

Decision 09-11-014 November 20, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Develop Additional Methods to Implement the California Renewables Portfolio Standard Program.

Rulemaking 06-02-012
(Filed February 16, 2006)

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.

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

**DECISION GRANTING IN PART PETITION FOR MODIFICATION OF
CALCULATION OF ANNUAL PROCUREMENT TARGET
FOR RPS COMPLIANCE**

Summary

The Joint Petitioners' Petition for Modification of Commission Decisions 06-10-019 and 06-10-050 is granted in part. The calculation of the annual procurement target (APT) of renewable energy procurement for compliance with the California renewables portfolio standard (RPS) is changed prospectively. For 2010 and any later years in which the APT for RPS compliance is 20% of retail sales, the calculation will be based on the current year's retail sales, rather than the prior year's retail sales as provided in Decision (D.) 06-10-019 and D.06-10-050.

Because D.07-07-025 modified the calculations for APT set out in D.06-10-019, on our own motion we make conforming modifications to D.07-07-025, but do not modify D.06-10-019. We also make conforming modifications to D.08-05-029 on our own motion.

Procedural Background

The Joint Petitioners' Petition for Modification of Commission Decisions 06-10-019 and 06-10-050 (Petition) was filed May 1, 2009.¹ Timely responses to the petition, in accordance with Rule 16.4(f) of the Commission's Rules of Practice and Procedure,² were filed by California Manufacturers and Technology Association; Pilot Power Group, Inc.; Pacific Gas and Electric Company (PG&E); Green Power Institute and Union of Concerned Scientists (jointly) (GPI); Southern California Edison Company (SCE); Energy Users Forum; 3 Phases Renewables, LLC and Commerce Energy, Inc. (jointly); and Alliance for Retail Energy Markets (AReM), California Retailers Association, Direct Access Customer Coalition (DACC), and Western Power Trading Forum (jointly). With permission granted by the Administrative Law Judge (ALJ) pursuant to Rule 16.4(g), the petitioners filed a timely reply to the responses.

D.06-10-019 was issued in Rulemaking (R.) 06-02-012, the RPS design proceeding. D.06-10-050 was issued in R.06-05-027, the RPS procurement and administration proceeding. R.08-08-009 is the successor proceeding to R.06-05-027; R.06-02-012 remains open. In accordance with the Administrative Law Judge's Ruling on Petitions for Modification (October 21, 2009), this decision

¹ The organizations filing the Petition are Constellation NewEnergy, Inc., Direct Energy, Inc., The Utility Reform Network, the Community College League of California, and the California Large Energy Consumers Association. They will be referred to collectively as "petitioners."

² The Commission's Rules of Practice and Procedure are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations. Unless otherwise indicated, all subsequent citations to rules refer to the Rules of Practice and Procedure, and all citations to sections refer to the Public Utilities Code.

will be filed in both proceedings because the Petition was filed in both proceedings.

Discussion

Timeliness of Petition

Rule 16.4(d) provides that:

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

The Petition was filed more than one year after the two decisions for which it seeks modification. The petitioners point out that other aspects of the RPS program have already been revisited and adjusted during its relatively short life. They argue that it has become apparent over the course of the RPS program that the compliance efforts of RPS-obligated load-serving entities (LSEs) are necessarily more complex than may have been understood initially. For these reasons, petitioners assert, the Petition should be viewed as part of the ongoing efforts to improve the RPS program, rather than as a belated attempt to alter a Commission decision.³ No other party suggests that the Petition should be rejected because it is not timely.

The petitioners properly point out that the administration of the RPS program may require adjustments as LSEs, other interested parties, and the

³ Petition at 10-11.

Commission gain experience with the program. The Petition identifies one of those circumstances. The petitioners have met their burden under Rule 16.4(d) to justify submission of the Petition more than one year after the effective date of the decisions that are proposed to be modified.

