Decision **05-11-025** November 18, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

I. 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.

We find that the Commission has the discretion under the RPS statute to determine the manner in which ESPs, CCAs, and small and multi-jurisdictional utilities participate in and comply with the RPS requirements. We require all entities to comply with the fundamental aspects of the RPS program, including procuring 20% of their retail sales from renewable energy sources by 2010, increasing their procurement of renewable energy by at least 1% of their retail sales per year, and reporting to the Commission on their compliance with these requirements.

In addition, we state our intent to explore policy options for allowing procurement entities, if any proposals are developed, and also allowing unbundled renewable energy credits (RECs) to count for RPS compliance purposes in the future. We determine that the current RPS law allows the Commission to explore utilizing unbundled and tradeable RECs for RPS compliance by all entities, including ESPs, CCAs, large utilities, and small and multi-jurisdictional utilities.

Finally, we also signal openness to and request comments on how short-term (less than ten years) contracting could be utilized by ESPs, CCAs, and small and multi-jurisdictional utilities, to satisfy RPS requirements. The policy options outlined in this decision will be further explored and refined in an implementation decision(s) to follow, on a timetable set by the Assigned Commissioner, Assigned ALJ, and Energy Division staff.

II. Legal Authority

There are several intertwined issues to be resolved here, all relating to the proper interpretation of SB 1078 as it applies to ESPs, CCAs, and small and multi-jurisdictional utilities. In essence, we have to determine how much authority the statute gives this Commission over these entities 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 Section 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]

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 Section 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.)

[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.

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 Section 387, which grants authority over 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.)

A. Electric Service Providers

Our first step is to determine the scope of our authority over ESPs 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 Section 399.12(c)(3)(C).)

[2] AReM previously argued that the Commission lacked the authority to require ESPs to comply with the accelerated target date of 2010, established for utilities in the Energy Action Plan. However, in its comments on this decision, AReM correctly clarifies that its members have since committed to meeting the accelerated target date.

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. On the other hand, there would also be no point in having a rulemaking on ESP participation in the RPS program if the Legislature intended that the ESPs participate in exactly the same manner as utilities. The Legislature's request that we determine the "manner" in which ESPs participate certainly indicates that the Commission has some discretion to make different requirements of ESPs than utilities.

Thus, there is obvious ambiguity in the statutory requirements. Although §399.12 requires that the Commission make ESPs "subject to the same terms and conditions applicable to an electrical corporation," it also requires the Commission to determine the "manner" in which those entities participate.

As TURN points out in its comments on this decision, AB 380, recently signed by the Governor, also includes the following language:

> "Each load-serving entity shall be subject to the same requirements for resource adequacy and the renewables portfolio standard program that are applicable to electrical corporations pursuant to

> this section, or otherwise required by law, or by order or decision of the commission." (See Public Utilities Code Section 380(e).)

This language is similar to the language in Section 399.12 that says ESPs shall be "subject to the same terms and conditions applicable to an electrical corporation." However, it does not replace or otherwise modify the additional language in Section 399.12 that requires the Commission to determine the "manner" in which ESPs comply with RPS.

Therefore, in order to harmonize these competing directives, the Commission still must exercise judgment and discretion in determining the manner of ESP participation in the RPS program.

B. Community Choice Aggregators

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 Section 399.12(c)(2).)

Thus, the same reasoning we applied above for ESPs also applies to CCAs. We believe the Legislature intended to give the Commission some discretion to make different requirements of CCAs than utilities.

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 Section 387, rather than Section 399.12, removing them from this Commission's control. This argument would render Section 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 assumption that CCAs are municipal utilities for RPS purposes is accordingly inconsistent with the statutory language.[3]

C. 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.

However, since the small and multi-jurisdictional utilities are nonetheless utilities (electrical corporations), they are accordingly clearly subject to the requirements of the RPS program.[4] To avoid questions of our jurisdiction over other states, we clarify that the obligation of multi-state utilities relates to their in-California sales, and that the generation used to count toward that requirement must meet the CEC's interconnection and deliverability requirements.[5]

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[3] 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.

