

Decision 03-12-065

December 18, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to  
Establish Policies and Cost Recovery  
Mechanisms for Generation  
Procurement and Renewable Resource  
Development.

Rulemaking 01-10-024  
(Filed October 25, 2001)

**ORDER MODIFYING DECISION (D.) 03-06-071 AND DENYING  
REHEARING OF THE DECISION, AS MODIFIED**

In this decision, we deny the applications filed by Pacific Gas and Electric Company (“PG&E”) and Southern California Edison Company (“Edison”) for rehearing of Commission Decision (D.) 03-06-071 (“Decision”). D.03-06-071 was issued pursuant to Senate Bill (“SB”) 1078 (Stats. 2002 (Reg. Sess.), ch. 516). Among other things, SB 1078 added Article 16 (commencing with section 399.11) to Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code, which established the California Renewables Portfolio Standard (“RPS”) Program. The issues raised on rehearing concern implementation of Public Utilities Code section 399.14,<sup>1</sup> which requires the Commission to

adopt rules, within 6 months of the effective date of these provisions, for electrical corporations establishing a process for determining market prices of electricity from renewable generators pursuant to specified criteria, a process for rank ordering and selection of least-cost and best-fit renewable resources to fulfill program obligations, flexible rules for compliance that permit electrical corporations to apply excess procurement in one year to subsequent years, or inadequate procurement in one year to the following 3

<sup>1</sup> Unless otherwise specified, all statutory references are to the Public Utilities Code.

years, and standard terms and conditions to be used by electrical corporations in contracting with renewable electricity generators.

(Leg. Counsel's Dig., Sen. Bill No 1078 (2002 Reg. Sess.), Summary Dig., p. 2; see also Pub. Util. Code, § 399.14, subd. (a)(2).)

In D.03-06-071, we took the first steps in implementing SB 1078 by adopting the rules mandated under section 399.14(a)(2).<sup>2</sup> However, due to the highly expedited schedule and complexity of tasks involved, certain refinements to these rules will be addressed in a later phase of this proceeding.<sup>3</sup>

Pacific Gas and Electric Company ("PG&E") and Southern California Edison Company ("Edison") filed timely applications for rehearing. PG&E raises the following challenges to the Decision: (1) the Commission improperly requires an annual 1% increase in the Annual Procurement Target ("APT") without first considering the utility's unmet needs; (2) imposition of a pre-determined penalty is both contrary to Public Utilities Code section 399.14(d) and a violation of the utilities' due process rights; and (3) the use of ISO Amendment 42 to account for the system integration costs associated with intermittent resources is not supported by the record.

Edison raises similar arguments regarding the imposition of automatic penalties and use of ISO Amendment 42. Additionally, it presents the following

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<sup>2</sup> The provisions of SB 1078 were effective on January 1, 2003. Consequently, we were required to implement section 399.14(a)(2) by June 30, 2003.

<sup>3</sup> Tasks to be addressed in the subsequent phase of this proceeding include adoption of standard contract terms and conditions, clarification of the definition of the environmental attributes that must be transferred to the utility for it to meet its RPS obligations, consequences of inadequate or exhausted Public Goods Charge funds, and permanent penalty amounts to be imposed on those utilities failing to meet their minimum APT procurement obligations. (D.03-06-071, pp. 58-60.)

In the Decision, we note that we will "consider the question of whether any penalty funds can be directed into PGC funds to be spent on additional renewable procurement" as part of the next phase of this proceeding. (D.03-06-071, p. 60.) However, absent statutory authority stating otherwise, any penalties imposed and collected by the Commission must be deposited in the State's General Fund. (Pub. Util. Code, § 2104; see also *Assembly v. Public Utilities Com.* (1995) 12 Cal.4<sup>th</sup> 87.) Therefore, use of penalties collected under section 399.14(d) to supplement PGC funds is a matter to be addressed by the Legislature. Accordingly, we shall modify the Decision to delete this statement.

grounds for finding legal error: (1) the Decision violates both Public Utilities Code section 399.15(d) and PURPA by establishing a mandatory as-available capacity price; (2) the mandatory as-available capacity price determined by the Commission is not supported by substantial evidence or findings of fact, in violation of Public Utilities Code sections 1757 and 1705; (3) the Decision violates Public Utilities Code section 399.15(c)(1) by only considering executed contracts when determining market price; and (4) the Decision fails to clearly state that the obligation to procure incremental renewable generation is limited to the availability of funds from the Public Goods Charge to cover the above-market costs.<sup>4</sup>

The Utility Reform Network (“TURN”) and the Center for Energy Efficiency and Renewable Technologies (“CEERT”) filed responses opposing PG&E and Edison’s rehearing applications. San Diego Gas and Electric Company (“SDG&E”) filed a response opposing PG&E and Edison’s arguments regarding the Decision’s use of ISO Amendment 42.<sup>5</sup>

We have carefully considered the arguments presented by PG&E and Edison and are of the opinion that no grounds for rehearing have been demonstrated. However, we shall modify the Decision to clarify language in Finding of Fact 30 and Ordering Paragraph 17 regarding use of ISO Amendment 42. We shall also modify the Decision to eliminate the term “automatic penalty” to refer to the procedure adopted to encourage utility compliance with the RPS

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<sup>4</sup> As part of its rehearing application, Edison also requests that it be provided an opportunity to reply to any comments filed in opposition to its application. (Edison App., p. 22.) However, the Commission’s Rules of Practice and Procedure do not provide for replies. Additionally, it has long been our practice to not accept replies to responses. Edison has had an opportunity to make its substantive arguments, as provided under the rules, and has not provided any reason why its request should be granted. Accordingly, Edison’s request is denied.

<sup>5</sup> In its response, SDG&E noted that it was neither endorsing nor opposing any of the other issues raised by PG&E or Edison on rehearing. (*Response of San Diego Gas & Electric Company to the Applications for Rehearing of Pacific Gas and Electric Company and Southern California Edison Company*, August 14, 2003, p. 1, fn. 1.)

program. PG&E and Edison's applications for rehearing of the Decision, as modified, are denied.

