

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

RESOLUTION E-4257
October 29, 2009

R E S O L U T I O N

Resolution E-4257. **PROPOSED OUTCOME**: This Resolution initiates a citation program authorizing Commission Staff to fine load serving entities (LSEs) for non-compliance with mandatory filing deadlines and reporting requirements of the Renewables Portfolio Standard (RPS). **ESTIMATED COST**: None.

This Resolution is made on the Commission's own motion.

SUMMARY

This Resolution approves a citation program under the administration of Commission Staff (Staff), as designated by the Executive Director, to enforce compliance with Renewables Portfolio Standard (RPS) reporting requirements. This Resolution establishes fines for non-compliance with the Commission's requirements for submission of RPS compliance reports and non-responsiveness to requests for information by Staff related to RPS compliance reports.

The citation program will apply to load serving entities (LSEs) subject to the Commission's RPS reporting requirements. Staff will be delegated authority to draft and issue citations and levy fines for specific violations as set forth in Appendix A. Nothing in this Resolution diminishes, alters, or reduces the Commission's existing authority to implement and administer the RPS program.

BACKGROUND

The California RPS Program was established by Senate Bill (SB) 1078, and has been subsequently modified by SB 107 and SB 1036.¹ The RPS program is codified in Public Utilities (PU) Code Section 399.11, et seq. An RPS policy

¹ SB 1078 (Sher, Chapter 516, Statutes of 2002); SB 107 (Simitian, Chapter 464, Statutes of 2006); SB 1036 (Perata, Chapter 685, Statutes of 2007)

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generally requires that a retail seller of electricity purchase a certain percentage of electricity generated by Eligible Renewable Energy Resources (ERR). Under the California RPS, an obligated LSE is required to increase its total procurement of ERRs by at least 1% of annual retail sales per year so that 20% of its retail sales are supplied by ERRs by 2010.

The RPS legislation directs the Commission and the California Energy Commission (CEC) to jointly implement and administer the RPS Program. Commission implementation includes setting procurement targets and enforcing compliance with those targets. LSEs must periodically report progress in achieving those targets. Decision (D.) 05-07-039 established a schedule for RPS compliance reports (Routine RPS Compliance Reports) to be filed on March 1st and August 1st of each year, with the opportunity to supplement or amend the March filing by May 1st of that year.²

The CEC is responsible for verifying RPS procurement claims. The CEC describes its findings of those claims in an RPS procurement verification report.³ Pursuant to D.06-10-050, within 30 days after the CEC adopts an RPS procurement verification report, LSEs must submit RPS compliance reports to the Commission, which use the CEC verified data (Verified RPS Compliance Reports). The Commission then uses the Verified RPS Compliance Reports to make a determination of compliance with the RPS program. Each verified and routine compliance report is filed with Energy Division and served on the service list for Rulemaking (R.) 08-08-009 or its successor proceeding.

In addition to the Routine RPS Compliance Reports and Verified RPS Compliance Reports, the large investor owned utilities (IOUs)⁴ are required to file Project Development Status Reports on March 1st and August 1st each year.⁵

²Ordering Paragraph (OP) 17

³ For example, see RENEWABLES PORTFOLIO STANDARD 2005 PROCUREMENT VERIFICATION Report <http://www.energy.ca.gov/2007publications/CEC-300-2007-001/CEC-300-2007-001-CMF.PDF>

⁴ Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company.

⁵ D.06-05-039, page 23.

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This additional reporting requirement was established in lieu of adopting margin of safety targets for the IOUs.⁶

DISCUSSION

PU Code Section 399.14(e) authorizes the Commission to enforce compliance with the RPS. Public utilities are subject to enforcement action and fines pursuant to PU Code Sections 2102-2015, 2017, 2108, and 2114. Electric service providers are subject to enforcement action pursuant to these same code sections as if they were public utilities.⁷ Community choice aggregators are subject to enforcement action pursuant to Section 2111.

A citation program will encourage complete and timely filings of RPS compliance reports. It will also encourage complete and timely responses to requests for information from Commission Staff that are related to RPS compliance reports.

In its administration of the RPS program, Energy Division has made itself available to LSEs to ensure complete and timely RPS filings. Specifically, Energy Division staff has been available to answer questions and review reports prior to filing deadlines to ensure they are correct and complete. Requests for an extension to file have been requested and routinely granted. Despite this, LSEs continue to file late, incomplete, or incorrect reports.