[4] 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).

[5] 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. Some utilities may also be eligible to make use of the provisions of Public Utilities Code section 399.17.

Subsequent to the issuance of the ALJ's draft decision, Assembly Bill 200 became effective, adding Section 399.17 to the Public Utilities Code. Section 399.17 affects the RPS compliance requirements for an electrical corporation "with 60,000 or fewer customer accounts in California that serves retail end-use customers outside California." Multi-jurisdictional utilities that fall into this category are subject to specific different requirements than other utilities regarding their participation with the RPS program, and should comply with the requirements of Section 399.17. Any electrical corporation that believes it is subject to Section 399.17 shall serve a letter to that effect on the service list to this proceeding.

In addition, in its comments on the draft decision, Mountain Utilities points out that AB 2509 (Nakanishi) established Public Utilities Code Sections 2780 and 2780.1 that apply to microutilities. We believe that the specific circumstances and needs of these unique utilities, as well as those subject to Section 399.17, should be examined more closely in the implementation phase of this proceeding, following this decision.

III. Fundamental Aspects of RPS Applicable to All Entities

Given that we have determined above that the Legislature intended that ESPs and CCAs be subject to the RPS program requirements but that the Commission should determine the manner in which those entities participate, we conclude that we have discretion to make these determinations on a policy basis. Using this same logic, it is reasonable to conclude that the Legislature intended that the ESPs and CCAs meet the RPS program goals, but that the "manner" in which these entities meet the program goals is up to the Commission to determine.

In harmonizing the portions of Section 399.12, we conclude that there are certain fundamental aspects of the RPS program that should apply to all entities subject to the RPS, regardless of their characteristics. This is consistent with the argument that CCSF puts forward. The first fundamental aspect is the requirement that all entities, including ESPs, CCAs, and small and multi-jurisdictional utilities subject to the RPS, meet the RPS requirement of providing 20% of their retail sales from renewables. This is the RPS requirement at its most basic level.

Green Power also 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 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 Section 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."[6]

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

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

done in the Energy Action Plan, and today we merely confirm that this requirement applies to ESPs, CCAs, small and multi-jurisdictional utilities, as well as to large utilities.

Along with that, in order to determine these entities' progress in meeting these requirements, it follows logically that the Commission should have some authority to require reporting of renewable sales to retail customers by ESPs, CCAs, and small and multi-jurisdictional utilities. Thus, the Commission will exercise that authority and require that these entities report their RPS progress to the Commission.

The specifics of the reporting requirement will be established in a subsequent decision implementing ESP, CCA, and small and multi-jurisdictional participation in the RPS program. However, at this time we will request that ESPs, CCAs, and small and multi-jurisdictional utilities provide information about the current contents of their renewable portfolio, in a format and manner to be determined by the Assigned ALJ in coordination with Energy Division staff.

Finally, for policy and equity reasons, we also believe that all entities should be allowed the same flexible compliance mechanisms as the large utilities, as well as be subject to the same penalty structure and process. To the extent that these areas require further refinement or modification in their application to ESPs, CCAs, and/or small and multi-jurisdictional utilities, such issues will also be addressed in the decision implementing the participation of these entities in the RPS program.

In sum, we see that the Commission will be exercising its authority over ESPs, CCAs, and small and multi-jurisdictional utilities in five basic areas: 1) requiring meeting the 20% goal; 2) adding at least 1% of retail sales in renewable

sales per year; 3) reporting progress toward these goals to the Commission; 4) utilizing flexible compliance mechanisms; and 5) being subject to penalties.

In the case of the first part, meeting the RPS requirement of 20% of retail sales from renewable sources, there is still the question of the deadline for that requirement. (See, e.g., AReM Opening Brief, pp. 9-10; CCSF Opening Brief, p. 6; PG&E Reply Brief, pp. 7-9.) In SB1078, the deadline for RPS full compliance is the end of 2017. In the first Energy Action Plan, adopted in 2003, the Commission and the California Energy Commission accelerated that deadline to 2010. Further, in the Order Instituting Rulemaking opening this proceeding, we made explicit the 2010 deadline for utilities. There is no explicit mention in the Energy Action Plan of 2003 or in this proceeding's OIR of the requirement for ESPs and CCAs, or for small and multi-jurisdictional utilities.

