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Decision 18-05-026 May 31, 2018

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration, and Consider Further Development, of California Renewables Portfolio Standard Program.

Rulemaking 15-02-020

DECISION IMPLEMENTING SENATE BILL 350 PROVISION ON PENALTIES AND WAIVERS IN THE RENEWABLES PORTFOLIO STANDARD PROGRAM AND DENYING PETITION FOR MODIFICATION OF DECISION 17-06-026

Table of Contents

Title	Page
DECISION IMPLEMENTING SENATE BILL 350 PROVISION ON PENALTIES AND WAIVERS IN THE RENEWABLES PORTFOLIO STANDARD PROGRAM AND DENYING PETITION FOR MODIFICATION OF DECISION 17-06-026	1
Summary	2
1. Procedural History	2
2. Plan of this Decision	4
3. Penalties	5
3.1. Background	5
3.2. Schedule of Penalties	6
3.3. Penalty Amount	8
3.4. Adjusting the Penalty Amount	10
3.5. Escalation for Length or Severity of Noncompliance	11
3.6. Penalty Cap	12
3.7. Comparability Between IOUs and Other Retail Sellers	14
4. Waivers.....	15
4.1. Background	15
4.2. Waiver Submission and Determination Process	16
4.3. Unanticipated Curtailment and Greenhouse Gas (GHG) Emission	17
4.3.1. Information Requirements	17
4.3.2. Geographic Boundaries for an Increase in GHG Emissions	19
4.4. Transportation Electrification	21
4.5. Procurement Actions Related to Transportation Electrification.....	23
5. Petition for Modification of D.17-06-026	25
6. Comments on Proposed Decision	27
7. Assignment of Proceeding	28
Findings of Fact.....	28
Conclusions of Law	29
ORDER	32

Appendix A - Sections of SB 350 Addressed in this Decision

DECISION IMPLEMENTING SENATE BILL 350 PROVISION ON PENALTIES AND WAIVERS IN THE RENEWABLES PORTFOLIO STANDARD PROGRAM AND DENYING PETITION FOR MODIFICATION OF DECISION 17-06-026

Summary

This decision completes the implementation of enforcement rules for the California renewables portfolio standard (RPS) program in response to changes made by Senate Bill (SB) 350 (De León), Stats. 2015, ch. 547. This decision:

1. Maintains the existing RPS penalty scheme.
2. Integrates changes made by SB 350 into the current RPS waiver scheme.
3. Denies the August 2, 2017 Petition of Shell Energy North America (US), L.P. for Modification of D.17-06-026.

1. Procedural History

Senate Bill (SB) 350 (De León), Stats. 2015, ch. 547, enacted wide-ranging changes and updates to a number of areas of California’s energy policy, including but not limited to the renewables portfolio standard (RPS).¹ SB 350 made changes to, among other aspects, the timing of compliance periods; the required proportion of retail sales that California retail sellers must provide from eligible renewable energy resources; the contractual arrangements that may be used to comply with the RPS procurement requirements; and the methods for carrying over excess procurement from one compliance period to later compliance periods.

In this proceeding, implementation of SB 350’s provisions for the RPS program began with the Administrative Law Judge’s Ruling Requesting

¹ The RPS is codified at Pub. Util. Code § 399.11-399.20. Unless otherwise noted, all further references to sections are to the Public Utilities Code.

Comment on Implementation of Elements of Senate Bill 350 Relating to Procurement under the California Renewables Portfolio Standard (Procurement Ruling) (April 15, 2016). Subsequently, in Decision (D.) 16-12-040, the Commission implemented the new compliance periods and procurement quantity requirements set by SB 350. D.17-06-026 was the second in the series of decisions implementing SB 350's changes to the RPS program and implemented new rules for use of long-term contracts in RPS compliance and for applying excess procurement in one compliance period to later compliance periods, among others. In D.17-06-026, the Commission stated that a subsequent decision would conclude the series by implementing any needed changes to RPS enforcement processes, including potential penalties.²

To conclude this series, on January 4, 2018, the Administrative Law Judge's Ruling Requesting Comments on Implementing SB 350 Provision on Penalties and Waivers in the Renewables Portfolio Standard Program (Penalties and Waivers Ruling) asked parties to comment on the new language added to Sec. 399.15(b)(8) and Sec. 399.15(b)(5)(C)-(D) by SB 350. Comments were filed on February 1, 2018 by Alliance for Retail Energy Markets and Just Energy Solutions, Inc. (jointly; collectively, AReM/Just); Calpine Energy Solutions LLC (Calpine); California Municipal Utilities Association (CMUA); Green Power Institute (GPI); Independent Energy Producers Association (IEP); Los Angeles Department of Water and Power (LADWP); Office of Ratepayer Advocates (ORA); Pacific Gas and Electric Company (PG&E); Regents of the University of California (UC Regents); Southern California Edison Company (SCE); San Diego

² D.17-06-026 at 4.

Gas & Electric Company (SDG&E); The Utility Reform Network and the Coalition of California Utility Employees (jointly; collectively, TURN/CUE). Reply comments were filed on February 12, 2018 by AReM/Just; Lancaster Choice Energy, Marin Clean Energy, Redwood Coast Energy Authority, Silicon Valley Clean Energy Authority, Sonoma Clean Power Authority, and Peninsula Clean Energy (collectively, CCA Parties); GPI; ORA; PG&E, SCE, and SDG&E (jointly; collectively, IOUs); and TURN/CUE.

2. Plan of this Decision

This decision is the third and final in a planned series of decisions implementing SB 350's changes to the RPS program. The Commission stated in D.14-12-023 that "the Commission's experience with the RPS program over the past decade confirms that ratepayers, retail sellers, and RPS market participants generally are better served by stability and continuity in the administration of compliance and enforcement in the RPS program than by wide-ranging revision of the fundamental enforcement structures, while incorporating the changes to the RPS requirements made by SB 2(1X)."³ Based on the record in this proceeding, it is our intention to continue to apply the same principle in this decision, especially since the existing structures have been working well. The most reasonable path forward is to integrate changes made by SB 350 into the ongoing RPS penalty and waiver scheme, rather than to revisit the penalty structure and compliance process that have already been carefully laid out by previous Commission decisions and are well understood by regulated entities and market participants.

³ D.14-12-023 at 6.

The sections of SB 350 addressed in this decision are reproduced in the appendix.

