**BEFORE THE CALIFORNIA ENERGY COMMISSION**

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| **IN THE MATTER OF: IMPLEMENTATION OF RENEWABLES PORTFOLIO STANDARD LEGISLATION** | **Docket No. 11-RPS-01** |

**COMMENTS OF THE NORTHERN CALIFORNIA POWER AGENCY ON THE DRAFT STAFF REPORT: 33 PERCENT RENEWABLES PORTFOLIO STANDARD PRE-RULEMAKING DRAFT REGULATIONS**

The Northern California Power Agency[1] (NCPA) offers the following comments to the California Energy Commission (CEC or Commission) on the California Energy Commission ***Draft Staff Report: 33 Percent Renewables Portfolio Standard Pre-Rulemaking Draft Regulations***, (Draft Regulation) issued on February 17, 2012.

## I. INTRODUCTION

NCPA was established in 1968, and is a California Joint Powers Agency. NCPA's members are publicly owned entities interested in the purchase, aggregation, scheduling, and management of electrical energy. NCPA is a long-time supporter of a 33% statewide renewable portfolio standard (RPS) target for all state utilities, and supports the Legislature's recognition in Senate Bill (SB) X1 2 that the oversight of local publicly owned utility (POU) RPS programs should remain – as is now the practice - with the local governing boards and elected officials who are directly accountable to their residents and communities. NCPA supports federal, regional, and statewide efforts to reduce greenhouse gas emissions and combat global climate change, and believes that its members' RPS programs help to advance those efforts. NCPA and

[1] NCPA members include the cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah, as well as the Bay Area Rapid Transit District, Port of Oakland, and the Truckee Donner Public Utility District. NCPA's Associate Members are the Plumas-Sierra Rural Electric Cooperative and Placer County Water Agency.

its members have a long history of environmental stewardship and have expended considerable resources to develop significant amounts of renewable electric generation resources, investments that are consistent with the fundamental objectives of climate change policy and a 33% RPS. All NCPA members, consistent with SBX1-2 and previously with Senate Bill 1078 (Sher), formally adopted RPS programs that are tailored to their individual communities. Collectively, NCPA members have greater than 20% RPS, and many individual NCPA member utilities already have California-eligible RPS levels that exceed a 33% threshold.

Over the more than four years during which the 33% RPS mandate was developed and negotiated at the legislature, the POU community stressed the critical nature of retaining local regulatory authority to ensure that programs and policies supporting the RPS mandate are realized in the most effective manner. The Legislature acknowledged this important role of local governance, and it was the retention of this local authority in SBX1-2 that played a key role in having NCPA and its members support the final outcome. This position regarding local authority retention resulted in a statute that retained the concept of two jurisdictional approaches for oversight; one for retail sellers, subject to California Public Utilities Commission (CPUC) jurisdiction, and one for POUs, subject to the jurisdiction of their respective governing boards or districts. This was neither an oversight, nor a mistake on the part of the Legislature, but a very deliberate act done to recognize the two distinct utility ownership models that exist in California.

## II. STATUTORY STRUCTURE

SBX1-2 made several significant changes to the state's RPS program. Prior to the passage of SBX1-2, the investor owned utilities (IOUs) had an RPS mandate that included, among other things, a requirement to increase their renewable procurement by 1% each year and achieve an RPS of 20% by 2010 and the POUs were required to implement an RPS program consistent with the state's objectives. The CPUC was responsible for implementing and overseeing the RPS programs of the IOUs and other CPUC-jurisdictional retail sellers, and local governing boards were responsible for implementing and overseeing the RPS programs of their respective POUs.

SBX1-2 changed the state's RPS program in several material respects in that the legislation:

- creates multi-year compliance periods for the first ten years of the program, with

annual compliance periods thereafter,[2]

- sets minimum renewable procurement requirements for each compliance period,[3]
- creates three categories of renewable portfolio products,[4]
- sets limits on the amount of products from each portfolio content category that a retail seller or POU can use in any given compliance period,[5]
- outlines three specific flexible compliance mechanisms that may be adopted by POUs when determining whether they have met the mandated RPS percentages in each compliance period,[6] and
- directs the CEC to implement regulations for the enforcement of the RPS for POUs.[7]

As stated in the Legislative Counsel's Digest, SBX1-2 "*generally* make the requirements of the RPS program applicable to local publicly owned electric utilities, *except that the utility's governing board would be responsible for implementation of those requirements*, instead of the PUC, and *certain enforcement authority with respect to local publicly owned electric utilities would be given to the Energy Commission* and State Air Resources Board, instead of the PUC."[8] SBX1-2 **does not** change the fundamental, underlying structure of the State's RPS program. That is, the CPUC still oversees the IOU and retail seller programs, and the local governing boards still oversee the RPS programs of their respective POUs. Therefore, while the Draft Regulation provides a comprehensive RPS program implementation plan, a significant number of the proposed regulatory sections contained therein exceed the jurisdiction granted to the CEC under SBX1-2 and would usurp the regulatory authority that is vested in the local governing boards. It is up to the individual POUs to take the provisions of SBX1-2 and implement them into their own Renewable Energy Resource Procurement Plans. Accordingly, NCPA urges the CEC to direct staff to work further with the POUs and other stakeholders to draft an RPS

[2] §§ 399.15(b), 399.30(b).

[3] §§ 399.15(b), 399.30(b).

[4] § 399.16(b).

[5] § 399.16(c).

[6] § 399.30(d)

[7] § 399.30(n).

[8] SBX1-2, Legislative Counsel's Digest, section (1), emphasis added.

enforcement regulation that is consistent with the statute itself, and specifically section 399.30(n).

In order to better understand the context in which SBX1-2 was developed, it is important to keep in mind the essential difference between POUs and IOUs. This difference is not, as frequently asserted, that POUs are not regulated. POUs are heavily regulated, at the first level by locally elected officials that provide oversight of policies and rates, and at state and federal levels on issues related to safety and reliability and other matters required under state and federal law. The equivalent "local authority" for IOUs is the CPUC, which provides the equivalent oversight of policies and "rate case" approval.