However, we clarify here that it is the Commission's intent that the 2010 deadline apply to all entities involved in RPS implementation. We believe that it is important to have a consistent deadline for RPS compliance for all entities in order not to create a competitive advantage or disadvantage of one retail provider over another in terms of the cost of electricity procured. Further, it is within the discretion the Legislature gave us in establishing RPS compliance rules for ESPs and CCAs to modify the deadline for meeting the 20% requirement.

IV. Manner of ESP and CCA Participation in RPS Program

Now that we have established the issues on which we believe the ESPs, CCAs, and small and multi-jurisdictional utilities should be subject to the same terms and conditions as the large utilities, we turn to our task of determining the manner in which these entities should participate in the RPS program.

We approach this question as an issue of policy. ESPs and CCAs each are subject to separate and distinct legal and regulatory requirements. Although they are each subject to certain requirements of this Commission as assigned by the Legislature, neither is regulated as a "public utility" as defined by the Public Utilities Code, nor are they subject to Commission regulatory authority as a matter of course. Instead, the Commission is granted specific regulatory authority over these entities for particular issues, in this case, RPS. Because of this, each of these entities in existence or planned operates under a business model that is different from a regulated public utility.

For example, as AReM argues, 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 fundamental point that CCAs are more akin to local publicly-owned utilities than they are to the investor-owned utilities.[7]

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

[7] 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.

CCAs do in fact reach the goal of 20% renewable energy by 2010.[8] We are, however, somewhat less concerned about the details of how they get there.

Therefore, we do not believe it is reasonable to require these entities to be subject to the exact same steps for RPS implementation purposes as the utilities we fully regulate. We also do not believe that it is necessarily reasonable to subject ESPs and CCAs to the same RPS process requirements as each other, simply because they are not utilities. A CCA, for example, will likely be answerable to the political authorities in the community in which it is operating, in addition to its customers. The business of an ESP, on the other hand, is much more highly sensitive to price pressures than a utility, which has captive customers, at least at this time. Thus, we are sensitive to the particular requirements and pressures of each type of entity and do not necessarily want to impose a "one size fits all" RPS regulatory scheme.

Similar reasoning exists for the small and multi-jurisdictional utilities. We understand that the small utilities have limited resources, and often have load profiles and equipment that differs from those of the larger utilities.

As pointed out by Pacificorp, multi-jurisdictional utilities present a different set of issues, rendering their participation in the RPS program somewhat more complex. 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

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

may have merit. (Pacificorp Reply Brief, pp. 1, 2, 7, 9.) We believe that it would be reasonable to treat the small and multi-jurisdictional utilities similar to ESPs and CCAs.

With this guidance in mind, we will ask the Assigned Commissioner and Assigned ALJ to determine a process for deciding how ESPs, CCAs, and small and multi-jurisdictional utilities participate in and comply with the RPS. We expect that, at a minimum, this process will request that interested ESPs, CCAs (or potential CCAs), and small and multi-jurisdictional utilities, and any other interested parties, submit to us their proposals for the manner in which these entities should participate in the RPS program, keeping in mind the five fundamental requirements of 1) meeting the 20% requirement by 2010; 2) increasing their renewable sales by at least 1% per year; 3) reporting their progress to the Commission; 4) utilizing flexible compliance mechanisms; and 5) being subject to penalties and penalty processes.

For CCAs, we will also make a minimum requirement that the CCAs file an RPS procurement plan along with their "implementation plan" required to be submitted to this Commission by Section 366.2(c) (3) and (5), which state that "a community choice aggregator establishing electrical load aggregation pursuant to this section shall develop an implementation plan detailing the process and consequences of aggregation" and "the community choice aggregator shall file the implementation plan with the commission, and any other information requested by the commission that the commission determines is necessary to develop the cost-recovery mechanism in subdivisions (d), (e), and (f)."