3. Penalties

3.1. Background

When the RPS program was initiated in 2001, Section 2113⁴ provided the basis for the Commission's authority to assess penalties for noncompliance. Since then, the Commission adopted a series of decisions to determine how penalties would be assessed in the RPS program.⁵ SB 2(1X) continued to rely on Section 2113 for the Commission's authority to assess penalties.⁶ In 2015, SB 350 amended Section 399.15(b)(8) and required the Commission to set a *schedule of*

⁴ Section 2113 provides:

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.

⁵ See D.03-06-071, D.03-12-065, D.06-10-050, and D.14-12-023.

⁶ Section 399.13(e) provided:

If an electrical corporation fails to comply with a commission order adopting a renewable energy resource procurement plan, the commission shall exercise its authority pursuant to Section 2113 to require compliance. The commission shall enforce comparable penalties on any retail seller that is not an electrical corporation that fails to meet the procurement targets established pursuant to Section 399.15.

Section 399.15(b)(8) provided:

If a retail seller fails to procure sufficient eligible renewable energy resources to comply with a procurement requirement pursuant to paragraphs (1) and (2) and fails to obtain an order from the commission waiving enforcement pursuant to paragraph (5), the commission shall exercise its authority pursuant to Section 2113.

penalties that will be *comparable* for electrical corporations and other retail sellers.

Section 399.15(b)(8) provides:

If a retail seller fails to procure sufficient eligible renewable energy resources to comply with a procurement requirement pursuant to paragraphs (1) and (2) and fails to obtain an order from the commission waiving enforcement pursuant to paragraph (5), the commission shall assess penalties for noncompliance. A schedule of penalties shall be adopted by the commission that shall be comparable for electrical corporations and other retail sellers. For electrical corporations, the cost of any penalties shall not be collected in rates. Any penalties collected under this article shall be deposited into the Electric Program Investment Charge Fund and used for the purposes described in Chapter 8.1 (commencing with Section 25710) of Division 15 of the Public Resources Code.

The statute does not specify particulars of a schedule of penalties or describe what constitutes a schedule of penalties. In this decision, first, we determine whether the current penalty scheme can be characterized as a schedule of penalties. Then, we review the particulars of the current penalty scheme to determine what modifications, if any, are warranted in light of the new language added to Section 399.15(b)(8) by SB 350.

3.2. Schedule of Penalties

The Penalties and Waivers Ruling (January 4, 2018) presented the current penalty scheme in a table format for illustrative purposes and asked the parties whether any changes to the current penalty scheme were necessary.⁷ In their

⁷ The purpose of the table was to be a visual aid demonstrating that the existing penalty scheme constitutes a schedule of penalties, but was not to capture all the rules related to RPS compliance or cover every compliance period. For a complete description of the penalty scheme in the RPS program, see the Commission decisions, including but not limited to, D.11-12-020, D.11-12-052, D.12-06-038, D.14-02-023, D.16-12-040, and D.17-06-026.

responses, parties express varying views. IEP, ORA, PG&E, SCE, SDG&E, and TURN/CUE do not recommend any substantive changes to the current scheme.⁸ Other parties offer a number of substantive modifications including removing penalty caps for all classes, adjusting the cap to reflect variations in load sizes, creating different, but comparable schedules applicable to specific categories of entities, among others.⁹

Based on the party comments, we conclude that parties disagree on whether it is necessary to change the existing penalty scheme, but no party disputes that the existing penalty scheme constitutes a *schedule of penalties*, and thus, fulfills the statute. We will address some of the particulars of the penalty scheme in this decision, but these elements can generally be described as follows:

- The current penalty scheme has a time component, covering compliance periods.
- The current penalty scheme has a predetermined penalty amount, \$50 per renewable energy credit (REC).¹⁰
- The current penalty scheme applies to all retail sellers.
- The current penalty scheme specifies the maximum penalty to be applied to investor-owned utilities and all other retail sellers.

We find that these elements of the penalty scheme and the way in which they are set in prior Commission decisions satisfy the plain meaning of a

⁸ PG&E Opening Comments at 2; SCE Opening Comments at 3; SDG&E Opening Comments at 2 and 3; IEP Opening Comments at 2; TURN/CUE Opening Comments at 2 and 4; ORA Reply Comments at 3 and 4.

⁹ See GPI Opening Comments at 1; AReM/Just Opening Comments at 4; UC Regents Opening Comments at 3.

¹⁰ A REC confers to its holder a claim on the renewable attributes of one unit of energy (Megawatt-hour (MWh)) generated from a renewable resource.

schedule;¹¹ and therefore, we conclude that the existing penalty scheme can in fact be referred to as a schedule of penalties.¹²

3.3. Penalty Amount

The Commission sets the rules and processes for imposing monetary penalties, which are determined on the basis of RPS procurement shortfall. The Commission initially set the penalty amount for noncompliance at \$50 per MWh with the annual cap at \$25 million per year.¹³ In the most recent RPS decision addressing penalty amounts, the Commission maintained the penalty amount of \$50 per REC that has been used since the inception of the RPS program.¹⁴

Parties have varying positions on whether the current penalty amount should be maintained as is. GPI, IEP, ORA, PG&E, SCE, SDG&E, and TURN/CUE support keeping the penalty amount at \$50 per REC. IEP, PG&E, and SDG&E argue that the current penalty amount provides a proper incentive for compliance.¹⁵ IEP adds that if the incidence of noncompliance increases or waiver requests increase, the Commission can then act to raise penalties.¹⁶

In contrast, AReM/Just, CMUA, and UC Regents support changing the penalty amount. AReM/Just proposes lowering it to reflect the current market

¹¹ A formal written list of items, usually in tabular form; especially, a listing of rates or prices. (The American Heritage Dictionary, 1981, at 1160)

¹² We use the terms schedule of penalties and penalty scheme interchangeably in the remainder of this Decision.

¹³ D.03-06-071 at Ordering Paragraph (OP) 23.

¹⁴ D.14-12-023 at 40.

¹⁵ PG&E Opening Comments at 2; SDG&E Opening Comments at 3; IEP Opening Comments at 3.