The fundamental difference between POUs and IOUs is that **POUs are not-for-profit public agencies**, compared to the for-profit IOUs tasked with optimizing the investment return to their shareholders. This is not a criticism of for-profit companies, just a statement of the differences in the structure and mission of a publicly-owned versus a privately-owned utility. In the POU environment, there is no "conflict" between customers and shareholders, as they are one and the same, and the local elected officials that govern the POUs are directly answerable to the community that is both served by their utility and owns it. IOUs provide an essential service to their customers but have a shareholder-elected board, and these customers and shareholders are typically not the same group. Because of the monopoly and essential nature of the service provided, the IOUs do not face much in the way of "market forces regulation" of rates and services, therefore they need an independent regulator to oversee policy and ensure fair and reasonable rates; the IOUs have this oversight in the CPUC. POUs simply do not need this additional layer of oversight to protect their customers and any regulation of such serves only to raise costs and undermine the concept of local governance established in California law. It is this essential difference that the Legislature acknowledged in developing a statewide 33% RPS that includes CPUC governance for IOUs and other retail sellers, and local governing board governance for POUs.

## III. SCOPE OF AUTHORITY

NCPA understands that the CEC wishes to have the provisions of the POU RPS program conform, to the greatest extent possible, to the CPUC's implementation of the RPS for retail sellers. This objective, however, must be reconciled with the fact that the statute creates two

separate renewable portfolio programs, albeit with consistent objectives. All retail sellers and POUs must procure a minimum quantity of electricity products from eligible renewable energy resources, including renewable energy credits, as a specified percentage of total kilowatt hours sold to the utility's retail end-use customers each compliance period.[9] Each retail seller and POU must meet these renewable portfolio standards by acquiring resources from one of three separate categories of renewable resources defined in Public Utilities Code[10]sections 399.30(c) and 399.16. There are portions of section 399.30 that require various aspects of the POU renewable energy resource procurement plans to be consistent with provisions of section 399.16 and 399.15, which generally apply to retail sellers. In each of these instances, however, the Legislature left it to either the CPUC or the local governing boards of the POUs to implement and interpret the specific statutory language, providing only the essential framework in the legislation for guiding that interpretation.

The legislation gives the CEC the authority to enforce POU compliance with the RPS. That authority does not extend, however, to the Commission's review or approval of all aspects of the POU's program, but rather its final compliance with the mandate. The Legislature left the POU – not the CPUC or the CEC – with exclusive purview over various aspects of its program, including the form of its own renewable energy procurement plan and the provisions contained therein.

NCPA is concerned that the lines between POU and CEC jurisdiction, which are clearly delineated in SBX1-2, have been blurred in the process of attempting to develop a comprehensive set of regulations applicable to the entire renewable portfolio program. Instead, consistent with section 399.30(n), the CEC regulations should be strictly focused on the compliance period review of POU procurement activities for purposes of determining whether or not the POU has met the RPS mandates set forth in SBX1-2. As proposed, the Draft Regulation would place the CEC in the role reserved for the governing boards of the POUs, and usurps the authority expressly provided to the POU governing boards in the statute.

[9] § 399.15(a) and § 399.30(a).

[10] Unless otherwise indicated, all statutory references will be to the California Public Utilities Code.

## IV. RPS ELIGIBILITY GUIDEBOOK REVISIONS

The imposition of deadlines and the practicalities of revising complex documents related to the state's renewable energy programs have created a situation where the RPS enforcement regulation is being developed at the same time the Commission is working on significant revisions to the RPS Eligibility Guidebooks. Unfortunately, these two documents are inexorably linked in many respects and it is not possible for stakeholders to provide meaningful comments on various sections of the Draft Regulation when the definitions and references contained therein are to a document that is still in a state of flux. NCPA urges the Commission to complete its revisions and approval of the pending RPS Eligibility Guidebooks as soon as possible, and only after those documents are finalized should the CEC proceed with drafting of the RPS enforcement regulation. Doing so will reduce the uncertainty regarding many of the matters that are addressed in both documents.

For example, there are definitions in the Draft Regulation that reference the Guidebook, but which staff has acknowledged refer to parts of the Guidebook currently being revised. Additionally, the Draft Regulation is replete with references to "certified" facilities, including requirements and limitations on the use of pre-June 1, 2010 resources, some of which were not previously subject to certification requirements. It is imperative that the POUs have a clear understanding of the requirements applicable to those facilities, including the manner in which they must be certified to count towards the RPS mandate. However, this cannot be done until the current Guidebook revisions are complete.

Likewise, the Guidebook is supposed to address matters regarding verification of compliance data. Reconciling compliance verification with the compliance reporting requirements set forth in the Draft Regulation cannot be done until the Guidebook provisions relevant to verification are complete.

## V. COMMENTS ON SPECIFIC PROVISIONS OF THE DRAFT REGULATION

As noted above, NCPA believes that the Draft Regulation includes provisions that are not properly included in a regulation "specifying procedures for enforcement of this article," and that several provisions should either be excluded from the Draft Regulation entirely, or significantly revised to more accurately reflect the statutory authority being referenced. The comments

offered on specific provisions of the Draft Regulation are in the interest of continuing dialogue on these issues that are of critical importance to both the POUs and the CEC.[11]

### A. Development of the POU Renewable Energy Resources Procurement Plan is Solely Within the Control of the POU (Draft Regulation Section 3205(a))

Adoption and implementation of the POU renewable energy resources procurement plan is within the exclusive purview of the local governing boards of the POUs. The Legislature sent a clear message regarding the entity responsible for adopting and implementing the POU 33% RPS program in that the legislation speaks only to the responsibility of the POU and its local governing board and not of any other oversight authority.[12] Any provisions in the enforcement regulation that attempt to set requirements for the POUs' renewable energy resources procurement plans would place the CEC in the role that the Legislature expressly reserved for the governing boards of the POUs. Such an outcome is inconsistent with the clear language of the statute and should be avoided.