For administrative simplicity, we suggest that CCAs include in their "implementation plans" required by Section 366.2 (c) information about their renewable procurement plans.

V. Methods of RPS Compliance for ESPs and CCAs

A. Procurement Entities

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 and CCAs in the RPS program, provided that the individual ESPs and CCAs remain responsible and accountable for RPS compliance. At this point, we believe it may be 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(s) implementing ESP, CCA, and small and multi-jurisdictional utility participation in the RPS program will further clarify the nature and role of the procurement entities or other intermediaries.

B. Renewable Energy Credits

This leaves us with one more complex issue to address: the ability of entities subject to the RPS requirements to utilize renewable energy credits (RECs) in meeting their RPS compliance requirements. In February of this year,

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

parties submitted extensive comments and reply comments addressing the Commission's ability and the advisability of authorizing the use of RECs, either unbundled or tradeable, for RPS compliance purposes.

In this decision, we utilize these comments to inform and articulate our preferences for further exploration of these policy issues. We do not, at this time, make any changes to the current rules governing participation in RPS. We will address more detailed implementation issues in a subsequent decision, and will rely on the Assigned Commissioner and Assigned ALJ to set a framework and schedule for addressing further implementation issues associated with RECs, either unbundled or tradeable. To facilitate this, we expect that the Assigned ALJ will schedule a prehearing conference as soon as possible after the adoption of this decision.

We understand that some parties question the legal basis for our authority in this area. TURN is the main party that argues that the Commission has no authority to allow the use of either unbundled or tradeable RECs for compliance with RPS without changes in law.[10] UCS and Green Power seem to agree in part, but UCS goes on to suggest ways that the Commission can phase in unbundled RECs. SCE, in its comments, believes that our authority is questionable, but TURN is the party that argues most strenuously that the definition of RPS contained in SB1078 prohibits unbundled REC trading. The language in SB1078 states:

[10] By "unbundled" RECs, we mean a single transaction from the original renewable resource to a single buyer who does not necessarily acquire the associated energy. By "tradeable" RECs, we mean RECs that can be traded among multiple buyers and sellers on a secondary market.

> "'Renewables portfolio standard' means the specified percentage of electricity generated by eligible renewable energy resources that a retail seller is required to procure pursuant to Sections 399.13 and 399.15."[11]

TURN's primary analysis is based on the use of the word "electricity" in the section cited above, arguing, based on the plain language, that it prohibits the use of RECs to satisfy this requirement. We disagree. We believe this definition was meant as general definitional guidance and not as a prohibition on the use of RECs. There are numerous places in SB 1078, including Section 399.15 to which the above definition refers, where the code refers to "procurement of eligible renewable energy resources." Thus, the term "electricity" is not consistently used throughout the statute.

TURN goes on to consider a great deal of legislative history surrounding the treatment of RECs. In particular SB 532 (Sher)[12] that was considered prior to the adoption of SB1078 would have created a REC-based RPS program. In addition, SB1478 (Sher)[13] from the 2003-2004 Legislative session, which was vetoed by the Governor, would have made explicit changes to the code that would have allowed the Commission to consider creating a REC trading system. TURN argues that these bills show that without additional legislation, the Commission does not have the authority to allow RECs as a compliance mechanism for RPS now.

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[11] Public Utilities Code Section 399.12(c).

[12] SB 532 (Sher), 2001-2002 legislative session.

[13] SB 1478 (Sher), 2003-2004 legislative session.

We note, however, that in an analogous manner, SB 107 (Simitian and Perata) from the most recent legislative session, at one point contained a provision that would prohibit the use of RECs to satisfy RPS requirements. Logically, the Legislature would not have considered it necessary to prohibit RECs for compliance with RPS if the Commission did not already have the authority to establish this compliance mechanism.