## I. DISCUSSION

### A. **The Commission correctly concluded that section 399.15(d) mandates that a utility's APT increase by a minimum of one percent annually and that twenty percent of a utility's energy be procured from renewable resources by 2017.**

In the Decision, the Commission concluded that section 399.15(a) requires a utility's annual procurement target ("APT") increase a minimum of one percent per year, with a target of twenty percent of a utility's energy procured from renewable resources by 2017. (D.03-06-071, pp. 42, 70 (COL 20 & 21).) Both PG&E and Edison raise arguments why such a conclusion is in error. These arguments are without merit.

#### 1. **The annual one percent increase in APT is not limited by a utility's unmet need.**

A threshold issue in adopting flexible rules for compliance was the nature of the Annual Procurement Target ("APT"). In various filings, PG&E argued that an increase in a utility's APT only exists if the utility identifies an unmet need. (See *Opening Brief of Pacific Gas and Electric Company on the Methodology for Implementing the Renewables Portfolio Standard*, April 28, 2003, pp. 6-7; *Opening Comments of Pacific Gas and Electric Company on the Proposed Decision of ALJ Allen Regarding Methodology for Implementing the Renewables Portfolio Standard*, June 9, 2003, pp. 6-7.) It argued that the reference to "unmet long-term resource needs" in section 399.15(a) referred to a utility's specific needs. The Decision rejected this argument, noting that the statewide focus and purpose of SB 1078 was inconsistent with PG&E's interpretation. (D.03-06-071, p. 41.) Thus, it concluded that the statute mandated a minimum one percent annual increase in APT. PG&E alleges on rehearing that this conclusion is in error.

PG&E's argument rests primarily on language in both sections 454.5(b), enacted by SB 1976<sup>6</sup>, and 399.14(a)(3), enacted by SB 1078, that refers to "unmet need." PG&E contends that this phrase can only be interpreted as limiting a utility's obligation to procure additional renewable resources if the utility has identified an "unmet need." (PG&E App., pp. 4-6.) PG&E's reading of the statutes is incorrect. Section 454.5(b) lists items that must be included in any proposed procurement plan submitted by the utilities. Section 399.14(a)(3) provides that the utility's procurement plan shall demonstrate that it is consistent with least-cost best-fit objectives. Neither of these statutory provisions limits the APT established by the Commission or excuses a utility's requirement to procure 20% of its energy from renewable resources by 2017 due to "unmet need." Indeed, section 399.15(b) expressly states

The commission *shall* implement annual procurement targets for each electrical corporation as follows:

(1) Beginning on January 1, 2003, each electrical corporation *shall*, pursuant to subdivision (a), 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, 2017.

(Pub. Util. Code, § 399.15, subd. (b) (emphasis added).) The mandatory language of this subdivision requires us to establish a minimum 1% annual increase in APT, with a goal that utilities procure 20% of their retail sales from renewable resources no later than 2017. (See Pub. Util. Code, § 14 ["'Shall' is mandatory and 'may' is permissive."].) Moreover, the Legislature has expressly stated that the RPS is to "attain a target of 20 percent renewable energy *for the state of California*." (Pub. Util. Code, § 399.11, subd. (a) (emphasis added).) PG&E's interpretation of SB

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<sup>6</sup> SB 1976 (Stats. 2002 (Reg. Sess.), ch. 850), and its counterpart, Assembly Bill ("AB") 57 (Stats. 2002 (Reg. Sess.), ch. 835), established guidelines for procurement of electricity by the utilities after January 1, 2003, and for Commission review of the utilities' procurement plans.

1078 and SB 1976, however, would mean that a utility could ignore express Legislative intent and the mandatory language in section 399.15(a) simply because it determined it did not have an “unmet need.” This interpretation lacks statutory support.

In this instance, section 399.15(b) clearly permits the Commission to establish a utility’s annual *obligation* to procure renewable resources and establishes the minimum percentage to be set. Thus, we properly concluded that the APT increase was not limited by a utility’s “unmet need” and that the minimum annual increase was one percent. Such a conclusion is not contrary to sections 454.5(b) or 399.15(a), which concern a utility’s *ability* to meet its procurement obligations. Accordingly, there is no basis for finding legal error.

In its rehearing application, PG&E also attempts to demonstrate that our interpretation of SB 1078 is somehow contradictory to SB 1976. However, as discussed above, we have properly interpreted the requirement to establish a utility’s annual procurement obligations. Section 454.5(b) provides that a utility’s procurement plan must demonstrate that it will meet its “unmet resource needs.” (Pub. Util. Code, § 454.5, subd. (b)(9)(A).) Whether the “unmet resource needs” will fulfill the utility’s procurement obligation is a separate issue. Indeed, section 399.14(a)(2)(C) provides for establishment of flexible rules to permit the utilities to meet their obligations. (D.03-06-071, pp. 48-50.) Thus, there are no contradictions, and our interpretation is consistent with the rules of statutory construction. (See, e.g., *Dyna-Med Inc. v. Fair Employment and Housing Com.* (1987) 43 Cal.3d 1379, 1387 [stating “statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible”]; *Waters v. Pacific Telephone Company* (1974) 12 Cal.3d 1, 11 [statutes must be harmonized to avoid unnecessary conflict].)

Finally, PG&E argues that requiring utilities to procure renewable resources regardless of need is an abuse of discretion because it would create the risk of over-procurement and increase procurement costs. (PG&E App., pp. 7-8.)

As discussed, although we have established the utilities' annual procurement obligations, we have also provided flexible rules for the utilities to meet these obligations. Thus, there is no reason for the utilities to over-procure as a result of the Decision. Accordingly, we have not abused our discretion.

