BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	Rulemaking 11-05-005

JOINT RESPONSE OF THE ALLIANCE FOR RETAIL ENERGY MARKETS AND RETAIL ENERGY SUPPLY ASSOCIATION IN OPPOSITION TO THE APPLICATION OF SOUTHERN CALIFORNIA EDISON COMPANY FOR REHEARING OF DECISION 11-12-052

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Pursuant to Rule 16.1 of the California Public Utilities Commission ("Commission" or "CPUC") Rules of Practice and Procedure, the Alliance for Retail Energy Markets ("AReM")[1] and the Retail Energy Supply Association ("RESA")[2] (collectively "AReM/RESA") submit this response in opposition to the *Application of Southern California Edison Company for Rehearing of Decision 11-12-052* ("SCE Application"). The SCE Application was filed on January 19, 2012, while a second Application for Rehearing was filed by the Public Utility District of Cowlitz County on January 20, 2012. Consistent with Rule 16.1(d), AReM/RESA is filing separate responses to the respective applications on February 6, 2012, 15 days following the filing of the later Application for Rehearing.

[1] AReM is a California mutual benefit corporation formed by electric service providers that are active in California's direct access market. The positions taken in this filing represent the views of AReM but not necessarily those of individual members or affiliates of its members with respect to the issues addressed herein.

[2] RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

I. Response

SCE's Application alleges legal error in Decision ("D.") 11-12-052 insofar as the Commission imposed certain ratepayer protection requirements on the investor owned utility ("IOU") renewable portfolio standard ("RPS") procurement activities that are not also imposed on the non-IOU retail providers not subject to Commission ratemaking authority. SCE states:

> each of these rules violates the Public Utilities Code's directive that the same RPS requirements, terms and conditions apply to all retail sellers and should either be removed from the Decision or modified to apply equally to all retail sellers.[3]

In SCE's view, the Commission's exercise of its authority to impose RPS procurement requirements on IOUs for the purpose of providing ratepayer protections—namely, a minimum duration for substitute energy transactions, Commission pre-approval of secondary or resale transactions, and a cap on the price that may be paid for renewable energy credits ("RECs")—is inappropriate because it results in different "terms and conditions" between retail sellers' compliance with the RPS procurement obligation.

However, existing statute is clear with respect to the Commission's authority to regulate the rates of Electric Service Providers ("ESPs"). Section 394 (f) of the Public Utilities code says:

> Registration with the commission is an exercise of the licensing function of the commission, and does not constitute regulation of the rates or terms and conditions of service offered by electric service providers. **Nothing in this part authorizes the commission to regulate the rates or terms and conditions of service offered by electric service providers.** (Emphasis added.)

[3] See SCE Application, page 5.

As explained more fully in the sections that follow, the provisions in SB 2(1X) do not overturn this essential framework for ESP service, and, as has been the case in the past, SCE is overreaching in its strained interpretation of the RPS statute.

A. The Commission's Authority to Protect Utility Ratepayers Is Not Nullified By Provisions Requiring Common Procurement Program Requirements.

SCE's argument that the Commission must either (i) impose uniform RPS procurement rules on both the IOUs and non-utility retail providers or (ii) abandon rules that have been imposed only on the IOUs must be rejected. The Commission did not commit legal error by not asserting ratemaking oversight on ESPs, because the Commission, as demonstrated in the section above, does not have ratemaking authority over them. Moreover, the Commission's ratemaking and ratepayer protection authority over the IOUs should not be overridden or nullified by SCE's request for the uniform implementation of RPS program requirements under Public Utilities Code Sections[4] 399.12(j)(2) or (3)[5], 399.16(c)[6], 365.1(c)[7] or 380(e)[8]. Yet, that is the result that

[4] All code section references are to the Public Utilities Code, unless otherwise noted.

[5] § 399.12(j)(2) and (3):

> (j) "Retail seller" means an entity engaged in the retail sale of electricity to end-use customers located within the state, including any of the following:
>
> ***
>
> (2) A community choice aggregator. The commission shall institute a rulemaking to determine the manner in which a community choice aggregator will participate in the renewables portfolio standard program subject to the same terms and conditions applicable to an electrical corporation.
>
> (3) An electric service provider, as defined in Section 218.3, for all sales of electricity to customers beginning January 1, 2006. The commission shall institute a rulemaking to determine the manner in which electric service providers will participate in the renewables portfolio standard program. The electric service provider shall be subject to the same terms and conditions applicable to an electrical corporation pursuant to this article. This paragraph does not impair a contract entered into between an electric service provider and a retail customer prior to the suspension of direct access by the commission pursuant to Section 80110 of the Water Code.