¹⁶ IEP Opening Comments at 3.

prices from today's technologies and considers \$30/REC to be a more appropriate level. CMUA also finds the current penalty level to be outdated but does not offer a specific proposal. Similarly, UC Regents does not have a specific proposal, but suggests taking into account size differences between small and large retail sellers. Calpine suggests establishing two separate penalties: A \$10 per REC penalty for not meeting the long-term requirement and a \$40 per REC penalty for not meeting the procurement quantity requirement.¹⁷ LADWP urges the Commission to consider mitigating factors in order to help with utilities' transition to greater targets, learning to integrate the variability of renewables into the higher targets, and additional planning.¹⁸ LADWP proposes that the mitigating factors be considered to reduce the total maximum penalty, but not the \$50 per MWh penalty.

We maintain the existing penalty amount at \$50 per REC for the following reasons. First and foremost, nothing in SB 350 or party comments on these issues suggest change is warranted. Second, we find the proposals to separate penalties for procurement requirements unreasonable: Long-term procurement is at the core of RPS program and a central legislative mandate, and the current enforcement scheme is carefully designed to promote long-term procurement. Lower (differential) penalties for not meeting the long-term procurement goals would undermine the core mandate of the RPS program. Third, lowering the current penalty amount will undermine compliance by creating an economic disincentive to comply, as it may be cheaper to pay a penalty for noncompliance

¹⁷ Calpine Opening Comments at 4.

¹⁸ LADWP Opening Comments at 2 and 3.

than comply with the procurement requirement. The RPS enforcement rules have always been structured to incentivize compliance rather than present options for Alternative Compliance Mechanisms or any other similar opportunities.¹⁹ Finally, as ORA pointed out, the evaluation and application of mitigating factors and predetermined conditions in order to lower penalties were considered and dismissed by the Commission in D.14-12-023. Parties did not provide any new evidence or persuasive argument that would lead us to reconsider mitigating factors and predetermined conditions. Therefore, there is no reason to revisit the issue in order to implement changes to the RPS program enacted by SB 350.

3.4. Adjusting the Penalty Amount

The current penalty amount is set out as \$50 per REC and does not differentiate between deficiencies in Portfolio Balance Requirement (PBR) or Procurement Quantity Requirement (PQR).²⁰ All parties, except CMUA and UC Regents, agree that the penalty amounts should not vary according to factors such as PBR or PQR. CMUA argues that PCC makes a per REC penalty inappropriate as the procurement covered under different portfolio content categories are worth different dollar amounts.²¹ Similarly, UC Regents proposes

¹⁹ D.14-12-023 at 49-51.

²⁰ PQR is defined by Sec. 399.15(b)(2)(B) and implemented in D.11-12-020; PQR refers to the percentage of retail sales required to be procured from eligible renewable energy resources. PBR is defined by Sec. 399.16(c) and implemented in D.12-06-038; PBR refers to the percentage of procurement that must come from specific portfolio content categories (PCC) in each compliance period. Category 1 (PCC 1) refers to procurement described in Section 399.16(b)(1); Category 2 (PCC 2) refers to procurement described in Section 399.16(b)(2); Category 3 (PCC 3) refers to procurement described in Section 399.16(3).

²¹ CMUA Opening Comments at 8.

differentiating between PCC 1 shortfall and PCC 3 shortfall due to differences in the cost of actual compliance. Calpine suggests creating two separate and distinct penalties, one for a retail seller's failure to meet any long-term contracting/ownership requirement, and a second penalty for a retail seller's failure to meet its PQR obligations.

As GPI and TURN/CUE point out, the issue of differentiating penalty amount by type of procurement deficiencies was litigated in Rulemaking (R.) 11-05-005. The Commission concluded in D.14-12-023 that there is no need to create a complex process to determine a variable penalty amount.²² We still consider a differentiating enforcement mechanism to be overly burdensome to regulate and implement. Adjusting the penalty amount based on the type of procurement shortfalls would complicate the compliance process without providing any countervailing benefits. In addition, nothing in the record and the statutory language suggests a change is needed or mandatory. Therefore, we maintain the current penalty amount at \$50 per REC and do not see any need to adjust it according to factors such as deficiencies in PQR or PBR.

3.5. Escalation for Length or Severity of Noncompliance

The current penalty schedule does not include escalation factors for the length or severity of noncompliance above and beyond the escalation inherent in a per-REC penalty scheme.

AReM/Just, Calpine, PG&E, SCE, SDG&E, and TURN/CUE suggest no changes to the existing penalty scheme. Both AReM and PG&E argue that adding escalations needlessly complicates the process without providing real

²² D.14-12-023 at 40.

benefits, as length and severity of compliance are not currently issues for retail sellers.²³ SCE states that the current penalty already escalates the penalty amount by the number of RECs not in compliance. TURN/CUE points out that the Commission has the authority to punish severe or chronic noncompliance with sanctions under Sections 2107 and 2113.

In contrast, CMUA, GPI, and IEP support changes to the current penalty scheme to reflect length or severity of noncompliance. While CMUA supports differentiated penalties based on whether or not penalties are passed through rates, IEP proposes increasing the penalty by 25 percent per quarter for which the retail seller fails to pay its penalty in order to incent timely payment. LADWP suggests using de-escalation factors for over-compliance.

The issue of escalating penalties was litigated in R.11-05-005. Even though the current penalty schedule does not include escalation factors for the length or severity of noncompliance, per the escalation inherent in a per-REC penalty scheme, the farther out of compliance the retail seller, the more the retail seller pays for noncompliance. There is nothing new in the record or statutory language to support penalizing retail sellers at a higher rate for severity and duration of noncompliance. Therefore, we maintain the current scheme as determined by D.14-12-023 and do not see any need to adjust the penalty amount for length or severity of noncompliance.

3.6. Penalty Cap

Penalty cap refers to the maximum penalty that a retail seller subject to the cap would be required to pay for a compliance period. D.14-12-023 set a cap on

²³ AReM/Just Opening Comments at 7; PG&E Opening Comments at 3.

penalties for a retail seller's failure to meet the RPS requirement. For large IOUs, the cap is set according to the numbers of years in the compliance period: \$75 million for the first RPS compliance period (2011-2013), \$75 million for the second RPS compliance period (2014-2016), \$100 million for the third compliance period (2017-2020), and \$25 million each year for all following years. For all other retail sellers, the penalty cap was set as the lesser of the penalty cap for the large investor-owned utilities or a cap figured as 50 percent of the retail seller's PQR for the compliance period multiplied by the penalty amount of \$50 per REC.

