facilities unless they have met the minimum quantity of procurement with long-term contracts or from new facilities, as set forth in D.07-05-028. To the extent that the Commission might consider other requirements or incentives for long-term RPS contracting by ESPs, it can do so in the context of the ESP procurement plans.

SCE urges the Commission to eliminate several elements of the RPS contracting process that have been developed over the course of the program. These include the limitations on exclusive contract negotiations that the Commission adopted at the recommendation of PG&E and SDG&E in D.09-06-018; utilities' reports on their RPS solicitation short lists; the use of least-cost best-fit methodology in evaluating bids; and the use of a project viability calculator developed by Energy Division staff, with input from the parties, to evaluate bids from RPS-eligible generation projects being developed. SCE argues that, if not eliminated, these elements should be applied to ESPs' RPS procurement activities as well.

All of these contracting requirements have been developed in the specific context of RPS bid solicitations by utilities, with extensive input from parties and detailed implementation by staff. SCE provides no information about the relevance of these specific elements to ESP RPS procurement practices. SCE makes no suggestions about how the Commission could implement the wholesale transfer of the RPS solicitation methods for large utilities to ESPs,

which are smaller than and different from the utilities in many respects that are relevant to RPS procurement. To the extent that any of these methods might be relevant to the efficacy of the ESPs' RPS procurement planning, the Commission can consider them in the context of the ESP RPS procurement plans.

SCE also proposes that the Commission eliminate its requirement that utilities use independent evaluators for their RPS procurement activities. SCE's fall-back proposal is that ESPs be required to engage independent evaluators and to have procurement review groups. This proposal would extend to ESPs all of the procurement review mechanisms that the Commission has designed specifically to protect utility ratepayers.

The Commission required the use of independent evaluators for utilities' general procurement activities in D.04-12-048. In D.05-07-039, the Commission adopted PG&E's suggestion that utilities use an independent evaluator in RPS solicitations. Utility consultation with procurement review groups has been required for general procurement for many years. (See D.04-01-050.) The Commission extended such consultation to RPS procurement in D.05-07-039.

SCE provides no logical basis for the Commission to impose either of these ratepayer protection mechanisms – the independent evaluator or the procurement review group – on ESPs, and it is difficult to discern one. This Commission has no responsibility for the price reasonableness of ESP procurement (whether conventional or RPS-eligible), and has no regulatory authority over ESP rates. In contrast, the Commission has responsibility for the price reasonableness of IOU procurement, and the reasonableness of IOU rates. Section 365.1(c) does not require that the Commission take elements of the procurement practices of the utilities it regulates with respect to procurement and rates and impose them on the ESPs that it does not regulate with respect to

procurement and rates, simply because the Commission has authority over ESPs' participation in the RPS program, and we decline to do so here.

SCE also criticizes the current process of using advice letters for Commission review and approval of utilities' RPS contracts. SCE urges that the Commission adopt a proposal for preapproval of certain contracts that it has made in other filings, but not in its briefs here on SB 695. Since it is not fairly presented in the pleadings requested by the ALJ's briefing ruling, this suggestion will not be considered here.

SCE makes the fall-back proposal that the current advice letter process be extended to the RPS procurement contracts of all RPS-obligated retail sellers. SCE does not present any arguments to support this significant change to the Commission's long-standing position, consistent with § 394(f), that it does not review or approve the procurement contracts of ESPs, whether for conventional generation or RPS-eligible resources.

Finally, two contracting issues identified by SCE are not currently relevant. The first, application of the rules for the use of above-market funds (see § 399.14(a)(2)(A), Resolution (Res.) E-4199), is moot. Available above-market funds were exhausted by May 2009. The second, special efforts to be made by the utilities in relation to bidders from the Imperial Valley, were to have occurred during 2009.²⁴

²⁴ The Commission may review the results of the utilities' efforts with respect to Imperial Valley bidders in considering the utilities' 2010 RPS procurement plans, but at this time, utilities have no obligations beyond those for 2009.