In Section 3205, the Draft Regulation would require that by January 1, 2013, each POU "submit to the Commission a renewable energy resources procurement plan that includes, at a minimum, the following information for the forthcoming calendar year and the current compliance period: . . ." which includes an extensive list of required elements[13] and that "by January 1 of each year following 2013, each POU shall submit any revisions to the renewable energy resources procurement plan, including all requirements of Section 3205 (a)(1), if the procurement plan is updated."[14] These requirements are not consistent with Section 399.30(a) which provides that:

> "In order to fulfill unmet long-term generation resource needs, each local publicly owned electric utility shall adopt and implement a renewable energy resources procurement plan that requires the utility to procure a minimum quantity of electricity products from eligible renewable energy resources, including renewable energy credits, as a specified percentage of total kilowatthours sold to

[11] Likewise, while NCPA and its members also worked with the California Municipal Utilities Association (CMUA) in an attempt to provide specific revisions to the Draft Regulation, that input should not be seen as an acceptance of the scope of the Draft Regulation, but rather for discussion purposes only relative to each of the specific provisions.

[12] § 399.30(c).

[13] Draft Regulation, Section 3205 (a)(1).

[14] Draft Regulation, Section 3205 (a)(2).

> the utility's retail end-use customers, each compliance period, to achieve the targets of subdivision (c)."

Nothing in the statute requires a POU to include the list of required elements proposed in section 3205(a)(1) of the Draft Regulation in the POU renewable energy resources procurement plan.

In contrast, SBX1-2 includes detailed provisions that require electrical corporations (i.e., IOUs) to prepare annual renewable energy procurement plans that contain specified required elements.[15] Unlike the provisions applicable to electrical corporations, where the Legislature grants the CPUC authority to direct what should be included in the electrical corporation's renewable energy procurement plans, and further specifically provides that the CPUC "**shall** review and accept, modify, or reject each electrical corporation's renewable energy resource procurement plan prior to the commencement of renewable energy procurement pursuant to this article by an electrical corporation,"[16] there are **no** provisions granting similar authority to the CEC regarding POU renewable energy resource procurement plans.

With regard to the POU plans, the statute requires only that the POUs "shall adopt and implement a renewable energy resources procurement plan,"[17] and that the POU "post notice . . . whenever its governing body will deliberate in public on its renewable energy resources procurement plan" and "contemporaneous with the posting of the notice . . . notify the Energy Commission of the date, time, and location of the meeting in order to enable the Energy Commission to post the information on its Internet Web site," and "upon distribution to its governing body of information related to its renewable energy resources procurement status and future plans, for its consideration at a noticed public meeting, the local publicly owned electric utility shall make that information available to the public and shall provide the Energy Commission with an electronic copy of the documents for posting on the Energy Commission's Internet Web site."[18] In order to carry out the legislative direction set forth in SBX1-2, it is necessary to distinguish between the POU's requirement to submit **notice** to the CEC when it is deliberating on the plan and the purported "**approval**" of the content of the plans.

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[15] § 399.13(a).

[16] § 399.13(c), emphasis added.

[17] § 399.30(a).

[18] § 399.30(f).

As noted, there are no statutory provisions that mandate the POUs to provide their renewable energy resources procurement plan to the CEC, nor for the CEC to approve or disapprove any portions of those plans. The reason for this is simple – there are more than three dozen POUs, each with an individual approach to renewable energy resources procurement planning. Mandating that every POU's renewable energy resources procurement plans look like the detailed plans that are mandated by the legislation for the retails sellers is impractical. Some POUs may in fact already have such a renewable energy resources procurement plan. Larger POUs may have processes and procedures in place for creating annual renewable energy resources procurement plans, and for including within those plans details regarding specific contracts and procurements that are anticipated each year. Other POUs, particularly smaller entities, may have renewable energy resources procurement plans that outline procurement targets and strategies consistent with the requirements set forth in section 399.30(a), but leave details and annual reporting outside of the plan itself. Either approach – and indeed any variation in between – is acceptable and consistent with the legislation.

The relationship the legislation contemplates between the IOUs and the CPUC is the same as what is contemplated between the POU and the POU's local governing board. The CEC's sole role is to make a determination of compliance at the end of the compliance period.

### B. POU Enforcement Programs Need Not be Revised to Reflect the Draft Regulation (Draft Regulation Section 3205(b))

SBX1-2 directs each POU's governing board to adopt a program for enforcement of the RPS mandate. Specifically 399.30(e) provides that:

> "The governing board of the local publicly owned electric utility shall adopt a program for the enforcement of this article on or before January 1, 2012. The program shall be adopted at a publicly noticed meeting offering all interested parties an opportunity to comment. Not less than 30 days' notice shall be given to the public of any meeting held for purposes of adopting the program. Not less than 10 days' notice shall be given to the public before any meeting is held to make a substantive change to the program.

Under the Draft Regulation, the POUs must submit their Enforcement Programs to the CEC annually. Furthermore, the Draft Regulation provides that "a POU shall revise its enforcement plan or program, as needed, to comply with these regulations within 90 days of the effective date of these regulations." This purported requirement is not consistent with the statute. Aside from

directing the POUs to adopt a program for enforcement of the RPS by January 1, 2012, SBX1-2 does not include specific mandates regarding the content or structure of the enforcement program. Neither does the legislation provide any authorization for the Commission to impose any such mandates. Accordingly, there is no need for the POUs to make any changes to their existing enforcement programs "to comply with these regulations." Unless the POU enforcement program is updated or otherwise brought before its local governing board for revisions, there is no reason for the POU to submit its enforcement program to the CEC. If the enforcement program is updated or revised, the POU is obligated to provide the appropriate notice as required under 399.30(e).