Therefore, given all of this complex history, we conclude that the Legislature has, at times, contemplated further articulating its preferences for how an unbundled REC framework should develop in California. Should the Legislature do so, we would be bound by any requirements in the code. But in the meantime, we conclude that further investigation of this issue by the Commission is not prohibited by current law.

Therefore, we intend to have further proceedings on the subject of how unbundled RECs might be used for RPS compliance, as well as how we might eventually provide for the ability of entities subject to the RPS to trade RECs. It is our hope that this exploration will inform future Legislative and regulatory work on these subjects.

CEERT's position, which is echoed by many others, is that REC components of a renewable energy power sale can be disaggregated from the underlying energy and sold by an "eligible renewable energy resource" to a "retail seller" as both are defined by SB 1078. CEERT argues that this can be used as a means of achieving flexible compliance with RPS requirements. We agree. As CEERT notes, more than two years ago, an ALJ ruling in R.01-10-024 (RPS phase) identified RECs as having a role in the "flexible compliance mechanisms" outlined by SB 1078 and we held, jointly with the CEC, workshops on the issue. In addition, RECs were acknowledged as the means to account for

RPS compliance in D.03-06-071 and a definition of RECs and contractual language was adopted among RPS standard terms in D.04-06-014.

In this way, the Commission set the stage for the potential unbundling of RECs from their underlying energy. In this decision, we state affirmatively that we wish to explore the possibility of allowing unbundled RECs to count in the future toward RPS compliance to support timely RPS compliance by all retail sellers, including the utilities, ESPs, CCAs, and small and multi-jurisdictional utilities. Subsequent to this decision, the Assigned Commissioner and Assigned ALJ may issue rulings to set the scope and schedule for further investigation into the implementation of an unbundled REC framework for RPS compliance.

We decline to initiate the use of unbundled RECs for RPS compliance immediately because there are still a number of implementation questions and issues that must be resolved. Thus, this decision simply affirms our preference for moving forward with exploration of this issue for the reasons discussed below, but we will decide in a subsequent decision if, when, and how RECs may be unbundled for RPS compliance purposes.

As pointed out by IEP and AReM, allowing unbundling of RECs may provide multiple advantages. RECs may allow RPS compliance without a need for as much emphasis on local or regional transmission congestion. RECs will allow project developers to sell output to multiple small buyers, such as small ESPs, CCAs, or utilities, where particular project sizes do not exactly match the needs of the buyer. In addition, because the renewable potential in California is not equally distributed geographically, RECs will facilitate RPS compliance regardless of load location.

All of these are good reasons for exploring the unbundling of RECs. We note, however, that, even if we authorize their use, we view unbundled RECs as

an additional tool for flexible compliance with RPS requirements. We believe RECs can reasonably be used to supplement RPS procurement by entities subject to the RPS requirements. We do not believe that it would be prudent for entities to rely solely on the purchase of unbundled RECs to satisfy their RPS requirements. It is not our intent to explore the use of unbundled REC purchases to supplant the long-term investment in renewable generation resources by entities required to comply with the RPS.

Several parties including UCS, IEP, AReM, PG&E, and others, in their comments, also raised the fundamental policy issue of whether supplemental energy payments (SEPs) can or should be allowed to be used to purchase unbundled RECs for RPS compliance. AReM argues that SEPs should be allowed to be used for unbundled REC purchases, so as not to discriminate among types of renewable purchases eligible for RPS compliance (assuming that unbundled RECs are eligible for compliance). AReM argues that SEPs are a reasonable proxy for the above-market costs of RECs when RECs are unbundled from the underlying electricity.[14] PG&E appears to agree.

UCS, on the other hand, makes the most persuasive case that SEPs should not be allowed to fund purchases of RECs. In particular, UCS argues that the purpose of SEPs is to support long-term investments in new in-state renewable energy resources. RECs, they say, cannot be easily translated into above-market costs of renewables, because it is conceivable that some delivered energy purchases from RPS facilities may cost less than the market price referent, and yet still come with associated RECs.

[14] See AReM, Phase II Opening Brief, January 18, 2005, p. 11.

