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Decision 07-05-028 May 3, 2007

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)

(See Appendix B for a list of appearances.)

INTERIM OPINION ON IMPLEMENTATION OF PUBLIC UTILITIES CODE SECTION 399.14(b)

Title **Page**

INTERIM OPINION ON IMPLEMENTATION OF PUBLIC UTILITIES CODE SECTION 399.14(b) 1
1. Summary 1
2. Procedural Background 1
3. Discussion 4
3.1. Background on RPS Procurement Contracts 4
3.2. SB 107 6
3.3. What is being Measured by the Minimum Quantity? 8
3.4. What is the Metric for the Minimum Quantity? 9
4. What Should the Minimum Quantity be? 12
4.1. Can the Minimum Quantity be Zero? 12
4.2. What Level Other than Zero Should the Minimum Quantity be? 14
5. Duration 21
6. Enforcement 21
7. Should There be a "Small LSEs" Exception? 22
8. Summary of § 399.14(b)(2) Compliance Process 23
9. Comments on Proposed Decision 24
10. Assignment of Proceeding 29
Findings of Fact 29
Conclusions of Law 31
INTERIM ORDER 33

APPENDIX A – Example of § 399.14(b) Compliance
APPENDIX B – List of Appearances

INTERIM OPINION ON IMPLEMENTATION OF PUBLIC UTILITIES CODE SECTION 399.14(b)

1. Summary

In this decision, we implement the requirements of new Pub. Util. Code § 399.14(b), regarding the use of contracts of less than 10 years' duration for the procurement of electricity from eligible renewable resources under the renewables portfolio standard (RPS) program. We determine that, beginning in 2007, RPS-obligated load-serving entities (LSEs) may use energy deliveries from contracts of less than 10 years' duration with eligible renewable energy resources that commenced commercial operation prior to January 1, 2005 for RPS compliance, on one condition. That condition is that each year they also sign 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 their prior year's retail sales.

2. Procedural Background

In 2006, the Legislature enacted Senate Bill (SB) 107 (Simitian), Stats. 2006, ch. 464, which made a number of clarifications and changes to the RPS program established by SB 1078 (Sher), Stats. 202, ch. 516, and implemented through a series of our decisions in Rulemaking (R.) 01-10-024, R.04-04-026, R.06-05-027, and this proceeding.

SB 107 was enacted during the period for comments on the proposed decision (PD) that became Decision (D.) 06-10-019. Several parties suggested that, since SB 107 would make a number of changes to the legislative framework for the RPS program if signed into law by the Governor, comments on the PD

should also include comments on the potential impact of SB 107. The Administrative Law Judge (ALJ) therefore granted an extension of time for filing comments, including authorization for the parties to address not only the usual topics within the scope of Rule 14.3 of the Commission's Rules of Practice and Procedure,[1] but also the potential impact of SB 107 on the topics addressed in the PD.

After considering the comments, we concluded in D.06-10-019 that the record in this proceeding at the time of the comments did not support taking steps to implement any of SB 107's elements without fuller consideration. We identified a number of tasks related to SB 107 and stated our intention to pursue their implementation during 2007.

At the prehearing conference (PHC) held November 2, 2006, in this proceeding, the parties engaged in a wide-ranging discussion of implementation of SB 107, which would become effective January 1, 2007. As part of that discussion, new § 399.14(b)[2] was considered. Parties agreed that the record

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[1] Unless otherwise indicated, all subsequent citations to rules refer to the Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations, and citations to sections refer to the Public Utilities Code.

[2] 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, subject to the following conditions:
>
> (1) No supplemental energy payments shall be awarded for a contract of less than 10 years' duration. The ineligibility of contracts of less than 10 years' duration for supplemental energy payments pursuant to this paragraph does not constitute an insufficiency in supplemental energy payments pursuant to paragraph (4) or (5) of subdivision (b) of Section 399.15.

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developed in the evidentiary hearing on RPS procurement using contracts of less than 10 years, held in May 2006, was clearly relevant, and should be used, as appropriate, in developing the implementation of § 399.14(b).

Some parties, noting that the requirements of this section would impact the 2007 procurement plans and solicitations of the large utilities, sought expedited consideration of implementing new § 399.14(b). On balance, the ALJ determined that a prompt, though not expedited, approach to implementation of § 399.14(b) was appropriate. The ALJ 's Ruling Regarding Filing of Comments on Minimum RPS Procurement from Long-Term Contracts and New Facilities (November 8, 2006) (Comment Ruling) set out a number of questions for the parties to consider.[3] Comments were filed December 1, 2006.[4] Reply comments

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(2) 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.

[3] Parties were asked to consider and address these issues:

1. What is the time frame of the established minimums? Should they be set on an annual basis? Once for the duration of the RPS program? For some other interval?
2. Should minimums be established for each retail seller individually? For each class of retail seller? For some other grouping of RPS-obligated retail sellers?
3. Should minimums be established with respect to the RPS annual procurement target? With respect to the incremental procurement target? As a percentage of actual RPS-eligible procurement? As a percentage of total retail sales? On some other quantitative basis?
4. Should separate minimums be established for: (1) procurement through contracts of at least 10 years' duration and (2) procurement from facilities commencing commercial operations on or after January 1, 2005? Should there be one overall minimum that can be met through either form of procurement?
5. What should the minimum quantities be?

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were filed December 15, 2006.[5] These filings were incorporated in the schedule set in the Assigned Commissioner's Ruling and Scoping Memo (December 29, 2006). The issues related to § 399.14(b) were submitted December 29, 2006.

3. Discussion

3.1. Background on RPS Procurement Contracts

The duration of RPS procurement contracts was first addressed in SB 1078. Pub. Util. Code § 399.14(a)(4) provides: "In soliciting and procuring eligible renewable energy resources, each electrical corporation shall offer contracts of no less than 10 years in duration, unless the commission approves of a contract of shorter duration."

We first considered this provision in D.03-06-071, when we set the initial parameters of the RPS solicitation process for the three large electric utilities.[6]

> Consistent with the SDG&E/TURN proposal, the utilities should seek bids for 10, 15, and 20-year products. The proposals of SCE

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6. Any other topics the parties believe to be relevant.