**2. The annual increase in APT is not limited by available Public Goods Charge funds.**

Edison alleges that the Decision errs by failing to note that the utilities' annual procurement obligations and overall objective of 20% are limited by the availability of Public Goods Charge ("PGC") funding. (Edison App., pp. 20-21.) Accordingly, it requests that the Decision be clarified to note this limitation. Similar to PG&E's arguments regarding the APT, Edison incorrectly assumes that the obligation to procure renewable resources must equal annual procurement targets. Edison's assumption is not supported by a plain reading of the statute.

As discussed above, section 399.15(b) directs the Commission to determine a utility's APT. Section 399.15(a), however, provides that a utility's requirement to procure energy from renewable energy resources is limited by the availability of PGC funds. Thus, while section 399.15(b)(1) mandates that we establish certain procurement targets, a utility's *ability* to meet these targets is limited by available PGC funds. The flexible rules for compliance recognize and accommodate this limitation by permitting "inadequate procurement in one year [to be applied] to not more than the following three years." (Pub. Util. Code, § 399.14, subd. (a)(2)(C).)

Edison's interpretation, however, conflates these two provisions and, if followed, would effectively eliminate the procurement targets mandated in section 399.15(b)(1). This is contrary to the rules of statutory construction, which provides that all parts of a statute must be harmonized without rendering any part superfluous or unnecessary. (See, e.g., *People v. Garcia* (1999) 21 Cal.4<sup>th</sup> 1, 8; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 459.) Our interpretation of section 399.15, subdivisions (a) and (b), harmonizes the mandatory procurement targets with the possibility of utilities not meeting these targets due to limited availability

of PGC funds. Accordingly, there is no basis for finding error and no clarification is necessary.<sup>7</sup>

Finally, we note that Edison's arguments are premature. In response to comments raised by parties to the draft decision, the consequences of inadequate PGC funds in any year will be examined in coordination with the CEC. (D.03-06-071, p. 60.) Thus, Edison may raise these arguments again at this later time.

**B. The Commission may establish pre-determined penalties to encourage utility compliance with the RPS program.**

To provide an incentive for each utility to meet its APT, we adopted an upfront penalty for any utility that fails to meet a minimum of 75% of its APT. (D.03-06-071, p. 50.) The penalty, however, may be reduced or eliminated upon demonstration by the utility of good cause. (D.03-06-071, p. 52.) Both PG&E and Edison charge that this incentive, which the Decision refers to as an "automatic penalty," is both contrary to section 399.14(d) and a violation of due process. Applicants also charge that the evidentiary record does not support the adoption of a pre-determined, automatic penalty. These arguments have already been raised by the parties and rejected. We continue to find them unpersuasive.

Many of the objections raised by PG&E and Edison on rehearing concern our use of the term "automatic penalty" to describe the procedure adopted in the Decision to encourage utility compliance with the RPS program. However, this procedure does not automatically impose penalties for failure to comply with the RPS program, but rather establishes a rebuttable presumption that a pre-determined penalty should be imposed in certain circumstances. The utility may reduce or eliminate the pre-determined penalty upon showing of good cause.

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<sup>7</sup> Edison also suggests that it is "erroneous" to conclude that the 20% procurement target would continue beyond 2017. Edison's position is clearly contrary to Legislative intent, which found that implementation of the RPS Program was to "attain a target of 20 percent renewable energy for the State of California . . . for the purposes of increasing the diversity, reliability, public health and environmental benefits of the energy mix." (Pub. Util. Code, § 399.11, subd. (a).) It would be unreasonable to conclude, absent any time limitations stated in the statute, that these objectives would only be for a single year.

Therefore, the term “automatic penalty” is somewhat of a misnomer. To eliminate any further confusion that may arise from of this term, we shall modify D.03-06-071 to eliminate reference to the compliance procedure as an “automatic penalty.”

**1. The Commission properly interpreted section 399.14(d).**

PG&E and Edison first contend that section 399.14(d) does not authorize the Commission to impose a pre-determined penalty, but rather can only impose penalties for non-compliance with the RPS program after a contempt proceeding. (PG&E App., p. 10; Edison App., p. 8.)

Section 399.14(d) states

If an electrical corporation fails to comply with a commission order adopting a renewable procurement plan, the commission shall exercise its authority pursuant to Section 2113 to require compliance.

(Pub. Util. Code, § 399.14, subd. (d).) Section 2113 states that

Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto.

(Pub. Util. Code, § 2113.) Based on the language in section 2113, both PG&E and Edison assert that section 399.14(d) requires that before a penalty may be imposed, the Commission must issue an order to show cause (“OSC”) and conduct a hearing. As discussed below, we disagree with these arguments on two grounds.

- a) *Section 399.14(d) does not require the Commission to issue an order to show cause to ensure compliance with the RPS Program.*

Section 399.14(d) mandates that the Commission exercise its authority under section 2113 to ensure compliance with the RPS program. Section 2113 permits the Commission to initiate contempt proceedings against any public utility, corporation or person that fails to comply with a Commission decision or order, *but does not bar or affect any other remedy prescribed in the Public Utilities Act.* (Pub. Util. Code, § 2113 (emphasis added).) Applicants' interpretation, however, ignores the second part of section 2113 since it would only permit the Commission to impose penalties for non-compliance after a contempt proceeding. This is contrary to the rules of statutory construction. (See, e.g., *People v. Baker* (1968) 69 Cal.2d 44, 50 [courts should not insert or delete words in a statute or give a different meaning to the words used].) Nothing in the language of either section 399.14(d) or section 2113 limits our ability to impose a penalty only until after we have conducted a contempt proceeding. Furthermore, the Commission is not precluded from issuing an OSC even if it does establish an upfront compliance procedure utilizing pre-determined penalties, since the other remedies referred to in the statute are cumulative, or in lieu of, a contempt proceeding. (Pub. Util. Code, § 2113.) These additional or alternative remedies include the ability to impose penalties and fines. (Pub. Util. Code, § 2107.)