Most recently, Energy Division staff conducted a thorough review of the March 2009 Routine RPS Compliance Reports. The Director of Energy Division sent letters to LSEs that submitted incomplete or incorrect reports directing them to file amended reports. Common mistakes included redacting data that should be public, submitting a public version of the report that was illegible, failing to fill out required information, and failing to provide supporting documentation for

⁶ The Commission considered establishing an incremental procurement target greater than the 1% increment required by statute to create a margin of safety toward meeting the 2010 RPS goal of 20%, thereby planning against various risks, including project or contract failure.

⁷ PU Code Section 394.25.

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earmarking or minimum contracting requirements.⁸ D.07-05-028 stated that the “Director of Energy Division may require LSEs that do not submit their RPS contracts for our approval to submit copies of contracts to Energy Division for verification of the terms, status, and categorization of the contract.”⁹ In the March 2009 Routine RPS Compliance Report templates, Energy Division included instructions directing LSEs to submit copies of contracts for this purpose. Energy Division also included this request in the e-mail that contained the March 2009 Routine RPS Compliance Report templates. Several LSEs failed to provide the requested documentation.

PU Code Section 702 mandates that “Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in anyway relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.” California law, including PU Code Section 7, authorizes the Commission to delegate certain powers to its staff, including the investigation of facts preliminary to agency action, and the assessment of specific fines for certain violations. A citation program administered by Staff¹⁰ for a specified violation will allow prompt action by the Commission. Over the last several years the Commission has used this authority in numerous areas, including household good movers; charter party carriers; passenger stage corporations; maintenance and operation of power plants; slamming by telecommunications providers; and compliance with resource adequacy requirements for electric power. This proposed resolution is consistent with these other approved citation programs.

The issuance of a citation for a specified violation is not mandatory. In the alternative, the Commission may initiate any authorized formal proceeding or pursue any other remedy authorized by the California Constitution, the Public

⁸ D.07-05-028 requires LSEs to enter into long-term renewable energy contracts or contracts with new facilities before counting renewable generation from short-term contracts with existing facilities.

⁹ OP 7

¹⁰ The term “Staff” refers to the portion of the Commission’s staff designated by the Executive Director to carry out the particular function involved.

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Utilities Code, other state or federal statutes, court decisions or decrees, or otherwise by law or in equity. Finally, the Commission's enforcement of this Resolution by informal proceedings, formal proceedings, or otherwise, does not bar or affect the remedies otherwise available to other persons or government agencies.

COMMENTS

Public Utilities Code Section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day comment period for the draft of this resolution was neither waived nor reduced. Accordingly, this draft resolution was mailed to parties for comments, and will be placed on the Commission's agenda no earlier than 30 days from today.

The Alliance for Retail Energy Markets (AReM), Mountain Utilities (MU), Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (SCE) filed timely Comments on July 20, 2009. Reply comments were timely filed on July 27, 2009 by AReM, MU, and SCE.

PG&E, SDG&E, and SCE do not oppose a citation program while AReM and MU oppose it. AReM and MU argue that a citation program for RPS compliance reports is unnecessary. Their argument is unpersuasive. RPS compliance reports are not overly burdensome, as LSEs generally have to file only 2-3 reports per year. LSEs know well in advance when the filings are due and what information is expected. The Commission has identified in previous decisions the strong public interest in RPS data.¹¹ The citation program is necessary to ensure that this information is available in a complete, correct, and timely manner to the public. Commission Staff uses the RPS compliance reports to make final compliance determinations as well as aid the CEC in its preparation of Verified

¹¹ D.06-06-066 p. 59; D.07-05-039 p.3.

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RPS Reports. Receiving incomplete, incorrect, and late filed information disrupts and delays both of these processes.

PG&E, SDG&E, SCE, and AReM propose similar changes to the program language which would limit citations to willful failure to submit a required RPS compliance report in the time or manner required. The Commission declines this proposal to delegate to Staff the authority to judge whether omissions or incorrect information included in RPS compliance reports were made willfully or despite the good faith effort of the LSE. Staff has, and continues to review reports and answer questions from LSEs prior to filing deadlines. LSEs that are concerned about being fined for minor errors in their submissions can provide staff with a draft RPS compliance report ahead of the filing deadline, so that staff may provide input and feedback to the LSE.