[4] Comments were filed by Aglet Consumer Alliance (Aglet), Alliance for Retail Energy Markets (AReM), Central California Power (CCP), City and County of San Francisco (CCSF), Division of Ratepayer Advocates (DRA), Green Power Institute (GPI), Mountain Utilities (MU), Pacific Gas and Electric Company (PG&E), Pilot Power Group (Pilot Power), Southern California Edison Company (SCE), San Diego Gas & Electric Company (SDG&E), Sempra Energy Solutions (SES), and The Utility Reform Network (TURN). With permission of the ALJ, PacifiCorp and Sierra Pacific Power filed late comments.

[5] Reply comments were filed by Aglet, AReM, CCSF, MU, PG&E, Pilot Power, SCE, SDG&E, SES, TURN, and Union of Concerned Scientists (UCS).

[6] PG&E, SDG&E and SCE.

> and PG&E to seek shorter-term (five-year and one-year) products do not appear likely to promote development of new renewable resources. In addition, § 399.14(a)(4) states that: 'In soliciting and procuring eligible renewable energy resources, each electrical corporation shall offer contracts of no less than 10 years in duration, unless the commission approves a contract of shorter duration.' We do not see any good reason to permit the utilities to offer contracts of less than 10 years in duration, so we similarly see no reason to deviate from the basic language of the statute. (D.03-06-071, p. 58.)

In a footnote to that discussion, we stated that " [t]he SDG&E/TURN proposal does allow for shorter-term contracts to be bid by developers. Any such shorter-term contracts require express Commission approval." (*Id.*) We thus made explicit the dual nature of the § 399.14(a)(4) bidding process: utilities must offer long-term contracts in solicitations, but bidders could counteroffer short-term contracts, which could be accepted subject to our approval.[7] This understanding was incorporated in D.04-06-014, our decision on standard terms and conditions for RPS contracts.

Specific design and implementation questions remained, however, in the application of these requirements to RPS-obligated LSEs that are not utilities, in particular energy service providers (ESPs) and community choice aggregators (CCAs).[8] In this proceeding, an evidentiary hearing was held in May 2006, on

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[7] Throughout this decision, unless a particular context requires greater specificity, we will use "contracts of at least 10 years in duration" and "long-term contracts" interchangeably. We will also use "contracts of less than 10 years in duration" and "short-term contracts" interchangeably.

[8] With the enactment of Assembly Bill (AB) 200 (Leslie), Stats. 2005, ch. 50, codified as § 399.17, the application of RPS requirements to multi-jurisdictional utilities serving fewer than 60,000 customers in California (currently, PacifiCorp and Sierra Pacific) was

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the issues related to the use of contracts of less than 10 years' duration for RPS procurement by all RPS-obligated LSEs. Based on that record, we concluded in D.06-10-019 that (subject to any subsequent adjustments required to comply with SB 107), RPS-obligated LSEs could use procurement contracts with eligible renewable resources for periods as short as one month[9] for RPS compliance. Such short contracts were allowed, so long as utilities continued to comply with the requirements of § 399.14(a)(4) and D.03-06-071 regarding solicitations for long-term contracts and Commission approval of counter-offered short-term contracts.

3.2. SB 107

Meanwhile, the Legislature was reviewing the RPS program and developing SB 107. This legislation affects many aspects of the RPS program. In this order, we focus on the impact of the legislation on RPS procurement contracting practices.

SB 107 made no changes to the utilities' existing obligations to offer long-term contracts in solicitations.[10]

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altered to grant those utilities increased flexibility in using out-of-state resources for RPS requirements. Section 399.17 did not alter the underlying RPS program requirements for utilities. To the extent that adjustments to implementation of existing requirements, including those of § 399.14(b), are needed in the context of § 399.17, we will address them in our separate consideration of § 399.17.

[9] The California Energy Commission (CEC), charged with verifying RPS compliance, requires this minimum contract length for verification purposes.

[10] Section 399.14(a)(4) continues to provide:

> In soliciting and procuring eligible renewable energy resources. each electrical corporation shall offer contracts of no less than 10 years in duration, unless the commission approves of a contract of shorter duration.

New § 399.14(b), however, both made explicit our ability to allow short-term contracts to fulfill RPS obligations, and put conditions on the use of such contracts. The first condition, found in § 399.14(b)(1), makes short-term contracts ineligible for supplemental energy payments (SEPs) administered by the CEC. (See § 399.13(e).) No action is required here to implement that requirement.

It is the second condition on the use of short-term contracts for RPS compliance, found in § 399.14(b)(2), with which we are principally concerned. This condition requires us to establish "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."[11] We view this condition as authorizing us to set up a "gatekeeping" function. In order for a retail seller to count the energy from "a contract of less than 10 years' duration with an eligible renewable energy resource" toward its RPS obligations, it must "go through the gate." The gate is the satisfaction of Commission-established requirements for minimum quantities of long-term contracts (with new or existing facilities) and/or short-term contracts with new facilities.[12]

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[11] Unless the context requires otherwise, we will refer to RPS-eligible generation facilities that began operation on or after January 1, 2005 as "new facilities." We will refer to RPS-eligible generation facilities that began operation before January 1, 2005 as "existing facilities." In the event that an existing facility undertakes repowering, its status will be determined by the CEC in accordance with its RPS Eligibility Guidebook found at http://www.energy.ca.gov/2007publications/CEC-300-2007-006/CEC-300-2007-006-CMF.PDF.

[12] Unless the context requires otherwise, we will refer to this requirement generally as the "minimum quantity."

3.3. What is being Measured by the Minimum Quantity?

SCE, supported by PG&E, proposes that we measure contracted-for energy, not delivered energy. We agree. Section 399.14(b) creates incentives for entering into particular types of procurement contracts. The most straightforward way to implement those incentives is at the level of contracts signed. Each calendar year that the minimum quantity requirement applies, the LSE must, in its annual report, state its prior year's retail sales and calculate 0.25% of that amount. The RPS procurement contracts signed by each LSE, including energy deliveries in each contract, will also be reported in the LSE's annual March compliance report, and categorized as:

a. long-term, with an existing facility or a new facility,

b. short-term with a new facility, or

c. short-term with an existing facility.