Applicants further assert that the second sentence in section 2113 does not provide a basis for imposing penalties, as section 2104 only permits the Commission to recover penalties for violating a Commission decision or rule by bringing an action in Superior Court. (PG&E App., pp. 14-15; Edison App., p. 8, fn. 5.) PG&E additionally contends that in prior decisions, the Commission has conceded that it does not have authority to impose penalties. (PG&E App., p. 15, citing *Dimaggio v. Pacific Bell* (1992) 43 Cal.P.U.C.2d 392.) These arguments lack merit, as both PG&E and Edison are fully aware.

Commission decisions over the past five years have affirmed our authority to impose penalties. Numerous petitions for writs of review to the appellate courts have raised this precise issue and, without exception, they have all been summarily denied. Section 2104 refers to “actions to *recover* penalties.” (Pub. Util. Code, § 2104 (emphasis added).) Since 1997, we have consistently interpreted this language to refer to our ability to collect an unpaid penalty, not our ability to impose a penalty. (See, e.g., *Strawberry Property Owners Assoc. v. Conlin Strawberry Water Co.* [D.00-03-023] (2000) 2000 Cal.PUC LEXIS 127, \*6-\*7, and cases cited therein.) Moreover, PG&E’s reliance on *Dimaggio* is unavailing, as we specifically overruled the language in that decision in *Re Communications TeleSystems International* [D.97-10-063] (1997) 76 Cal.P.U.C.2d 212, 220, 224, fn. 7. (See also *Hudson v. Board of Administration* (1997) 59 Cal.App.4<sup>th</sup> 1310, 1326 [“an administrative agency may change its interpretation of a statute, rejecting an old construction and adopting a new.”] (citations omitted).)

PG&E and Edison also note that a prior version of the RPS legislation, which would have included automatic penalties for non-compliance, was considered and rejected by the Legislature. (PG&E App., p. 13; Edison App., pp. 8-9.) Applicants contend that this action demonstrates that the Legislature rejected an automatic penalty in favor of a contempt proceeding. We disagree for two reasons. First, courts have found that Legislative bills that have not been enacted and proposed legislative bills that have not passed have little value as evidence of legislative intent. (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 379; *Miles v. Workers' Comp. Appeals Bd.* (1977) 67 Cal.App.3d 243, 248.) Consequently, reliance on this proposed, but unenacted, legislation as evidence of legislative intent is unfounded. Second, the Decision did not adopt an “automatic penalty”, but rather a compliance procedure using pre-determined penalties. Thus, any intent that the Legislature may have expressed regarding “automatic penalties” is not applicable in this instance. As mentioned previously, we will modify our

decision to clarify the intent of our compliance procedure by deleting the term “automatic.”

Section 399.14(d) does not require the Commission to use its contempt powers, but rather directs the Commission to “exercise its authority pursuant to Section 2113 to ensure compliance.” (Pub. Util. Code, § 399.14, subd. (d).) Based on the plain language of section 2113, we reasonably concluded that we had options other than an OSC to encourage compliance with the RPS program. Further, based on consideration of comments provided by parties, we were persuaded that a process using pre-determined penalties would be more effective to encourage compliance with the RPS program than an open-ended OSC. (See, e.g., *Opening Brief of the Utility Reform Network on Implementation of the California Renewables Portfolio Standard*, April 28, 2003, p. 40; *Opening Brief of the California Wind Energy Association on the Implementation of the California Renewables Portfolio Standard Program*, April 28, 2003, pp. 19, 22-23; *Reply Brief of the Independent Energy Producers Association Related to Standard Contract Terms and Conditions*, May 5, 2003, pp. 15-16.) Additionally, pre-determined penalties would provide due process by removing “the uncertainty of an open-ended order to show cause process with unspecified consequences for a utility. . . . The Commission’s goal in setting this penalty is to create clear consequences for utility inaction and to provide further incentive to each utility to meet its APT.” (D.03-06-071, pp. 50-51.) Thus, we reasonably interpreted section 399.14(d) when we adopted a procedure for pre-determined penalties to encourage utility compliance with the RPS program.<sup>8</sup>

We do remind the utilities that section 399.14(d) does not limit us to only one means to ensure compliance with the RPS program. Therefore, the utilities are on notice that, if necessary, we shall use other remedies authorized under

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<sup>8</sup> Further, the procedure adopted in this Decision is similar to procedures we have adopted in prior Commission decisions to encourage utility compliance. (See, e.g., *Re Electric Distribution Facility Standard Setting* [D.00-05-022] (2000) 2000 Cal. PUC LEXIS 346; *Re Pacific Bell* [D.91-07-010] (1991) 40 Cal P.U.C.2d 675, 686-687.)

section 399.14(d), including issuing an order to show cause (“OSC”), to ensure compliance.

- b) *The procedure adopted in D.03-06-071 provides the same due process protections found in an order to show cause.*

Many of the concerns expressed by Applicants concern the due process protections provided by an OSC. For example, Edison argues that an “automatic penalty is a complete replacement for [a] contempt proceeding . . . with its attendant procedural safeguards and deliberative processes” (Edison App., p. 8), while PG&E maintains that “the contempt process practice at the CPUC gives the utility notice of an initial determination of culpable behavior and grants the utility the opportunity to explain why it should not be penalized” (PG&E App., p. 10). These arguments, however, focus on the consequences associated with an actual “automatic penalty,” rather than on the actual procedures adopted in the Decision.

As discussed in greater detail below, the procedure adopted in D.03-06-071 addresses the concerns expressed by Applicants. By establishing upfront that failure by a utility to procure a minimum of 75% of its APT is subject to pre-determined penalties, we have provided notice to the utilities of the initial determination of culpable behavior and the consequences for failing to comply. The procedure then grants the utilities the opportunity to explain this failure and present reasons why the pre-determined penalties should be reduced or eliminated. That the utility, rather than the Commission, initially determines culpable behavior does not deny the utility due process. Therefore, the protections associated with the procedure adopted in the Decision to encourage utility compliance could be considered comparable to the due process afforded by a contempt proceeding.

