Decision **DRAFT DECISION OF ALJ ALLEN (Mailed 6/29/2005)**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| Order Instituting Rulemaking to Implement the California Renewables Portfolio Standard Program. | Rulemaking 04-04-026 (Filed April 22, 2004) |

# OPINION ON PARTICIPATION OF ENERGY SERVICE PROVIDERS, COMMUNITY CHOICE AGGREGATORS, AND SMALL AND MULTI-JURISDICTIONAL UTILITIES IN THE RENEWABLES PORTFOLIO STANDARDS PROGRAM

## Summary

In this decision we set forth the basic parameters for the participation of Energy Service Providers (ESPs), Community Choice Aggregators (CCAs), and small and multi-jurisdictional utilities in the Renewables Portfolio Standards (RPS) program.

Under Senate Bill (SB) 1078, ESP and CCA participation in the RPS program is subject to the same terms and conditions applicable to an electrical corporation. Accordingly, ESPs and CCAs are generally treated identically to the investor-owned utilities for purposes of the RPS program if, like the utilities, they enter into power purchase contracts that require Public Goods Charge (PGC) funds. The requirements of SB 1078 are also applicable to small and multi-jurisdictional utilities in California, but we need more detailed information in order to determine how to best facilitate their participation in the RPS program.

## ESPs and CCAs

There are several intertwined issues to be resolved here, all relating to the proper interpretation of SB 1078 as it applies to ESPs and CCAs. In essence, we have to determine how much authority the statute gives this Commission over ESPs and CCAs for purposes of the RPS program, and determine, as a matter of law and policy, how to apply that authority.

The main area of dispute amongst the parties is around the meaning of Pub. Util. Code § 399.12, which was enacted as part of SB 1078. The utilities (and a number of other parties) focus on the language in the statute that states that ESPs "shall be subject to the same terms and conditions applicable to an electrical corporation," and that CCAs "will participate in the renewables portfolio standard subject to the same terms and conditions applicable to an electrical corporation." (See, e.g., Pacific Gas and Electric Company (PG&E) Opening Brief, pp. 3-4; San Diego Gas & Electric Company (SDG&E) Opening Brief, pp. 1-2.)

Based on this language, the utilities argue that the Commission's authority over ESPs and CCAs is identical to its authority over utilities, that as a matter of law the Commission is required to treat ESPs and CCAs identically to the utilities, and finally that it is simply a matter of good policy and fairness that the ESPs and CCAs be treated identically to the utilities. (See, e.g., SDG&E Reply Brief, p. 2.)[1]

[1] The Utility Reform Network (TURN), the Center for Energy Efficiency and Renewable Technologies (CEERT), the Office of Ratepayer Advocates (ORA), the Union of Concerned Scientists (UCS), and the Green Power Institute (Green Power) generally concur with the utilities that the Commission has broad authority over ESPs and CCAs.

Opposing this interpretation is the Alliance for Retail Energy Markets (AReM), which represents ESPs in this proceeding. According to AReM, an "overly literal" interpretation of § 399.12 is contrary to legislative intent (AReM Opening Brief, p. 3), and by looking at the larger context, including the legislative history, one comes to the conclusion that the Commission has relatively limited authority over ESPs (and by implication, CCAs). AReM argues:

> The Commission is authorized to develop and adopt rules for determining an ESP's baseline and procurement targets and to resolve various RPS compliance-related issues (i.e., the manner in which ESPs will participate in the RPS). The Commission is not authorized, however, to require ESPs to submit procurement plans, conduct Commission-supervised bid solicitations or enter into long-term contracts for renewables. (AReM Opening Brief, pp. 3-4.)

AReM goes on to argue that not only is this outcome required by law, but also that it is practical and sound policy as well.[2]

The City and County of San Francisco (CCSF) agrees with AReM, and makes the same arguments as AReM in the context of CCAs, namely that only certain "fundamental aspects" of the RPS program apply to CCAs, while other aspects of CCA compliance with the RPS requirements should remain independent from Commission oversight. (CCSF Opening Brief, pp. 1-2.)