MU argues that the citation program does not allow LSEs facing penalties to have input into the process or present evidence and argument. This argument is unpersuasive. The citation program includes an appeal process that is present in other Commission citation programs. MU also states that the program does not take into account the relative size of LSEs. The Commission declines to adopt different penalties for different LSEs. SCE points out in its reply comments that the Commission has found that LSEs should be subject equally to RPS penalties and penalty processes. Although MU is a small utility with fewer resources, its reporting burden is also much less complex, as MU has yet to procure any RPS-eligible energy.

AReM argues that penalties for failure to file an RPS compliance report in the time or manner required or to submit a response to a Staff information request in the time or manner required should not start to accrue until at least twenty (20) days after the reporting LSE is provided notice of the error or omissions. The Commission adopts AReM's recommendation in part. It is unreasonable to allow penalties to accrue for errors or omissions without giving an LSE time to correct the errors or omissions. Therefore, the Commission will allow 10 business days from the date Staff notifies¹² an LSE to remedy an incomplete or incorrect report. If the errors or omissions identified by Staff have not been corrected within 10 days, a fine will be levied. Requests for additional time to remedy errors or omissions may be requested by contacting Staff.

¹² Notification includes e-mail or written communications.

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SCE argues that the specified violation for failure to comply with a request for information from CPUC Staff should be limited to formal requests for information related to the RPS compliance reports, instead of generally related to the implementation of the RPS. SCE further states that due to the number of informal and formal data requests, some without strict deadlines and some related to other proceedings, it may be difficult to determine if an LSE has responded "in the time or manner required." The Commission agrees with SCE and directs Commission Staff to provide a header in data requests that are made directly related to RPS compliance reports. The header will read as follows: "This data request is directly related to Renewables Portfolio Standard compliance reports and is subject to the fine schedule outlined in Resolution E-4257."

FINDINGS OF FACT:

1. D.05-07-039 established a schedule for Routine Renewables Portfolio Standard (RPS) Compliance Reports to be filed on March 1st and August 1st of each year, with the opportunity to supplement or amend the March filing by May 1st of that year.
2. D.06-10-050 established that Verified RPS Reports must be filed using California Energy Commission (CEC) verified RPS procurement data within 30 days after the CEC adopts an RPS Procurement Verification Report.
3. The Commission is authorized to enforce compliance with the RPS.
4. The Commission has the power to act as an enforcement agency and to ensure that penalties are promptly prosecuted and collected pursuant to Public Utilities Code Section 2101.
5. Public utilities are subject to Commission enforcement action and penalties pursuant to Public Utilities Code Sections 2102-2105, 2017, 2108 and 2114.
6. Pursuant to Public Utilities Code Section 394.25, electric service providers are subject to Commission enforcement action pursuant to Public Utilities Code Sections 2102-2105, 2017, 2108 and 2114 as if they were public utilities.

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7. Community choice aggregators are subject to enforcement action pursuant to Public Utilities Code Section 2111.
8. Public Utilities Code Section 702 mandates every public utility to obey and comply with every Commission order, decision, direction, or rule.
9. Under California law, including Public Utilities Code Section 7, the Commission may delegate authority to its Staff to perform certain functions.
10. Delegation of authority to Commission Staff to issue citations and levy Scheduled Fines for Specified Violations will encourage compliance with the RPS program reporting requirements.
11. The Scheduled Fines set forth in Appendix A are reasonable, will encourage complete and timely filings of RPS compliance reports, and will encourage complete and timely responses to requests for information from Commission Staff that are directly related to RPS compliance reports.
12. Due to the number of informal and formal data requests, some without strict deadlines and some related to other proceedings, it may be difficult to determine if an LSE has responded to a data request related to RPS compliance reports in the time or manner required. Therefore, when making data requests directly related to RPS compliance reports, Commission Staff shall include the following header: "This data request is directly related to Renewables Portfolio Standard compliance reports and is subject to the fine schedule outlined in Resolution E-4257."
13. The proposed procedures for the citation program ensure due process, fairness, and efficiency in the application of the citation program.