**2. The Decision affords the utilities sufficient due process before any penalties for non-compliance would be imposed.**

PG&E and Edison argue that the pre-determined penalty would deny the utilities due process because it does not provide the utilities' notice and opportunity to be heard before the penalty would be imposed, as would be provided in a contempt proceeding.<sup>9</sup> (PG&E App., p. 10; Edison App., pp. 10-11.) Edison also contends that the utilities would be subject to penalties as a result of conduct "outside the presence of the Commission" and thus, the facts surrounding the alleged contempt will not be immediately known by the Commission. (Edison App., p. 11) PG&E further maintains that due process is violated because the utilities would be subject to penalties based on activities that have not yet been defined. (PG&E App., p. 16.) These arguments are without merit.

As discussed above, section 399.14(d) does not require us to first issue an OSC before imposing penalties on the utilities for failing to comply with the RPS program goals. Moreover, as explained, while we use the term "automatic penalty" in D.03-06-071, the amounts calculated by the utilities will only be immediately imposed if the utilities accept them as is. Utilities are required to submit an annual filing on February 1, which summarizes their results in achieving their APT. A utility that fails to meet its APT by more than 25% may, as part of its February 1 compliance filing,

demonstrate why its APT shortcoming is a result of one or more of the four reasons for non-compliance [listed in the Decision]. If the utility's shortcoming is not a result of one or more of these reasons, this filing represents the utility's opportunity to seek approval for

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<sup>9</sup> The process for contempt proceedings is specified in section 1217 of the Code of Civil Procedure, which provides that "the court or judge must proceed to investigate the charge [of contempt], and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary." (Code Civ. Proc., § 1217.)

annual shortfalls greater than 25% of the APT if the conditions of §399.14(c) are triggered or to convince the Commission that a deferral would promote ratepayer interests and the overall procurement objectives of the RPS program. This filing should also include a calculation of any automatic penalties to be assessed for APT deficits above the 25% threshold granted to the utility for each year, calculated based on the penalty levels [adopted in this Decision] (or any future modifications of that penalty), which the Commission can choose to alter by taking the above outlined factors into consideration. The Commission will act within 90 days of receiving this filing, if Commission action is necessary.

(D.03-06-071, p. 52.) Furthermore, a utility “may seek advance Commission approval of any expected APT shortcoming beyond the 75% threshold by making a filing on its own volition.” (D.03-06-071, pp. 52-53.)

There is no question that this procedure provides an opportunity to be heard. Since the utilities are responsible for informing the Commission whether they have complied with the minimum APT requirements, they cannot argue that they would not have notice that they have not achieved at least 75% of their APT. Moreover, the penalties are not necessarily automatically assessed on the utilities upon a finding of non-compliance. Rather, the February filing gives the utilities an opportunity to comment on why they have failed to meet the minimum APT, and explain why a reduction or elimination of the penalty is appropriate. Accordingly, the utilities will be provided sufficient opportunity to inform the Commission of the reason why they have not met the minimum APT requirements and to present their arguments as to why the penalty should be reduced or waived. Additionally, the utilities are not required to remit any penalties until after the Commission has considered the reasons for non-compliance and determined the actual penalty to be assessed. Given these procedural safeguards, requiring the utilities to calculate as part of their annual compliance filing the potential penalty

that could be due for failing to meet the minimum APT goal does not constitute a denial of due process.

PG&E further argues that the RPS program has not specifically defined all procurement activities that will satisfy the APT. Consequently, it contends that the utilities would be denied due process because they will not be able to determine what conduct will subject them to penalties. It relies on footnote 22 in *BMW of North America v. Gore* (1996) 517 U.S. 559, 574 for the proposition that “a person [must] receive fair notice the conduct that will subject him to punishment.” (PG&E App., p. 16.) Footnote 22, however, simply points out that due process requires that an actor have fair notice of what it must do to comply and what the potential sanctions are for an offense. While this is indisputably the law, PG&E has not established a failure on the part of the Commission to comply with these requirements.<sup>10</sup> Notice has been given as to which procurement activities will currently satisfy the APT. The procurement activities listed by PG&E in its rehearing application have not yet been found by the Commission to satisfy the APT requirements. Therefore, pursuing these activities would subject PG&E to penalties at this time.<sup>11</sup> Moreover, the Commission could provide fair notice by initially listing activities that will satisfy the APT even if it later expands that list to include additional activities. Further, the utilities are aware of the potential sanctions for failing to meet the minimum APT, as the Decision has established upfront the interim penalty amounts for failing to comply with the RPS program requirements. Both Edison and PG&E had notice and the opportunity to be heard with respect to these interim penalty amounts. Accordingly, PG&E’s argument is unpersuasive and without merit.

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<sup>10</sup> Indeed, one of the objectives for adopting upfront penalties specifically addresses the concern expressed in footnote 22. “An upfront penalty provides concrete and transparent rules in advance of each utility’s RPS activities and removes the uncertainty of an open-ended order to show cause process with unspecified consequences for a utility.” (D.03-06-071, p. 50.)

<sup>11</sup> Furthermore, if PG&E believes that these procurement activities should count towards meeting its APT, it is free to file a petition to modify D.03-06-071 to include them as eligible activities.

For the reasons above, PG&E and Edison have not established that the pre-determined penalty will deny them due process.

**3. The Decision is supported by the evidentiary record.**

PG&E and Edison finally argue that there is no record evidence regarding the penalty amount to be assessed. (PG&E App., p. 17; Edison App., p. 10, fn. 6.) Both Applicants also note that there is no evidence that a penalty is necessary, as the utilities have not indicated that they will not comply with the Commission's orders regarding the procurement of renewables.<sup>12</sup> These arguments are unpersuasive.

