BEFORE THE CALIFORNIA ENERGY COMMISSION

In the matter of: **Amendments to Regulations Specifying Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities**	**Docket No. 14-RPS-01**

NORTHERN CALIFORNIA POWER AGENCY COMMENTS ON 15-DAY LANGUAGE TO THE PROPOSED MODIFICATIONS TO THE ENFORCEMENT PROCEDURES FOR THE RENEWABLES PORTFOLIO STANDARD FOR LOCAL PUBLICLY OWNED ELECTRIC UTILITIES

Pursuant to the California Energy Commission (CEC or Commission) July 6, 2015 *Notice of Changes to Proposed Regulations, Notice of Hearing, and Notice of 15-Day Comment Period* (Notice), the Northern California Power Agency (NCPA)[1] offers these comments to the Commission on the 15-Day Language (15-Day Language) regarding modification of the regulations establishing *Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* (RPS Regulations).[2]

I. INTRODUCTION

In comments on the March 27 Proposed Amendments, NCPA made several recommendations regarding the proposed revisions to the RPS Regulation and raised concerns regarding some of the proposed modifications, as well as related discussion items in the ISOR.[3] The 15-day Language addresses some, but not all, of the concerns raised by NCPA and other stakeholders. As more fully set forth herein, NCPA supports many of the changes proposed in the 15-day Language, but urges the Commission to direct further revisions to proposed amendments to Section 1240.[4] Changes to the provisions regarding enforcement and compliance

[1] NCPA is a not-for-profit Joint Powers Agency, whose 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, and whose Associate Member is the Plumas-Sierra Rural Electric Cooperative.

[2] The proposed modifications were part of the Modification of Regulations Establishing Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities, dated March 27, 2015, and further addressed in the accompanying Express Terms and Initial Statement of Reasons (ISOR). Hereinafter, these changes are referred to as the "March 27 Proposed Amendments."

[3] *Northern California Power Agency Comments on Proposed Amendments to the Enforcement Procedures for the Renewables Portfolio Standard For Local Publicly Owned Electric Utilities*, dated May 11, 2015 (NCPA May 11 Comments); http://www.energy.ca.gov/portfolio/pou_rulemaking/2014-RPS-01/2015-04-09_workshop/comments/NCPA_Comments_on_Proposed_Amendments_05-11-15.pdf

[4] Unless otherwise noted, all section references shall refer to the RPS Regulation, Title 20, Div. 2, Ch. 13, and all references to "Section 1240" refer to RPS Regulation, Section 1240 (Title 20, Div. 2, Ch. 2, Article 4).

are necessary in order to retain the statutory distinction between a review of compliance under the RPS program and the separate process to determine whether or not penalties are warranted in the event of noncompliance.

Changes that address the following sections should be adopted by the Commission:

- *Definition of Bundled*: The 15-day Language properly removes proposed modifications that would limit the definition of bundled electricity products to those that are owned by the publicly owned utility (POU);
- *Definition of Retail Sales*: The 15-day Language provides clarification that not all on-site generation is "self generation," but should be further clarified to ensure that POUs sales to a customer from facilities located on a customer's site are eligible for the appropriate portfolio content category (PCC) classification, including PCC 1;
- *Calculation of Excess Procurement*: Proposed modifications to the excess procurement provisions set forth in the 15-day Language properly allow for inclusion of all eligible renewable energy in the excess procurement calculation without unnecessary restrictions;
- *Supporting Documentation*: The 15-day Language provides appropriate clarification regarding the documentation that may be used to demonstrate the PCC claimed for renewable resources.

Proposed modifications to the RPS Regulation and the 15-day Language should be further revised to address the following shortcomings in the July 8 changes:

- *Enforcement*: The 15-day Language distinguishes between findings relevant to compliance matters versus those that are germane to the California Air Resources Board's (CARB) determination of potential penalties, but fails to address the distinction between the bifurcated roles of the CEC and CARB with regard to matters regarding potential penalties and continues to include proposed modifications to the RPS Regulations that impinge upon CARB's statutory authority;
- *Reporting of POU Consumption Data*: The 15-day Language fails to recognize the existing data provided to the CEC that can more efficiently be utilized to address the Commission's desire for specific information regarding POU consumption.

II. COMMENTS ON 15-DAY LANGUAGE

A. Enforcement – Section 1240

Several stakeholders, including NCPA, noted that the March 27 proposed modifications to Chapter 2, Article 4, Section 1240 of the RPS Regulation[5] would remove the clearly distinct division set forth in Public Utilities (PU) Code section 399.30 between the CEC's role to verify compliance with the RPS mandate and CARB's role in determining, what, if any penalties are

[5] March 27 Proposed Amendments, Express Terms, p. 22.

warranted in the event that the CEC issues a notice of violation.[6] As drafted, even as revised by the 15-day Language, changes to Section 1240(d)(1) would improperly expand the role of the CEC to include matters that are relevant to "a possible monetary penalty." Such a change to the RPS Regulation exceeds the CEC's statutory authority and is contrary to the bifurcated roles the Legislature has conferred on the CEC and CARB relevant to the RPS program. While the 15-day Language would add some clarification regarding the Commission's findings in a decision determining noncompliance with the RPS Regulation, the changes fail to address the concerns raised by stakeholders, namely that the March 27 Proposed Amendments unlawfully extend the scope of the CEC's review authority relevant to potential penalties and would impinge upon CARB's sole jurisdiction in matters regarding any such penalties.