Those LSEs that submit their RPS procurement contracts for our approval, whether by advice letter or application, must also indicate with the advice letter or application in which category the contract being submitted falls. All LSEs must indicate in their annual compliance reports the contracted-for energy quantities in each category for the reporting year (the prior calendar year). The Director of Energy Division may require LSEs that do not submit their RPS contracts for our approval to submit copies of contracts to Energy Division for verification of the terms, status, and categorization of the contract. On the basis of the annual reports and supplemental documentation submitted by each LSE, the Director of Energy Division will determine whether each LSE has complied with the "gatekeeping" requirement for the calendar year being reported.

We remind parties that this approach to implementation of § 399.14(b)(2) does not change any other RPS requirements. Actual delivered energy remains the method for meeting RPS obligations, such as the annual procurement target (APT). For the limited purpose of the minimum quantity requirement only, however, contracted-for energy will be measured.

3.4. What is the Metric for the Minimum Quantity?

We seek a metric that can apply to all LSEs in the same way, that is not complex to administer, that fits in with existing reporting requirements, and that allows a straightforward determination of compliance.

The parties agree that we should apply a single minimum quantity, encompassing both long-term contracts with a new facility or an existing facility, and short-term contracts with new facilities, rather than separate minimums for each type of contract. We agree. This method is consistent with the statute's language that the minimum quantity is to be procured *either* through long-term contracts *or* through short-term contracts with new facilities. There is no reason to add complexity and difficulty by requiring, in effect, two minimums, when the Legislature made no such requirement.

There are many possible ways to express the minimum quantity. The ALJ's Comment Ruling posed four possibilities for parties' consideration of the basis of the minimum quantity.[13] Most parties commenting on this issue

[13] "Should minimums be established with respect to the RPS annual procurement target? With respect to the incremental procurement target? As a percentage of actual RPS-eligible procurement? As a percentage of total retail sales? On some other quantitative basis?" (ALJ Comment Ruling, p. 2.)

proposed that the minimum quantity be a percentage of the APT for each LSE, though their proposals for the percentage varied.[14]

The use of the APT as the basis for the minimum quantity is intuitively appealing, since APT is the LSE's total RPS obligation for each calendar year. On reflection, however, the use of APT is more problematic than it first appears. The APT is easy to state, as noted in our recent decision on reporting and compliance, D.06-10-050: "Current year APT = prior year APT + current year IPT."[15] The APT each year is a fixed number, but in satisfying the APT, an LSE may employ various flexible compliance options. The flexible compliance options that may apply to the APT are potentially complex, including deferral without explanation of up to 25% of the incremental procurement target (IPT) amount and the use of "earmarking," allowing an LSE to "use signed contracts with future deliveries as a temporary reason for noncompliance with the current year's APT. . . "[16] AReM suggests that analogous flexible compliance requirements would need to be applied to the minimum quantity.

While we could use the APT itself as the metric without the flexible compliance elements, the flexible compliance rules potentially present some complexity. Given the simple function of the minimum quantity, it does not seem sensible to pick a basis for the minimum quantity metric that is subject to potentially complex regulatory and compliance interpretations.

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[14] CCSF and SES suggest that the minimum quantity be a subset of the overall 20% renewable procurement target.

[15] D.06-10-050, Attachment A, p. 6.

[16] D.06-10-050, Attachment A, p. 10.

Nor is it necessary to do so. The minimum quantity, as noted above, performs a gatekeeping function: providing an incentive for all LSEs to contribute to new renewable generation, while allowing the use of short-term contracts with existing facilities once the minimum quantity has been met. This relatively simple function can be measured with a simple quantity—a proportion of each LSE's prior year's retail sales. Prior year's retail sales are transparent, readily accessible to each LSE, and reported as part of the standard RPS reporting format. This quantity therefore provides a sound and easy to use basis for the minimum quantity.[17]

Use of prior year's retail sales also simplifies the integration of new ESPs or CCAs into the system, consistent with the plan for ESPs and CCAs laid out in D.06-10-019. A new ESP or CCA (or new utility, for that matter) would not be subject to the minimum quantity requirement in its first year of operation. Rather, after the first year in which it had retail sales, that figure would be used as the basis for the LSE's obligation in its second calendar year of operation. This would then put the newer LSE on a par with other LSEs that had previously been subject to the minimum quantity obligation.[18]

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[17] The prior year's retail sales also forms the basis for the IPT, which is 1% of prior year's retail sales. The minimum quantity metric is not, however, part of the IPT or related to it. The use of prior year's retail sales is independent in the two measures.

[18] This approach also resolves CCSF's concern about possible "legacy" procurement by IOUs that would be passed on to CCAs: only the CCA's own retail sales would be used in the calculation of the minimum quantity obligation for each year.

4. What Should the Minimum Quantity be?

4.1. Can the Minimum Quantity be Zero?

Parties make proposals for the minimum quantity that vary widely, from zero[19] to up to 80% of APT in 2010.[20] In support of their "zero" position, AReM, CCSF, and GPI argue, based in part on the record from the evidentiary hearing in May 2006 and in part on other analysis, that setting a requirement greater than zero will provide no additional incentive for RPS procurement through long-term contracts or short-term contracts with new facilities. They assert that it is clear that there is not enough existing renewable capacity in California to meet RPS requirements, so contracting for new capacity will be required regardless of the statutory scheme. CCSF, MU, and Pilot Power also suggest that a minimum quantity of zero is appropriate because it will be difficult for small LSEs to organize their RPS procurement to meet a requirement of long-term contracting and/or short-term contracting with specific types of facilities. [21]

TURN, by contrast, asserts that § 399.14(b) would be meaningless if the Legislature intended to have a minimum of zero. TURN bases this assertion

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[19] AReM, CCSF, GPI, MU, and Pilot Power propose a minimum quantity of zero, or a "nominal" quantity.

[20] TURN proposes an obligation that escalates each year from 20% of APT in 2007 to 80% of APT in 2010.

[21] Pilot Power also argues that we do not have jurisdiction over the contracting practices of ESPs. We reject this argument as plainly contrary to the language of § 399.14(b), which imposes the minimum contracting requirement on "each retail seller." ESPs are retail sellers under the RPS statute. (§ 399.12(h)(3).)

largely on the drafting history of the addition of new § 399.14(b) to SB 107.[22] We disagree. We conclude that the plain language of § 399.14(b)(2), which is not brought into question by different versions of the section in the drafting of SB 107,[23] gives us the discretion to set the minimum quantity at any level that

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[22] TURN did not accompany this argument with a motion, pursuant to Rule 13.9, seeking official notice of the different versions of new § 399.14(b) in SB 107. No party objected to TURN's citation of this history, however, so we will take official notice of the different versions of new § 399.14(b). (See *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062 n.5.)