THEREFORE, IT IS ORDERED THAT:

1. The citation program and the Scheduled Fines for the Specified Violations as described in Appendix A, are hereby adopted.
2. Authority is delegated to Commission Staff to issue citations and levy Scheduled Fines for the Specified Violations set forth in Appendix A to enforce compliance for Load Serving Entities subject to the Commission's Renewables Portfolio Standard reporting requirements.
3. The issuance of a citation for a Specified Violation is not mandatory, and, in the alternative, the Commission may initiate any formal proceeding authorized by the California Constitution, the Public Utilities Code, other state and federal statutes, court decisions or decrees, the Commission's Rules of Practice and Procedure, or prior Commission orders, decisions, rules, directions, demands or requirements, and pursue any other remedy authorized by the California Constitution, the Public Utilities Code, other state or federal statutes, court decisions or decrees, or otherwise by law or in equity.
4. Nothing in this Resolution bars or affects the rights or remedies otherwise available to other persons or government agencies.
5. Resolution E-4257 is enacted.
6. This Resolution is effective today.

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I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on October 29, 2009; the following Commissioners voting favorably thereon:

PAUL CLANON
Executive Director

MICHAEL R. PEEVEY
PRESIDENT
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners

APPENDIX A

Renewables Portfolio Standard Citation Program

1.0 Specified Violations and Scheduled Fines

1.1 “Specified Violation” means the failure, absent an approved extension, to submit: (a) a Routine Renewables Portfolio Standard (RPS) Compliance Report at the time or manner required; (b) a Verified RPS Compliance Report at the time or manner required; and (c) other supporting data required by Staff that is directly related to RPS compliance reports.

1.2 “Scheduled Fines” for Specified Violations are set forth in Appendix A.

1.3 Modification of Scheduled Fines. Scheduled Fines may be modified by Resolution.

2.0 Procedures for Citation Program

2.1 Citations for Specified Violations. After appropriate informal investigation and verification that a Specified Violation defined in this Resolution has occurred, Commission Staff is authorized to issue a citation. The Specified Violations and the corresponding Scheduled Fine that may be levied are described in this Appendix.

2.2 Service of Citations. Citations shall be sent by Commission Staff by first class mail to the Respondent at the address of the agent for service of process.

2.3 Content of Citations. Citations shall state the alleged violation, the evidence supporting the alleged violation, and the proposed Scheduled Fine. The citation may summarize the evidence and Commission Staff shall make the evidence available for timely inspection upon request by the Respondent. Citations also shall include an explanation of how to file an appeal of the citation, including the explanation of a right to have a hearing, to have a representative present at the hearing, and to request a transcript.

2.4 Response to Citation. A Respondent may either: (1) accept the citation and the Scheduled Fine; or (2) appeal the citation.

2.5 Filing with Commission Staff. Unless otherwise specified, “notify Commission Staff,” “filing,” or “file” means to send a written communication by the U.S. Mail or an express mail service to the address specified in the order or citation that requires the filing or notification. These written communications are not filed with the Commission’s Docket Office. In addition to or instead of communications by mail service, Commission Staff may allow electronic submissions.

2.6 Acceptance of Scheduled Fine. In the event the proposed Scheduled Fine is accepted, the Respondent shall notify Commission Staff in writing and shall pay the Fine in full as set forth in subsection 2.8, below within thirty (30) days of the date of the citation.

2.7 Appeal of Citation. In lieu of accepting the Scheduled Fine, a Respondent may appeal the citation and request a hearing. In the event of an appeal, any remedy available may be imposed, and the remedy shall not be mandated by or limited to the Scheduled Fine.

2.7.1. Notice of Appeal. To appeal a citation, the Respondent must file a written Notice of Appeal. The Notice of Appeal must state the grounds for appeal and be filed with Commission Staff within thirty (30) days of the date of the citation.

2.7.2. Referral to Administrative Law Judge. Upon receipt of a timely Notice of Appeal, Commission Staff shall promptly provide a copy of the Notice of Appeal to the Chief Administrative Law Judge. The Chief Administrative Law Judge shall promptly designate an Administrative Law Judge to hear the appeal.