History of APT Calculation

Section 399.15(b) sets the parameters for the APT. It provides that:

The commission shall implement annual procurement targets for each retail seller as follows:

- (1) Each retail seller shall . . . increase its total procurement of eligible renewable energy resources by at least an additional 1 percent of retail sales per year so that 20 percent of its retail sales are procured from eligible renewable energy resources no later than December 31, 2010. A retail seller with 20 percent of retail sales procured from eligible renewable energy resources in any year shall not be required to increase its procurement of renewable energy resources in the following year.
- (2) For purposes of setting annual procurement targets, the commission shall establish an initial baseline for each retail seller based on the actual percentage of retail sales procured from eligible renewable energy resources in 2001, and to the extent applicable, adjusted going forward pursuant to Section 399.12.⁴

The Commission took the first steps to implement these procurement metrics in D.03-06-071, the first decision on the RPS program. The Commission noted that "[a]nnual procurement targets are not optional." (D.03-06-071 at 43.) The Commission emphasized that the required minimum 1% annual increase in

⁴ These requirements were set out in the initial RPS legislation, Senate Bill (SB) 1078 (Sher), Stats. 2002, ch. 516. That legislation established December 31, 2017, as the date for meeting the 20% target. SB 107 (Simitian), Stats. 2006, ch. 464, changed the target date to December 31, 2010, but made no other changes to the statutory requirements.

the proportion of RPS-eligible procurement was an important element in reaching the ultimate 20% target, because "the small annual targets are steps on the way to the larger ultimate target . . ." (D.03-06-071 at 47.)⁵

The basis of the calculation of APT was laid out in the Order Instituting Rulemaking (OIR) for R.04-04-026. The OIR explained that the APT consists of:

... two separate components: the baseline, . . . representing the amount of renewable generation a utility must retain in its portfolio to continue to satisfy its obligations under the RPS targets of previous years; and the incremental procurement target (IPT), defined as at least 1% of the previous year's total retail electrical sales, including power sold to a utility's customers from its [Department of Water Resources] DWR contracts.⁶ (P. 5.)

The IPT therefore is the year-over-year increase in RPS procurement, for which the Legislature set a minimum of 1% more than the prior year.

The Commission's first calculation of APT based on these principles was made in D.04-06-014. There, the APTs for 2004 of PG&E, SCE, and San Diego Gas & Electric Company were calculated, based on their initial baseline amounts and IPTs consisting of 1% of each utility's 2003 retail sales.

In D.06-10-019, the Commission applied the calculation of APT for the large investor-owned utilities (IOUs) to energy service providers (ESPs), whose RPS compliance obligations commence January 1, 2006.⁷ The Commission did

⁵ At the time of that decision, the 20% target was to be met in 2017.

⁶ Section 399.15(b)(3) mandates the inclusion of "all electricity sold to retail customers by the Department of Water Resources pursuant to Section 80100 of the Water Code in the calculation of retail sales by an electrical corporation."

⁷ SB 107 changed the phase-in of ESPs' RPS obligations set in SB 1078 to a uniform starting date of January 1, 2006. (§ 399.12(h)(3).)

not accept the suggestion that, for ESPs, the IPT component of APT should be calculated as 1% of their current year's sales, rather than prior year's sales as provided in D.04-04-026 and D.06-04-014. The decision, noting the importance of uniformity in RPS compliance and reporting, required ESPs to apply the same calculation methods for IPT and APT as those required for the large IOUs. (D.06-10-019 at 10.)

In D.06-10-050, the Commission gathered the many pieces of RPS reporting and compliance practice and organized them in a comprehensive methodology that applies to all RPS-obligated LSEs. The Commission reaffirmed the structure of the APT, explaining that:

The APT is . . . initially made up of a baseline amount, calculated as a percentage of retail sales procured from renewable energy. (§ 399.15.) . . . Going forward, the APT is made up of the prior year's APT plus an IPT. (P. 35.)⁸

D.06-10-050 recognized that beginning in 2010, the RPS obligations of all LSEs would become and remain 20% of retail sales, in accordance with § 399.15(b)(1).⁹ The Commission instructed RPS-obligated LSEs to calculate this

⁸ D.06-10-050 was modified with respect to the method for calculating the initial baseline amount by D.07-03-046. A similar modification was made with respect to D.06-10-019 by D.07-07-025. These modifications to the initial baseline calculation are not relevant to the discussion or outcome of this decision. However, because the revised calculation method for APT in its entirety was set forth in D.07-07-025, we now modify D.07-07-025 (Appendix B), rather than D.06-10-019.