[23] There are two versions of § 399.14(b). The August 7, 2006 version read:

> (b) The commission may authorize a retail seller to enter into a contract of less than 10 years duration with an eligible renewable energy resource, subject to the following conditions:
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> > (1) No supplemental energy payments shall be awarded for a contract of less than 10 years' duration. The ineligibility of contracts of less than 10 years' duration for supplemental energy payments pursuant to this paragraph does not constitute an insufficiency in supplemental energy payments pursuant to paragraph (4) or (5) of subdivision (b) of Section 399.15.
> >
> > (2) The commission has established minimum quantities of eligible renewable energy resources to be procured by the retail seller through contracts of at least 10 years' duration.

The August 29, 2006 version was changed as follows (with new language in italics and deleted language in strike-outs):

> 399.14(b)(2) The commission has established, *for each retail seller*, minimum quantities of eligible renewable energy resources to be procured ~~by the retail seller through contracts of at least 10 years' duration.~~ e*ither through contracts of at least 10 years' duration or from new facilities commencing commercial operations on or after January 1, 2005*.

reasonably contributes to the goals of the RPS program. As explained below, however, we determine that level to be greater than zero.

4.2. What Level Other than Zero Should the Minimum Quantity be?

a. General Considerations

We believe that the RPS program would benefit from a minimum quantity that is greater than zero. Proposals from parties for a level greater than zero range from, at the far extreme, CCP's suggestion that 90% of all RPS contracts be long term, to TURN's escalating percentage of APT, to the 25% of APT flat rate proposed by PG&E, and SDG&E's proposed flat rate of 10% of APT.[24]

We find that these proposals for large, and even increasing, fractions of APT as the minimum quantity would exceed the mandate of § 399.14(b)(2) by essentially creating a new RPS procurement element. Instead of implementing conditions to integrate the use of short-term contracts with existing facilities with the use of long-term contracts and contracts with new facilities, these proposals would turn § 399.14(b)(2) into a new requirement for extensive use of long-term contracts and contracts with new facilities.

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[24] Aglet and DRA each propose that a workshop be held to set the minimum quantity. DRA advances no specific proposal, while Aglet proposes basing the minimum quantity on determining the minimum percentage of long-term contracts by comparing volatilities and the correlation between long-term and short-term products.

We recognize that the parties have made disparate proposals, but we believe that a workshop is not necessary to resolve the issues raised by the implementation of § 399.14(b)(2). Consideration of the rationales advanced by the parties, in conjunction with analysis of the legislative language, leads us to conclude that our discretion in implementing the legislative policy allows us to make the necessary findings and conclusions based on the current record.

The large utilities are already using long-term contracts, often with new facilities, for the majority of their new RPS procurement. We see no need to use § 399.14(b)(2) to add requirements related to long-term contracts and/or new facilities to their current contracting practices, which—as noted by many parties—are largely dictated by the need to make long-term contractual arrangements that will support the construction of new renewable generation that will be delivered into California. We believe that a more modest minimum contracting requirement will prevent the large utilities from backsliding in their RPS procurement from new facilities, while not interfering with the implementation of the procurement plans we recently conditionally approved in D.07-02-011.

For other LSEs, we seek a balance between encouraging their contribution to the construction of new renewable generation and facilitating their progress toward overall RPS procurement goals. We agree with the majority of parties that propose that there be one, uniform minimum quantity requirement that applies to all RPS-obligated LSEs. This requirement will be more or less significant in an LSE's planning, depending on its size and its procurement policies, but a uniform requirement will be easy to administer and will allow each LSE to contribute to the development of new renewable generation in proportion to its size or procurement capacity.

These goals can reasonably be accomplished by requiring that, in each calendar year for which the requirement applies, each RPS-obligated LSE—utility and non-utility—must sign long-term contracts and/or contracts with new facilities for energy deliveries equivalent to 0.25% of its prior year's retail sales, in order to count the energy deliveries from *any* short-term contracts with existing facilities signed in that year toward its RPS obligations in *any* year.

We set the amount at 0.25% of prior year's sales based on several considerations. Any requirement at 1% of APT or above would be equal to or greater than the LSE's IPT. That would essentially require 100%, or even more, of incremental procurement growth to be from long-term contracts or contracts with new facilities. As explained above, that would in effect create a new RPS program element, which we believe is both unnecessary and not consistent with the language of § 399.14(b)(2). It could also, as a practical matter, be prohibitively difficult for LSEs that are not large utilities. Considering the range of possibilities offered by the parties' comments, we believe that 0.25% of prior year's sales (which is equivalent to 25% of the expected annual RPS program growth) is a reasonable and sufficient incentive for use of long-term contracts and short-term contracts with new facilities, without being excessive.[25]

b. Implementation

If an LSE fails to meet the 0.25% of prior year's retail sales gatekeeping requirement in a calendar year, the energy deliveries from the long-term contracts and short-term contracts with new facilities that it does sign will count toward the LSE's RPS obligations. Only the energy deliveries from the short-term contracts with existing facilities will be barred from use for RPS compliance, though the LSE of course may sell that energy to its customers even though it will not count toward its RPS obligations.

If the LSE exceeds the 0.25% requirement for a calendar year, it may carry forward (or "bank") the "excess" contracted-for energy and use it to meet the

[25] We reiterate, as explained above, that although this minimum quantity is numerically equivalent to 25% of IPT, it is a separate measure that is not related to or dependent on IPT or APT.

0.25% requirement in later years. This mechanism will allow smaller LSEs to enter into larger contracts, whether long-term or short-term with new facilities, to meet their § 399.14(b)(2) obligations. Such contracts may be easier to procure, as well as more efficient, than annual procurement of smaller contracts. Allowing banking will also encourage smaller LSEs to enter into long-term contracts and/or short-term contracts with new facilities sooner rather than later, since they will be able to capture full credit under § 399.14(b)(2) for the contracted energy.

