

D.12-06-038

R.11-05-005

**Concurrence of Commissioner Michel Peter Florio on Item 39, Decision
Setting Compliance Rules for the Renewables Portfolio Standard Program**

This decision implements changes to the rules for retail sellers' compliance with the Renewables Portfolio Standard (RPS) program in order to implement Senate Bill (SB) X1-2 (Simitian). I support the decision on balance, but take exception to one of its provisions – the determination to allow pre-2011 renewable procurement under the 20% RPS program to be carried forward into the new 33% program that starts in 2011. I also have concerns about another issue, the Renewable Energy Credit (REC) retirement rules.

Carrying Forward Excess Procurement from 2010 to 2011

Conclusion of Law 6 of the decision states as follows:

After calculating its deficits, if any, in meeting its APT obligations for all years prior to 2011, a retail seller that has met all its APT obligations should be allowed to carry forward any procurement from contracts or ownership agreements originally executed prior to June 1, 2010 (and, for retail sellers that are IOUs but not MJUs, that were approved by the Commission) that is not necessary to meet its APT obligations in years prior to 2011 for use in any compliance period after 2010, without limitation.

This conclusion allows a Load Serving Entity (LSE) to carry-forward any excess pre-2011 procurement beyond its obligations into the first compliance period of the 2011 compliance regime.

The decision grounds this conclusion in Public Utilities Code Section 399.16(d), which says that: “Any contract or ownership agreement originally executed prior to June 1, 2010, shall count in full towards the procurement requirements established pursuant to this article...” According to the decision, this “count in full” clause overrides the requirements of Section 399.13(a)(4)(B). That section directs the Commission to establish:

Rules permitting retail sellers to accumulate, *beginning January 1, 2011*, excess procurement in one compliance period to be applied to any subsequent compliance period.
(emphasis added)

When faced with somewhat conflicting statutory direction as here, the Commission must do its best to interpret the statute in a way it is consistent with the legislature's intent. In this case, I believe it is clear that the legislature did **not** intend for the Commission to allow pre-2011 procurement to be carried forward and used for compliance with the 33% RPS requirements in 2011 and later years.

There are several reasons I come to this conclusion. First, due to its position squarely in the middle of the section 399.16, the section dedicated to portfolio content categories, the “count in full” language was more likely meant to ensure pre-June 1, 2010

procurement would not be subject to the portfolio content limits in 399.16(c). The decision correctly fulfills that purpose, but then overextends the language to allow excess procurement from the 20% program to be carried forward into the 33% program.

Second, the analyses produced by the Senate Energy, Utilities and Communications Committee and the Assembly Utilities and Commerce Committee state that banking of generation procured prior to 2011 would not be allowed. On February 15, 2011 the Senate Committee analysis said, “this bill does allow for banking but it is limited to generation between compliance periods and *does not permit banking of generation earned prior to January 1, 2011*” (emphasis added). Similarly, the Assembly analysis declared on March 3, 2011, “this bill does not permit banking of generation earned prior to January 1, 2011.” These committee analyses provide compelling evidence that carrying forward generation from the 20% regime to the 33% regime was not anticipated.

Third, AB 1868, a bill introduced in 2012, after the passage of SB X1-2, would have allowed LSEs to bank excess procurement associated with the 20% regime. According to the Legislative Counsel Digest, “this bill would recast the requirement that the PUC adopt banking rules and would expand the banking rules to authorize excess procurement accumulated through December 31, 2010, to be applied to subsequent compliance periods...” If the Legislative Counsel had understood Section 399.16(d) to trump 399.13(a)(4)(B), then it would have indicated that this bill was unnecessary. No such indication is apparent. A comparable set of circumstances surround SB 23, a 2011 bill introduced for the same purpose, which failed to pass the legislature.

For these three reasons, I firmly believe that the legislature intended for the Commission to prohibit carrying forward of excess procurement from pre-2011 into 2011 and later years.

REC Retirement Rules

In a separate but related vein, I am concerned that the rules governing the retirement of RECs adopted by this decision could be misapplied by market participants. Again, SB X1-2 has provided disjointed guidance on REC retirements. Section 399.21(6) allows the owner of a REC 36 months before it must be retired. Meanwhile, Section 399.13(a)(4)(B) requires the LSE to subtract all unbundled RECs from its excess procurement in determining what may be carried forward to a future compliance period. At question is whether a REC that has not yet been retired may be carried forward, or must it be deducted pursuant to 399.13(a)(4)(B). The decision determines that unretired RECs may be carried forward.

I can accept for now the proposition that unretired RECs should be allowed to be carried forward from one compliance period to the next; however, parties in this proceeding have raised legitimate concerns about how this allowance may be used creatively by LSEs to avoid contracting with long term, category 1 (399.16(b)(1)) resources. SB2 (1x) clearly intends for this Commission and the LSEs under its

jurisdiction to carry their weight in contracting for long-term category 1 resources. To the extent the rules adopted by this decision are proven to allow LSEs to evade that intent, I will ask that we revisit the rules and close any inappropriate loopholes.

With these additional thoughts, I concur in the issuance of D.12-06-038.

Dated June 28, 2012, at San Francisco, CA

A handwritten signature in black ink, reading "MP Florio". The signature is written in a cursive, somewhat stylized font.

Michel Peter Florio
Commissioner