⁹ The Commission determined that this constant 20% obligation did not excuse making up shortfalls in APT accrued in prior years. (D.06-10-050 at 32-34.)

ongoing 20% obligation for 2010 and later years in accordance with the following formula: **APT = 20% of prior year total retail sales.**¹⁰

The Commission completed its development of the fundamental rules of RPS compliance in D.08-05-029, which examined issues specific to small and multi-jurisdictional utilities. D. 08-05-029 required the methodology of D.06-10-050, as modified by D.07-03-046, to be used by the two small California utilities, Bear Valley Electric Service and Mountain Utilities. D.08-05-029 also adapted the same methodology for use by the two multi-jurisdictional utilities, PacifiCorp and Sierra Pacific Power Company, to take into account the statutory provision that only the California portion of their load is subject to California RPS requirements.¹¹

Calculation When APT is 20% of Retail Sales

The petitioners seek a limited change to the compliance metrics. They ask that the calculation of APT in 2010 and later years in which the APT is 20% of retail sales be based on current year's retail sales, rather than prior year's retail sales. The formula for APT in 2010 and later years in which APT is 20% of retail sales would thus be:

$$\text{APT} = 20\% \text{ of } \textit{current year} \text{ total retail sales.}$$

All responses except those of PG&E and SCE support granting the Petition.

The petitioners and their supporters base their arguments principally on practical considerations for ESPs and their customers. They assert that ESPs'

¹⁰ The formula is found at p. 7 of Attachment A to D.06-10-050.

¹¹ The RPS procurement obligations of multi-jurisdictional utilities are set forth in § 399.17.

contracts with their customers typically extend for a short period of time, often only one year. Thus, the argument continues, it is easier for ESPs to fairly allocate the costs of RPS compliance to their current customers if their RPS obligations are aligned with the current, rather than past, year's sales. The petitioners argue that this is particularly important if an ESP's sales have declined from one year to the next, because the ESP would be forced to "over-procure" RPS-eligible energy for compliance in the current year, based on the prior year's greater retail sales.

PG&E and SCE also focus on practical considerations, though from a different angle. They claim that using prior year's sales allows utilities to have a firmer basis for planning for RPS compliance at the beginning of the RPS compliance year, rather than waiting until the end of the year to find out what the denominator for their APT calculation should have been. They argue that the existing flexible compliance rules, including the ability to bank RPS-eligible procurement indefinitely, should take care of managing RPS compliance with respect to yearly variations in any LSE's sales. They further argue that it would not be fair to change the rules now, since that would in effect make 2009 retail sales (the current basis of 2010 APT) disappear as a part of the RPS compliance calculation. PG&E asserts that the proposed change could, in some circumstances, increase the RPS obligation of an LSE out of proportion to any increases in its annual retail sales.

GPI focuses its argument on the RPS statute. GPI asserts that the statute is most naturally read to require that APT be determined on the basis of current year's sales. GPI opines that the flexible compliance rules can then continue to be applied without changing the nature of an LSE's obligation.

The practical considerations advanced by both supporters and opponents of the Petition are not persuasive. The petitioners' position is largely based on the assumption that ESPs' ability to sign up new customers will continue to be limited by the current suspension of direct access. (D.01-06-090, implementing Water Code § 80110.) In such a situation, it is more likely that the sales of ESPs in the aggregate will decline rather than increase, though any one ESP may experience an increase in sales because it acquires a customer from another ESP. Petitioners acknowledge that the reopening of direct access could change the zero-sum situation for ESPs postulated by the Petition.¹² SB 695 (Kehoe), Stats. 2009, ch. 337, which is effective as an urgency measure as of October 11, 2009, provides for a phased resumption of direct access, within certain limits to be determined by the Commission. Thus, the situation of ESPs may be about to change.

The utilities' position is largely based on a contrary assumption that their sales will remain stable or increase. With the limited resumption of direct access, that assumption may not be true in every year. More importantly, as has become painfully obvious in the past year, changes in the larger economic situation may occur which could cause unexpected decreases in utilities' retail sales.

PG&E and SCE correctly point out that planning for RPS procurement is somewhat simpler if APT is based on prior year's retail sales, since that figure is known early in the current year. While true, this is not crucial to RPS compliance. The flexible compliance rules are intended to cover, among other things, situations in which the difference between an LSE's actual retail sales and

¹² Reply of Joint Petitioners to Responses on the Petition for Modification of Commission Decisions 06-10-019 and 06-10-050 (June 10, 2009) (Reply) at 8 n.14.

its projected retail sales is large enough to affect meeting the APT. It is also true, as the utilities assert, that compliance statistics for 2009 and prior years will not be strictly comparable to those for 2010 and subsequent years where APT is 20% of retail sales. This does not affect any LSE's RPS reporting obligation, which is set out in Commission decisions and made operational through the RPS compliance spreadsheet. It merely requires noting, in any context where it is relevant, that the calculation basis of the RPS procurement percentages may be different prior to 2010, and in 2010 and later years.