3.3.6. Tariffs and Standard Contracts for Small Generators

SCE also seeks significant changes to the small generator feed-in tariff program adopted by the Commission in D.07-07-027, pursuant to AB 1969 (Yee), Stats. 2006, ch. 731.²⁵ SCE asks that we eliminate the application of the program to certain utility customers. Alternatively, SCE asks that the Commission extend the program to all retail sellers.

AB 1969 requires each utility to develop tariffs or standard contracts that provide for the utility's purchase of electricity from electric generation facilities owned and operated "within the service territory of the electrical corporation" by "a public water or wastewater agency that is a retail customer of an electrical corporation." ([former] § 399.20(e), (b).) In D.07-07-027, the Commission implemented AB 1969 and also "adopt[ed] the proposals of SCE and PG&E. . . to initiate limited expansion to other customers of the tariffs/standard contracts here. . ." (at 46.)

By its express terms, AB 1969 applies only to utilities and their customers. The language used in both AB 1969 and D.07-07-027 assumes that the program applies only to utilities and their customers. The structure of the program makes sense only for utilities and their customers.²⁶ SCE makes no arguments and provides no information that would allow the Commission or the parties to understand how the programs set out in D.07-07-027 could be applied to ESPs.

²⁵ AB 1969 was codified at § 399.20. That section has since been amended and replaced by SB 32 (Negrete McLeod), Stats. 2009, ch. 328. SCE seeks changes only to the program based on AB 1969.

²⁶ One example, pointed out by Shell Energy, is that ESPs do not offer tariffs approved by the Commission governing service to their customers.

Since the programs described in D.07-07-027 by their nature do not apply to ESPs, and SCE has provided no explanation of how to make them apply, we decline to attempt to extend them to ESPs.

3.3.7. Next Steps

As the implementation of the RPS program continues, the Commission should seek and parties should provide input on the application of the mandate of § 365.1 to particular aspects of the program. Commission staff should ensure that practices and protocols for the RPS program apply equally to large utilities and ESPs, where necessary and feasible.

The Commission has not yet completed specification of the rules for CCAs; only one CCA is currently active, and it has served customers only since May 2010.²⁷ This task will be completed in this proceeding or its successor, and will include whether the temporary TREC usage limit and price cap should apply to CCAs, but is not limited to those issues.

4. Comments on Proposed Decision

The PD of ALJ Anne E. Simon in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on September 30, 2010 by AReM, City of Cerritos (Cerritos), PG&E, Shell Energy, Sierra Pacific Power, and SCE. Reply comments were filed on October 5, 2010 by AReM, Cerritos, Mountain Utilities, Shell Energy, SCE, and TURN.

²⁷ See <http://www.marinenergyauthority.org/index.cfm>.

The Administrative Law Judge's Ruling Granting Motion Requesting Comment Period for the Revised Proposed Decision of Commissioner Peevey (October 27, 2010), allowed supplemental comments on Section 3.9 and related ordering paragraphs of Revision 3 of the PD on petitions for modification of D.10-03-021 that was pending in R.06-02-012. These sections relate to the application to ESPs of the temporary limits on use of TRECs for RPS compliance that D.10-03-021 imposes on the large utilities. The ALJ's ruling required that any supplemental comments or supplemental reply comments were to be filed in both R.06-02-012 and R.08-08-009, and served on the service lists in both proceedings. Supplemental comments were filed on November 5, 2010 by AReM, Direct Access Customer Coalition, School Project for Utility Rate Reduction, California State University, Walmart Stores, Commerce Energy, 3 Phases Renewables, and WPTF (jointly) (collectively, joint ESP parties); Cerritos; Independent Energy Producers Association; PG&E; Pilot Power; SDG&E; Shell Energy; SCE; TURN; and Union of Concerned Scientists. Supplemental reply comments were filed on November 12, 2010 by City and County of San Francisco; joint ESP parties; PG&E; PacifiCorp and Sierra Pacific (jointly); Shell Energy; and SCE.

The Commission has reviewed all comments, reply comments, supplemental comments, and supplemental reply comments. We are persuaded that this PD is the appropriate place to address the application to ESPs of the temporary limit on the use of TRECs for RPS compliance, and do so.