The interim penalty amount established in the Decision is based on penalty amounts proposed by TURN and adopted by other states, and is set at 5 cents/kWh with a maximum penalty cap of \$25 million per utility per year. (D.03-06-071, p. 50; see also, *Opening Brief of the Utility Reform Network on Implementation of the California Renewables Portfolio Standard*, April 28, 2003, p. 40.) PG&E argues that due to different circumstances present in California, imposition of these penalties is an abuse of discretion. The Commission, however, cannot be said to have abused its discretion if its actions are based on evidence in the record. In this instance, the penalties we adopted were the only ones proposed by the parties. Additionally, an interim penalty of 5 cents/kWh would be considered reasonable in light of the 5.37 cents/kWh reasonableness benchmark for renewable

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<sup>12</sup> Edison specifically charges that a statement made by CEERT, and the accompanying discussion, on page 54 of the Decision that Edison intends to “dismantle, not implement, the RPS Program as intended by SB 1078,” are unsubstantiated by the record. (Edison App., p. 11, fn. 7.) Therefore it requests that this portion of the Decision be deleted. However, an administrative order is considered to be supported by substantial evidence in light of the whole record and will not be reversed if its findings are based on inferences reasonably drawn from the record. (See, e.g., *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 187.). In this instance, the utilities' testimony and briefs discuss numerous limitations that would excuse the utilities' obligation to meet the 20% goal for procurement of renewable resources by 2017. (See e.g., *Opening Brief of the Center for Energy Efficiency and Renewable Technologies in the Renewable Portfolio Standard Phase*, April 28, 2003, pp. 8-15.) Based on this evidence, we could reasonably conclude that we had “concerns regarding PG&E's and SCE's apparent resistance to the requirements of SB 1078 and renewable procurement in general.” (D.03-06-071, p. 54.) Therefore, the statements to which Edison objects are supported by the record, and we decline to delete this language.

contracts adopted in D.02-08-071. Furthermore, these penalties are interim in nature, subject to change in the next phase of the proceeding. (D.03-06-071, p. 50, fn. 46.) Accordingly, there is record evidence to support the interim penalty amounts adopted.

Applicants' arguments that a pre-determined penalty is not necessary since there is no evidence that they will not comply with the RPS program are equally unavailing. Applicants simply point out that they have met their past procurement obligations. However, they provide no authority why the Commission, as part of its implementation of a new procurement program, may not establish pre-determined penalties to encourage future compliance. Various parties to the proceeding explained why pre-determined penalties should be established as part of adopting flexible rules for compliance with the RPS procurement goals. For example:

- TURN stated that based on the compliance flexibility provided by the TURN/SDG&E Joint Principles, "assessing penalties offer basic protections against willful non-compliance by placing retail sellers on notice that the Commission is committed to vigorous enforcement of the RPS program and its obligations." (*Opening Brief of the Utility Reform Network on Implementation of the California Renewables Portfolio Standard*, April 28, 2003, p. 40.)
- The California Wind Energy Association ("CALWEA") states "without the threat of meaningful non-compliance penalties, there is no point in adopting any flexibility measures. If the utility believes that deviations from the RPS mandates will either go unpunished or that the threat of punishment is too remote to serve as legitimate deterrent of improper conduct, then flexible compliance rules are not needed." It further points out the benefits of establishing pre-determined penalties include providing utilities with incentives to comply with the RPS program, reducing Commission costs for enforcement, and providing renewable energy developers of some certainty of a continuing market

for renewable energy. (*Opening Brief of the California Wind Energy Association on the Implementation of the California Renewables Portfolio Standard Program*, April 28, 2003, pp. 19, 22-23)

- The Independent Energy Producers Association (“IEP”) notes that while flexible compliance mechanisms would better enable the utilities to implement their procurement strategies, “[f]lexible compliance, in the absence of some financial tools to ensure actual compliance, looks a lot like non-compliance. (*Reply Brief of the Independent Energy Producers Association Related to Standard Contract Terms and Conditions*, May 5, 2003, p. 15.)
- TURN witness Marcus testified that: “Any effective regulatory program necessarily involves penalties. The California RPS Program should be no exception. Absent a credible penalty, the structure of the RPS may create incentives for retail sellers to aggressively delay the procurement requirement or to establish a particular solicitation or evaluation rules that are inconsistent with ratepayer interests.” (*Testimony of William B. Marcus*, Exh. RPS-25, p. 38.)

Based on this evidence, we reasonably concluded that as part of the overall RPS program, pre-determined penalties would serve to achieve the goals of SB 1078. This would be especially true since we had adopted the flexible compliance rules proposed by the TURN/SDG&E Joint Principles. (D.03-06-071, pp. 48-49.) Moreover, pre-determined penalties would “comport with the intent of [AB 57], which prohibits most instances of after-the-fact reasonableness review for procurement.” (D.03-06-071, p. 51.)

PG&E also raises a variety of arguments why the Texas RPS penalties should not be applied in California. None of these are grounds for granting rehearing. First, it contends that Texas has lower renewable energy procurement goals than California and that, absent a refusal to procure, penalties are unlikely to be incurred by the Texas utilities. (PG&E App., p. 17.) In contrast, it suggests that possible lack of participation by renewable generators will make it difficult to