At this point, on a policy basis, we preliminarily agree with UCS. It is not clear to us how SEPs could appropriately be used to support the purchase of RECs without the underlying electricity. We will ask for further information on this subject from parties subsequent to this decision.

So far we have only discussed using unbundled RECs for RPS compliance purposes, and not for secondary trading among entities required to comply with the RPS. As several parties have argued, including PG&E, CEERT, IEP and UCS, a tool for tracking RECs will soon be available, in the form of the Western Renewable Energy Generation Inventory System (WREGIS), being developed by the CEC. We believe that such a tracking mechanism should be a precursor to the trading of RECs, since adequate tracking and monitoring is necessary in order to facilitate a robust and fair trading market. We do not intend to preclude, however, the possibility of developing an interim mechanism for certifying and tracking RECs, prior to the rollout of WREGIS, if such an interim mechanism can be developed in the course of our exploration of these issues.

In this decision we state that we would only consider authorizing fully tradeable RECs in the future, after further exploration, after WREGIS, or another viable tracking mechanism, is completed in the future. As stated in D.03-06-071, we remain concerned about the potential for manipulation of the renewable market through the trading of RECs, and will need to be assured that any potential tradeable REC market has appropriate safeguards in place. We also remind parties that our other concerns expressed in D.03-06-071 about the advisability of allowing tradeable RECs must be satisfied if we are to move forward with a tradeable REC framework in the future. With this guidance, the Assigned Commissioner and ALJ can proceed to frame our future proceedings and exploration of these issues.

C. Short-Term Contracting

We are aware that, in the context of the Legislative debate on SB 107 from this year, a proposal was discussed that would allow ESPs and CCAs to use shorter-term contracts (less than the ten years presumptively prescribed in the RPS statute[15]) to comply with their RPS targets. We expect to entertain this option in our further proceedings on the subject of CCA, ESP, and small and multi-jurisdictional utility participation in the RPS program, and will ask for parties' comments on whether and how the use of this type of short-term contracting authority should or should not be allowed for RPS compliance purposes. We do not intend, however, to entertain this option for large utility compliance with RPS requirements. This is consistent with our discussion in section II above, where we articulate our policy reasons for differentiating the manner in which entities comply with RPS requirements, depending on their particular characteristics such as level of regulatory oversight, level of competition affecting their business, and accountability.

VI. 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.

VII. Comments on Alternate Draft Decision

The draft decision of President Peevey in this matter was mailed to the parties in accordance with Pub. Util. Code Section 311(e) and Rule 77.6 of the

[15] Section 399.14 (a)(4) provides that "…each electrical corporation shall offer contracts of no less than 10 years in duration, unless the commission approves of a contract of shorter duration." There is no reason our discretion to approve shorter contracts would not also apply to ESPs and CCAs.

Rules of Practice and Procedure. Comments were filed on September 29, 2005 by IEP, CalWEA, AReM, UCS, ORA, Mountain Utilities, GPI, CCSF, SCE, TURN, 3 Phases Energy Services, PG&E, and CEERT. Reply comments were filed on October 3, 2005 by SCE, AReM, PG&E, CCSF, and TURN. Most comments and reply comments simply reargue parties' previous positions on issues in this decision. No changes were made in response to reargumentation. However, several clarifications were made to respond to specific targeted comments of some parties, as reflected in the text of the decision above.

VIII. 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. The RPS Statute also states that the Commission shall institute a rulemaking to determine the manner in which electric service providers and community choice aggregators will participate in the RPS program.

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

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

multi-jurisdictional utilities, provided that those individual entities remain responsible and accountable for RPS compliance.

8. AB 200, adding Section 399.17 to the Public Utilities Code, effective in 2005, affects RPS compliance requirements for an electrical corporation with 60,000 or fewer customer accounts in California that serves retail end-use customers outside of California.

9. The Commission lacks accurate information about the amount of renewable generation being procured by ESPs, CCAs, and small and multi-jurisdictional utilities.