The comments and reply comments reveal that the paragraph about the inapplicability of the temporary TRECs usage limit to small utilities created confusion. Since it is not necessary to our decision, we remove this paragraph.

We also do not address here the issues raised by Cerritos. Although substantive, those issues are outside the scope of this decision.

5. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Burton W. Mattson and Anne E. Simon are the assigned ALJs for this proceeding.

Findings of Fact

1. SB 695 gave the Commission the responsibility to review and revise the obligations of ESPs in comparison to those of the large utilities under the RPS program.

2. The Commission does not regulate the rates or terms and conditions of service offered by ESPs.

Conclusions of Law

1. SB 695 does not alter or amend other statutes governing the Commission's administration of the RPS program and its regulatory relationship to ESPs.

2. ESPs should be required to submit RPS procurement plans, in compliance with instructions from the assigned Commissioner or assigned administrative law judge in this proceeding or its successor, beginning with the 2011 RPS compliance year.

3. ESPs' RPS procurement plans should be subject to appropriate confidentiality protections.

4. Any limit on the use of TRECs for compliance with RPS annual procurement targets should apply to ESPs as well as the three large IOUs.

5. Any limit on the price that IOUs can pay for TRECs should not be extended to ESPs.

6. Going forward, the Commission should consider the mandate of § 365.1 in all decisions about the RPS program.

7. The Director of Energy Division should ensure that the practices and protocols for administration of the RPS program apply equally to ESPs and the large IOUs, so far as necessary and feasible.

8. In order to facilitate the orderly functioning of the RPS program, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. All electric service providers shall submit plans for the procurement of eligible renewable energy resources to meet their obligations under California's renewables portfolio standard program, in compliance with instructions from the assigned Commissioner or assigned Administrative Law Judge in this proceeding or its successor, beginning with the 2011 compliance year.

2. Any renewables portfolio standard procurement plan filed by an electric service provider shall be subject to the appropriate confidentiality protections.

3. Any electric service provider registered in California may use renewable energy credits procured from contracts for renewable energy credits only, as defined in Decision 10-03-021, to meet up to 25% of its annual procurement targets for the California renewables portfolio standard, beginning with the 2010 compliance year.

4. The temporary limit on the use of tradable renewable energy credits for compliance with the California renewables portfolio standard shall not be applied to deliveries to an electric service provider from contracts that transfer both renewable energy credits and energy to the buyer but that do not meet the Commission's criteria for considering a procurement transaction a bundled

transaction and that were signed by the electric service provider prior to the effective date of this decision, if such deliveries would cause that electric service provider to exceed the annual 25% limit on the use of tradable renewable energy credits for compliance with the California renewables portfolio standard. In this circumstance, the electric service provider may not use any tradable renewable energy credits associated with any additional contracts that were signed by the electric service provider on or after the effective date of this decision for compliance in that year that would exceed the 25% annual limit. The electric service provider may, however, bank any excess TRECs for compliance in future years, in accordance with the flexible compliance rules for the renewables portfolio standard.

5. The special provision set out in Ordering Paragraph 4, above, for procurement contracts for compliance with the renewables portfolio standard that were signed by electric service providers prior to the effective date of this decision does not apply if either of the following occurs:

- a. The expiration date of the contract is extended beyond the expiration date existing on January 13, 2011; or
- b. The deliveries allowed under the contract are increased beyond the maximum deliveries identified in the contract as the contract read on January 13, 2011.

If either of these changes is made to the contract, all deliveries after the effective date of the contract amendment that are incremental to the deliveries in the original contract will be treated according to the then-applicable classification of transactions for renewable energy credits only and bundled transactions.

6. The temporary limit on the use by electric service providers of tradable renewable energy credits for compliance with the California renewables portfolio standard shall terminate December 31, 2013.

7. The Director of Energy Division shall ensure that the practices and protocols developed by Commission staff for administration of the California renewables portfolio standard program apply equally to electric service providers and the three large investor-owned utilities, so far as necessary and feasible.

8. Rulemaking 08-08-009 remains open.

This order is effective today.

Dated _____, at San Francisco, California.