These competing arguments based on the practical impact of the calculation do not in themselves justify changing the APT calculation method. GPI's argument based on the language of the RPS statute, however, provides a reasoned basis for revising the calculation for 2010 and any later years in which the APT is 20% of retail sales.

Section 399.15(b)(1) provides that an LSE must increase its RPS-eligible procurement "so that 20 percent of its retail sales are procured from eligible renewable energy resources no later than December 31, 2010." Since the deadline is the last day of 2010, measuring compliance with it requires simply a calculation of the proportion of RPS-eligible energy to total retail sales in 2010. The formula set forth in D.06-10-050 (APT = 20% of prior year total retail sales) does not capture the necessity for RPS compliance in 2010 to be measured as a 2010-based quantity.

The RPS statute also provides that "[a] retail seller with 20 percent of retail sales procured from eligible renewable energy resources in any year shall not be required to increase its procurement of renewable energy resources in the following year." (§ 399.15(b)(1).) This provision effectively makes the APT 20% for 2010 and all later years to which this statutory provision may apply. For

those years, the target is the same from year to year. The requirement of incremental increases toward the target drops out, since the 20% target itself must be met in each year, subject to the flexible compliance rules. (D.08-02-008 at 11-12.)¹³ It therefore makes sense, and is more consistent with the 20% compliance target, to shift the calculation of APT so that it is based on retail sales in the current year for each year in which the target is a fixed 20% of retail sales.¹⁴

Comments on Proposed Decision

The proposed decision (PD) of ALJ Anne E. Simon in this matter was mailed to the parties in R.06-02-012 and R.08-08-009 in accordance with Section 311 of the Public Utilities Code. Comments are allowed pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, and in accordance with the ALJ's October 21, 2009 ruling.

¹³ In D.08-02-008, the Commission adopted SCE's proposal that, for 2010 and later years, the IPT calculation should be abandoned, and a new calculation used for purposes of applying the Commission's flexible compliance rules. D.08-02-008 provides that, for purposes of applying the flexible compliance rules, in 2010 and later years, an LSE may carry forward a deficit up to 0.25% of its prior year retail sales without explanation. (D.08-02-008 at 12; Appendix D at 1.) Our decision today does not change either this metric for flexible compliance in 2010 and later years or the method for calculating it.

¹⁴ GPI makes the additional argument that the change to using the current year's retail sales as the denominator for the APT calculation should be applied to any later year, whether the RPS procurement target remains at 20% or changes. Comments of the Green Power Institute and the Union of Concerned Scientists on the Joint Petitioners' Petition for Modification of Commission Decisions 06-10-019 and 06-10-050 at 3. The petitioners adopt this position in their Reply. (Reply at 9-10.) We do not. Any change to the ongoing 20% target is likely to be accompanied by changes to compliance metrics, target dates, and flexible compliance parameters. We see no reason to prejudge these elements of a potentially expanded RPS program now.

Comments were filed on November 10, 2009 by AReM; DACC; petitioners and GPI (jointly; collectively, Joint Commenting Parties); PG&E; and SCE. Reply comments were filed on November 16, 2009 by Joint Commenting Parties. All commenters other than PG&E and SCE support the PD. PG&E and SCE each reiterate their opposition to granting the petition. After considering the comments and reply comments, we conclude that no changes to the PD are required.

Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Anne E. Simon and Burton W. Mattson are the assigned ALJs in these proceedings.

Findings of Fact

1. The method of calculating APT set out in D.06-10-050 is consistent with statutory requirements and efficient RPS administration for all years of RPS obligation prior to 2010.
2. The method of calculating APT set out in D.06-10-050 does not provide appropriate guidance for calculating APT in 2010 and any later years in which APT is 20% of retail sales.
3. The APT calculation method set out in D.06-10-050 can be readily revised to provide appropriate guidance for calculating APT in 2010 and any later years in which APT is 20% of retail sales.
4. The APT calculation method for multi-jurisdictional utilities set out in D.08-05-029 can be readily revised to provide appropriate guidance for calculating APT in 2010 and any later years in which APT is 20% of the California portion of their retail sales.