### C. Provisions regarding the Treatment of Pre-June 2010 Resources Must be Clarified (Draft Regulation Section 3202)

The Draft Regulation is replete with references to requirements that all resources used to qualify for the RPS be "certified." However, under the statute, there are resources that are eligible to count towards the RPS requirements, but that were not previously certified because of the rules in place at that time. While Staff has indicated that the newest revisions to the RPS Eligibility Guidebook will address these instances, as drafted, it is not possible to reconcile the proposed requirements with the current rules. These details need to be addressed before the RPS enforcement regulation can be completed.

### D. Qualifying Electricity Products (Draft Regulation Section 3202)

In the Draft Regulation, the CEC has generally established definitions for qualifying electricity products consist with those set forth in the CPUC's Decision 11-12-052. As more fully addressed in the comments submitted by the California Municipal Utilities Association, the POUs do not believe that the exact interpretations adopted by the CPUC must be utilized by the CEC, especially in instances where there is clear legal support for an alternate interpretation.[19]

[19] Again, it is worth noting that consistent programs are not necessarily going to be exactly the same. The POUs are required to adopt provisions "consistent with" the statutory provisions applied to the retail sellers in several instances, but this does not mean that the CPUC's interpretation of those provisions for the purposes of governing their jurisdictional entities is the same as how the statute should be interpreted for POUs. There is no requirement in the statute for the POUs to adopt the CPUC's interpretation, nor to wait for the CPUC to take action on these issues prior to adopting their own RPS program measures. Furthermore, even the CPUC has acknowledged that the rules applicable to the Investor Owned Utilities do not automatically apply to other entities, including CPUC-jurisdictional energy service providers and community choice aggregators. See, for example, Decision 10-03-021,

NCPA supports the comments of CMUA regarding the need to ensure that unbundled renewable energy credits be eligible for classification in portfolio content categories 1 and 2.

### E. Compliance Period Calculation (Draft Regulation Section 3204(a))

The Draft Regulation provides the CEC's interpretation of the calculation to be used for determining compliance with the RPS mandate. For the first compliance period, the compliance obligation is measured by procuring electricity products from eligible renewable energy resources sufficient to equal an average of 20% over all three years (2011, 2012, 2013). For the second and third compliance periods, the POU must procure electricity products sufficient to meet or exceed 25% and 33%, respectively, in the last year of the compliance period.

The metric used for the Commission to verify the POU's compliance must be set forth in the POU's renewable energy resources procurement plan. NCPA supports the final calculation recommendation set forth in the Draft Regulation as **an option** that can be utilized by the POUs. NCPA also supports the alternate proposed methodology that would establish a trajectory for procurement between the first and last years of the second and third compliance periods. The latter option, which would have the POU adopt an assumed trajectory, is also linked to the demonstration of reasonable progress that the POUs need to make in the intervening years of the second and third compliance periods. NCPA believes that either compliance metric should be available to the POUs.

### F. The Annual Demonstration of Reasonable Progress is Determined by the POU and not the CEC (Draft Regulation Section 3204(d))

The Draft Regulation would require the POU to demonstrate reasonable progress to the Commission during each of the intervening years of the second and third compliance periods. As proposed, the POU can make the demonstration in its annual filings to the Commission or the POU is deemed to be making reasonable progress if it demonstrates an increase in the procurement of eligible products of no less than 1.5% annually during the intervening years of the second compliance period, and 2% annually during the intervening years of the third

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where the Commission noted that it "has different responsibilities with respect to utilities, on the one hand, and ESPs and CCAs on the other. . . . Commission does not set the rates of ESPs or CCAs and has no responsibility to ensure that their charges to their customers are just and reasonable." Id at 48.

compliance period, as long as the POU met its procurement target for the prior compliance period.

In discussing these requirements, it is imperative to note that the legislation does not mandate a numerical calculation or require minimum procurement requirements during the intervening years of the second and third compliance periods. Indeed, section 399.15(b)(2)(C) specifically states that the CPUC shall not require retail sellers to demonstrate a specific quantity of procurement for any individual intervening year. NCPA is concerned that the interpretation of an implied annual increase set forth in the Draft Regulation would do just that. While the current limitation may be seen as an attempt to set a "safe harbor," the mere application of a numerical safe harbor that must be demonstrated to the CEC de facto creates such a requirement.

It is undisputed that procurement of renewable resources varies over time for myriad reasons. Variations in the availability of renewable resources and the uncertainties in the contracting process make it difficult to set straight line trajectories. Doing so also undermines the flexibility and primary purpose of the multi-year compliance periods established by the statute. NPCA does not dispute that the POUs need to make a demonstration of reasonable progress to their local governing boards as part of their ongoing procurement efforts. However, the Draft Regulation's characterization of this demonstration as something that must be made to and/or approved by the CEC is inappropriate and not consistent with the clear meaning of the statute that gives the POU governing boards authority over the POU renewable energy procurement plans and execution of those plans.

### G. The Draft Regulation Exceeds the CEC's Authority in its Proposal to Draft Rules for RPS Compliance Options (Draft Regulation Sections 3206(a)(1), 3206(a)(2), and 3206(a)(3))

The legislation specifically authorizes POUs to adopt, at their discretion, three different mechanisms that address compliance flexibility. Section 399.30(d) provides that:

> "The governing board of a local publicly owned electric utility may adopt the following measures:
> (1) Rules permitting the utility to apply excess procurement in one compliance period to subsequent compliance periods in the same manner as allowed for retail sellers pursuant to Section 399.13.
> (2) Conditions that allow for delaying timely compliance consistent with subdivision (b) of Section 399.15.

> (3) Cost limitations for procurement expenditures consistent with subdivision (c) of Section 399.15."