The unambiguous distinction between CARB and CEC authority is set forth in section PU code section 399.30(n)(1), which grants explicit authority to CARB regarding penalties to enforce the RPS mandate.[7] As noted in NCPA's comments on the March 27 Proposed Amendments, the "distinct role the legislature has reserved to the Air Resources Board is separate and apart from the Commission's role to determine compliance with the RPS mandates."[8] The CEC's authority is to enforce the RPS mandates and determine compliance; this authority does not extend to matters regarding the potential imposition of penalties in the event of noncompliance. Matters regarding penalties for noncompliance are within the sole purview of CARB. Despite these concerns and the clear Legislative mandate distinguishing between the roles of the CEC and the CARB relevant to the determination of potential penalties in the event of noncompliance, the 15-day Language fails to make the necessary revisions to the proposed modifications to clearly differentiate the agencies' different roles vis-à-vis the RPS program. Indeed, the 15-day Language makes only minor modifications to sections 1240(d) and (g), regarding the information to be included in a POU's answer to a complaint and the scope of the CEC's findings in the event of a determination of noncompliance. None of these changes address the underlying infirmity in the March 27 Proposed Amendments regarding the Commission's unlawful exercise of authority in matters solely within the purview of CARB.

NCPA appreciates that the 15-day Language would clarify that the provision of information regarding any relevant or mitigating factors related to a possible monetary penalty is in the event that noncompliance "**is determined pursuant to this section.**"[9] As originally

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[6] *Sacramento Municipal Utility District Comments*, dated May 11, 2015, pp. 14-17; *Initial CMUA Comments*, dated April 30, 2015, pp. 6-7; *Comments from the Los Angeles Department of Water and Power*, dated May 7, 2015, pp. 11-15; *SCPPA Comments*, dated April 30, 2015, p. 6; *CMUA Comments*, dated May 11, 2015, pp. 4-7.

[7] Such authority is consistent with the Air Resources Board's role in regulating air quality, and PU Code section 399.30(n)(3) provides that "for purposes of this subdivision, this section is an emission reduction measures pursuant to Section 38580 of the Health and Safety Code."

[8] NCPA May 11 Comments, p. 3.

[9] Section 1240(d).

proposed, changes to this section appeared to presuppose a finding of noncompliance. However, language that would add the description of information to be included regarding factors relevant to "possible monetary penalties that may be imposed" remains in the in the proposed amendments to the RPS Regulation, as does the list of specific factors CARB reviews in making a penalty determination. In requiring a POU to include *any* information that is solely relevant to a penalty determination and *not* a determination of compliance under the RPS Regulation, the Commission exceeds its statutory authority. This inclusion is improper, as information that is not relevant to compliance, but rather only relevant to the potential imposition of penalties is not appropriately included in an answer to a complaint. Indeed, such an inclusion assumes that the Commission has a role in making a determination regarding a potential penalty, which it does not. Furthermore, the fact that providing such information is discretionary on the part of the POU does nothing to obviate the significance of the request, since failure to provide this "optional" information will likely result in a "finding" by the CEC under Section 1240(g) that no mitigating factors exist. Such a finding – even if clearly distinguished as not part of the finding of noncompliance – is highly likely to prejudice a POU. The proposed modifications to the RPS Regulations must be changed to address these concerns.

Additionally, as currently proposed, section 1240(g) continues to include a presumed role for the CEC relevant to a determination of potential penalties. Stakeholder comments sought changes that would clarify the scope of the CEC's authority and exclude any discussion in a final CEC decision regarding "findings" that were not expressly limited to matters related to noncompliance. The 15-day Language begins to address this concern by bifurcating the sentence related to its findings. The first sentence now reads: "The decision will include all findings, including findings regarding mitigating and aggravating factors **related to noncompliance.**" The second sentence states: "**The decision may also include findings regarding mitigating and aggravating factors** upon which [CARB] may rely in assessing a penalty … ." However, this change does not correct the problem. Inclusion of *any* findings relevant to the assessment of a potential penalty should not be part of the CEC's final decision regarding compliance with the RPS Regulation. The mere fact that the CEC "may" make such findings creates an implication that a POU *must* address all penalty-related factors within the context of the CEC compliance review (and ostensibly as part of its answer to a complaint pursuant to section 1240(d)), which continues to obfuscate the clear distinction between the CEC and CARB roles in this regard. The Commission should revise the March 27 Proposed Amendments to remove the references to findings relevant to penalties and clearly retain the distinction between the two agencies' separate statutory functions.

