

## WSGR ALERT

APRIL 2011

# CALIFORNIA ADOPTS AGGRESSIVE RENEWABLES PORTFOLIO STANDARD

On April 12, 2011, California Governor Jerry Brown signed into law one of the nation's most far-reaching Renewables Portfolio Standards (RPS), which requires "retail sellers" of electricity and local, publicly owned electric utilities to ensure that 33 percent of the electricity they procure comes from renewable resources by December 31, 2020. "Retail sellers" include "electrical corporations" (generally, one of the three large investor-owned utilities, or IOUs, in California: Pacific Gas & Electric, Southern California Edison, and San Diego Gas & Electric), community choice aggregators, and electric service providers. Senate Bill X1 2, introduced by Senator Joe Simitian, is the culmination of four years of debate regarding the rules for a 33 percent RPS. This new law replaces California's previous RPS, which required the state's regulated electric utilities to obtain 20 percent of their electricity from renewable resources by December 31, 2010, with extensions available to 2013 under flexible compliance rules.

### Renewable Procurement Targets

California's new RPS sets forth three compliance periods:

- (1) January 1, 2011, to December 31, 2013;
- (2) January 1, 2014, to December 31, 2016; and
- (3) January 1, 2017, to December 31, 2020.

To satisfy the requirements of each compliance period, retail sellers and local,

publicly owned electric utilities must procure electricity from eligible renewable energy resources in such a quantity that an average of 20 percent of their retail sales by the end of the first period, 25 percent of their retail sales by the end of the second period, and 33 percent of their retail sales by the end of the third period and thereafter will be supplied using renewable energy. The California Public Utilities Commission (CPUC) can waive enforcement of these requirements if a retail seller demonstrates certain conditions beyond its control that will prevent compliance, such as inadequate transmission capacity or interconnection or permitting delays.

### Eligible Renewable Resources

As with the existing 2010 RPS, an "eligible renewable energy resource" under the new RPS denotes an electric generating facility that uses biomass; fuel cells using renewable fuels; small hydroelectric energy (30 megawatts or less, subject to certain exceptions); digester gas; municipal solid waste conversion (except for most combustion of municipal solid waste); landfill gas; or solar thermal, photovoltaic, wind, geothermal, ocean wave, ocean thermal, or tidal current energy.

The new RPS no longer specifically requires that electricity from renewable resources be "delivered" to California, but it specifies that a facility must:

- (A) be located in California, or have its first

point of interconnection to the transmission network of a balancing authority area<sup>1</sup> in California;

- (B) have a first point of interconnection outside of California, but within the Western Electricity Coordinating Council service area; have commenced commercial operation after January 1, 2005; not cause or contribute to any violation of a California environmental quality standard or requirement; if outside the United States, be operated in a manner that is as protective of the environment as a similar in-state facility; and participate in the California Energy Commission's RPS-compliance verification program; or

- (C) if such facility commenced commercial operation prior to January 1, 2005, but otherwise meets the requirements of (B) above, ensure that the electricity purchased is from incremental generation resulting from the expansion or repowering of the facility, or that the electricity was procured by a retail seller or local, publicly owned electric utility as of January 1, 2010.

### Limitations on Out-of-State Power and RECs

In addition to requiring facilities to satisfy the eligibility criteria above, the new RPS statute places limitations on the use of power generated outside the state of California and

<sup>1</sup>"Balancing authority" means the entity that integrates electricity resources, maintains load-interchange generation balance within a balancing authority area, and supports interconnection frequency in real time (i.e., the California Independent System Operator, or CAISO). "Balancing authority area" is the area in which the balancing authority balances load and generation.

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renewable energy certificates (RECs) by creating the following three categories of eligible renewable resources:

## Category 1 resources:

- a. Have a first point of interconnection with a California balancing authority;
- b. Have a first point of interconnection with distribution facilities used to serve end users within a California balancing authority area;
- c. Are scheduled from the eligible renewable energy resource into a California balancing authority without substituting electricity from another source; or
- d. Have an agreement to “dynamically transfer” electricity to a California balancing authority.

## Category 2 resources include:

Firmed and shaped eligible renewable energy resource electricity products that provide incremental electricity and are scheduled into a California balancing authority. This includes intermittent energy that is not directly interconnected with a California transmission provider, and therefore needs to be “firmed” and “shaped” to make it marketable to a California retail provider.

## Category 3 resources include:

Eligible renewable energy resource electricity products or any fraction of the electricity generated, including unbundled RECs that do not qualify under the criteria of Categories 1 or 2.

Category 1 must be used to satisfy a minimum of 50 percent of the renewable procurement target in the first compliance period, 65 percent in the second compliance period, and 75 percent in the third compliance period and in subsequent years. Category 3 can be utilized for a maximum of 25 percent of the renewable procurement target in the

first compliance period, 15 percent in the second compliance period, and 10 percent thereafter. There is neither a minimum nor a maximum use of electricity from Category 2 to satisfy the new RPS.

The rules for Categories 1 and 3 apply retroactively to power purchase agreements (PPAs) executed after June 1, 2010. PPAs executed prior to June 1, 2010, are grandfathered in and may be counted in full toward the new RPS requirements if: (1) the resource was eligible under the rules in place when the contract was executed; (2) the contract is with an electrical corporation and is approved by the CPUC, even if such approval occurs after June 1, 2010; and (3) the contract is not amended after June 1, 2010, to increase the facility’s nameplate capacity or expected quantities of annual generation, or to substitute a different renewable resource.