The County of Los Angeles and the City of Chula Vista, in a joint brief, make a different argument, claiming that CCAs are a form of municipal utility, and accordingly fall under Pub. Util. Code § 387, which grants authority over

[2] AReM also argues that the Commission lacks the authority to require ESPs to comply with the accelerated target date of 2010, established for utilities in the Energy Action Plan.

implementation of the RPS program to the governing body of the local publicly-owned utility, rather than to this Commission. (County of Los Angeles and Chula Vista Opening Brief, pp. 4-9.)

Our first step is to determine the scope of our authority over ESPs and CCAs for purposes of the RPS program. The statutory language at issue for ESPs reads:

> The commission shall institute a rulemaking to determine the manner in which electric service providers will participate in the renewables portfolio standard. The electric service provider shall be subject to the same terms and conditions applicable to an electrical corporation pursuant to this article. (Pub. Util. Code § 399.12(c)(3)(C).)

The fact that this language calls for ESPs to be subject to the same terms and conditions as the utilities (electrical corporations) implies that the Commission has the authority to impose those same terms and conditions on ESPs. Furthermore, as ORA points out,

> The statute provides that the "Commission shall institute a rulemaking to determine the manner in which electric service providers will participate … " PUC section 399.12.(b)(3)(C). Thus, it grants the Commission authority over the various acts or practices that comprise the "manner" in which ESP[s] participate. (ORA Reply Brief, p. 3.)

In short, there would be no point in the Commission having a rulemaking on ESP participation in the RPS program if the Commission did not have authority over ESP participation. As ORA and the utilities argue, the statute is sufficiently clear on its face that we need not resort to the complex analysis of

legislative history urged upon us by AReM.[3] Accordingly, for purposes of the RPS program, this Commission has broad statutory authority over ESPs.

The statutory language applicable to CCAs is similar to that applicable to ESPs:

> The commission shall institute a rulemaking to determine the manner in which a community choice aggregator will participate in the renewables portfolio standard subject to the same terms and conditions applicable to an electrical corporation. (Pub. Util. Code § 399.12(c)(2).)

For the same reasons that we reject AReM's arguments, we reject CCSF's identical arguments relating to CCAs. As argued by the utilities and a number of other parties, the statutory language is clear. We do not need to engage in the complex parsing of legislative history urged by AReM and CCSF. (See, e.g., PG&E Reply Brief, p. 6; CEERT Reply Brief, pp. 2-3.)

The argument of the County of Los Angeles and the City of Chula Vista is based upon the assumption that CCAs are in fact municipal (local publicly-owned) utilities. From that assumption, they argue that CCAs fall under § 387, rather than § 399.12, removing them from this Commission's control. This argument would render § 399.12(c)(2) a nullity, as there would no longer be CCAs, as for RPS purposes they would be identical to municipal utilities. The

[3] CEERT describes AReM's interpretation of SB 1078 as "convoluted, unsupported and piecemeal" (CEERT Reply Brief, p. 2), while Southern California Edison Company (SCE) describes it as "self-serving and tortured." (SCE Reply Brief, p. 2.)

assumption that CCAs are municipal utilities for RPS purposes is accordingly inconsistent with the statutory language.[4]

Again, as in the case of ESPs, the statutory language is clear—CCAs are to be treated the same as the investor-owned utilities. The arguments of Los Angeles and Chula Vista are not supported by the statute. Accordingly, as with ESPs, for purposes of the RPS program this Commission has broad authority over CCAs.

Given that we have broad authority over ESPs and CCAs, the next question is to determine what we should do with that authority. The position of the utilities on this issue is based upon the same statutory language discussed above, namely that an ESP "shall be subject to the same terms and conditions applicable to an electrical corporation." This language is in fact fairly clear, and would appear to indicate that ESPs and CCAs are to be treated identically to the utilities.

This also resolves the question of whether the ESPs and CCAs must meet the accelerated goal of 20% renewables by 2010, as laid out in the Energy Action Plan, or the goal of 20% by 2017, as contained in the statute. (See, e.g., AReM Opening Brief, pp. 9-10; CCSF Opening Brief, p. 6; PG&E Reply Brief, pp. 7-9.) The utilities are subject to the accelerated goal, and ESPs and CCAs are subject to the same terms and conditions as the utilities. Green Power points out that SB 1078 requires every electrical corporation to "increase its total procurement of eligible renewable energy resources by *at least* an additional 1 percent of retail

[4] Even if a CCA qualified as a local publicly-owned utility under §§ 387 and 9604, that would not remove it from the purview of § 399.12(c)(2), which specifically applies to CCAs.

sales per year so that 20 percent of its retail sales are procured from eligible renewable energy resources *no later than* December 31, 2017." (Green Power Reply Brief, p. 3, emphasis in original, citing § 399.15(b)(1).) Green Power argues that the addition of the phrases "at least an additional 1 percent" and "no later than December 31, 2017" would be rendered surplusage if the statute was interpreted to mean "only an additional 1 percent" and "by December 31, 2017."[5]

As we stated in Decision (D.) 03-06-071, SB 1078 sets an annual procurement target (APT) of 1% as the minimum requirement the Commission can impose, not the maximum. (*Id.*, p. 46, footnote 38.) Green Power is correct that the Commission has the authority to set an APT for retail sellers "at greater than 1% per year and to direct retail sellers to meet the target by an earlier date than 2017." (Green Power Reply Brief, p. 3.) That is precisely what we have done in the Energy Action Plan, and today we merely confirm that this requirement applies to ESPs and CCAs as well as to utilities.

AReM, however, does raise a valid point with its argument that treating ESPs identically to utilities simply does not make sense. AReM points out a number of ways in which ESPs are different from utilities. For example, this Commission does not set rates or rates of return for ESPs, or review their overall procurement plans, and ESPs are currently limited in their ability to sign up new customers. Likewise, there is merit to Los Angeles and Chula Vista's

[5] This part of the argument probably should have been stated as "*on* December 31, 2017," rather than "*by* December 31, 2017."

fundamental point that CCAs are more akin to local publicly-owned utilities than they are to the investor-owned utilities.[6]

This Commission has less overall control over how ESPs and CCAs operate than we do over how utilities operate. Also, to the extent we consider ESP and CCA operations, our concerns about their operations differ somewhat from our concerns about the operations of the investor-owned utilities. In the context of the RPS program, our primary concern is to ensure that ESPs and CCAs do in fact reach the goal of 20% renewable energy by 2010.[7] We are, however, somewhat less concerned about the details of how they get there.[8] At the same time, if an ESP or CCA enters into a power purchase contract that provides a generator with a supplemental energy payment (SEP), that SEP comes from ratepayer-funded PGC funds. This use of ratepayer moneys increases our level of concern, as we have a duty to protect ratepayers, and ensure that the money they provide to the PGC funds is used prudently.

Despite the differences between ESPs, CCAs, and investor-owned utilities, we are constrained by the statutory language, which appears to require us to treat them identically. At the same time, however, not all utility activities are treated identically for RPS purposes. Because there is some variation in how

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[6] We note that the structure of the RPS program, with its calculation of a Market Price Referent, and contract prices above that level paid from Public Goods Charge funds, appears to have been designed specifically to deal with legal issues that are more applicable to utilities than to ESPs or CCAs.

[7] The annual procurement targets are a means of ensuring that goal is reached in a relatively orderly fashion.

[8] This does not mean that we are authorizing the use of unbundled or tradable renewable energy credits (RECs) for purposes of RPS compliance.

utility activities are treated under the RPS program, being treated identically to the investor-owned utilities does not mean only one thing. This variation in our treatment of the investor-owned utilities provides a way to mitigate the burden the statute places on ESPs and CCAs.

In D.03-06-071, we held that in the case of bilateral contracts for which no PGC funds were required, utilities were relieved of some of the otherwise applicable requirements of the RPS program. (*Id.*, p. 59.) Contracts that do not require PGC funds place fewer ratepayer dollars at risk. In addition, PGC funds are preserved for future use. The reduced risk to ratepayers and the conservation of PGC funds ameliorated some of our concerns, and justified a lesser level of oversight over utility contracting processes.

It is reasonable to use the same approach here. As ORA argues: "Unless the ESPs and CCAs will not collect PGC funds, they should be subject to the requirement that they use least-cost/best-fit criteria established in the prior phase of this proceeding to rank bids submitted in their RPS plans." (ORA Opening Brief, p. 6.) Consistent with ORA's recommendation, use of PGC funds is a reasonable trigger for additional scrutiny, as we found in D.03-06-071.

Accordingly, if an ESP or CCA utilizes any PGC funds, it is subject to all of the same terms and conditions imposed on the utilities in this proceeding (and in the RPS phase of the prior proceeding, Rulemaking 01-10-024), including submission and approval of procurement plans, and use of the market price referent and least-cost/best-fit ranking criteria. On the other hand, if an ESP or CCA does not require the use of any PGC funds, it only needs to meet the fundamental requirements of the RPS program, which are meeting the goal of 20% renewable energy, meeting APTs sufficient to reach that goal, and reporting that is adequate to ensure that these requirements are met.

The reporting requirement is to ensure that no RECs are double-counted, to ensure the validity of all RECs that are counted, and to ensure that no PGC funds have been used. The specifics of the reporting requirement will be established in a subsequent decision implementing ESP and CCA participation in the RPS program, which will also establish the process by which ESPs and CCAs will state whether or not they will accept PGC funds (and what happens if they later change their mind).

Whether or not they utilize PGC funds, ESPs and CCAs are allowed the same flexible compliance mechanisms as the utilities, and are subject to the same deadlines, penalties and penalty process as the utilities. To the extent that these areas require further refinement or modification in their application to ESPs and CCAs, such issues will also be addressed in the decision implementing the participation of ESPs and CCAs in the RPS program.

TURN recommends the use of procurement entities, which would enter into long-term contracts on behalf of those ESPs that are unable to meet long-term resource commitments. (TURN Opening Brief, pp. 6-8.)[9] PG&E and SCE, while they express some concerns about how such an arrangement would work (and oppose being required to act as procurement entities), note that in some circumstances such an arrangement may make sense. (PG&E Reply Brief, pp. 9-10; SCE Reply Brief, pp. 5-8.) PG&E supports the participation of third party intermediaries to provide credit enhancement to non-investment grade ESPs. (PG&E Reply Brief, p. 10.) We endorse the concept of using procurement entities or other intermediaries to facilitate the successful participation of ESPs

[9] Green Power generally supports the concept of using of procurement entities.

and CCAs in the RPS program. At this point, we believe it is appropriate to allow the utilities to act as procurement entities for ESPs and CCAs, but we will not require them to do so. The subsequent decision implementing ESP and CCA participation in the RPS program will further clarify the nature and role of the procurement entities or other intermediaries.

### Small and Multi-jurisdictional Utilities

The small and multi-jurisdictional utilities are different from the three larger investor-owned utilities, but otherwise have little in common with each other. Our record in this area, with the exception of the thoughtful opening and reply briefs from Pacificorp, is relatively scanty. While we would have preferred to set forth in more detail the interaction between the small and multi-jurisdictional utilities and the RPS program, we feel limited to fairly general statements of policy. Our starting point is that the small and multi-jurisdictional utilities are nonetheless utilities, and accordingly are required to comply with the requirements of the RPS program.[10]

We understand that the small utilities have limited resources, and often have load profiles and equipment that differs from those of the larger utilities. Nevertheless, given the size of the small utilities, the volume of renewable generation required to reach a 20% level is also quite small. Our policy is that all utilities in California, including the small ones, should reach our stated goal of 20% renewable energy by 2010.

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[10] This holding is consistent with the arguments of the UCS (Opening Brief, pp. 5-7), PG&E (Opening Brief, pp. 4-5), CEERT (Opening Brief, pp. 3-6), TURN (Opening Brief, pp. 8-9), Green Power (Opening Brief, p. 4), ORA (Opening Brief, p. 7), and SDG&E (Opening Brief, p. 2).

As pointed out by Pacificorp, multi-jurisdictional utilities present a different set of issues, rendering their participation in the RPS program somewhat more complex. Nevertheless, we do not see a basis in SB 1078 for exempting some utilities from the RPS requirements laid out in the statute. Our policy for the multi-jurisdictional utilities, just like our policy for the small utilities, is that they should reach the state's goal of 20% renewable energy by 2010. To avoid questions of our jurisdiction over other states, we clarify that the obligation of multi-state utilities is 20% of their in-California sales, and that the generation used to count toward that requirement must meet the CEC's interconnection and deliverability requirements.[11]

UCS, ORA, and TURN note that small and multi-jurisdictional utilities are in fact different from the large utilities, and suggest alternative methods for the Commission to use in ensuring their participation in the RPS program. (See, UCS Opening Brief, pp. 5-6; ORA Opening Brief, p. 7; TURN Opening Brief, pp. 8-9.) Pacificorp believes that some of these suggestions may have merit. (Pacificorp Reply Brief, pp. 1, 2, 7, 9.) While this shows some progress toward a possible resolution, the record before us on this issue is basically at the early conceptual stage. We intend to address further the issue of how the small and multi-jurisdictional utilities can best be brought into the RPS program, including the potential use of procurement entities. The Assigned Commissioner and ALJ may establish a process to further develop the record on this issue.

[11] We do not address the situation in which a multi-jurisdictional utility may wish to count generation and load from other states in calculating its percentage of renewable energy for purposes of the RPS program, as that question would be properly addressed by the CEC.

## Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Peter V. Allen and Anne E. Simon are the assigned ALJs for this proceeding.

## Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed _____.

## Findings of Fact

1. D.03-06-071 initiated the implementation of the RPS program for the three large investor-owned utilities.

2. The investor-owned utilities are electrical corporations for purposes of the RPS statute.

3. The Energy Action Plan requires electrical corporations to reach 20% renewable generation by 2010.

4. The RPS statute states that, for purposes of the RPS program, ESPs and CCAs are subject to the same terms and conditions applicable to an electrical corporation.

5. Small and multi-jurisdictional utilities are electrical corporations for purposes of the RPS statute.

6. D.03-06-071 distinguished between power purchase contracts that required the use of PGC funds and those that did not require the use of PGC funds.

7. D.03-06-071 held that power purchase contracts that did not require the use of PGC funds required less oversight over contracting practices.

8. Procurement entities or other third party intermediaries may facilitate the procurement of renewable generation contracts by ESPs and CCAs.

## Conclusions of Law

1. ESPs and CCAs should be treated identically to the investor-owned utilities for purposes of the RPS program.

2. Small and multi-jurisdictional utilities should be treated identically to the larger investor-owned utilities for purposes of the RPS program.

3. ESPs and CCAs should be required to meet the Energy Action Plan's 2010 deadline.

4. Small and multi-jurisdictional utilities should be required to meet the Energy Action Plan's 2010 deadline.

5. ESPs and CCAs that do not use PGC funds should be treated differently from those that do use PGC funds.

6. The use of procurement entities or other third party intermediaries should be explored further to see if they can facilitate the procurement of renewable generation by ESPs and CCAs.

## O R D E R

**IT IS ORDERED** that:

1. For purposes of the Renewables Portfolio Standards (RPS) program, Energy Service Providers (ESPs) and Community Choice Aggregators (CCAs) are to be treated identically to the investor-owned utilities.

2. For purposes of the RPS program, small and multi-jurisdictional utilities are to be treated identically to the larger investor-owned utilities.

3. ESPs and CCAs are required to meet the Energy Action Plan's 2010 deadline.

4. Small and multi-jurisdictional utilities are required to meet the Energy Action Plan's 2010 deadline.

5. ESPs and CCAs that do not use Public Goods Charge (PGC) funds are subject to fewer requirements than those that do use PGC funds, as described above.

6. We will further explore the potential use of procurement entities or other third party intermediaries to facilitate the procurement of renewable generation by ESPs and CCAs.

7. The Assigned Commissioner and Administrative Law Judges may make such rulings as necessary to manage this proceeding consistent with this decision.

This order is effective today.

Dated _____, at San Francisco, California.