[6] § 399.16(c): "In order to achieve a balanced portfolio, all retail sellers shall meet the following requirements for all procurement credited towards each compliance period [with specified percentages of product types by compliance period]"

SCE improperly seeks by asserting that rules added to protect IOUs ratepayers found in D.11-12-052 should extend to non-IOU retail providers.

The Commission's rationale for imposing on the IOUs particular ratepayer protections was clearly articulated in section 3.6.3 of D.11-12-052.[9] After noting that certain "fundamental elements" would apply to "any retail seller" for the Category 2 type transactions, the Commission noted "additional requirements designed to allow evaluation of the price reasonableness …, to provide a basis for cost containment measures the Commission will develop [footnote omitted], and to aid in resource planning."[10]

B. SCE Should Not Be Permitted To Collaterally Attack Existing Commission Decisions Regarding IOU Ratepayer Protections.

In fact, this is not the first time that SCE has implored the Commission to impose on ESPs "the same rules" the Commission applies to IOUs under its ratemaking oversight authority over public utilities. The same type of issue was before the Commission in D.11-01-026, the decision implementing Section 365.1 and examining the extent to which ESPs and IOUs are

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[7] § 365.1(c):

> (c) Once the commission has authorized additional direct transactions pursuant to subdivision (b), it shall do both of the following:
>
> (1) Ensure that other providers are subject to the **same requirements** that are applicable to the state's three largest electrical corporations **under any programs or rules adopted by the commission to implement** the resource adequacy provisions of Section 380, the renewables portfolio standard provisions of Article 16 (commencing with Section 399.11), and the requirements for the electricity sector adopted by the State Air Resources Board pursuant to the California Global Warming Solutions Act of 2006 (Division 25.5 (commencing with Section 38500) of the Health and Safety Code). This requirement applies notwithstanding any prior decision of the commission to the contrary.

[8] § 380(e) The commission shall implement and enforce the resource adequacy requirements established in accordance with this section in a nondiscriminatory manner. Each load-serving entity shall be subject to the same requirements for resource adequacy and the renewables portfolio standard program that are applicable to electrical corporations pursuant to this section, or otherwise required by law, or by order or decision of the commission. The commission shall exercise its enforcement powers to ensure compliance by all load-serving entities.

[9] D.11-12-052 pp. 49-51.

[10] D.11-12-052, p. 49.

subject to the same RPS requirements, when the Commission reviewed the same Section 365.1(c)(1) language and the language now found in Section 399.12(j)(3).[11] In D.11-01-026, the Commission determined that while most fundamental RPS requirements should apply equally to IOUs and ESPs, not all requirements (such as the TREC price limit) must be applied equally. The fact that the same language has been codified into different sections in SB 2 (1X) should not now result in a different conclusion by the Commission. That is, the Commission should not now interpret the same statutory language in a different manner so as to extend the IOU ratepayer protection elements to non-IOU entities. The Commission's underlying rationale for rejecting SCE's arguments advocating for identical RPS structures between IOUs and non-IOUs in D.11-01-026 approximately one year ago remain legally sound today:

> This Commission has no responsibility for the price reasonableness of ESP procurement (whether conventional or RPS-eligible), and has no regulatory authority over ESP rates. In contrast, the Commission has responsibility for the price reasonableness of IOU procurement, and the reasonableness of IOU rates. **Section 365.1(c) does not require that the Commission take elements of the procurement practices of the utilities it regulates with respect to procurement and rates and impose them on the ESPs that it does not regulate with respect to procurement and rates, simply because the Commission has authority over ESPs' participation in the RPS program, and we decline to do so here.** (D.11-01-026, pp. 22-23, emphasis added.)

Accordingly, the Commission should reject the SCE Application as an out-of-time collateral attack on the determinations made in D.11-01-026 regarding the legitimate rationale for requiring IOUs to meet certain additional ratemaking-related requirements for the protection of ratepayers.

[11] The Section 399.12(j)(3) language was then codified in Section 399.12(g).

C. SCE's Selectivity With Respect to Which Elements of the Order Need Revision Are Proof Itself of the Speciousness of its Request.