In order to use the banking mechanism, an LSE must include in its annual report the amount of contracted-for energy, if any, from long-term contracts or short-term contracts with new facilities that it would like to carry forward. It also must indicate whether it is using any credit toward its § 399.14(b)(2) obligation carried forward from a prior year. An LSE may not, however, erase a failure to meet the 0.25% requirement in a prior year by applying a later year's contracted-for energy in excess of the 0.25% requirement. The banking mechanism is one-way, forward, only.[26]

Thus, if an LSE fails to meet the gatekeeping requirements in 2007, it may not count its short-term contracts with existing facilities for RPS compliance, but it will begin 2008 with a clean slate. If it exceeds the 0.25% requirement in 2008, it will be able to count its short-term contracts with existing facilities signed in 2008 for all RPS compliance purposes, and may bank any energy contracted for

[26] Carrying forward credit for compliance with § 399.14(b)(2) is independent of, and has no impact on, the existing requirements and flexible compliance mechanisms for meeting an LSE's APT obligations with delivered energy.

(either long-term contracts or short-term contracts with new facilities) in excess of the 0.25% for future years.

This requirement will ensure a modest but real annual contribution to new renewable generation. A simple example, using ESPs, will illustrate this point. In 2005, ESPs as a group had statewide retail sales of approximately 20,000,000 megawatt hours (MWh).[27] One quarter of 1% of that total is approximately 50,000 MWh. If, for illustrative purposes, all ESPs statewide met the minimum quantity requirement through purchases of wind energy, at a 30% capacity factor, approximately 19 megawatts (MW) of new wind capacity would be required.[28] In the past, utilities have signed RPS wind contracts for smaller total capacity; for example, PG&E signed an 18 MW contract with the Diablo Winds facility. (See Resolution E-3900, November 19, 2004.) Thus, the potential contribution of ESPs statewide would be equivalent to or greater than some RPS procurement contracts of large utilities. We note that this contribution could be made through a number of contracts signed by individual ESPs around the state. It could also be made through contracts obtained by a procurement entity, as authorized by § 399.14(f).

TURN, supported by AReM, proposes that we allow "trading" of "excess" contracting for long-term contracts and/or contracts with new facilities among LSEs of the same type (*e.g.*, CCAs, ESPs). Although not fully developed, this

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[27] This information is derived from the responses of ESPs to the ALJ's Ruling Requiring Submission of Information for Determination of Baselines and Procurement Targets (November 13, 2006).

[28] The use of wind is illustrative only. An LSE may meet its obligations with contracts with any RPS-eligible generation certified by the CEC.

suggestion on its face is substantially too complex for the limited purposes served by § 399.14(b)(2). The statute itself authorizes us to set contracting requirements for each RPS retail seller. It does not suggest that those requirements could be met by transfer of credit for one LSE's contracting to another LSE.

Nor would such a system advance the purposes of the statute. If, for example, LSE "A" reports that it has sold credit for 10 "excess" gigawatt hours (GWh) of long-term contracts to LSE "B" in 2007, what would that mean? Has LSE "A" sold the rights to receive 10 GWh of delivered energy? Or has LSE "A" simply sold the right to *claim* the signing of long-term contracts for 10 GWh of energy? If the former, extensive monitoring would be required to verify the transaction, since the energy could be delivered several years after the year the contract is signed. If the latter, it could create an incentive for LSEs to enter into short-term contracts with existing facilities and hope that they would be able to buy credit for a portion of another LSE's long-term contracts or contracts with new facilities before the end of the calendar year. This would distort the value of such contracts, and could in fact be contrary to the purpose of § 399.14(b)(2), by leading to the transfer of funds from "long-term contract poor" to "long-term contract rich" LSEs without any underlying increase in new renewable generation for California.

We would rather see LSEs contract directly to meet their needs under § 399.14(b)(2). Alternatively, one of the suggestions made at the May 2006 evidentiary hearing could be implemented on a broader scale than has been the case to date: a larger entity could enter into a long-term contract, and repackage the contracted-for energy into various forms that could meet the needs of RPS-obligated LSEs. For example, a 10-year contract for 50 GWh/year from a new

facility could be re-divided to yield both 10-year contracts for 5 GWh/year and three-year contracts for 10 GWh/year.

The LSE that is the purchaser of such repackaged contracts could use them to meet the requirements of § 399.14(b)(2), so long as the repackaged contract is either with a new facility or is a long-term contract. That is, the repackaged contract must itself meet the requirements of being either a long-term contract or a short-term contract with a new facility. Use of repackaged contracts is subject to proper documentation and reporting to this Commission, including verification that the underlying contract, before repackaging, was a long-term contract with an RPS-eligible facility or a short-term contract with a new RPS-eligible facility. It is also subject to verification by the CEC.[29] Generators building new facilities could also develop short-term contracts and sell them directly to RPS-obligated LSEs.

The procurement flexibility provided by both carrying forward "excess" contracted-for energy and using repackaged contracts should allow all LSEs to meet their § 399.14(b)(2) obligations, if and when they have them.[30] It can also provide an opportunity for an LSE to begin or intensify a "green" marketing

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[29] See Section 2, Methodology, in the CEC's Renewables Portfolio Standard Verification Report, found at http://energy.ca.gov/2006publications/CEC-300-2006-002/CEC-300-2006-002-CMF.PDF.

[30] An LSE that does not sign any short-term contracts with existing facilities in a particular year will not need to meet the § 399.14(b)(2) requirements that year. MU points out that it will not be signing contracts with any existing generating facilities, because MU is not connected to the grid. MU would, therefore, not have obligations under § 399.14(b)(2).

campaign, improving relations with existing customers and improving its image with potential customers.

5. Duration

SB 107 became effective January 1, 2007. Therefore, the 2007 calendar year is the first year that the minimum quantity requirement applies. Parties' proposals for the duration of the requirement tend to be either "until 2010," the formal legislative deadline for compliance with the requirement that 20% of retail sales be met with eligible renewable resources, or "until the 20% requirement is met."