2.7.3 Time of Hearing. No less than ten (10) days after the Notice of Appeal is filed, the assigned Administrative Law Judge shall set the matter for hearing promptly. The Administrative Law Judge, may, for good cause shown or upon agreement of the parties, grant a reasonable continuance of the hearing.

2.7.4 Location of Hearing. Appeals of citations shall be heard in the Commission’s San Francisco courtroom on regularly scheduled days.

2.7.5 Transcripts. The Respondent may order a transcript of the hearing, and shall pay the cost of the transcript in accordance with the Commission’s specified procedures.

2.7.6 Representation at Hearing. The Respondent may be represented at the hearing by an attorney or other representative, but any such representation shall be at the Respondent's expense.

2.7.7. Evidentiary Hearing. At an evidentiary hearing, Commission Staff bears the burden of proof and, accordingly, shall open and close. The Administrative Law Judge may, in his or her discretion to better ascertain the truth, alter the order of presentation. Formal rules of evidence do not necessarily apply, and all relevant and reliable evidence may be received at the discretion of the Administrative Law Judge.

2.7.8 Submission. Ordinarily, the matter shall be submitted at the close of the hearing. The Administrative Law Judge, upon a showing of good cause, may keep the record open for a reasonable period to permit a party to submit additional evidence or argument.

2.7.9 Decision. The Administrative Law Judge shall issue a draft Resolution resolving the appeal not later than thirty (30) days after the appeal is submitted in accordance with subsection 2.7.8, and the draft Resolution shall be placed on the first available agenda, consistent with the Commission's applicable rules.

2.7.10 Communications. From the date that a citation is issued to and including the date when the final decision is issued, neither the Respondent nor Commission Staff, or any agent or other person on behalf of the Respondent or Commission Staff, may communicate regarding the appeal, orally or in writing, with a Commissioner, Commissioner's advisor, or Administrative Law Judge.

2.8 Payment of Scheduled Fines. Payment of Scheduled Fines shall be submitted to the Commission's Fiscal Office, 505 Van Ness Avenue, San Francisco, CA 94102, in the form of certified check, payable to the Public Utilities Commission for the credit of the State General Fund.

2.9 Default. If the Respondent: (a) notifies Commission Staff of acceptance of a Scheduled Fine and fails to pay the full amount of the Scheduled Fine within thirty (30) days of the date of the written acceptance of the Scheduled Fine; or (b) fails to notify Commission Staff of acceptance of a Scheduled Fine or fails to file a written Notice of Appeal in the manner and time required, then the citation and fine shall become final and the Respondent is in default. Upon

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default, any unpaid balance of a Scheduled Fine shall accrue interest at the legal rate of interest for judgments, and Commission Staff and the Commission may take any action provided by law to recover unpaid penalties and ensure compliance with applicable statutes and Commission orders, decisions, rules, directions, demands or requirements.

2.10 Reporting. Commission Staff shall regularly report to the Commission summarizing actions taken pursuant to this Resolution. The report shall include a summary of the citations and penalties imposed, fines paid, and the disposition of any appeals.

SPECIFIED VIOLATIONS AND SCHEDULED FINES

SPECIFIED VIOLATION	SCHEDULED FINE
Failure to file ¹³ a Routine RPS Compliance Report at the time required. This includes the Project Development Status Report that the investor owned utilities must file.	\$500 per day for the first ten days the filing was late and \$1,000 for each day thereafter.
Failure to file a corrected Routine RPS Compliance Report within 10 business days after receiving notice from Staff that the report is incorrect or incomplete. This includes the Project Development Status Report that the investor owned utilities must file.	\$500 per day for the first ten days the corrected filing was late and \$1,000 for each day thereafter.
Failure to file a Verified RPS Compliance Report at the time required.	\$500 per day for the first ten days the filing was late and \$1,000 for each day thereafter.
Failure to file a corrected Verified RPS Compliance Report within 10 business days after receiving notice from Staff that the report is incorrect or incomplete.	\$500 per day for the first ten days the corrected filing was late and \$1,000 for each day thereafter.

¹³ Filings must contain all sections of the Staff provided template to be considered on time.

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Failure to comply with a request for information from Commission Staff that is related to RPS compliance reports in the time or in the manner required.	\$500 per day for the first ten days an LSE fails to respond to Commission Staff's request and \$1,000 for each day thereafter.
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