If a POU intends to apply excess procurement from one compliance period to the next, delay timely compliance due to operational constraints, or establish a limitation for procurement expenditures, it must adopt a measure to do so. Each of these measures is defined in the applicable statutory provision, and is not subject to further interpretation or more extensive requirements in the enforcement regulation. As set forth in the Draft Regulation, the CEC would add restrictions and requirements to the three compliance alternatives that are not mandated by the statute itself. If the RPS enforcement regulation is to reference the provisions of 399.30(d), it must do so without extra-statutory interpretations or additional restrictive provisions.

1. Excess Procurement - Draft Regulation Section 3206(a)(1)

In order to apply excess procurement from one compliance period to subsequent compliance periods, a POU must meet certain requirements. Section 399.13(a)(4)(B)) provides that the CPUC shall adopt:

> "Rules permitting retail sellers to accumulate, beginning January 1, 2011, excess procurement in one compliance period to be applied to any subsequent compliance period. The rules shall apply equally to all retail sellers. In determining the quantity of excess procurement for the applicable compliance period, the commission shall deduct from actual procurement quantities, the total amount of procurement associated with contracts of less than 10 years in duration. In no event shall electricity products meeting the portfolio content of paragraph (3) of subdivision (b) of Section 399.16 be counted as excess procurement."

Under section 399.30(d)(1), **POUs may adopt** excess procurement provisions in the same manner as section 399.13(a)(4)(B). Therefore, the only restrictions and limitations that the POU must comply with are those set forth in the statute. The Draft Regulation attempts to apply a formula to the application of excess procurement that goes beyond the requirements set forth in 399.13(a)(4)(B), and therefore should be stricken.

2. Delay of Timely Compliance-Draft Regulation Section 3206(a)(2)

POUs have the sole discretion of whether or not to adopt provisions for compliance options, such as provisions that allow a delay of timely compliance. POUs are restricted, however, in their adoption of such provisions in that they must comply with the provisions set

forth in the statute. Section 399.30(d)(2) allows POUs to adopt measures that include "conditions that allow for delaying timely compliance consistent with [399.15(b)]."

The provisions of section 399.15(b) that apply to a delay in timely compliance provide that:

> (5) The commission shall waive enforcement of this section if it finds that the retail seller has demonstrated any of the following conditions are beyond the control of the retail seller and will prevent compliance:
>
> (A) There is inadequate transmission capacity to allow for sufficient electricity to be delivered from proposed eligible renewable energy resource projects using the current operational protocols of the Independent System Operator. In making its findings relative to the existence of this condition with respect to a retail seller that owns transmission lines, the commission shall consider both of the following:
>
> (i) Whether the retail seller has undertaken, in a timely fashion, reasonable measures under its control and consistent with its obligations under local, state, and federal laws and regulations, to develop and construct new transmission lines or upgrades to existing lines intended to transmit electricity generated by eligible renewable energy resources. In determining the reasonableness of a retail seller's actions, the commission shall consider the retail seller's expectations for full-cost recovery for these transmission lines and upgrades.
>
> (ii) Whether the retail seller has taken all reasonable operational measures to maximize cost-effective deliveries of electricity from eligible renewable energy resources in advance of transmission availability.
>
> (B) Permitting, interconnection, or other circumstances that delay procured eligible renewable energy resource projects, or there is an insufficient supply of eligible renewable energy resources available to the retail seller. In making a finding that this condition prevents timely compliance, the commission shall consider whether the retail seller has done all of the following:
>
> (i) Prudently managed portfolio risks, including relying on a sufficient number of viable projects.
>
> (ii) Sought to develop one of the following: its own eligible renewable energy resources, transmission to interconnect to eligible renewable energy resources, or energy storage used to integrate eligible renewable energy resources. This clause shall not require an electrical corporation to pursue development of eligible renewable energy resources pursuant to Section 399.14.
>
> (iii) Procured an appropriate minimum margin of procurement above the minimum procurement level necessary to comply with the renewables portfolio standard to compensate for foreseeable delays or insufficient supply.
>
> (iv) Taken reasonable measures, under the control of the retail seller, to procure cost-effective distributed generation and allowable unbundled renewable energy credits.
>
> (C) Unanticipated curtailment of eligible renewable energy resources necessary to address the needs of a balancing authority.

A POU, at is sole discretion, may adopt a measure that establishes conditions for delay of timely compliance, consistent with this section. There is no statutory authority, however, for the Commission to add additional requirements, as it purports to do in the Draft Regulation. The POU need only adopt measures that are consistent with section 399.15(b)(5).

3. Expenditure Limitations - Draft Regulation Section 3206 (a)(3)

The provisions regarding expenditure limitations set forth in the Draft Regulation are too expansive and not consistent with the Legislation. The Legislation allows POUs to adopt provisions regarding expenditure limitations. Section 399.15(c) provides that:

> "The commission shall establish a limitation for each electrical corporation on the procurement expenditures for all eligible renewable energy resources used to comply with the renewables portfolio standard. In establishing this limitation, the commission shall rely on the following:
>
> (1) The most recent renewable energy procurement plan.
> (2) Procurement expenditures that approximate the expected cost of building, owning, and operating eligible renewable energy resources.
> (3) The potential that some planned resource additions may be delayed or canceled."

Without statutory support for such a position, the Draft Regulation would purport to establish those provisions for the POUs. It would also include requirements that are not set forth in the legislation itself, such as those set forth in section 399.15(d). Provisions from section 399.15(d) are used by the CPUC to develop the cost limitations for IOUs, and are not required of the POUs, although the POUs can take them into consideration as part of their regular deliberations if they decide to. The POU programs must comply with the statutory provisions, and not additional requirements. Furthermore, it is the POU that establishes those provisions, not the CEC. Establishing these provisions as part of the RPS enforcement regulation usurps an express authorization given to the POUs and fails to recognize the discretion reserved to the local governing boards of the POUs under the statute.