In comments on the March 27 Proposed Amendments, NCPA also noted the need to correct statements set forth in the ISOR that, despite assertions from Commission staff that the

CEC does not intend to usurp CARB's role in the RPS process, would do just that.[10] The ISOR discussion on page 13 regarding the proposed amendments to section 1240 would usurp all CARB authority to review CEC findings relevant to the assessment of potential penalties by stating that "[the] Commission's final decision regarding any complaint issued pursuant to section 1240 will include all findings of fact, including any findings regarding any mitigating and aggravating factors, upon which the **ARB <u>will</u> rely in assessing a penalty**."[11] In order to rectify this error, it is imperative that the proposed modifications to the RPS Regulation be corrected to remove the reference to findings regarding matters related solely to penalties, and that the Final Statement of Reasons also reflect these necessary changes.

Because none of the concerns discussed herein are addressed in the 15-day Language, the further revisions to the March 27 Proposed Amendments fail to adequately address the unlawful expansion of the CEC's role and fail to provide the necessary distinction between the roles of the CEC and CARB relevant to enforcement and penalties. The Commission should direct further revisions to the proposed amendments that address these concerns as discussed herein and in the NCPA May 11 Comments.

B. <u>Definition of Bundled – Section 3201(e)</u>: As originally proposed, the amended definition of "bundled" included an express statement classifying non-POU owned generation as unbundled. This change was unnecessary and would have unlawfully excluded eligible renewable energy resources from being classified as bundled electricity products and the corresponding PCC 1 designation. The language in the March 27 Proposed Amendments was unduly restrictive and placed an unwarranted constraint on a POU's interest in renewable resources that are properly counted as bundled products. The 15-day Language correctly removes language that would have added this restriction. This revision is wholly consistent with the law and neither expands the definition of eligible products, nor does it provide different treatment for POU or other load serving entities. The revisions to Section 3201(e) set forth in the 15-day Language that remove the ownership restrictions on the definition of "bundled" should be adopted by the Commission.

C. <u>Definition of Retail Sales – Section 3201(cc)</u>: The 15-day Language would revise the definition of retail sales to read as follows: "'Retail Sales' means sales of electricity by a POU to end-use customers and their tenants, measured in MWh. This does not include energy consumption by a POU, electricity used by a POU for water pumping, or electricity produced for onsite consumption (self-generation) <u>that was not sold to the customer by the POU</u>." The change appears to clarify that not all electricity produced for onsite consumption is "self-generation." If the Commission agrees that this change is necessary, the proposed

[10] March 27 Proposed Amendments, ISOR, p. 13.

[11] *Id.*, emphasis added; s*ee also* NCPA May 11 Comments.

revisions should also clarify that eligible renewable electricity products sold to a customer by the POU are properly included in a POU's RPS portfolio and appropriate PCC designation. NCPA also recommends a minor modification to the proposed language so that the newly added text would read: "that was purchased by the customer from the POU."

D. Excess Procurement – Section 3206(a)(1): The Commission should adopt the changes to excess procurement provisions set forth in the 15-day Language. These changes acknowledge industry practices as well as the need for retail sellers to alter or amend existing contacts to meet need created by dynamic renewable energy and electricity markets, and correctly calculate the eligibility of the renewable energy products for excess procurement purposes. The 15-day Language makes it clear that contracts with an original term of 10 or more years already meet the statutory objective of encouraging long term commitments, and any generation from a contract extension – even if the extension is for less than 10 years –is eligible for inclusion in the excess procurement calculation. As originally proposed, the modifications would have excluded from the excess procurement calculation electricity products from contract extensions of less than 10 years for contracts that were originally at least 10 years, without sound policy rationale to support the unnecessary limitation; the 15-day Language properly removes those restrictions. The 15-day Language also makes the necessary clarification that for contracts of less than 10 years that are extended to at least 10 years, electricity products generated as of the month and year of the contract amendment will be eligible for excess procurement, and for any contract amendments the duration of the contract for purposes of determining excess procurement eligibility is counted from the **original** contract date to amended contract date, rather than from the date of the amendment. These changes to the RPS Regulation should be adopted by the Commission.

E. Supporting Documentation – Section 3207(c)(2)(F): The 15-day Language clarifies the scope of potential documentation that can be used by a POU in its compliance filings, and ensures that POUs are not limited to the list of acceptable documentation provided in the regulation to support the PCC designation set forth in those filings. The Commission should adopt this revision to the RPS Regulation.

F. POU Consumption Data - 3207(c)(2)(I): NCPA strongly encourages the Commission to remove the provision set forth in the March 27 Proposed Amendments that would require POUs to separately report consumption data. As more fully addressed in NCPA's May 11 Comments, the Commission already receives reports that include the sought-after information through other programs or regulations. Instead of adding the new requirement in Section 3207(c)(2)(I), the Commission should utilize existing reports and data sources that the POUs already provide to the CEC to obtain this information.

III. CONCLUSION

NCPA appreciates the opportunity to provide these comments on the 15-day Language, and respectfully requests adoption of the revisions addressed herein and in NCPA's Comments on the May 27 Proposed Amendments. Please do not hesitate to contact the undersigned or Scott Tomashefsky at 916-781-4291 or scott.tomashefsky@ncpa.com with any questions.

Dated this 21st day of July, 2015.

Respectfully submitted,

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