achieve the goals established in California and increase the risk that California utilities will be assessed penalties. PG&E's argument, however, ignores the flexible rules for compliance adopted by the Decision. One of the reasons for excusing utility non-compliance with its APT is lack of sufficient responses to its request for offers.<sup>13</sup> (D.03-06-071, p. 49.) Thus, the difference in renewable procurement targets between Texas and California does not necessarily increase the risk that California utilities will be penalized for failing to meet their APT. PG&E also maintains that the Texas utilities are not faced with the same investment-grade issues faced by California utilities that would make it difficult for them to procure renewables. (PG&E App., p. 18.) However, SB 1078 specifically provides that utilities are not required to procure under the RPS program until the utility "is deemed creditworthy by the commission upon it having attained an investment grade rating as determined by at least two major rating agencies." (Pub. Util. Code, § 399.14, subd. (a)(1).) Moreover, the Decision specifically provides that "compliance requirements are not triggered until the beginning of the first calendar year after the utility is deemed creditworthy by the Commission." (D.03-06-071, p. 53; see also D.03-06-071, pp. 68 (COL 1), 71 (OP 2).) Thus, PG&E's argument is unfounded. As discussed above, we properly established pre-determined penalties, with appropriate procedural safeguards, which are both supported by the record and consistent with the overall intent of the statute. Accordingly, we properly exercised our discretion when we decided to use the penalty amounts adopted by Texas on an interim basis.

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<sup>13</sup> Additionally, nothing in the record would lead us to conclude that renewable generators would decline to participate in the RPS program simply because California already procures more than 12% of its energy from renewable resources.

**C. The Decision needs clarification to clearly explain the use of ISO Amendment 42 to determine potential intermittent resource generator imbalance costs.**

As part of the criteria for rank ordering and selection of least-cost and best-fit, the Decision used the CEC Integration Study workshop group's methods for determining total integration costs for short-listed contracts, as recommended by TURN and SDG&E. (D.03-06-071, p. 32.) Part of this process included using ISO Amendment 42 for determining potential intermittent resource generator imbalance costs. (D.03-06-071, p. 33.)

PG&E and Edison contend that the Decision errs by using ISO Amendment 42 as the basis for estimating all system integration costs caused by intermittent resources. (PG&E App., pp. 19-22; Edison App., pp. 17-19.) Additionally, they maintain that use of Amendment 42 for this purpose is not supported by the record.

Upon consideration of the arguments presented by Applicants, we find that the arguments raised by PG&E and Edison on this issue are due to an inconsistency between the text of the Decision and Finding of Fact 30 and Ordering Paragraph 17. The text of the Decision properly states that results of Phases 1 and 2 of the CEC Integration Study will be used to determine integration costs, and that all intermittent resources should take responsibility for imbalance costs through the use of ISO Amendment 42. (D.03-06-071, pp. 32-33.) Since Amendment 42 is an accounting mechanism for scheduling deviations, the Commission properly determined that no further calculation of schedule deviations would be needed. However, Finding of Fact 30 and Ordering Paragraph 17 combined these two determinations and state that "system costs" of intermittent resources will be determined pursuant to ISO Amendment 42. (D.03-06-071, pp. 67 (FOF 30) & 72 (OP 17).) Accordingly, we shall modify Finding of Fact 30 and Ordering Paragraph 17 so that they are consistent with the text of the

Decision. This modification disposes of these arguments and rehearing on this issue is denied.

**D. Commission-approved capacity values may be used to establish the as-available capacity price for rank ordering of bids.**

As part of the criteria for rank ordering and selection for least-cost and best-fit renewable resources, Commission-approved capacity values may be used to establish the as-available capacity price. (D.03-06-071, p. 30.) Edison contends that by doing so, the Decision has in effect established a wholesale rate. (Edison App., p. 6.) It asserts that such action is both contrary to section 399.15(d)<sup>14</sup> and the Public Utility Regulatory Policies Act (“PURPA”).<sup>15</sup> (Edison App., p. 4.) Edison’s assertion is based on an incorrect reading of the Decision.

Edison has concluded that the Commission has established a “mandatory” as-available capacity price for purposes of ranking bid prices. This is not the case. The Decision provides that the as-available capacity price will be ranked based on *either* the Commission-approved capacity values or an “all-in price to supply the baseload or peaking product” submitted by the bidder. (D.03-06-071, pp. 30-31; see also D.03-06-071, pp. 23-24, 63.) As-available bidders are not required to incorporate the Commission-approved price in their bids, but may set their own price for bidding. (D.03-06-071, pp. 69 (COL 16), 72 (OP 11).) Moreover, as noted in TURN’s response to Edison’s rehearing application:

Since all products compete against each other in a solicitation, there will be a variety of pricing terms offered by both firm and as-available resources with no obligation for the utility to accept any bids that do not demonstrate superior cost-effectiveness in the least-cost/best-fit evaluation. The level of competition

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<sup>14</sup> Section 399.15(d) provides that “The establishment of a renewables portfolio standard shall not constitute implementation by the commission of the federal Public Utility Regulatory Policies Act of 1978 (Public Law 95-617).”

<sup>15</sup> 16 U.S.C. § 824a-3.

built into this process means that there is little risk that as-available capacity payments will drive the ultimate prices paid by utilities. (*Response of the Utility Reform Network to the Applications for Rehearing of D.03-06-071 by Southern California Edison and Pacific Gas & Electric*, August 7, 2003, p. 7.)

Thus, contrary to Edison's conclusions, the ability to use Commission-approved capacity values does not establish a "mandatory" price. Consequently, Edison's arguments regarding section 399.15(d) and PURPA are unfounded.

Moreover, PURPA is not even implicated in this instance. PURPA concerns establishment of rates for purchase of power from qualifying facilities, and does not address how bids from qualifying facilities should be evaluated. In this instance, the Commission-approved capacity values are simply used for purposes of ranking bid prices. (D.03-06-071, p. 38.) Edison is not required to execute contracts at this price. (D.03-06-071, pp. 26-27.) Rather than establishing any rate for wholesale power, the Decision simply provides the methodology for utilities to rank and select bids based on lowest cost and best fit, as required by section 399.14(a)(2). This is clearly within our jurisdiction. (See Pub. Util. Code, § 399.14, subd. (a)(2)(B).)

Edison also contends that the Decision is not supported by substantial evidence and fails to contain separately stated findings of fact and conclusions of law concerning the as-available capacity rate. (Edison Petition, p. 6.) This argument, however, is premised on Edison's assumption that the Commission is implementing PURPA or setting a mandatory as-available capacity rate. As discussed above, this is not the case. Accordingly, Edison's contention is unfounded.

For the reasons stated above, Edison's arguments regarding the as-available capacity rate are without merit and are not grounds for granting rehearing of this issue.

**E. The Commission properly determined that little weight should be afforded to unaccepted bid and quote data.**

In the Decision, we established the methodology for determining the market price of electricity pursuant to the requirements of section 399.15(c). (D.03-06-071, p. 15.) As part of this methodology, we determined that while bids and quotes would be used as an additional source of information for determining market price, it would be given relatively little weight. (D.03-06-071, p. 17.) Edison argues that this improperly limits the market price determination process and is contrary to the provisions of section 399.15(c)(1). (Edison App., p. 12.) Edison's assertions are without merit.

Edison's arguments are based on caselaw that defines the term "market price" generally. (Edison App., p. 16.) Reliance on these cases is misplaced. In *Sackett v. Spindler* (1967) 248 Cal.App.2d 220, 235-236, the First Appellate District noted that when measuring damages resulting from a breach of contract under the Uniform Sales Act, the "market price" was based on whether there was an available market for the item. In another case relied upon by Edison, *J.M. Huber Corporation v. Denman* (5<sup>th</sup> Cir. 1966) 367 F.2d 104, 109, the question was whether the "market" should be determined based on the contract or in broader terms. In both cases, the courts were required to determine what should be considered to determine the term "market price." That is not the case here, where the "methodology to determine the market price of electricity" is established by statute and shall consider, among other things, "the long-term market price of electricity for fixed price contracts." (Pub. Util. Code, § 399.15, subd. (c)(1).) Thus, the definitions for "market price" in *Sackett* and *J.M. Huber Corporation* are inapplicable.

Edison further cites to the California Uniform Commercial Code, which provides

Whenever the prevailing price or value of any goods regularly bought and sold in any established

commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

(Cal. U. Com. Code, § 2724.) Reliance on this authority is also not applicable in this instance, since the determination of “market price” is specified by statute and not subject to different interpretations.

Further, even if section 2724 of the Uniform Commercial Code were applicable, we still properly concluded that bid and quote data would be considered, but afforded little weight. As discussed in the Decision, evidence presented by parties suggested that bid and unaccepted quote data may not be accurate or possibly subject to manipulation. (D.03-06-071, p. 17.) Consequently, we concluded, as permitted under the California Uniform Commercial Code, that while this data could serve as an additional source of information, it would be afforded relatively little weight.<sup>16</sup> (D.03-06-071, p. 17.) The fact that Edison disagrees with the weight we afforded this information does not demonstrate legal error.

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<sup>16</sup> This conclusion is also consistent with Edison’s proposal that the Commission should “at the very least consider [bid and unaccepted quote] data to determine whether the market price of electricity determined under subdivision (2) [of section 399.15(c)] is ‘in the ballpark’.” (*Opening Brief of Southern California Edison*, April 28, 2003, p. 29.)

## II. CONCLUSION

PG&E and Edison have failed to demonstrate grounds for establishing legal error in D.03-06-071. However, D.03-06-071 is modified, as discussed in this Order.

**IT IS ORDERED** that:

1. D.03-06-071 is modified as follows:
  - a. Pages 50 through 52 are deleted and replaced with the pages in Attachment A of this Order.
  - b. The second full paragraph on page 60, which begins with “This decision adopts an automatic penalty . . .” is deleted and replaced with the following:

“This decision adopts a compliance procedure utilizing pre-determined penalties, subject to further refinement in the next phase of this proceeding, along with certain reporting requirements. We will hold evidentiary hearings, as necessary, on this subject in the next phase and allow for possible refinement of the penalty and the penalty cap amounts, but we will not allow re-litigation of the threshold question of whether to implement a compliance procedure utilizing upfront, pre-determined penalties. We will also consider possible modifications to the reporting requirements.”
  - c. On page 64, the first full sentence, beginning with “The alternate proposed decision also adopts automatic penalties . . .” is deleted and replaced with the following:

“The alternate proposed decision also adopts a compliance procedure utilizing upfront, pre-determined penalties in lieu of an order to show cause process, based on the support of all parties except the three utilities and in concert with the previous testimony of CEERT and TURN referenced in their Comments.”
  - d. On page 67, Finding of Fact 30 is deleted and replaced with the following:

“30. The ISO’s Amendment 42 provides a method for valuing the imbalance costs of intermittent resources.”

- e. On page 68, the word “automatic” is deleted from Finding of Fact 42.
  - f. On page 72, Ordering Paragraph 17 is deleted and replaced with the following:

“17. The imbalance costs of intermittent resources shall be valued by use of the Independent System Operator’s Amendment 42.”
  - g. On page 73, the words “an automatic penalty” is deleted from Ordering Paragraph 23 and replaced with the words “a penalty”.
  - h. On page 73, Ordering Paragraph 24 is deleted and replaced with the following:

“24. Absent a showing of good cause, failure to meet the 20% renewable procurement obligation by the end of 2017 will result in additional penalties.”
  - i. On page 73, Ordering Paragraph 25 is deleted and replaced with the following:

“25. Parties will have further opportunities to address the level of pre-determined penalties and a penalty cap, but not the threshold issue of whether to have a compliance procedure which utilizes upfront, pre-determined penalties.
- 2. Edison’s request to respond to replies to its application for rehearing is denied.
  - 3. Rehearing of D.03-06-071, as modified, is denied.

This order is effective today.

Dated: December 18, 2003, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
CARL W. WOOD  
LORETTA M. LYNCH  
GEOFFREY F. BROWN  
SUSAN P. KENNEDY  
Commissioners

[Attachment A](#)