IX. Conclusions of Law

1. All entities subject to the RPS program, including utilities (electrical corporations), small and multi-jurisdictional utilities, energy service providers and community choice aggregators, should be subject to the following requirements under the same terms and conditions:

- The requirement that 20% of retail sales come from renewable sources by 2010, as required by the Energy Action Plan
- The requirement that all entities increase their renewable retail electricity sales by at l% per year
- The requirement to report their progress toward meeting RPS program requirements to the Commission
- The ability to utilize the flexible compliance mechanisms
- The requirement that they be subject to the same penalties and penalty processes.

2. The Commission has policy discretion to determine the manner of ESP and CCA participation in the RPS program.

3. ESPs, CCAs, and small and multi-jurisdictional utilities should not be treated identically to the investor-owned utilities for purposes of the manner in which they meet RPS program requirements listed in Conclusion of Law 1.

4. The manner in which ESPs, CCAs, and small and multi-jurisdictional utilities should comply with RPS requirements should be further explored.

5. Electrical corporations with 60,000 or fewer customer accounts in California that serve retail end-use customers outside California should comply with the terms of Public Utilities Code Section 399.17 and file a letter with the Commission stating that they are subject to this provision.

6. The Commission should undertake further investigation into the circumstances relevant to those utilities subject to Section 399.17 as well as other small and multi-jurisdictional utilities.

7. CCAs should include information about their renewable procurement plans in their CCA implementation plans required by Public Utilities Code Section 366.2(c).

8. 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, CCAs, and small and multi-jurisdictional utilities.

9. The Commission should further explore authorizing the use of unbundled and/or tradeable renewable energy credits (RECs) for compliance with the RPS requirements.

10. The Commission should have more information about the amount of renewable generation being procured by ESPs, CCAs, and small and multi-jurisdictional utilities.

O R D E R

IT IS ORDERED that:

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

- The requirement that 20% of retail sales come from renewable sources by 2010, as required by the Energy Action Plan
- The requirement that they increase their renewable retail electricity sales by at l% per year through 2010
- The requirement to report their progress toward meeting RPS program requirements to the Commission
- The ability to utilize the same flexible compliance mechanisms
- The requirement that they be subject to the same penalties and penalty processes.

2. Electrical corporations subject to Public Utilities Code Section 399.17 should file a letter with this Commission so stating within 30 days of the date of this decision.

3. The Assigned ALJ, in consultation with the Assigned Commissioner, shall set a process and schedule for further exploration of the manner in which ESPs, CCAs, and small and multi-jurisdictional utilities should participate in the RPS program. This process shall include, at a minimum, an opportunity for ESPs, CCAs (or potential CCAs), small and multi-jurisdictional utilities, and any other interested parties, to submit detailed proposals for the manner in which these entities should participate in the RPS program.

4. Entities who believe they are subject to Public Utilities Code Section 399.17 shall file a letter so stating in this proceeding. We will further explore the implications of Section 399.17 for those entities in this proceeding.

5. We will further explore the potential use of procurement entities or other third party intermediaries to facilitate the procurement of renewable generation by ESPs, CCAs, and small and multi-jurisdictional utilities.

6. We will further explore in this proceeding or successor proceedings the potential for authorizing unbundled and tradeable renewable energy credits, in a manner and schedule to be determined by the Assigned Administrative Law Judge in consultation with the Assigned Commissioner.

7. We will further explore the use of short-term contracting (less than ten years) to fulfill RPS requirements for CCAs, ESPs, and small and multi-jurisdictional utilities.

8. Energy Division staff and the assigned ALJ shall develop a format and process for obtaining information from the ESPs, CCAs, and small and multi-jurisdictional utilities about their current and projected future renewable resources.

9. The ESPs, CCAs, and small and multi-jurisdictional utilities shall provide information about the current contents of their renewable portfolio and their projected renewable portfolio for 2006 through 2010.

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

This order is effective today.

Dated November 18, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President

GEOFFREY F. BROWN
SUSAN P. KENNEDY
JOHN A. BOHN
Commissioners

Commissioner Grueneich recused herself from this agenda and was not part of the quorum in its consideration.