Furthermore, it is important that economic and cost information provided to the CEC be used appropriately. For example, the CEC is required to compile economic information on the administrative cost of implementing the RPS Regulation as part of the Office of Administrative Law process of submitting final regulation for approval. The numbers and data that are utilized for that exercise are not necessarily related to a POU's overall RPS compliance costs, nor to the

numbers that are used for determining what a reasonable cost limitation should be for purposes of procuring renewable resources. Information relevant to the administrative cost of implementing the RPS is not the same as data relevant to expenditures on RPS eligible resources. This is especially significant in light of the fact that the POU has complete discretion over matters regarding "the mix of eligible renewable energy resources procured by the utility and those additional generation resources procured by the utility for purposes of ensuring resource adequacy and reliability" and "the reasonable costs incurred by the utility for eligible renewable energy resources owned by the utility."[20]

### H. Commission Approval of POU Flexible Compliance Mechanisms (Proposed Regulation Section 3206(c))

The Draft Regulation would require the POUs to seek CEC approval of the provisions adopted by their local governing board regarding flexible compliance alternatives. The Draft Regulation would also require that provisions adopted by the POUs be part of the POU's renewable energy resource procurement plan for the given calendar year, be submitted to the CEC "for a determination of consistency" with section 399.30, which the CEC will make within 120 days, and include a provision that the Executive Director of the CEC receives notice no less than 30 days in advance of a proposed action under the rule, which notice shall include all supporting documentation used by the POU to make the determination. There is simply no statutory support for these requirements. The POUs acknowledge that they must first adopt the relevant compliance provisions before invoking them to make a compliance determination; however, these provisions apply to determinations of compliance by compliance period, and not annually. Accordingly, the provisions must be adopted by the POU only prior to the end of compliance period in which they are invoked.

### I. Compliance Reporting (Draft Regulation Section 3207)

NCPA urges the CEC to work closely with POU stakeholders to ensure that the reporting requirements set forth in the RPS enforcement regulation do not go beyond the requirements mandated in the legislation. The legislation provides for POUs to report specific information to the Commission on an annual basis; the majority of that information is already provided to the

[20] § 399.30(m).

Commission as part of ongoing reporting obligations and requirements. As more fully set forth below, the RPS regulation needs to distinguish between the ministerial reporting requirements mandated in SBX1-2 (which, for the most part, are consistent with current reporting obligations), and the actual compliance reports. NCPA looks forward to collaborating with the Commission on a proposal for compliance reporting that would eliminate additional annual reporting that extends beyond information that is already provided to the CEC related to the Power Source Disclosure Program, information that has been given to the CEC on an annual basis since 1998.

For purposes of determining compliance, POUs would submit "Compliance Reports" at the end of each compliance period. NCPA recommends that a verification process similar to that employed by the California Air Resources Board (CARB) be used for purposes of determining the accuracy of the information contained in the Compliance Reports.[21] To the extent a resource is deemed to be eligible, the CEC's processes would then only require verification of the total megawatts reported and the content category designations, all of which can be further refined as part of the WREGIS process on a going forward basis. NCPA believes that the costs associated with such a verification process – to either the POU or the CEC – would be incremental to the total cost and would more than offset the added staffing and time associated with providing far more documentation than is needed.

### J. Clear Distinctions Should be Made Between Ministerial Reporting for Data Gathering and Compliance Reporting at the End of Each Compliance Period

The Commission has the authority to establish procedures for the enforcement of the RPS regulation[22] and may issue a notice of violation and correction against the POU to the CARB for a possible determination of penalties. The CEC also has authority, under the statute, to receive notice and be provided with forms or information pursuant to sections 399.30(f), 399.30(g), 399.30(l).

In Section 399.30(f),[23] deliberations on procurement plan, the information provided to the CEC is ministerial and not intended to be used for purposes of approving or disapproving a POU

[21] As noted above, the manner in which information is to be verified for purposes of the compliance reports is another area where the overlap between the RPS Eligibility Guidebooks and the current Proposed Regulation must be reconciled.

[22] § 399.30(n).

[23] § 399.30(f)): (1) Each local publicly owned electric utility shall annually post notice, in accordance with Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code, whenever its

renewable procurement plan adopted (or updated) pursuant to the provisions of section 399.30(a). The statute is completely **un**ambiguous on this matter. The POUs have exclusive control over their renewable energy resource procurement plans. If the POU is going to deliberate on its plan, it must comply with the Brown Act and publicly post notice of such actions. The POU must also provide notice to the CEC at the same time, and allow for the notice to be posted on the CEC's website. Finally, when any documents or other information regarding the deliberation on the renewable energy procurement plan are provided to the City Councils or local governing boards, that information must also be made available to the public and the CEC must be provided with an electronic copy.

Likewise, 399.30(g)[24] requires the submission of an annual report to the CEC regarding contract execution. The POUs are required to submit a list of the various renewable procurement activities during the last year. However, as with the posting of notice of deliberations regarding procurement activities, the information provided under section 399.30(g) is ministerial and not for purposes of CEC approval or disapproval of POU renewable energy procurement activities.

Pursuant to 399.30(l),[25] the POUs are to provide a report to the CEC and their customers in much the same manner as they have been doing for many years. There is no reason why

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governing body will deliberate in public on its renewable energy resources procurement plan. (2) Contemporaneous with the posting of the notice of a public meeting to consider the renewable energy resources procurement plan, the local publicly owned electric utility shall notify the Energy Commission of the date, time, and location of the meeting in order to enable the Energy Commission to post the information on its Internet Web site. This requirement is satisfied if the local publicly owned electric utility provides the uniform resource locator (URL) that links to this information. (3) Upon distribution to its governing body of information related to its renewable energy resources procurement status and future plans, for its consideration at a noticed public meeting, the local publicly owned electric utility shall make that information available to the public and shall provide the Energy Commission with an electronic copy of the documents for posting on the Energy Commission's Internet Web site. This requirement is satisfied if the local publicly owned electric utility provides the uniform resource locator (URL) that links to the documents or information regarding other manners of access to the documents.