We prefer to keep the requirement in place until an LSE actually attains the 20% goal. This will provide a small additional reward for any LSE that meets the goal earlier than 2010. It will also simplify enforcement with respect to those LSEs that do not attain the 20% goal by 2010. Instead of developing potentially complex adjustments and/or penalties each year, the requirement will simply remain until the LSE attains the 20% goal. If the goal is attained in 2009, the LSE no longer has an obligation under § 399.14(b)(2) from 2010 forward. If the goal is attained in 2013, the LSE's obligation under § 399.14(b)(2) will end in 2014.[31]

6. Enforcement

Parties' comments focus less on enforcement of the minimum quantity requirement than on other aspects of implementation of § 399.14(b)(2). CCSF

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[31] We use the 20% goal, since it is the current legislative goal, and will provide an incentive for LSEs to reach it before 2010. We note the goal of 33% of retail sales provided by eligible renewable resources by 2020 in Energy Action Plan II. If the overall RPS goal increases, parties may address in future pleadings the application of § 399.14(b)(2) requirements.

specifically proposes that no penalties be imposed for failure to meet § 399.14(b)(2) requirements. Because these requirements are not a separate element of the RPS program, and do not add to the APT obligations of LSEs, we agree that penalties are not an appropriate enforcement tool.

Other parties commenting on enforcement tend to assume that the requirements would continue in force for a period of years, but do not address the consequences of failure to meet the requirements. We believe that the process we have outlined provides clear and direct enforcement of the § 399.14(b)(2) mandate, without burdening LSEs with deficits that carry over from year to year. If, in one calendar year, an LSE does not sign long-term contracts and /or contracts with new facilities for energy deliveries equivalent to 0.25% of its prior year's retail sales, no energy deliveries from any short-term contracts with existing facilities signed in that year may be counted toward the LSE's RPS obligations in any year. The next calendar year, however, the LSE starts fresh, unaffected by the previous year's failure to meet the minimum quantity.

We note that a failure to meet the minimum quantity requirement in one year will not necessarily expose an LSE to immediate penalties. If the LSE is unable to count energy deliveries from that year's short-term contracts with existing facilities for its RPS compliance, it may still avail itself of all existing flexible compliance mechanisms to defer compliance or excuse noncompliance. (See D.06-10-050.)

7. Should There be a "Small LSEs" Exception?

Several parties, including those advocating a minimum quantity of zero, raise the concern that compliance with the § 399.14(b)(2) contracting requirements would be too difficult for smaller LSEs, thus warranting an exemption from the requirements. Pilot Power also identifies the specific issue

that small LSEs seeking to enter into long-term contracts may not be deemed credit-worthy customers by the generator, given the large amount of money involved over the life of a long-term contract.

While we appreciate these concerns, we are unwilling to create a blanket "small LSE" exemption to the requirements of § 399.14(b)(2). The category of "small LSE" is too hard to define to be reasonable to use in this context. Pilot Power's suggestion of a definition based on "MW of summer peak" illustrates the difficulty: potentially, each year the members of the "small LSE" group could change as their loads change. This would put too much focus on determining membership in the category, to the detriment of meeting the contracting goals of § 399.14(b)(2). Thus, we decline to adopt a small LSE exception.

8. Summary of § 399.14(b)(2) Compliance Process

All LSEs must report their compliance with the § 399.14(b)(2) gatekeeping process in their annual compliance reports by reporting their prior year's retail sales, calculating 0.25% of prior year's retail sales, and reporting energy deliveries in contracts signed during the reporting year according to the relevant categories, with appropriate documentation of "existing" or "new" status of the facility:

a. long-term, with an existing facility or a new facility;

b. short-term with a new facility; and

c. short –term with an existing facility.

Any LSE seeking to carry forward credit for signing long-term contracts or short-term contracts with new facilities with contracted-for energy in excess of the 0.25% requirement must indicate the credit to carry forward, as well as any credit being claimed, in its annual reports.

In addition, those LSEs that submit their RPS procurement contracts for Commission approval must indicate in their advice letter or application the same information about categorization of the contract being submitted. Those LSEs that do not submit their RPS contracts for our approval may be required by the Director of Energy Division to submit copies of their contracts for verification of the terms, status, and categorization of the contract, as well as copies of the original contract with the generation facility if they are using any repackaged contracts to meet the § 399.14(b)(2) requirements.

A tabular overview of the implementation of § 399.14(b)(2), from the point of view of an RPS-obligated LSE, is presented in Appendix A.

9. Comments on Proposed Decision

The PD of ALJ Simon in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 14.3 of the Rules of Practice and Procedure. Comments were filed on April 19, 2007 by AReM, CalpinePowerAmerica-CA, LLC (Calpine), CCSF (joined by the City of Chula Vista), GPI, MU, PG&E, SES, TURN, and UCS. Reply comments were filed on April 24, 2007 by AReM, Calpine, MU, PG&E, SCE, and TURN.

Metric

TURN, as it did in its initial comments, argues that APT should provide the metric for the minimum quantity. No other commenter now seeks an APT metric. We do not change the PD's adoption of prior year's sales as the metric for the minimum quantity.

Minimum Quantity

Calpine urges us to set the minimum quantity at zero, at least for small LSEs. MU notes that it is in the unique situation of having no connection to the grid, and thus—regardless of our position about other small LSEs—it should

have a minimum quantity of zero. TURN continues to argue that the minimum quantity should be an escalating percentage of APT, up to 80% in 2010. SES, supported by AReM, seeks to defer the 2007 requirement to 2008, creating a zero minimum quantity in 2007 and 0.50% of prior year's sales in 2008. UCS seeks a change, for the year 2010 only, to provide that 25% of the RPS-eligible energy required to meet the 20% goal be in the form of long-term contracts and/or short-term contracts with new facilities. UCS asserts that this change would reduce the likelihood that LSEs other than PG&E, SCE, and SDG&E will make too small a contribution to new renewable generation.

We do not change the minimum quantity in the PD. Even for small LSEs, a minimum quantity of zero is unnecessary. They have the possibilities of carrying forward "excess" contracted energy for future years and using repackaged contracts originally negotiated by larger entities to comply with § 399.14(b)(2) requirements. Further, LSEs that do not seek to count short-term contracts with existing facilities for RPS compliance do not have any obligations under § 399.14(b)(2). MU, because it is not connected to the grid, is a clear example of an LSE that is not going to be affected by § 399.14(b)(2); an LSE that generates all its own RPS-eligible power is another example. TURN's proposal for a large and escalating requirement is not more persuasive now than it was originally.