While the SCE Application contends that all terms and conditions of the Commission's RPS rules must be imposed equally on IOUs and ESPs, the reality is that SCE only selects issues that will work to its competitive advantage. For instance, SCE takes no issue with the fact that only the IOUs are assured full cost recovery of all their RPS investments, including preferential statutory authority to meet a portion of their RPS requirements with utiliy-owned generation. Nor does SCE take issue with the fact that SB 2 (1X) provides the IOUs with specific cost containment provisions that may excuse compliance that are not equally applicable to ESPs. SCE makes no attempt to explain why it selectively argues for equal application of some RPS program provisions but not others. The only rational explanation for this selectiveness is that SCE does not want to see equal application of certain protections to ESPs. ESPs do not seek or need these protections, but simply wish to highlight that SCE's mantra of "same, same, same" is really a highly selective approach that seeks to advantage the incumbent utilities and compromise the effectiveness of retail choice for customers. The Commission should see through this ruse and reject the rehearing request.

D. AReM/RESA Oppose SCE's Requested Revisions Because They Exceed Statutory Design

As demonstrated in the sections above, SCE's Application overreaches in its demands that the Commission MUST impose the same ratemaking and ratepayer protections on ESPs, or abandon those restrictions altogether. Notwithstanding AReM/RESA's strong opposition of SCE's expansive reading of the cited statutory provisions and its argument that there can be no deviation from the ratepayer protection-related conditions in the RPS (and RA and GHG program implementation), AReM/RESA do point out that the restrictive provisions will impede

the operation of the RPS market and the creation of streamlined retail products and transactions. It is important for non-IOU retail sellers to be able to undertake secondary market transactions with the IOUs on an expedited basis, particularly given the IOUs' expansive portfolio of in-state RPS production. As SCE noted in its Application, restricting the effectiveness of secondary transactions to the point of time after Commission pre-approval of the transaction will result in significant delivery delays, particularly since the Commission rejected the concept of secondary transactions of an entity's inventory of previously delivered and perfected RPS products. Because only subsequent deliveries after contract effectiveness can count,[12] requiring completed pre-approval by the Commission will mean that surplus product will not be timely conveyed to a new purchaser, effectively causing a loss of potential ratepayer value.

The minimum duration of substitute energy transactions also impedes the market because it can unnecessarily foreclose an ability to convert transactions that currently must be structured as Category 2 from becoming the more valuable Category 1 product should changes to transmission availability arise during the initial five year term. By imposing a minimum substitute energy transaction duration, the Commission is locking the IOUs into a transaction that may be less economic or potentially precludes category type conversion to a higher customer valued category, thus hampering the RPS market and driving up costs for customers.

The Commission can still protect ratepayers in the course of subsequent review of utility transactions on an *ex post* basis. For example, the Commission can provide a general outline of permissible secondary market transactions in recognition that such transactions will help the utilities optimize existing portfolios and provide ratepayer benefits, and then review after

[12] See, D.11-12-052, pp. 36-37, 52, and OPs 4 and 5, wherein the Commission rejected parties' argument that secondary transactions of ownership to previously perfected product deliveries should be permitted.

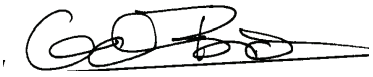
execution the utility's conformance with the standard. This would provide a mechanism for rapid secondary transactions and maintain utility oversight for ratepayer protection purposes.

II. Conclusion

AReM/RESA strongly oppose SCE's interpretation of statutory provisions calling for common requirements for procurement program implementation. The concept of common terms and conditions in the implementation of RPS is achieved in Decisions 11-12-020 and 11-12-052 with respect to the volumes to be procured and the defined product types. For the reasons articulated in D.11-12-052, the Commission adopted certain mechanisms applicable only to the IOUs as a means of protecting the utility ratepayers. The Commission does not have a similar ratemaking role with respect to the customers of non-IOU retail sellers, and hence it is proper to not extend those additional rules to ESPs.

While AReM/RESA disagree with SCE's articulated rationale for changing those provisions, AReM/RESA do believe that the restrictive elements can impede the operation of the RPS market which will involve transactions between all forms of retail providers.

Respectfully submitted,



February 6, 2012

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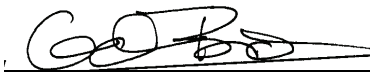
VERIFICATION

I am an agent of the respondent corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the forgoing is true and correct.

Executed on February 6, 2012 at Sacramento, California.



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