[24] § 399.30(g): (g) A local publicly owned electric utility shall annually submit to the Energy Commission documentation regarding eligible renewable energy resources procurement contracts that it executed during the prior year, as follows: (1) A description of the eligible renewable energy resource, including the duration of the contract or electricity purchase agreement. (2) A description and identification of the electrical generating facility providing the eligible renewable energy resource under the contract. (3) An estimate of the percentage increase in the utility's total retail sales of electricity from eligible renewable energy resources that will result from the contract.

[25] § 399.30(l): "(*l*) Each local publicly owned electric utility shall report, on an annual basis, to its customers and to the Energy Commission, all of the following: (1) Expenditures of public goods funds collected pursuant to Section 385 for eligible renewable energy resource development. Reports shall contain a description of programs, expenditures, and expected or actual results. (2) The resource mix used to serve its customers by energy source. (3) The utility's status in implementing a renewables portfolio standard pursuant to subdivision (a) and the utility's progress toward attaining the standard following implementation."

provision of this information cannot be done in the same format and utilizing the same forms that CEC Staff and stakeholders have already been utilizing, and which were developed for just this purpose. Even the newer provision regarding a report on the POU's status in implementing its renewable energy program and the "progress toward attaining the standard following implementation," are designed to be informative. Indeed, any measure of compliance with the RPS is not done by reviewing ministerial annual reports, but rather by reviewing the final procurement summary at the end of the compliance period, ensuring that the POU has achieved the required percentage of renewable energy products from the various portfolio content categories for any given compliance period.

### K. RPS Enforcement (Draft Regulation Section 3208)

Section 3208 of the Draft Regulation states that enforcement will be in compliance with Section 1240, which adds a new provision to Title 20 of the CEC's Regulations that provides that only the CEC may file a complaint against a POU for failure to comply with the RPS mandate. NCPA believes that under the statute, only the CEC is authorized to bring a complaint against the POU. It is the CEC that has access to all of the compliance data at the end of each compliance period, and it is the CEC that the Legislature has tasked with enforcing the mandate against the POUs. Therefore, the CEC is the only entity that may properly bring an action for failure to comply. This is consistent with the express statutory direction set forth in section 399.30(n).

NCPA also believes that the CEC's determination of compliance and any finding of a failure to comply with the RPS mandate should be based on a POU's activities as judged at the end of the compliance period, and not during the intervening years. During each of the intervening years of the first three compliance periods, the Commission is provided with reports and data from the POUs regarding their overall procurement activities, including power content disclosure and summaries of contracts executed during any given calendar year. The CEC may utilize this information, if it desires to do so, to informally track the progress of a POU towards meeting the compliance year targets. However, when it comes to making a determination regarding compliance with the RPS, it is the POU's final procurement of eligible renewable

resources that must be measured, and in order to do so, the CEC must be able to look at the POU's final compliance report, inclusive of its application of any potential compliance alternatives that may be appropriate. Accordingly, it is this final and total review of compliance that should be the basis upon which the CEC makes a determination of compliance, and if non-compliance is found, files a complaint against the POU.

### L. Provisions Should be Added to Address 399.30(i)

Consistent with the provisions incorporated throughout the Draft Regulation to address the statute's particular treatment of various POUs due to their existing long term contracts, any RPS enforcement regulation should also include specific references to the provisions of 399.30(i). Section 399.30(i) provides that:

> "For a local publicly owned electric utility that was in existence on or before January 1, 2009, that provides retail electric service to 15,000 or fewer customer accounts in California, and is interconnected to a balancing authority located outside this state but within the WECC, an eligible renewable energy resource includes a facility that is located outside California that is connected to the WECC transmission system, if all of the following conditions are met:
>
> (1) The electricity generated by the facility is procured by the local publicly owned electric utility, is delivered to the balancing authority area in which the local publicly owned electric utility is located, and is not used to fulfill renewable energy procurement requirements of other states.
>
> (2) The local publicly owned electric utility participates in, and complies with, the accounting system administered by the Energy Commission pursuant to this article.
>
> (3) The Energy Commission verifies that the electricity generated by the facility is eligible to meet the renewables portfolio standard procurement requirements."

## V. ATTACHMENT "A" QUESTIONS

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| Should the Energy Commission determine reasonableness for cost limitations and delay of timely compliance based on the structure to be determined for retail sellers? Should rules for excess procurement for POUs also be consistent with excess procurement rules for retail sellers? If not, explain how the rules should differ. Please discuss any pertinent legal or policy arguments in support of your position. |

While the meaning of "consistent with" as set forth in the legislation may be subject to more than one reasonable interpretation, it clearly does not mean "the same as." Nor does the legislation provide that the POU rules must be consistent with the CPUC's interpretation of the

legislation, as the legislation clearly provides the local POUs with the discretion to adopt measures consistent with the statutory provisions. Nowhere in the statute are the POUs directed to comply with the CPUC's adopted program interpretations. Nor does the statute require the CEC to do so. The clear intent of SBX1-2 was to recognize the difference between retail sellers and publicly owned electric utilities. Even the CPUC recognizes that not all retail sellers can be treated the same (ESPs and CCAs have slightly different rules in some regards), and the expenditure limitation provisions of SBX1-2 are specific to the electrical corporations – the three IOUs – and do not even extend to the remaining CPCU jurisdictional retail sellers. NCPA raises this distinction because this is a key point with regard to interpreting the Legislature's intent in adopting different provisions for POUs and retail sellers and in developing the regulation to implement the RPS mandate. Specifically, as it pertains to the cost limitation provisions, a single set of metrics cannot be used to assess the economic vitality of projects for all of the state's POUs, as those entities are of widely varied sizes, and are geographically and demographically diverse. Likewise, with regard to the provisions allowing the use of excess procurement, the POUs are bound to follow the provisions of the statute, and should not be subject to requirements that go beyond the scope of what is set forth in the legislation.