We also decline to adopt the two proposals that would change the temporal aspects of the PD. The UCS proposal might or might not require a large jump in long-term contracts and contracts with new facilities in 2010, depending on an LSE's progress toward the 20% goal. It would introduce unnecessary uncertainty into RPS procurement planning, especially for smaller LSEs that may need deliveries from only one or two contracts to meet their 20%

goal. The SES proposal to postpone compliance to 2008 is not justified, since all parties have known since late September 2007 that § 399.14(b)(2) would be effective January 1, 2007.

Enforcement and Compliance

CCSF and AReM, supported by PG&E, urge that we allow energy contracted for in excess of the 0.25% requirement in any calendar year to be carried forward and used for compliance with § 399.14(b)(2) in subsequent years. Although implementing such banking of credit for long-term contracts and short-term contracts with new facilities would add some reporting and monitoring complexity, we are persuaded by CCSF's numerical demonstration that it could make it easier for smaller and/or newer LSEs to comply. Allowing LSEs to carry forward credit will also give them more incentive to sign larger contracts, sooner rather than later, which will advance overall RPS program goals. The PD has therefore been changed to allow credit, but not deficits, in meeting the 0.25% requirement to be carried forward.

AReM also seeks clarification of the role of" repackaged" contracts originating between an RPS-eligible generator and a purchaser who then divides some or all of the contract into smaller pieces and sells them to RPS-obligated LSEs. The discussion in the PD has been expanded and the requirements for allowing the use of repackaged contracts made more explicit. We also adopt TURN's suggestion that Energy Division staff have access to the underlying contract that has been repackaged.

GPI suggests that an LSE that fails to meet its § 399.14(b)(2) requirements be allowed to swap its otherwise RPS-eligible short-term contracts with existing facilities to another RPS-obligated LSE that will be able to count them for RPS compliance. This proposal has some of the same drawbacks as TURN's original

proposal for "trading" credit for contracts. It would add complexity in reporting and monitoring, without predictable gains for compliance.

AReM elaborates on this idea by proposing that failure to meet the 0.25% requirement be subject to monetary penalties, but the LSE be allowed to swap or sell its otherwise RPS-eligible short-term contracts with existing facilities to other RPS-obligated LSEs. The addition of penalties does not eliminate the problems with swapping credit for contracts. It also introduces penalties for a shortfall in meeting a requirement that is neither APT or the 20% goal, contrary to our intention to keep implementation of § 399.14(b)(2) as simple as possible.

TURN suggests that penalties be imposed if actual deliveries fall short of the contract amount of energy used for compliance with the 0.25% requirement. This proposal, as SCE points out, does not take into account the fact that some contracts will not deliver, or will deliver less energy than contracted, for a variety of reasons other than deliberately constructing an infeasible contract in order to meet § 399.14(b)(2) requirements. TURN ignores, moreover, the likelihood that knowingly undertaking contracts that never deliver would subject an LSE to more significant penalties for failing to meet its APT, as well as the 20% goal. We do not change the PD's rejection of penalties for failing to meet § 399.14(b)(2) requirements.

AReM proposes that we allow waivers of the 0.25% requirement on an LSE's showing of scarcity of available contracts or market power conditions. Since penalties are not assessed for failure to meet the 0.25% requirement, this waiver proposal is unnecessary. If and when an LSE is subject to a possible penalty for failing to meet its APT or the 20% goal, it may avail itself of the established reasons to seek to avoid imposition of a penalty.

AReM also proposes that LSEs newly doing business in California be required to meet the 0.25% requirement in their first year of retail operation. We do not adopt this proposal, which is inconsistent with our reporting regime and with our treatment of other RPS obligations.

SES, citing the table in Appendix A, urges that the 0.25% requirement end in the year an LSE attains the 20% goal, rather than the following year, as the text of the PD states. This comment reveals an error in the table, which we correct in a revised table reflecting changes made to the PD. We do not change the termination of the requirement as stated in the PD.

Administration

AReM asks us to "grandfather" all short-term contracts with existing facilities that are signed prior to the effective date of this order. We note initially that contracts signed prior to January 1, 2007 are not subject to § 399.14(b)(2). Contracts signed in 2007 and later years are subject to the requirements of that section. We do not adopt AReM's grandfathering proposal. As TURN points out, grandfathering could allow an LSE to sign short-term contracts with existing facilities for large amounts of energy, with no additional obligation to sign long-term contracts or short-term contracts with existing facilities. The LSE would thus effectively avoid the § 399.14(b)(2) requirements. There is no reason to allow this result, or even to create the risk of this result.

Finally, TURN asks that non-market participants, in addition to Commission staff, receive copies of contracts and other documentation of compliance with § 399.14(b)(2). For the large utilities, such information is already available through participation in procurement review groups (PRGs). We decline to create quasi-PRGs for ESPs, CCAs, and small and multi-

jurisdictional utilities and will not require documentation to be provided to non-market participants.

The PD has also been revised to eliminate inconsistencies and to correct minor errors.

10. Assignment of Proceeding

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

Findings of Fact

1. New sources of RPS-eligible generation will be necessary to meet the goal of 20% of retail sales from eligible renewable energy resources by December 31, 2010.

2. Long-term contracts are an important tool in developing new RPS-eligible generation.

3. Other contracting and financing methods to encourage new RPS-eligible generation may be available to California LSEs.

4. All RPS-obligated LSEs have a responsibility to contribute to the development of new RPS-eligible generation.

5. RPS-obligated LSEs vary widely in their size and in the resources they have available for RPS procurement.

6. All RPS-obligated LSEs have the capacity to contribute to the development of new RPS-eligible generation, though for some LSEs that capacity may be relatively modest.

7. A straightforward way to implement an incentive to develop new renewable resources within the structure of § 399.14(b)(2) is to measure the contracted-for energy in signed contracts, not the energy delivered.

8. For purposes of fulfilling the requirements of § 399.14(b)(2), both long-term contracts (with either an existing or new facility) and contracts with new facilities are of equal weight and value.

9. Prior year's retail sales of RPS-obligated LSEs are regularly reported as part of the RPS compliance process.

10. An LSE's prior year's retail sales are a sound basis for calculating the LSE's obligations under § 399.14(b)(2) because prior year's sales are regularly reported and reasonably straightforward, while avoiding potentially complex regulatory and compliance interpretations that might apply to the use of APT, including various flexible compliance elements.