The new RPS also provides that PPAs for eligible renewable energy resources with California electrical corporations that already have been approved by the CPUC will qualify for RPS procurement targets. It also states that 7,000 MW of new renewable projects outside of California that currently are awaiting interconnection approval from CAISO will satisfy the Category 1 requirements.

The new RPS is less restrictive than rules the CPUC approved in January 2011. The new standards slightly expand the allowable procurement from resources located outside of California, likely including “firm transmission” transactions within the unlimited Category 1 classification; provide a gradual phase-in on the minimum use of Category 1 resources and the limitation on the use of Category 3 resources; and vary the grandfathering rules. For more information regarding the CPUC’s “TREC’s decision,” please read our prior WSGR Alert at [http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert\\_california\\_energy\\_regulatory\\_update.htm](http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert_california_energy_regulatory_update.htm).

The TREC’s decision was set to expire in 2013 and will need to be reconciled with the new statute.

## Expansion of RPS to Municipal Utilities

Previously, the RPS applied only to “retail sellers” of electricity (generally, the IOUs) and permitted municipal utilities and other such entities to design and implement their own programs for achieving rough compliance with the goals of the RPS. The new RPS requirements now specifically apply to local, publicly owned electric utilities, including municipal utilities. While the CPUC has regulatory authority over implementing the RPS for retail sellers, the governing boards of publicly owned utilities will have authority over implementing the RPS for municipal utilities.

## Achieving the 33 Percent RPS

Under the new RPS, by January 1, 2012, the CPUC must determine how much electricity should be purchased by each retail seller for the specified compliance periods. Retailer sellers must submit an annual compliance report to the CPUC. In addition to compliance reporting, electrical corporations (i.e., the IOUs) are required to submit compliance plans for CPUC approval, detailing how each corporation will meet its CPUC-mandated RPS targets. Further, the RPS requires that by January 1, 2016, the CPUC report to the California legislature with an assessment of whether or not each electrical corporation can achieve a 33 percent RPS by December 31, 2020, and maintain that level thereafter within the cost limitations set forth by the CPUC.

Since California’s original RPS law was passed in 2002, the percentage of total retail sales of electricity supplied by eligible renewable energy resources for the three large IOUs has jumped to nearly 18 percent, and a total of just over 2,000 MW of clean energy have come online.<sup>2</sup> While the three large IOUs are already ahead of schedule to

<sup>2</sup> See <http://www.cpuc.ca.gov/NR/rdonlyres/62B4B596-1CE1-47C9-AB53-2DEF1BF52770/0/Q12011RPSReporttotheLegislatureFINAL.pdf>.

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meet the 33 percent standard,<sup>3</sup> not all projects under contract will reach commercial operation, providing new market opportunities. In addition, the expanded RPS creates significant new procurement demand from municipal utilities, community choice aggregators, and energy service providers.<sup>4</sup> Most importantly, the passage of S.B. X1 2 provides the renewable energy industry with much-needed regulatory certainty regarding the rules and opportunities available as California strives to achieve a 33 percent RPS.

Uncertainty remains, however, as to precisely how the 33 percent RPS will be implemented. For example, the issue of economic curtailment—the right claimed by IOUs to direct generators not to produce when the IOU determines that it is not economically advantageous for the generator to do so—arose in the context of the CPUC's approval of the IOUs' 2010 RPS Procurement Plans. On April 14, 2011, the CPUC gave final approval to a decision that will permit each IOU to determine its own method of implementing economic curtailment. Backtracking from a prior version of the decision that would have required the IOUs to pay the full contract price to curtailed generators (PG&E's proposal), the approved decision will permit IOUs to curtail renewable generators without compensation up to a negotiated curtailment cap (Southern California Edison's proposal). The IOUs have until April 28, 2011, to file their Final 2011 RPS Procurement Plans with the CPUC (the 2011 plans will be based on drafts of the 2010 plans, which were never approved due to the length of the proceeding). Each IOU will issue its request for offers within one to two weeks after the plans are filed, and generator bids will be due to each IOU approximately four to six weeks thereafter.

Wilson Sonsini Goodrich & Rosati has been monitoring these developing issues and advising our clients in their dealings with the IOUs, CPUC, CAISO, and other key market participants. For further analysis of California's new RPS and how it may affect your business, please contact Todd Glass, Sheridan Pauker, Sunil Bector, or Keene O'Connor in the firm's energy and clean technology practice.



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<sup>3</sup> See [http://www.dra.ca.gov/NR/rdonlyres/OCB0B986-E93B-462A-BA62-804EDAE43B82/0/RPSReportPublic\\_FINAL\\_2011\\_Feb\\_14\\_v2.pdf](http://www.dra.ca.gov/NR/rdonlyres/OCB0B986-E93B-462A-BA62-804EDAE43B82/0/RPSReportPublic_FINAL_2011_Feb_14_v2.pdf).

<sup>4</sup> Susannah Churchill, Vote Solar Initiative, "California's 33% RPS: Procurement Progress and Deliverability Rules" (April 2011).