Question: Is there any reason why RECs generated before January 1, 2011, could be used for the first compliance period? Should this depend on whether the utility met its procurement target in 2010, or in years before? How would the Energy Commission verify that a POU has met these targets? How would the Energy Commission verify that a REC generated prior to January 1, 2011, has not been claimed for RPS compliance in a previous year?

Yes, there are properly instances where RECs generated before January 1, 2010 could be used in the first compliance period. As there is a 36-month period to retire RECs, any RECs that were not retired in WREGIS prior to January 1, 2011 should be available for use in the first compliance period. The CEC should be able to verify that a REC generated prior to January 1 2011 has not been claimed for compliance in a previous year if it has not already been retired in a POU's WREGIS account.

Question: Considering a 36 month timeframe for retiring RECs, can RECs generated under a contract approved prior to June 1, 2010, in accordance with PUC section 399.16 (d), be used for the first compliance period? Should the portfolio content categories be applied to those RECs, and should the RECs in different portfolio content categories be treated the same? Can RECs produced from contracts that were approved after June 1, 2010 be used for the first compliance period? Should the portfolio content categories be applied to those RECs, and should the RECs in different portfolio content categories

be treated the same?

Regardless of the 36-month timeframe, if the POU had the resource, then the fact that it was not necessarily from an RPS registered facility (given the ambiguity in the RPS Guidelines), they should be allowed for the first compliance period. All RECs should be treated in the same manner as the underlying resource.

Question: Must electricity products be retired in the same compliance period as when they are procured to be used for compliance?

There is no policy reason or statutory requirement to apply arbitrary limitations on the ability to retire electricity products. Procurement and retirement dates need not be linked.

Question: There are no provisions included in SB X1 2 that would exclude a POU from RPS requirements based on a POU's retail load or number of customers served. There are, however, provisions in the law that allow for the adoption of compliance measures, such as reasons for delay of timely compliance, cost limitations, and procurement category reductions. These measures may help reduce the impact of RPS compliance on POUs that would otherwise encounter significant impacts. Are there any additional alternatives that are available and that the Energy Commission should consider to limit the burden on very small POUs?

Without a doubt, small POUs will face significantly higher costs associated with meeting the mandates of the RPS. Economies of scale and the nature of renewable contract procurements are going to result in disproportionately higher compliance costs for smaller POUs, especially those that are going to be required to ramp-up their procurement from lower RPS levels. These entities are going to need to look closely at that their expenditures on renewables and their total portfolio costs. These costs will be reflected in any provisions regarding expenditure limitations that are adopted. The CEC can – and should – consider this information. The Commission should also look to streamlining and reconciliation of overall reporting obligations as ways in which to reduce the burden on all utilities, but particularly smaller POUs.

Question: How should late reporting, failure to report, or late submittal of an approved enforcement plan or procurement plan be included in findings of RPS non-compliance for a POU? How should these items be evaluated when determining reasonable progress?

Unless the POUs are updating or deliberating on their procurement plans, there is no requirement under the statute for annual filings of the procurement plans. NCPA believes that penalties should only attach to a POU's failure to meet the minimum RPS percentage at the end

of the compliance period. Adherence to reporting and other requirements should be taken into consideration as part of the final compliance assessment.

Question: Is 90 days after the effective date of the 33 percent RPS regulations a reasonable amount of time for a POU to adjust an enforcement plan, to comply with the provisions of the regulations? If not, what is a reasonable timeframe and why?

As noted above, the statute does not require POUs to revise their enforcement programs to meet the requirements of the regulation. However, for purposes of revising POU policies and having them approved by the local governing boards, 120 days would be more reasonable.

Question: Should other individuals or entities be allowed under the Energy Commission's regulations to file a complaint against a POU for failing to comply with the regulations? If so, what other individuals and entities, and why? What public purpose is served by allowing these individuals and entities to file a complaint against the POU, if Energy Commission staff have already determined the POU to be in compliance?

The Draft Regulations properly identifies the Commission as the only entity that can file a complaint for a POU's failure to meet its compliance obligation. There is no public policy served by allowing third parties to file such a compliant at the CEC. To be clear, the POUs process is already open to the public, and deliberations regarding their compliance with the RPS will be ongoing at the local level throughout the compliance period. If an entity believes that the CEC has failed in its review and determination of a POU's compliance with the statutory mandates, any complaint is properly against the CEC.

Question: If the Energy Commission initiates a public proceeding to consider a staff complaint against a POU, should other individuals or entities to allowed to intervene or otherwise be granted party status in the proceeding? If so, what other individuals or entities, and why? What public purpose is served by allowing these individuals and entities to intervene as parties in the proceeding?

There are properly only two parties to a CEC enforcement proceeding – the POU and the CEC. Not only does the statute contemplate such a paradigm, but there is no public purpose served by creating a compliance process that would be open to any member of the public. Again, the POU's are already subject to public scrutiny. The CEC process should not be opened to the public as an alternative venue for expressing grievances against a POU. NCPA can envision instances where third parties may want to protest a POU's compliance status simply because they do not agree with the type of resources that were procured and would prefer to see

different resources or agreements as a greater part of their portfolio, which would be an inappropriate application of the enforcement process contemplated under the statute.

## VI. CONCLUSION

NCPA appreciates the opportunity to provide these comments to the Commission and the willingness of CEC staff to work with stakeholders on issues of clarification regarding the implementation of the RPS enforcement regulation. NCPA looks forward to continuing to work with the CEC on these matters. If you have any questions regarding these comments, please do not hesitate to contact the undersigned or Scott Tomashefsky at 916-781-4291 or scott.tomashefsky@ncpa.com.

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Respectfully submitted,

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