The majority of parties support extending the current penalty cap into future compliance periods. SCE notes that the current caps were carefully deliberated and there are no changes in the circumstances that warrant a modification.²⁴ SDG&E argues that eliminating caps would be overly punitive, resulting in penalties outweighing cost of noncompliance.²⁵

Opposing extending the penalty cap into the future, CMUA, GPI, and UC Regents argue that caps are disproportionate and unfair to non-IOU retail sellers and should be removed or reconsidered. UC Regents asserts that IOUs' penalty cap would have to be 17 times higher to be equivalent to a penalty cap imposed on small retail sellers.²⁶ Similarly, GPI argues that the current penalty cap strongly favors the larger load serving entities and asserts that dropping the cap would promote equity among load serving entities and enhance penalties for severe noncompliance.

²⁴ SCE Opening Comments at 4.

²⁵ SG&E opening Comments at 4.

²⁶ UC Regents Opening Comments at 5.

AReM/Just also recommends refinement of the cap to reflect the differences between IOUs and non-IOU retail sellers. AReM/Just considers a comparable, proportionately similar cap that takes into account size of retail load and market share to be a reasonable and equitable approach. Calpine proposes that the penalty cap in any single compliance period should be allocated between a retail seller's long-term contracting/ownership requirement and the PQR obligation.

As stated in D.14-12-023, penalty caps are designed to encourage compliance while providing a reasonable limitation on total penalty exposure for each type of retail seller. The current penalty cap is already adjusted by D.14-12-023 to account for size differences between non-IOU retail sellers and IOUs.²⁷ Nothing in the record or statute requires or persuades us to modify the cap to further reflect size differences among retail sellers on the penalty cap or suggests such a change is warranted. Therefore, current caps should continue into the future and be kept at current levels in order to maintain their effectiveness.

3.7. Comparability Between IOUs and Other Retail Sellers

Section 399.15(b)(8) requires that a schedule of penalties be comparable between IOUs and other retail sellers. Currently, all load serving entities pay the same \$50 per REC penalty amount, but there are some differences between penalties for IOUs and other retail sellers, such as maximum penalties. Penalty caps as set out by D.14-12-023 takes into account the size differences between IOUs and other retail sellers, as described in 3.6 above. The Penalties and

²⁷ D.14-12-023 at 44-47.

Waivers Ruling sought party comments on whether there are any other instances where the current penalties are not comparable between IOUs and other retail sellers.

Most parties either did not comment, stating that they believe all retail sellers are subject to equal enforcement of compliance rules, or expressed that they were not aware of any instances where the current penalties are not comparable between IOUs and other retail sellers.²⁸

In their comments, AReM/Just and GPI brought up the issue of penalty caps as an area in which the current penalties are different for large IOUs and the other retail sellers. As we have discussed and determined in Section 3.2, we do not find any need for modifying the penalty cap. In conclusion, we find no compelling arguments for changing the current rules to ensure comparability; current penalty scheme rules were carefully deliberated and made to be comparable.

4. Waivers

4.1. Background

Section 399.15(b)(5) directs the Commission to waive the enforcement of a retail seller's RPS penalty if the retail seller can demonstrate that it met any of the conditions listed in that section. The Commission adopted particulars of the process for submission and determination of a waiver request in D.14-12-023.

SB 350 added language to Sec. 399.15(b)(5)(C)-(D) specifying the basis on which retail sellers may seek a waiver of their RPS obligations, including for:

1) unanticipated curtailment of eligible renewable resources, "if the waiver

²⁸ See PG&E Opening comments at 4; SCE Opening Comments at 4; TURN/CUE Opening Comments at 6.

would not result in an increase in GHG [greenhouse gas] emissions,” or 2) if the retail seller is impacted by an “unanticipated increase in retail sales due to transportation electrification.” Any waiver requested under Sec. 399.15(b)(5)(C) must show that there was an unanticipated curtailment of eligible renewable resources and the waiver would not result in an increase in GHG emissions. Similarly, any waiver requested under Sec. 399.15(b)(5)(D) must show that actual sales exceeded prior forecasts due to transportation electrification and that the retail seller has taken reasonable measures to procure sufficient resources to account for the unanticipated increase.

4.2. Waiver Submission and Determination Process

In D.14-02-023 the Commission established a process for consideration of a waiver request.²⁹ In general, all parties agree that OPs 2 through 13 of D.14-12-023 apply to the new provisions added by SB 350 for a retail seller seeking a waiver of its RPS procurement requirements. As GPI noted, while OPs 2 through 13 provide the procedural requirements for a retail seller that fail to comply with its procurement requirement for a given compliance period to seek a waiver of those requirements, new provisions added by SB 350 describe the conditions that can provide justification for a waiver. Therefore, OPs 2 through 13 of D.14-12-023 are compatible with the statutory language of SB 350.

Since nothing in SB 350 warrants modifications to OPs 2 through 13 of D.14-12-023, retail sellers should continue to follow these Ordering Paragraphs, taking into account that relevant statutory condition or conditions may change from time to time.

²⁹ D.14-12-023 OP 2 through OP 13.

4.3. Unanticipated Curtailment and Greenhouse Gas (GHG) Emission

Section 399.15(b)(5)(C) provides a basis on which a retail seller may seek a waiver of its RPS procurement obligation for unanticipated curtailment of eligible renewable resources, if the waiver would not result in an increase in GHG emissions, but does not specify conditions that must be met before a waiver will be granted. The retail seller seeking a waiver of its RPS procurement obligation under Section 399.15(b)(5)(C) must demonstrate that there was an unanticipated curtailment of renewable energy resources and the waiver would not result in an increase in greenhouse gas emissions. In order to determine whether the waiver would not result in increased GHG emissions, the Commission needs to specify (1) the information that the Commission will require from the retail sellers seeking a waiver under Section 399.15(b)(5)(C), and (2) the geographic boundaries for a GHG emissions analysis.

4.3.1. Information Requirements

Both PG&E and SDG&E point out that there are only two plausible scenarios for unanticipated curtailment: 1) economic curtailment to remove excess generation; and 2) to address a reliability issue. Under the first scenario, curtailment to remove excess generation would not result in increased emissions, because the resources that are typically curtailed are sources that do not emit GHG, e.g. solar, wind. According to SDG&E, because the second scenario is for addressing a reliability issue, it should not warrant a penalty.³⁰ Therefore, SDG&E concludes, there is no need to conduct a GHG emissions analysis.

³⁰ PG&E Opening Comments at 6; SDG&E Opening Comments at 6.

Similarly, ORA does not foresee a situation in which granting a waiver due to unanticipated curtailment would increase GHG emissions, therefore, ORA suggests maintaining the current penalty and waiver structure until such a case occurs.³¹

In D.14-12-023 the Commission concluded that “because the facts and circumstances may differ in each request for waiver of procurement quantity requirements or request for reduction of portfolio balance requirements, it is appropriate for the Commission to make a case-by-case determination of the merits of each request for waiver of procurement quantity requirements or request for reduction of portfolio balance requirements.”³² We find that it is appropriate to maintain the same conclusion. Accordingly, we will not prejudge the outcome of waiver requests submitted under Section 399.15(b)(5)(C) by concluding that there is no need for GHG analysis or by specifying the scenarios that may result in increase in GHG emissions. We will continue to make a case-by-case determination of the merits of each request for waiver of procurement quantity requirements or request for reduction of portfolio balance requirements. However, in the interest of assisting the waiver request consideration and providing certainty for retail sellers that may seek waivers in the future, we find that it is reasonable to require the following information in their waiver requests from the retail sellers seeking waiver of their RPS obligations under Section 399.15(b)(5)(C):

- Description of the curtailment event.

³¹ ORA Reply Comments at 8.

³² D.14-12-023 at COL 10.

- Reason for the curtailment event.
- Reason why the curtailment was unanticipated.
- Whether there was any replacement energy needed, and if so, description of the replacement energy procured as a result of the curtailment.
- Whether there was any increased GHG emissions attributed to the retail seller seeking a waiver as a result of the curtailment.

4.3.2. Geographic Boundaries for an Increase in GHG Emissions

Parties have varying positions regarding the geographic boundary for the emission increase analysis necessary to determine whether the waiver would not result in increased GHG emissions. Supporting the use of the state of California as a boundary for the emissions increase, PG&E and SCE argue that expanding the emissions increase analysis outside California would be burdensome, impractical, and impossible to implement.³³ In particular, PG&E and SCE suggest that the Commission consider GHG emissions in California from the electricity sector, as is determined in the Cap-and-Trade Program. ORA agrees that in the event that it is necessary to determine whether a waiver would result in increase of GHG emissions, the emissions attributed to a retail seller should be consistent with its total covered emissions as defined by the California Air Resources Board (CARB),³⁴ which is used as the basis for compliance obligations in the Cap-and-Trade Program.³⁵

³³ PG&E Opening Comments at 5; SCE Opening Comments at 6.

³⁴ 17 CCR Section 95100-95163.

³⁵ ORA Reply Comments at 9.

Other parties support the use of a broader region. GPI, IEP, and TURN/CUE support using the Western Electricity Coordinating Council (WECC) area as the basis of GHG emissions increase, because, these parties argue, in most cases WECC is the area from which a retail seller procures energy. Pointing out that unlike conventional pollutants, e.g. NO_x and particulate matters, GHG emissions are global and the source of the emissions is irrelevant, GPI argues that not the service territory but the energy procurement region of the load serving entity should be considered in the emissions analysis. Accordingly, GPI finds the WECC area to be appropriate for the emissions increase analysis, if the load serving entity procures from out-of-state resources.

AReM/Just agrees with some other parties that the GHG-related analysis should not be expanded to WECC. AReM/Just considers the requirement that a waiver request would not result in GHG emissions increase may be an impossible standard, because (1) there may be many reasons an entity may request a waiver, and (2) it may be impossible to determine if the retail seller's waiver would have changed the historical system dispatch in a way that increased GHG emissions. AReM/Just recommends workshops to explore this topic further.

Parties gave no example of how to evaluate emissions increase using the WECC area or any agency using the WECC area as a basis for emissions analysis. In contrast, there is a known method for California. Therefore, in the interest of keeping RPS program simple to administer and implement, we will align our consideration of geographic boundaries for an increase in GHG emissions with the geographic boundaries applied in California's Cap-and-Trade Program. We also find that the emissions attributed to a retail seller seeking a waiver under

this provision should be consistent with its total covered emissions compliance obligation in the Cap-and-Trade Program.³⁶

4.4. Transportation Electrification

SB 350 also added language to Section 399.15(b)(5)(D) allowing retail sellers to seek a waiver of their RPS obligations if they are impacted by an “unanticipated increase in retail sales due to transportation electrification.” Section 399.15(b)(5)(D)(i) directs the Commission to account for whether transportation electrification significantly exceeded forecasts in the service territory of the retail seller seeking a waiver using the best and most recently available information filed with CARB, California Energy Commission (CEC) or other state agency. Towards this end, the Commission needs to determine whether transportation electrification significantly exceeded forecasts for retail sellers.

Both PG&E and SCE support the use of the same burden of proof for all entities and propose that the Commission require that all electric service providers submit sufficient information regarding their retail load and generation profiles.³⁷ Similarly, TURN/CUE recommends requiring energy service providers to submit a sales forecast attributable to transportation electrification and to take proactive measures to limit their exposure to risk that unanticipated increases in transportation electrification could affect RPS compliance.³⁸ They also argue that electric service providers should not be

³⁶ Under California’s regulation for the mandatory reporting of GHG emissions, retail sellers must report their annual GHG emissions to the CARB.

³⁷ PG&E Opening Comments at 7.

³⁸ TURN/CUE Opening Comments at 6 and 7.

allowed to seek a waiver unless they have filed forecasts as part of their procurement plans related to electric vehicles with the state agencies.

Supporting a more definite target, GPI suggests that the proper guide for anticipated load growth due to transportation electrification should be the Governor's goal of 1.5 million electric vehicles on the road by 2025, apportioned to the load serving entity seeking a waiver.

Transportation electrification is now an essential component of the State's climate change goals and included in other areas of SB 350, hence it is a factor in RPS program changes per SB 350. There are initiatives that aim to accelerate the deployment of zero emission vehicles. For example, the goal of the Charge Ahead California Initiative is "to place in service at least 1,000,000 zero-emission and near-zero-emission vehicles by January 2023."³⁹ In 2018, California Governor Jerry Brown issued Executive Order B-48-18, which set a target of getting 5 million zero-emission vehicles on the roads in California by 2030. The impact of these initiatives on transportation electrification, and hence on load growth, should not be ignored.

For waiver determinations, it is necessary for the Commission to be informed about the retail seller's transportation electrification forecast and how the retail seller computed that forecast. Unless the Commission is informed

³⁹ The goal of the Charge Ahead California Initiative is "to place in service at least 1,000,000 zero-emission and near-zero-emission vehicles by January 1, 2023, to establish a self-sustaining California market for zero-emission and near-zero-emission vehicles in which zero-emission and near-zero-emission vehicles are a viable mainstream option for individual vehicle purchasers, businesses, and public fleets, to increase access for disadvantaged, low-income, and moderate-income communities and consumers to zero-emission and near-zero-emission vehicles, and to increase the placement of those vehicles in those communities and with those consumers to enhance the air quality, lower greenhouse gases, and promote overall benefits for those communities and consumers." (Health and Safety Code § 44258.4.(b))

about what is anticipated by the retail seller, the Commission would not have a basis to determine what is unanticipated by the retail seller. Therefore, all retail sellers must annually demonstrate that transportation electrification is quantitatively accounted for in their RPS procurement plans: All retail sellers must explicitly reference forecasted transportation electrification in their procurement plans; provide a detailed description of the data and method used to support their forecast; and explain how they considered the California Energy Commission's Integrated Energy Policy Report transportation electricity demand forecast in creating their own forecast. These forecasts, along with publicly available information from the Commission, CEC, and CARB, are necessary for the Commission to make the determination in waiver requests submitted under Section 399.15(b)(5)(D)(i).

4.5. Procurement Actions Related to Transportation Electrification

Sec. 399.15(b)(5)(D)(ii) requires that retail sellers must have taken reasonable measures "to procure sufficient resources" to account for unanticipated increases in retail sales due to transportation electrification in order to be granted a waiver. Being informed about what procurement actions were available to a retail seller is necessary as the information will allow the Commission to determine whether additional procurement should have been done to account for unanticipated increases such that it should now be ordered by the Commission and incorporated into retail sellers' procurement plans.

Parties expressed varying views on the need for additional procurement actions that may be needed to meet the additional load growth due to unanticipated level of transportation electrification. Some parties do not see a need for additional procurement action, because currently available procurement

options, such as long-term and short-term contracts, as well as the ability to apply eligible RECs from excess procurement to later compliance periods,⁴⁰ are considered to be adequate tools to address unanticipated changes in demand forecast due to electric vehicle penetration or other reasons.⁴¹ SDG&E notes that “minimum margin of procurement”⁴² is a tool authorized by Section 399.13(a)(4)(D) and available to all load-serving entities to hedge against procurement shortfalls for numerous reasons including unanticipated demand increase due to electric vehicle penetration.⁴³

In contrast, GPI suggests a specific target of 30 percent over-procurement ratio to meet unanticipated increase in demand. Pointing out that the Commission’s Integrated Resource Planning (IRP) effort is tasked with forecasting electric vehicle penetration,⁴⁴ ORA suggests waiting on identifying a target for retail sellers in this proceeding until the IRP process reaches a conclusion.

⁴⁰ D.17-06-026 Section 3.1.5 implements excess procurement rules under SB 350.

⁴¹ See IEP Opening Comments at 7; PG&E Opening Comments at 7; SDG&E Opening Comments at 7.

⁴² Section 399.13(a)(4)(D) provides:

An appropriate minimum margin of procurement above the minimum procurement level necessary to comply with the renewables portfolio standard to mitigate the risk that renewable projects planned or under contract are delayed or canceled. This paragraph does not preclude an electrical corporation from voluntarily proposing a margin of procurement above the appropriate minimum margin established by the commission.

⁴³ SDG&E Opening Brief at 7.

⁴⁴ Order Instituting Rulemaking to Develop an Electricity Integrated Resource Planning Framework and to Coordinate and Refine Long-Term Procurement Planning Requirements (IRP OIR) at 10-11 (issued February 19, 2016); in R.16-02-007.

As pointed out by many parties, retail sellers' RPS procurement plans already contain measures that mitigate the risk of noncompliance due to error in load forecasts or fluctuations in generation. Section 399.13 (a)(4)(D) requires the Commission to adopt "[a]n appropriate minimum margin of procurement above the minimum procurement level necessary to comply with the renewables portfolio standard." This margin of procurement provides a buffer that would protect against retail sellers falling short of their RPS procurement obligation in the event that transportation electrification exceeds forecasts. Section 399.13(a)(4)(B) requires the Commission to adopt "Rules permitting retail sellers to accumulate ["bank"], beginning January 1, 2011, excess procurement in one compliance period to be applied to any subsequent compliance period." Banking excess procurement provides another buffer that would protect against RPS procurement shortfall.

Given the existing measures that allows for mitigating errors in load forecasts, we determine that no additional procurement actions are necessary to satisfy this provision. Existing procurement options such as RPS request for offers, bilateral contracting, banking of RECs, and reasonable amounts of over-procurement should be sufficient to mitigate the impact of any unanticipated increase in retail sales due to transportation electrification.

5. Petition for Modification of D.17-06-026

Shell Energy North America (US), L.P. (Shell) filed a petition to modify D.17-06-026 (Shell Petition) on August 2, 2017. ORA, TURN/CUE, (jointly), and the IOUs (jointly) filed timely responses, opposing the modifications sought. Shell filed a timely reply to responses. The Shell Petition was filed within one year of the effective date of D.17-06-026 (June 29, 2017). Thus, it meets the timeliness requirement of Rule 16.4(d).

The Shell Petition seeks to modify the Commission's implementation of Section 399.15(b) in D.17-06-026. The Shell Petition asks the Commission to modify D.17-06-026 by 1) allowing a load-serving entity's customers' long-term contracts to count toward the load-serving entity's long-term contracting requirement, and 2) allowing "repackaged"⁴⁵ portions of long-term contracts to count toward the load-serving entity's (LSE) RPS obligation.

Shell argues that a customer's long-term investment in renewables is unrecognized by the Commission because D.17-06-026 requires an LSE, not a customer, to be the owner of the RPS contract or ownership agreement in order to comply with the RPS procurement requirement. Because the customer's ownership is not recognized, Shell argues, the customers that are owners of the RPS contract or ownership agreement get penalized by paying for the cost of their RPS procurement program as well as their share of the LSE's mandated RPS procurement. Shell believes that its proposed modification would promote increased customer participation in pursuing the state's green energy goals. Shell additionally points out that D.16-01-032⁴⁶ allows for counting voluntary storage deployments by electric service provider (ESP) customers to count toward the ESP's storage target.⁴⁷

⁴⁵ A "repackaged" contract is a special case of long-term contract, in which a long-term contract for a large volume of generation is divided into smaller pieces, with the pieces being sold to several different entities. (D.17-06-026 at 21.)

⁴⁶ D.16-01-032 was issued in R.15-03-011, Order Instituting Rulemaking to consider policy and implementation refinements to the Energy Storage Procurement Framework and Design Program (D.13-10-040, D.14-10-045) and related Action Plan of the California Energy Storage Roadmap.

⁴⁷ Shell Petition at 7.

Regarding the repackaged contracts, Shell argues that a repackaged contract does not need to be ten years to achieve the goal of promoting investment in new renewable generation. Shell considers repackaged agreements of less than ten years to be just as beneficial for the LSE and the contract holder.

IOUs and ORA point out that the Shell Petition attempts to relitigate issues that have already been considered and resolved in D.17-06-026. The issues that are addressed in the Shell Petition are the same issues that Shell brought up in June 15, 2017 Opening Comments of Shell Energy North America (US), L.P. on Presiding Judge Simon's Proposed Decision on SB 350 RPS Implementation.⁴⁸ Because these issues were already determined in D.17-06-026, we deny the Shell Petition.

6. Comments on Proposed Decision

The proposed decision of Administrative Law Judges (ALJ) Atamturk and Mason in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on May 21, 2018 by AReM/Just, GPI, IEP, and ORA. Reply comments were filed on May 29, 2018 by ORA and jointly by PG&E, SCE, and SDG&E. All comments and reply comments have been carefully reviewed. Revisions have been made to improve clarity and to correct clerical errors.

⁴⁸ Opening Comments of Shell Energy North America (US), L.P. on Presiding Judge Simon's Proposed Decision on SB 350 RPS Implementation, June 15, 2017, at 2-10.

7. Assignment of Proceeding

Clifford Rechtschaffen is the assigned Commissioner and Robert M. Mason III and Nilgun Atamturk are the assigned ALJs in this proceeding.

Findings of Fact

1. SB 350 amends Section 399.15(b)(8) and requires the Commission to set a schedule of penalties that will be comparable for electrical corporations and other retail sellers.

2. SB 350 adds new language to Sec. 399.15(b)(5)(C)-(D) specifying the basis on which retail sellers may seek a waiver of their RPS obligations, including for unanticipated curtailment of eligible renewable resources, “if the waiver would not result in an increase in GHG [greenhouse gas] emissions,” and, if the retail seller is impacted by an “unanticipated increase in retail sales due to transportation electrification.”

3. No party disputes that the existing penalty scheme constitutes a schedule of penalties.

4. The current penalty scheme meets the plain meaning of a schedule.

5. Nothing in the record suggests a need for changing the penalty amount.

6. Nothing in the record suggests a need for differentiating the penalty amount by type of procurement deficiencies.

7. It would be burdensome to implement a mechanism that differentiates penalty amount by type of procurement deficiencies.

8. The current penalty scheme does not include escalation factors for the length or severity of noncompliance above and beyond the escalation inherent in a per-renewable energy credit (REC) penalty scheme.

9. There is nothing new in the record to support penalizing retail sellers at a higher rate for severity and duration of noncompliance, above and beyond the escalation inherent in the current penalty scheme.

10. The current penalty cap is already adjusted by D.14-12-023 to account for size differences between retail sellers.

11. Under California' regulation for mandatory reporting of GHG emissions, retail sellers must report their annual GHG emissions to the California Air Resources Board; these reports are used as the basis for compliance obligations in the Cap-and-Trade Program.

12. Transportation electrification is now an essential component of the State's climate change goals and included in other mandates of SB 350; hence it is also a factor in RPS program changes made by SB 350.

13. Retail sellers' RPS procurement plans already contain measures that mitigate the risk of noncompliance due to error in load forecasts or fluctuations in generation.

14. The Petition for Modification of Decision 17-06-026 by Shell Energy North America (US), L.P. (Shell) was filed on August 2, 2017.

Conclusions of Law

1. Because the current RPS penalty scheme meets the plain meaning of a penalty schedule and is consistent with the language added by SB 350, it constitutes a schedule of penalties.

2. Because nothing in the statutory language or in the record suggests a need for changing the penalty amount, we should maintain the penalty amount of \$50 per REC adopted in D.14-12-023.

3. Because nothing in the statutory language or in the record suggests a change is needed and it would be burdensome to implement a mechanism that

differentiates penalty amount by type of procurement deficiencies, we should maintain the penalty amount invariant to factors such as procurement deficiency types.

4. Because there is nothing new in the statutory language or in the record to support penalizing retail sellers at a higher rate for severity and duration of noncompliance, above and beyond the escalation inherent in the current penalty scheme, we should not adjust the penalty amount for duration or severity of noncompliance.

5. Because the current penalty cap is already adjusted to account for size differences between retail sellers, current penalty caps should continue into the future and be kept at current levels.

6. Because there are no compelling arguments for changing the schedule of penalties to make it more compatible between investor-owned utilities and other retail sellers, we should maintain the current penalty scheme as adopted in D.14-12-023.

7. Because the OPs 2 through 13 of D.14-12-023 are consistent with the language added by SB 350, we should not modify them.

8. In the interest of assisting the waiver request consideration and providing certainty for retail sellers that may seek waivers in the future, retail sellers should include the following information in their waiver requests seeking waiver of their RPS obligations under Section 399.15(b)(5)(C): Description of the curtailment event; reason for the curtailment event; reason why the curtailment was unanticipated; whether there was any replacement energy needed, and if so, description of the replacement energy procured as a result of the curtailment; whether there was any increased GHG emissions attributed to the retail seller seeking a waiver as a result of the curtailment.

9. We should continue to make a case-by-case determination of the merits of each request for waiver of procurement quantity requirements or request for reduction of portfolio balance requirements.

10. To maintain consistency among statewide programs, we should align our consideration of geographic boundaries for an increase in GHG emissions with the geographic boundaries applied in the Cap-and-Trade Program and the emissions attributed to a retail seller seeking a waiver under Section 399.15(b)(5)(C) should be consistent with its total covered emissions subject to compliance obligation in the Cap-and-Trade Program.

11. Because the Commission must make a determination in waiver requests submitted under Section 399.15(b)(5)(D), all retail sellers should demonstrate that transportation electrification is accounted for in their RPS procurement plans by explicitly referencing forecasted transportation electrification in their procurement plans; providing a detailed description of the data and method used to support their forecast; and explaining how they considered the California Energy Commission's Integrated Energy Policy Report transportation electricity demand forecast in creating their own forecast.

12. Due to the availability of procurement options to mitigate errors in load forecast, including unanticipated increase in retail sales due to transportation electrification, no additional procurement actions should be imposed.

13. Because Shell is relitigating the issues it has already commented on in June 15, 2017 Opening Comments of Shell Energy North America (US), L.P. on Presiding Judge Simon's Proposed Decision on SB 350 RPS Implementation, Shell's Petition for Modification of D.17-06-026 should be denied.

O R D E R

IT IS ORDERED that:

1. The Commission shall maintain the existing Renewables Portfolio Standard program penalty and waiver scheme.
2. If a retail seller as defined in Public Utilities Code Section 399.12(j) requests a waiver of its procurement quantity requirements for a compliance period under Section 399.15(b)(5)(C), the retail seller must include the following information in its waiver request: Description of the curtailment event; reason for the curtailment event; reason why the curtailment was unanticipated; whether there was any replacement energy needed, and if so, description of the replacement energy procured as a result of the curtailment; and whether there was any increased greenhouse gas emissions attributed to the retail seller seeking a waiver as a result of the curtailment.
3. Beginning with the 2018 Renewables Portfolio Standard Procurement Plan cycle, all retail sellers as defined in Public Utilities Code Section 399.12(j) must annually demonstrate that transportation electrification is accounted for in their procurement plans by explicitly referencing forecasted transportation electrification in their Renewables Portfolio Standard procurement plans; providing a detailed description of the data and method used to support their forecast; and explaining how they considered the California Energy Commission's Integrated Energy Policy Report transportation electricity demand forecast in creating their own forecast.

4. The Petition of Shell Energy North America (US), L.P. for Modification of D.17-06-026, filed on August 2, 2017, is denied.

5. Rulemaking 15-02-020 remains open.

This order is effective today.

Dated May 31, 2018, at San Francisco, California.

MICHAEL PICKER

President

CARLA J. PETERMAN

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

Commissioners

APPENDIX A

Sections of SB 350 Addressed in this Decision

APPENDIX A

Public Utilities Code Sections

Waivers: 399.15(b)(5) – 399.15(b)(7)

Penalties: 399.15(b)(8)

(5) The commission shall waive enforcement of this section if it finds that the retail seller has demonstrated any of the following conditions are beyond the control of the retail seller and will prevent compliance:

(A) There is inadequate transmission capacity to allow for sufficient electricity to be delivered from proposed eligible renewable energy resource projects using the current operational protocols of the Independent System Operator. In making its findings relative to the existence of this condition with respect to a retail seller that owns transmission lines, the commission shall consider both of the following:

(i) Whether the retail seller has undertaken, in a timely fashion, reasonable measures under its control and consistent with its obligations under local, state, and federal laws and regulations, to develop and construct new transmission lines or upgrades to existing lines intended to transmit electricity generated by eligible renewable energy resources. In determining the reasonableness of a retail seller's actions, the commission shall consider the retail seller's expectations for full-cost recovery for these transmission lines and upgrades.

(ii) Whether the retail seller has taken all reasonable operational measures to maximize cost-effective deliveries of electricity from eligible renewable energy resources in advance of transmission availability.

(B) Permitting, interconnection, or other circumstances that delay procured eligible renewable energy resource projects, or there is an insufficient supply of

eligible renewable energy resources available to the retail seller. In making a finding that this condition prevents timely compliance, the commission shall consider whether the retail seller has done all of the following:

(i) Prudently managed portfolio risks, including relying on a sufficient number of viable projects.

(ii) Sought to develop one of the following: its own eligible renewable energy resources, transmission to interconnect to eligible renewable energy resources, or energy storage used to integrate eligible renewable energy resources. This clause shall not require an electrical corporation to pursue development of eligible renewable energy resources pursuant to Section 399.14.

(iii) Procured an appropriate minimum margin of procurement above the minimum procurement level necessary to comply with the renewables portfolio standard to compensate for foreseeable delays or insufficient supply.

(iv) Taken reasonable measures, under the control of the retail seller, to procure cost-effective distributed generation and allowable unbundled renewable energy credits.

(C) Unanticipated curtailment of eligible renewable energy resources if the waiver would not result in an increase in greenhouse gas emissions.

(D) Unanticipated increase in retail sales due to transportation electrification. In making a finding that this condition prevents timely compliance, the commission shall consider all of the following:

(i) Whether transportation electrification significantly exceeded forecasts in that retail seller's service territory based on the best and most recently available information filed with the State Air Resources Board, the Energy Commission, or other state agency.

(ii) Whether the retail seller has taken reasonable measures to procure sufficient resources to account for unanticipated increases in retail sales due to transportation electrification.

(6) If the commission waives the compliance requirements of this section, the commission shall establish additional reporting requirements on the retail seller to demonstrate that all reasonable actions under the control of the retail seller are taken in each of the intervening years sufficient to satisfy future procurement requirements.

(7) The commission shall not waive enforcement pursuant to this section, unless the retail seller demonstrates that it has taken all reasonable actions under its control, as set forth in paragraph (5), to achieve full compliance.

(8) If a retail seller fails to procure sufficient eligible renewable energy resources to comply with a procurement requirement pursuant to paragraphs (1) and (2) and fails to obtain an order from the commission waiving enforcement pursuant to paragraph (5), the commission shall assess penalties for noncompliance. A schedule of penalties shall be adopted by the commission that shall be comparable for electrical corporations and other retail sellers. For electrical corporations, the cost of any penalties shall not be collected in rates. Any penalties collected under this article shall be deposited into the Electric Program Investment Charge Fund and used for the purposes described in Chapter 8.1 (commencing with Section 25710) of Division 15 of the Public Resources Code.

(END OF APPENDIX A)