Conclusions of Law

1. Solely for purposes of considering the two Petitions for Modification, one decision on the Petitions should be issued, to be docketed in both R.06-02-012 and R.08-08-009 (the successor to R.06-05-027).
2. The calculation of the APT for RPS compliance should be revised for the year 2010 and any subsequent years in which APT is required to be 20% of an LSE's retail sales.
3. For the year 2010 and any subsequent years in which APT is required to be 20% of an LSE's retail sales, APT should be calculated based on the LSE's current year's retail sales; e.g., APT for 2010 would be 20% of 2010 retail sales, and APT for 2011 would be 20% of 2011 retail sales.
4. D.06-10-050, D.07-07-025, and D.08-05-029 should be modified to reflect the revised APT calculation for the year 2010 and any subsequent years in which APT is required to be 20% of an LSE's retail sales.
5. D.06-10-019 does not require modification because the relevant modification to the APT calculation should be made in D.07-07-025.
6. The Director of Energy Division should revise the RPS reporting protocols and documents to incorporate the revised APT calculation.

O R D E R

IT IS ORDERED that:

1. The Joint Petitioners' Petition for Modification of Commission Decisions 06-10-019 and 06-10-050, filed May 1, 2009, is granted in part.
2. Decision 06-10-050 shall be modified as follows:
 - a. The second paragraph of Section 6.5 shall be deleted and replaced with:

The RPS legislation requires that we establish an APT, and that it grow by at least 1% per year. The APT is a target. It is initially

made up of a baseline amount calculated as a percentage of retail sale procured from renewable energy. (§ 399.15.) This is the only time actual procured energy is used in relationship to the targets. Going forward, for all years prior to 2010 (when the target becomes 20% of retail sales), the APT is made up of the prior year's APT plus an IPT. The required minimum annual growth reflected in the IPT is relative to actual retail sales per year. (§ 399.15(b)(1).) Neither the APT nor IPT are related to actual renewable procurement (other than once, when creating the baseline). Rather, each is a target related to retail sales. Actual procurement is measured against targets to assess progress. Actual procurement does not reset the targets.

b. The third line of page 7 of Attachment A shall be modified by deleting the formula "APT = 20% of prior year total retail sales," and replacing it with the formula, "APT = 20% of current year total retail sales."

3. Decision 07-07-025 shall be modified by deleting Appendix B and replacing it with a new Appendix B. The new Appendix B of Decision 07-07-025 is set out in Attachment 1 to this decision.

4. Decision 08-05-029 shall be modified as follows:

- a. The first sentence on page 10 shall be deleted and replaced with:
"For each succeeding year until 2010, when the goal is 20%, as set out in D.06-10-050, the APT formula is:

APT = Prior year's APT + 1% of prior year's retail sales.

For 2010 and any later years in which the APT is 20% of retail sales, the APT formula is:

APT = 20% of current year's retail sales."

- b. The last two lines of section 3.2.1 shall be deleted and replaced with:

APT in succeeding years prior to 2010 = Prior year's APT + 1% of prior year's California retail sales.

APT in 2010 and any later years in which the APT is 20% of retail sales = 20% of current year's retail sales.

5. The Director of Energy Division is authorized to revise the California renewables portfolio standard reporting protocols and documents to incorporate the revised annual procurement target calculation.

This order is effective today.

Dated November 20, 2009, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners

**ATTACHMENT 1
(Modified Appendix B to D.07-07-025)**

APPENDIX B

**SAMPLE ESP / CCA BASELINE AND ANNUAL PROCUREMENT TARGET
(APT) CALCULATIONS**

1. For years prior to 2010:

#	MWh	2001	2005	2006	2007	2008	Calculation
A	Total California Retail Sales	18,000	20,000	21,000	20,500	23,000	
B	Total RPS-Eligible Procurement	450	N/A	N/A	N/A	N/A	As verified by CEC
C	2001 RPS percentage	2.5%	N/A	N/A	N/A	N/A	Line B / Line A
D	2005 Baseline Procurement Amount ¹	N/A	500	N/A	N/A	N/A	2001 renewable percentage * 2005 total retail sales
E	Incremental Procurement Target (IPT)	N/A	N/A	200	210	205	1% * Prior Year Line A
F	Annual Procurement Target (APT)	N/A	N/A	700	910	1115	Line E + Prior Year Line F ²

¹ For any ESP or CCA not currently operating in California, the baseline procurement amount will be calculated as: total RPS-eligible procurement in first calendar year of operation.

² Because there is no APT for ESPs in 2005, the APT in 2006 is calculated by adding the 2006 IPT to the 2005 baseline procurement amount.

2. For 2010 and any later years in which APT is 20% of retail sales:

APT = 20% of current year retail sales.

(END OF APPENDIX B)

(END OF ATTACHMENT 1)