11. Use of 1% of an LSE's prior year's retail sales for this measure would be equivalent to the full amount of the IPT, and would unreasonably require 100% of the LSE's growth in renewable procurement to be from long-term contracts or contracts with new facilities, while use of 0.25% of prior year's sales provides an incentive without being excessive.

12. It is reasonable to impose an obligation, on an annual basis, to enter into long-term contracts and/or contracts with new facilities for energy deliveries equivalent to 0.25% of an RPS-obligated LSE's prior year's retail sales as a condition of allowing an LSE to use energy deliveries from short-term contracts with existing facilities for purposes of RPS compliance.

13. It is reasonable to allow LSEs to carry forward contracted-for energy in long-term contracts and short-term contracts with new facilities that is in excess of the 0.25% requirement in the year such contracts are signed, to be used for compliance with the 0.25% requirement in future years, but not to carry forward any deficit in meeting the 0.25% requirement.

14. It is reasonable to allow LSEs to use long-term contracts that have been repackaged from long-term contracts with RPS-eligible generation facilities, and short-term contracts that have been repackaged from contracts with new RPS-eligible generation facilities, for compliance with § 399.14(b)(2) requirements, so long as the use of such contracts is properly documented and reported to this Commission and the RPS eligibility of the both the repackaged and underlying contract is verified by the CEC.

15. It is reasonable to require RPS-obligated LSEs to report on their compliance with the requirements of § 399.14(b)(2) in their annual compliance reports, and more often if required to do so by the Director of Energy Division.

16. Applying § 399.14(b)(2) until an LSE meets the goal of 20% of retail sales from eligible renewable resources (or an increased goal upon later application) will provide an additional incentive for an LSE to meet RPS goals early, while also being simple to enforce.

Conclusions of Law

1. All RPS-obligated LSEs should contribute to the development of new RPS-eligible generation.

2. Section 399.14(b) gives this Commission discretion to shape conditions and incentives to encourage all RPS-obligated LSEs to contribute to the development of new RPS-eligible generation.

3. Our discretion should be applied to create conditions that encourage all RPS-obligated LSEs to contribute to the development of new RPS-eligible generation, while not creating complex, administratively burdensome new elements for the RPS program.

4. For purposes of fulfilling the requirements of § 399.14(b)(2,) both long-term contracts, with either an existing or new facility, and contracts with new facilities should be accorded equal weight and value.

5. An LSE's prior year's retail sales should be used for calculating the LSE's obligations under § 399.14(b)(2).

6. All RPS-obligated LSEs should, on an annual basis, sign long-term contracts and/or contracts with new facilities for a sufficient amount of energy to contribute to the development of new RPS-eligible generation.

7. All RPS-obligated LSEs should, on an annual basis, enter into long-term contracts and/or contracts with new facilities for energy deliveries equivalent to 0.25% of an RPS-obligated LSE's prior year's retail sales, as a condition of allowing an LSE to use energy deliveries from short-term contracts with existing facilities for purposes of RPS compliance.

8. RPS-obligated LSEs should be allowed to carry forward contracted-for energy in long-term contracts and short-term contracts with new facilities that is in excess of the 0.25% requirement in the year such contracts are signed, to be used for compliance with the 0.25% requirement in future years, but should not be allowed to carry forward any deficit in meeting the 0.25% requirement.

9. RPS-obligated LSEs should be allowed to use long-term contracts that have been repackaged from long-term contracts with RPS-eligible generation facilities, and short-term contracts that have been repackaged from contracts with new RPS-eligible generation facilities, for compliance with § 399.14(b)(2) requirements, so long as the use of such contracts is properly documented and reported to this Commission, and the RPS eligibility of the both the repackaged and underlying contract is verified by the CEC.

10. The minimum quantity requirement should continue until an LSE reaches the goal of 20% of retail sales obtained from eligible renewable resources.

11. In order to allow RPS procurement to proceed expeditiously, this order should be effective immediately.

INTERIM ORDER

IT IS ORDERED that:

1. Beginning in calendar year 2007, each load-serving entity (LSE) obligated under the renewables portfolio standard (RPS) program must, in order to be able to count for any RPS compliance purpose energy deliveries from contracts of less than 10 years' duration ("short-term") with RPS-eligible facilities that commenced commercial operation prior to January 1, 2005 ("existing facilities"), in each calendar year enter into contracts of at least 10 years' duration ("long-term") and/or short-term contracts with facilities that commenced commercial operation on or after January 1, 2005 ("new facilities") for energy deliveries equivalent to at least 0.25% of that LSE's prior year's retail sales (the "minimum quantity").

2. If an LSE fails to meet the requirement in any calendar year, beginning with 2007, that it enter into long-term contracts and/or short-term contracts with new facilities for energy deliveries equivalent to at least 0.25% of that LSE's prior year's retail sales, any energy deliveries resulting from contracts the LSE enters into in that calendar year of less than 10 year's duration with existing facilities shall not be used for any RPS compliance purposes in any year.

3. RPS-obligated LSEs may carry forward contracted energy in long-term contracts and short-term contracts with new facilities that is in excess of the 0.25% requirement in the year such contracts are signed, to be used for compliance with the 0.25% requirement in future years, but may not carry forward to future years any deficit in meeting the 0.25% requirement.

4. RPS-obligated LSEs may use contracts that have been repackaged from contracts signed by other entities with RPS-eligible generation facilities, so long as the repackaged contracts are long-term (with existing or new facilities) or short-term with new facilities, for compliance with § 399.14(b)(2) requirements, and so long as the use of such contracts is properly documented and reported to this Commission, and the RPS eligibility of the both the repackaged and underlying contract is verified by the California Energy Commission.

5. The minimum quantity requirement shall continue until an LSE reaches the goal of 20% of retail sales obtained from eligible renewable resources, and shall terminate the calendar year after the LSE attains the 20% goal.

6. The requirements of this Order shall apply to an LSE newly commencing operations in California beginning in its second calendar year of retail operations.

7. The Director of Energy Division may require the submission of appropriate documentation to verify compliance with the requirements set forth above.

This order is effective today.

Dated May 3, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN

RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners