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**FINAL STATEMENT OF REASONS**

**MODIFICATIONS OF REGULATIONS ESTABLISHING  
ENFORCEMENT PROCEDURES FOR THE  
RENEWABLES PORTFOLIO STANDARD FOR LOCAL PUBLICLY  
OWNED ELECTRIC UTILITIES**

**California Code of Regulations  
Title 20, Division 2, Chapter 13, Sections 3201 – 3204, 3206, 3207, and  
Chapter 2, Article 4, Section 1240**

**California Energy Commission  
DOCKET NUMBER 14-RPS-01**

**OFFICE OF ADMINISTRATIVE LAW  
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# INTRODUCTION

This document is the Final Statement of Reasons (FSOR) required by Government Code section 11346.9(a) for the modification of regulations promulgated by the California Energy Commission (Energy Commission), establishing enforcement procedures for the California Renewables Portfolio Standard (RPS) for local publicly owned electric utilities (POUs).

The Energy Commission adopted the regulations in 2013 in accordance with Public Utilities Code section 399.30 (l), as enacted by Senate Bill X1-2 (Stats. 2011, 1<sup>st</sup> Ex. Sess., ch. 1) and subsequently revised by Assembly Bill 2227 (Stats. 2012, ch. 606, sec. 8). Public Utilities Code section 399.30 (l) directed the Energy Commission to adopt regulations specifying procedures for the enforcement of the RPS on POUs under Article 16 (commencing with section 399.11) of Chapter 2.3 of Part 1 of the Public Utilities Code. Section 399.30 (l) required the regulations to include a public process under which the Energy Commission may issue a notice of violation and correction against a POU for failure to comply with the RPS, and for referral of violations to the California Air Resources Board (ARB) for penalties.

Public Utilities Code section 399.30 was subsequently amended by Senate Bill 591 (SB 591, Stats. 2013, ch. 520, sec. 1)<sup>1</sup> after the Energy Commission adopted the regulations in 2013. SB 591 modifies the RPS requirements for a qualifying POU. Specifically, SB 591 adds a new subdivision (k) to Public Utilities Code section 399.30, which establishes a limited procurement exemption for a “local publicly owned electric utility that receives greater than 50 percent of its annual retail sales from its own hydroelectric generation that is not an eligible renewable energy resource.” If this criteria is satisfied the POU may limit its RPS procurement obligations for a given compliance period to the lesser of 1) the portion of the POU’s retail sales not met by its own hydroelectric generation, 2) the procurement obligations applicable to other POUs under Public Utilities Code section 399.30 (c), or 3) the amount of procurement capped by the POU’s cost limitations adopted in accordance with Public Utilities Code section 399.30.

In addition, the regulations are being amended to clarify several existing provisions in the regulations, including the following: 1) the definitions of “bundled,” “resale,” and the “Western Electricity Coordinating Council”; 2) the requirements for qualifying electricity products procured under agreement executed prior to June 1, 2010; 3) the requirements for electricity products qualifying as dynamic transfers; 4) the rules for determining excess procurement related to amended contracts; 5) the application of optional compliance measures; 6) select reporting requirements; and 7) procedural provisions for complaints of noncompliance.

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<sup>1</sup> SB 591 amended Public Utilities Code section 399.30, subdivision (k), and renumbered subsequent subdivision, so that former Public Utilities Code section 399.30, subdivisions (k) – (n) became subdivisions (l) – (o), respectively. Under SB 591, subdivision (l) of Public Utilities Code section 399.30 was renumbered subdivision (m). As a result of additional amendments under Senate Bill 350 (Stats. 2015, ch. 547, sec. 24), subdivision (m) of Public Utilities Code section 399.30 was renumbered subdivision (o). Senate Bill 350 became effective January 1, 2016.

The proposed modifications to the regulations implement, interpret, and make specific the provisions in Public Utilities Code section 399.30 (o), as renumbered by SB 350.<sup>2</sup> The proposed modifications to the regulations also implement, interpret, and make specific related provisions in Public Utilities Code sections 399.13, 399.15, 399.16, 399.21, 9507, 9508, and in Public Resources Code sections 25741 and 25747. The proposed modifications to the regulations will be codified in the California Code of Regulations, Title 20, Division 2, Chapter 13, sections 3201, 3202, 3203, 3204, 3206, and 3207, and in Title 20, Division 2, Chapter 2, Article 4, section 1240.

## **PROCEDURAL HISTORY OF RULEMAKING**

On March 27, 2015, the Office of Administrative Law published a Notice of Proposed Action (NOPA) concerning the potential adoption of modifications to the subject regulations. The Energy Commission posted the NOPA, the Express Terms of the regulations, also referred to as the 45-day language Express Terms, the Initial Statement of Reasons (ISOR), and the Energy Commission's fiscal and economic analysis for the proposed modifications to regulations on its website on March 27, 2015, and made these available to interested persons. The NOPA was also distributed to every subscriber on the Energy Commission's Renewable Listserv, and to every person who had requested notice of such matters.

The Energy Commission held the first public hearing listed in the NOPA, identified as a staff workshop, on April 9, 2015, for the purpose of receiving public comments. A second public hearing, identified in the NOPA as an adoption hearing, was noticed to be held before the full Energy Commission on June 10, 2015. The public comment period for the NOPA was open from March 27, 2015, through and including May 11, 2015. The Energy Commission received a significant number of comments.

On June 8, 2015, pursuant to Government Code section 11346.8, the Energy Commission published a Notice of Postponement of Hearing to inform interested parties and members of the public that consideration of the proposed modifications to the regulations would not be considered at the Energy Commission's June 10, 2015 Business Meeting, as indicated in the NOPA. The Notice of Postponement of Hearing was posted on the Energy Commission's website and distributed to every person and entity on the Energy Commission's Renewable Listserv and to every person who had requested notice of such matters.

On July 6, 2015, pursuant to the NOPA and Government Code section 11346.8, the Energy Commission published a Notice of Changes to Proposed Regulations, Notice of Hearing and Notice of 15-Day Comment Period regarding changes to the text of the proposed modifications to the regulations. This notice was published along with the full text of the revised proposed modifications to the regulations ("15-Day Language") with the changes clearly indicated in double underline/strikeout. The notice and the 15-Day Language were posted on the Energy

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<sup>2</sup> See footnote 1 for legislative citation to SB 350.

Commission's website and distributed to every person and entity on the Energy Commission's Renewable Listserv and to every person who had requested notice of such matters consistent with the NOPA. The notice provided a 15-day period through July 21, 2015, to comment on the changes to the proposed modifications to the regulations. The notice identified August 12, 2015, as the Energy Commission hearing date to consider adoption of the proposed modifications to the regulations.

On August 7, 2015, pursuant to Government Code section 11346.8, the Energy Commission published a Notice of Postponement of Hearing to inform interested parties and members of the public that consideration of the proposed modifications to the regulations would not be considered at the Energy Commission's August 12, 2015 Business Meeting, as indicated in the July 6, 2015 Notice of Changes to Proposed Regulations, Notice of Hearing and Notice of 15-Day Comment Period. The Notice of Postponement of Hearing was posted on the Energy Commission's website and distributed to every person and entity on the Energy Commission's Renewable Listserv and to every person who had requested notice of such matters.

On September 29, 2015, pursuant to Government Code section 11346.8, the Energy Commission published a Notice of Hearing to inform interested parties and members of the public that consideration of the proposed modifications to the regulations would be considered for adoption at the Energy Commission's October 14, 2015 Business Meeting. The Notice of Hearing was posted on the Energy Commission's website and distributed to every person and entity on the Energy Commission's Renewable Listserv and to every person who had requested notice of such matters.

On October 14, 2015, the Energy Commission held the hearing to consider adopting the originally proposed Express Terms, as modified and published in the 15-Day Language. No public comments were made at the hearing. After considering the entire record of Docket No. 14-RPS-01, including the memorandum regarding the *Application of California Environmental Quality Act to Modifications of Regulations Establishing Enforcement Procedures for the RPS for Local Publicly Owned Electric Utilities*, all relevant public comments, and the public presentation made by Energy Commission staff at the hearing, the Energy Commission unanimously adopted the originally proposed Express Terms, as modified and published in the 15-Day Language.

## **INCORPORATION BY REFERENCE OF MATERIALS FROM THE NOTICE OF PROPOSED ACTION**

The 15-Day Language does not substantially deviate from the originally proposed Express Terms of the regulations. Therefore, in accordance with Government Code section 11346.9(d), the Energy Commission determines that this FSOR can satisfy the following requirements by incorporating by reference various parts of the March 27, 2015 NOPA.

- Section 11346.9 (a)(2). The Local Mandate Determination from the NOPA is incorporated by reference.

- Section 11346.9 (a)(5). The Small Business Impacts and Economic Impact on Business determinations from the NOPA are incorporated by reference. The Energy Commission has determined that the regulations have no adverse economic impact upon small businesses. Thus, alternatives to lessen any impact were not considered, and none were identified.
- Section 11346.9 (c). The relationship to federal law discussion from the NOPA is incorporated by reference.

## **UPDATE OF INITIAL STATEMENT OF REASONS**

Government Code section 11346.9(a)(1) requires the FSOR to include an update of the information contained in the Initial Statement of Reasons (ISOR). Other than the changes noted below, no other changes to the ISOR are necessary. Those items not addressed below are incorporated by reference.

### **Introduction**

The Introduction section of the ISOR refers to Public Utilities Code section 399.30 (l) as the authority that directs the Energy Commission to adopt regulations specifying procedures for the enforcement of the RPS for POUUs. This reference should have been to subdivision (m) of section 399.30, rather than subdivision (l). Subdivision (l) of section 399.30 was renumbered subdivision (m) as a result of amendments under SB 591. Subdivision (m) of section 399.30 was renumbered again after the Energy Commission adopted the subject modifications to the regulations on October 14, 2015. Subdivision (m) of section 399.30 was renumbered subdivision (o) as a result of amendments under SB 350, which became effective on January 1, 2016.

### **Studies, Reports, and Documents Relied Upon.**

No additional studies, reports, or documents, other than those identified in the ISOR, were relied upon by the Energy Commission.

### **Updates to Discussion of Chapter 13. Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities.**

#### **Section 3201 – Definitions**

Subdivision (e). Seven modifications were made to the definition of “bundled”: 1) “For example,” was added before “if the POU”; 2) “claiming an electricity product” was added after “the POU”; 3) “associated” was added before “eligible renewable energy resource”; 4) “all” was added before “electricity products”; 5) “, including those” was added before “associated with

electricity consumed onsite”; 6) a comma was added between “onsite” and “may”; 7) the last sentence was deleted.

This subdivision was modified to clarify that the second sentence is only one example of a scenario that may be considered a bundled product, that the example only applies to a POU that is both claiming the electricity product and owns the resource, and that all of the electricity products generated may be considered bundled, even if the electricity is used onsite. The last sentence in the definition was deleted because there may be circumstances when the electricity consumed onsite may be considered bundled, even though the POU does not own the associated eligible renewable energy resource.

Subdivision (cc). The definition of “retail sales” was modified to add the clause “that was not sold to the customer by the POU” to the end of the definition. This change was necessary to make clear that retail sales includes any electricity that the POU sells to the customer, including onsite consumption of electricity from a POU-owned resource.

## **Section 3203 – RPS Procurement Requirements**

No modifications were made to section 3203 (a)(1)(D). However, the ISOR included two minor grammatical errors in the first paragraph of the explanation of the original Express Terms for section 3203(a)(1)(D). The explanation in the ISOR referred to “generating” rather than “generation” and referred to “resources procured under dynamic transfer agreement” rather than “resources procured under dynamic transfer agreements.” The sentences that included these minor grammatical errors should have stated as follows: “Eligible renewable energy resources that have dynamic transfer agreements are generally treated as if the resource is located within a California Balancing Authority (CBA), because the scheduling of *generation* from the resource is controlled by a CBA in a manner similar to the way a CBA controls the scheduling of generation from a resource that is located within the CBA. However, unlike the generation from eligible renewable energy resources that are located in a CBA, the generation from resources procured under dynamic transfer *agreements* may not necessarily be scheduled into the CBA” (emphasis added).

## **Section 3204 – RPS Procurement Requirements**

Subdivision (a)(7)(C). No modifications were made to section 3204 (a)(7)(C). However, the explanation in the third paragraph of the ISOR needs to be clarified. This paragraph states: “While seven years is not an inappropriate averaging period under Public Utilities Code section 399.30 (j), the better averaging period is twenty years, because it will capture more fluctuations in production from the facility as a result of drought years.” This paragraph should be clarified to state: “While seven years is not an inappropriate averaging period under Public Utilities Code section 399.30 (j), the better averaging period is twenty years, because it *better reflects the long-term historical production by balancing out* fluctuations in production from the facility as a result of drought years *and years of above-average precipitation*” (emphasis added).



Subdivision (a)(10)(B). Two modification were made to this subdivision: 1) “an average of greater than 50 percent of the POU’s annual retail sales” was deleted before “in the twenty years preceding each compliance period,” and 2) “is greater than 50 percent of the POU’s retail sales for the year preceding that compliance period” was added after “whichever is less.”

This subdivision was modified to rephrase the demonstration required by a POU meeting the criteria of Public Utilities Code section 399.30(k), to require a 20 year average of hydroelectric production as a percentage of a single year of retail sales, instead of the requirement in the original Express Terms to calculate the 20 year average of hydroelectric production as a percentage of an average of 20 years of retail sales. This modification was made in response to a comment from an affected stakeholder, who argued that an averaging of retail sales is unnecessary to smooth out hydroelectric production fluctuations.

In addition, the ISOR included two minor abbreviation errors in the first paragraph of the explanation of the original Express Terms for section 3204 (a)(10)(B). The explanation in the ISOR referred to “PUC section 399.30 (c)” and “PUC section 399.30,” rather than “Public Utilities Code section 399.30 (c)” and “Public Utilities Code section 399.30.”

## **Section 3206 – Optional Compliance Measures**

Subdivision (a)(1)(A). Five modifications were made to paragraph (3) of this subdivision: 1) “of less than 10 years duration” was deleted before “that has been amended to extend the term”; 2) “original” was added before “contract”; 3) “amendment” was deleted before “execution date to the amended contract end date”; 4) the sentence “If electricity products are procured under a contract of less than 10 years in duration that has been amended to extend the total term to at least 10 years in duration, then electricity products generated as of the month and year in which the contract amendment occurs will be eligible to qualify as excess procurement” was added to the end of paragraph (3); and 5) the sentence “If a contract of at least 10 years duration is amended to extend the term by fewer than ten years, electricity products that are procured after the end of the original contract term will be subtracted from the calculation of excess procurement” was deleted from end of paragraph (3) as noted in the original Express Terms for section 3206 (a)(1)(A)(3).

These change were made to modify the calculation in subdivision (a)(1)(A)(3) to determine the contract length of amended contracts for purposes of excess procurement. Instead of calculating from the contract amendment execution date, the calculation will use the original contract execution date. Additionally, the last sentence in subdivision (a)(1)(A)(3) was deleted and replaced with “If electricity products are procured under a contract of less than 10 years in duration that has been amended to extend the total term to at least 10 years in duration, then electricity products generated as of the month and year in which the contract amendment occurs will be eligible to qualify as excess procurement.”

These modifications were made to clarify the application of excess procurement rules, in accordance with Public Utilities Code section 399.30 (d)(1) and Public Utilities Code section

399.13 (a)(4)(B), for amended contracts. The calculation has been simplified, applies equally whether the original contract was short term or long term, and better recognizes the benefit of long term contracts. The modifications were made in response to comments received from an affected stakeholder.

Subdivision (f). This subdivision was modified to replace references to section “3204 (a)(4)” with “3206 (a)(4).” The language of subdivision (f) proposed in the Express Terms provided an inaccurate reference to section 3204 (a)(4) and was potentially confusing. The correct reference is to section 3206 (a)(4).

## **Section 3207 – Compliance Reporting for POU**

Subdivision (c)(2)(F). This subdivision was modified to add the clause “, but is not limited to,” after the phrase “This documentation may include.” This modification clarifies that the documentation used to demonstrate the portfolio content category classification is not limited to the examples listed in subdivision (c)(2)(F). This modification was made in response to a comment from an affected stakeholder.

Additionally, the word “procurement” in the second sentence of subdivision (c)(2)(F) should have been underlined in the original Express Terms and 15-Day Language to indicate that it was a modification to the regulations, and the word “contract” in this sentence should not have been underlined as it was not a modification to the existing regulatory language. The Express Terms identified the modifications to the second sentence of subdivision (c)(2)(F) as follows: “This documentation may include interconnection agreements, NERC e-Tag data, scheduling agreements, firming and shaping agreements, and electricity product procurement contracts or similar ownership agreements and information.” The Express Terms should have identified the modifications to the second sentence of subdivision (c)(2)(F) as follows: “This documentation may include interconnection agreements, NERC e-Tag data, scheduling agreements, firming and shaping agreements, and electricity product procurement contracts or similar ownership agreements and information.”

The 15-Day Language identified the modifications to the second sentence of subdivision (c)(2)(F) as follows: “This documentation may include, but is not limited to, interconnection agreements, NERC e-Tag data, scheduling agreements, firming and shaping agreements, and electricity product procurement contracts or similar ownership agreements and information.” The 15-Day Language should have identified the modifications to the second sentence of subdivision (c)(2)(F) as follows: “This documentation may include, but is not limited to, interconnection agreements, NERC e-Tag data, scheduling agreements, firming and shaping agreements, and electricity product procurement contracts or similar ownership agreements and information.”

It is appropriate to correct this error, since the correction is minor and can be characterized as a non-substantial, editorial-type change to the regulations, as described in the NOPA. Moreover, when the Energy Commission adopted the subject modification to the regulations on October

14, 2015, it directed the Energy Commission Executive Director to take all actions reasonably necessary to have the adopted modifications to the regulations go into effect, including making any non-substantial, editorial-type changes to the regulations that may be necessary, and preparing and filing all appropriate documents with the Office of Administrative Law.<sup>3</sup> Consequently, it is appropriate for the Energy Commission Executive Director to correct the underlining in subdivision (c)(2)(F) of section 3207.

Subdivision (h). Seven modifications were made to this subdivision: 1) “the average annual” was added before “qualifying hydroelectric generation”; 2) “an average of greater than 50 percent of the POU’s annual retail sales” was deleted before “in the twenty years preceding each compliance period”; 3) “, is greater than 50 percent of the POU’s retail sales for the year preceding that compliance period” was added after “whichever is less”; 4) the letter “s” was added to the end of “amount”; 5) “qualifying hydroelectric generation produced during the compliance period, qualifying hydroelectric generation procured by the POU during the compliance period, and” was added before “any generation during the compliance period”; 6) the letter “s” was added to the end of “amount” as used in the last sentence; and 7) “qualifies as qualifying hydroelectric generation, or that” was added before “would have qualified as qualifying hydroelectric generation” in the last sentence.

These modifications were necessary to add a requirement for a POU meeting the criteria of Public Utilities Code section 399.30 (k) to report qualifying hydroelectric generation that was produced during the compliance period and that was procured by the POU during the compliance period. This requirement is needed to verify that a POU meets the criteria of Public Utilities Code section 399.30 (k), and to calculate the POU’s procurement requirements.

This subdivision was additionally modified to clarify that the Energy Commission may request additional documentation not only to determine the amount of generation that would have qualified were it not for efficiency improvements that were RPS eligible, but also any amount that does qualify as qualifying hydroelectric generation.

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<sup>3</sup> Section V of Energy Commission Order no. 15-1014-7, *ORDER ADOPTING MODIFICATIONS OF REGULATIONS ESTABLISHING ENFORCEMENT PROCEDURES FOR THE RENEWABLES PORTFOLIO STANDARD FOR LOCAL PUBLICLY OWNED ELECTRIC UTILITIES*, dated October 14, 2015, provides as follows:

The California Energy Commission delegates the authority and directs the Executive Director to take, on behalf of the Energy Commission, all actions reasonably necessary to have the adopted modifications to the regulations go into effect, including but not limited to making any appropriate non-substantial, editorial-type changes to the regulations and preparing and filing all appropriate documents, such as the Final Statement of Reasons with the Office of Administrative Law and the Notice of Exemption with the Office of Planning and Research.

## **Updates to Discussion of Chapter 2. Rules of Practice and Procedures; Article 4. Complaints and Investigations.**

### **Section 1240 – Renewables Portfolio Standard Enforcement**

Subdivision (b)(1). This subdivision was replaced with “The Executive Director may file a complaint against a local publicly owned electric utility for failure to meet a Renewables Portfolio Standard requirement, or any regulation, order, or decision adopted by the Commission pertaining to the Renewables Portfolio Standard for local publicly owned electric utilities.” The language of subdivision (b)(1) previously stated that complaints could not be filed by anyone except Energy Commission staff. This modification was made to rephrase the subdivision and clarify that only the Executive Director may file a complaint, rather than any Energy Commission staff. This modification was made to ensure consistency with other Energy Commission enforcement provisions in sections 1230 through 1236. These modifications were not unanticipated when the NOPA, ISOR, and original Express Terms were published on March 27, 2015.

As noted in the ISOR, minor changes to section 1240 might be necessary to correct citations to sections 1230 through 1236, and to align the language of section 1240 with any changes that may be made to sections 1230 through 1236. At the time the NOPA, ISOR, and original Express Terms were published, the Energy Commission was considering possible changes to sections 1230 through 1236 as part of a separate effort to update the Energy Commission’s existing process and procedure regulations in accordance with the Energy Commission’s Order Instituting Informational Proceeding No. 10-1201-20.<sup>4</sup> If, as part of that effort, the Energy Commission decided to propose changes to sections 1230 through 1236, and those proposed changes required a change to the citations in section 1240 or a change to the language of section 1240, the Energy Commission would propose needed changes to section 1240 as part of the subject rulemaking proceeding.

At its September 9, 2015 Business Meeting, the Energy Commission adopted amendments to its existing process and procedure regulations which, among other things, revised sections 1230 through 1236, thereby necessitating changes to section 1240 (b)(1).

Additionally, the word “requirements” in subdivision (b)(1) is being revised to “requirement” to correct a grammatical error. The 15-Day Language for subdivision (b)(1) stated: “The Executive Director may file a complaint against a local publicly owned electric utility for failure to meet a Renewables Portfolio Standard requirements, or any regulation, order, or decision adopted by the Commission pertaining to the Renewables Portfolio Standard for local publicly

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<sup>4</sup> The Energy Commission established two dockets to address this proceeding. The initial docket number was 10-SIT-OII-1 and was followed by docket number 14-OII-01. Information on this proceeding is available on the Energy Commission’s website at <http://www.energy.ca.gov/title20/2014prerulemaking/>

owned electric utilities.” To be grammatically correct, the word “requirements” should be singular, not plural.

As discussed above, when the Energy Commission adopted the subject modification to the regulations on October 14, 2015, it directed the Energy Commission Executive Director to take all actions reasonably necessary to have the adopted modifications to the regulations go into effect, including making any non-substantial, editorial-type changes to the regulations that may be necessary, and preparing and filing all appropriate documents with the Office of Administrative Law. Consequently, it is appropriate to correct the grammatical error in subdivision (b)(1) of section 1240, since the correction is minor and can be characterized as a non-substantial, editorial-type change to the regulations, as described in the NOPA.

Subdivision (b)(3). This subdivision was deleted. It previously stated “A declaration under penalty of perjury shall not be required for the filing of a complaint under this section 1240.” This modification was made to ensure consistency with other Energy Commission enforcement provisions in sections 1230 through 1236.

As discussed above for subdivision (b)(1), these types of modifications were not unanticipated when the NOPA, ISOR, and original Express Terms were published on March 27, 2015.

Subdivision (d)(1). Three modification were made to this subdivision: 1) the reference to section “1233 (b)” was replaced with “1233.2,” to ensure consistency with other Energy Commission enforcement provisions in sections 1230 through 1236; 2) the word “for” was replaced with “if” before “noncompliance”; and 3) “is determined pursuant to this section” was added after “[if] compliance.” The first modification was made to ensure consistency with other Energy Commission enforcement provisions in sections 1230 through 1236, as discussed above for subdivision (b)(1). The second modification was made to clarify a grammatical error. The third modification was made to clarify that a monetary penalty will only be imposed if noncompliance is determined pursuant to section 1240 of the regulations.

Additionally, the ISOR included two citation errors in the first paragraph of the explanation of the original Express Terms for section 1240 (d). The ISOR referred to Public Utilities Code section 399.30 (l) and (m), instead of Public Utilities Code section 399.30 (m) and (n). At the time the ISOR was published, the correct reference should have been to Public Utilities Code section 399.30 (m) and (n). Subdivisions (m) and (n) of section 399.30 have since been renumbered subdivisions (o) and (p), respectively, as a result of amendments under SB 350, which took effect January 1, 2016.

Also in the ISOR, the second paragraph of the explanation of the original Express Terms for section 1240 (d) needs to be clarified. This paragraph states: “The Energy 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 will rely in assessing a penalty. ... The ARB does not intend to re-adjudicate the Energy Commission’s final decisions, any POU violations set forth in the decisions, or any findings of fact regarding the decisions.”

The clarified explanation is as follows: “The Energy Commission’s final decision regarding any complaint issued pursuant to section 1240 will include all findings of fact to support the decision. The final decision also will include findings regarding any mitigating and aggravating factors that relate to noncompliance with the RPS, and may include finding regarding mitigating and aggravating factors that the ARB may consider in assessing a penalty. Additionally, the ARB does not intend to re-adjudicate the Energy Commission’s final decisions regarding noncompliance with the RPS, any POU violations set forth in the decisions, or any findings of fact regarding determination of noncompliance in the decisions.”

Subdivision (f)(2). This subdivision was modified to replace references to section “1234 (b)” with “1233.3 (b).” This modification was made to ensure consistency with other Energy Commission enforcement provisions in sections 1230 through 1236, as discussed above for subdivision (b)(1).

Subdivision (f)(4). This subdivision was modified to replace references to section “1235” with “1233.4 (a)” This modification was made to ensure consistency with other Energy Commission enforcement provisions in sections 1230 through 1236, as discussed above for subdivision (b)(1).

Subdivision (g). Four modifications were made to this subdivision: 1) the clause “related to noncompliance” was added after “including findings regarding mitigating and aggravating factors”; 2) “The decision may also include findings regarding mitigating and aggravating factors” was added before “upon which the Air Resources Board may rely in assessing a penalty”; 3) “California” was added before “Air Resources Board” in the third sentence; 4) “California” was added before “Air Resources Board” in the fourth sentence.

The first two modifications clarify that the Energy Commission’s final decision will include all findings regarding mitigating and aggravating factors that relate to noncompliance with the RPS, and may also include findings regarding mitigating and aggravating factors that the California Air Resources Board may use in assessing a penalty. The Energy Commission made these modifications to provide clarity in response to comments from affected stakeholders regarding the type of findings that the Energy Commission’s final decision would include or may include.

The third and fourth modifications were minor and reflect the California Air Resources Board’s full name, consistent with common state practice.

Additionally, the references to Public Utilities Code section 399.30, subdivisions (m) and (n), are being revised to subdivisions (o) and (p), respectively to reflect amendments to Public Utilities Code section 399.30 resulting from SB 350. As discussed above, various subdivisions in section 399.30 were renumbered as a result of SB 350, which took effect on January 1, 2016, after the Energy Commission had adopted the subject modifications to the regulations on October 14, 2015.

The 15-Day Language did not identify needed changes to the references of Public Utilities Code section 399.30, subdivisions (m) and (n), because when the 15-Day Language was published on July 6, 2015, SB 350 had not been enacted or gone into effect. However, it is appropriate to

update these references in subdivision (g), since the updates are minor, are based on subsequent amendments in the statute, and can be characterized as non-substantial, editorial-type changes to the regulations, as described in the NOPA.

As discussed above, when the Energy Commission adopted the subject modification to the regulations on October 14, 2015, it directed the Energy Commission Executive Director to take all actions reasonably necessary to have the adopted modifications to the regulations go into effect, including making any non-substantial, editorial-type changes to the regulations that may be necessary, and preparing and filing all appropriate documents with the Office of Administrative Law. Consequently, it is appropriate for the Energy Commission Executive Director to revise the references in subdivision (g) of section 1240 from Public Utilities Code section 399.30, subdivisions (m) and (n), to Public Utilities Code section 399.30, subdivision (o) and (p), respectively.

Subdivision (h)(1). This subdivision was modified to add “California” before “Air Resources Board.” This addition was made to reflect the California Air Resources Board’s full name, consistent with common state practice.

Subdivision (h)(2). This subdivision was modified to add “California” before “Air Resources Board.” This addition was made to reflect the California Air Resources Board’s full name, consistent with common state practice.

## **UPDATED INFORMATIVE DIGEST**

Pursuant to Government Code section 11346.9 (b), and except for the changes noted below, the Informative Digest contained in the NOPA is incorporated by reference.

The Informative Digest in the NOPA includes an error in the section providing a Summary of Existing Laws and Regulations. This section refers to Public Utilities Code section 399.30 (l) as the authority that directs the Energy Commission to adopt regulations specifying procedures for the enforcement of the RPS for POUs. This reference should have been to subdivision (m) of section 399.30, rather than subdivision (l). This same error was repeated in the ISOR.

Upon review of the public comments received on the 45-day language Express Terms, the Energy Commission developed changes to the 45-day language and made the proposed modifications to the regulations, as revised, publicly available for comment as “15-Day Language” pursuant to Government Code section 11346.8. These changes were made in response to comments to provide additional clarity to the proposed modification to the regulations. Specifically, the changes made to the 45-day language:

- Further clarified the definition of “bundled” in section 3201 (e) to make clear that the second sentence in the definition is only one example of a scenario that may be a

considered a bundled product. In addition, the last sentence in the definition was deleted to clarify that there may be circumstances when the electricity consumed onsite may be considered bundled, even though the POU does not own the associated eligible renewable energy resource.

- Further clarified the definition of “retail sales” in section 3201 (cc) to make clear that retail sales includes any electricity that the POU sells to the customer, including onsite consumption of electricity from a POU-owned resource.
- Revised the requirements in section 3204 (a)(10)(B) by rephrasing the demonstration required by a POU meeting the criteria of Public Utilities Code section 399.30 (k), to require a 20 year average of hydroelectric production as a percentage of a single year of retail sales, instead of the requirement in the original Express Terms to calculate the 20 year average of hydroelectric production as a percentage of an average of 20 years of retail sales.
- Revised the calculation of excess procurement for amended contracts under section 3206 (a)(1)(A)(3) to clarify the application of excess procurement rules, in accordance with Public Utilities Code section 399.30 (d)(1) and Public Utilities Code section 399.13 (a)(4)(B), for amended contracts. The revised calculation is simplified, applies equally whether the original contract was short term or long term, and better recognizes the benefit of long term contracts.
- Corrected a cross reference to section 3206 (a)(4) in section 3206 (f).
- Clarified that acceptable documentation under section 3207 (c)(2)(F) is not limited to the specific examples listed in section 3207 (c)(2)(F).
- Revised and clarified the reporting requirements under section 3207 (h) for qualifying POUs that satisfy the exemption criteria of Public Utilities Code section 399.30 (k).
- Revised and clarified procedural provisions for complaints of noncompliance under sections 1240 (b), (d), (f), and (g) to ensure consistency with other Energy Commission enforcement provisions in sections 1230 through 1236.

## **ALTERNATIVES DETERMINATION**

The Energy Commission has determined that no alternative would be more effective in carrying out the purpose for which the regulations are proposed, would be as effective and less burdensome to affected private persons than the adopted regulations, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.



## **SUMMARY OF COMMENTS RECEIVED AND ENERGY COMMISSION RESPONSES**

Pursuant to Government Code section 11346.9 (a)(3), the Energy Commission has summarized and provided responses to all of the comments received during the public comment period of the rulemaking that were directed at the regulations or the process by which they were developed. Attachment A to this FSOR provides the summary of comments and responses, and addresses comments received on the original 45-Day Express Terms and the 15-Day Language changes. The comments received during the public comment period are compiled in the rulemaking file and have been numbered for organizational and reference purposes.

The Energy Commission received numerous comments in the rulemaking, including written comments provided in response to the original 45-Day Express Terms, the 15-Day Language changes, and oral comments provided at the April 9, 2015, staff workshop. To the extent possible, the Energy Commission has grouped and summarized overlapping and similar comments to provide a uniform and concise response and to avoid duplication.

In general, the Energy Commission organized comments by which section of the regulations they addressed, beginning with general comments that concern no particular section of the regulations. The comment summaries include the comment number of each comment included in the summary, the party or parties making the comment, and the page number on which the comment may be found.

**SUMMARY OF COMMENTS RECEIVED AND THE ENERGY COMMISSION'S  
RESPONSES**

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**Table of Commenters and Corresponding Comments**

<b>Abbrev.</b>	<b>Name of Commenter</b>	<b>Comment Nos./Date</b>
Between Friends	Between Friends	31.1/April 9, 2015
Farm Bureau	California Farm Bureau Federation	10.1/May 8, 2015
CMUA	California Municipal Utilities Association	5.1-5.7/April 30, 2015 18.1-18.10/May 11, 2015 22.1-22.5/July 21, 2015 33.1-33.5/April 9, 2015
CalWEA	California Wind Energy Association	8.1-8.2/May 6, 2015 39.1-39.3/April 9, 2015
Joint Comments of CalWEA, IEP, LSA	California Wind Energy Association, Independent Energy Producers Association, Large-scale Solar Association	19.1-19.2/July 21, 2015 46.1/October 8, 2015
CCSF	City and County of San Francisco	13.1-13.2/May 11, 2015
City of Colton	City of Colton	41.1/April 9, 2015
City of Vernon	City of Vernon	40.1-40.2/April 9, 2015
IEP	Independent Energy Producers Association	4.1-4.5/April 27, 2015 32.1-32.3/April 9, 2015
Label Technology	Label Technology, Inc	30.1/April 9, 2015
LSA	Large-scale Solar Association	2.1-2.2/April 8, 2015 35.1-35.3/April 9, 2015
LADWP	Los Angeles Department of Water and Power	9.1-9.14/May 7, 2015 21.1-21.14/July 21, 2015
Merced	Merced Irrigation District	15.1-15.5/May 11, 2015 27.1-27.2/April 9, 2015
Merced	Braun Blaising McLaughlin & Smith P.C., on behalf: -Merced Irrigation District	28.1-28.4/April 9, 2015 47.1/October 13, 2015
MC	Merced County	29.1/April 9, 2015
NCPA	Northern California Power Agency	17.1-17.6/May 11, 2015 20.1-20.7/July 21, 2015
NCPA, MSR	Northern California Power Agency, M-S-R Public Power Agency	36.1-36.5/April 9, 2015

Desert Coalition	Alliance for Desert Preservation, Oak Hills Property Owners Association, Lucerne Valley Economic Development Association, Lucerne Valley Market/Hardware, Morongo Basin Conservation Association, California Desert Coalition, Basin & Range Watch, Mojave Communities Conservation Collaborative	1.1-1.2/April 3, 2015 45.1/April 9, 2015
PG&E	Pacific Gas and Electric Company	7.1-7.4/April 30, 2015 25.1-25.2/July 21, 2015 34.1-34.3/April 9, 2015
Senator Cannella	Senator Cannella's Office	3.1/April 9, 2015 26.1/April 9, 2015
SCPPA	Southern California Public Power Authority	6.1-6.9/April 30, 2015 23.1-23.11/July 21, 2015 38.1-38.6/April 9, 2015
SMUD	Sacramento Municipal Utility District	14.1-14.8/May 11, 2015 24.1-24.3/July 21, 2015 37.1-37.6,42.1-42.2/April 9, 2015
Small POU Coalition	Braun Blasing McLaughlin & Smith P.C., on behalf: - City of Cerritos - City of Corona - City Of Colton - City of Moreno Valley - City of Needles - City of Rancho Cucamonga - City of Victorville - Eastside Power Authority - Pittsburg Power Company - Power & Water Resources Pooling Authority	12.1-12.3/May 8, 2015 43.1-43.2/April 9, 2015
TURN	The Utility Reform Network	11.1-11.2/May 8, 2015
UCS	Union of Concerned Scientists	16.1-16.4/May 11, 2015 44.1-44.2/April 9, 2015

## General Comments

1. COMMENTS NO. 4.1, 32.2: IEP (see Comments, pgs. 11 and 225) states that metering energy is essential for the RPS program in order to maintain public confidence that they are getting what they pay for. Distributed generation (DG) metering should not be relaxed.

RESPONSE: No change to the regulations. This comment is not directed at the proposed regulations or the process by which the regulations were adopted. The comment was directed at the Energy Commission's *RPS Eligibility Guidebook*, which is outside the scope of these regulations and specifies the requirements and process for certifying eligible renewable energy resources for California's RPS and describes how the Energy Commission tracks and verifies RPS-eligible electricity generation for the RPS. As explained in the ISOR, the Energy Commission's adoption of the RPS guidelines, as set forth in the *RPS Eligibility Guidebook*, are expressly exempt from the formal rulemaking requirements of the Administrative Procedures Act pursuant to subdivision (a) of Public Resources Code section 25747. In addition, this issue was raised and considered by the Energy Commission as part of the process to adopt the *RPS Eligibility Guidebook*, 7<sup>th</sup> edition.

2. COMMENTS NO. 1.2, 9.2, 21.4: Desert Coalition (see Comments, pg. 5) and LADWP (see Comments, pgs. 48 and 157) recommend that the Energy Commission develop a streamlined application to incorporate all of the requirements of certification, eligibility, registration, and metering to simplify the process for distributed generation (DG) system purchasers. They also suggest that DG output be approximated outside of WREGIS.

RESPONSE: No changes to regulations. The Energy Commission will continue to work with stakeholders on eligibility requirements in the *RPS Eligibility Guidebook* process, which is outside the scope of these regulations.

3. COMMENTS NO. 33.2: CMUA (see Comments, pg. 231) requests that the Energy Commission review and revise the economic analysis to more accurately reflect what POUs will need to do to meet the revised requirements.

RESPONSE: No change to the regulations. The *Economic and Fiscal Impact Statement and Assessment* estimates the cost to the POUs of complying with the regulatory requirements specifically. These regulatory costs include the cost to POUs to prepare and submit various documents and reports to the Energy Commission for purposes of verifying and determining compliance with the RPS procurement requirements. The regulatory costs do not include costs to comply with the existing regulatory or statutory requirements, as the costs to comply with these requirements exist irrespective of the subject regulations.

## Section 3201

4. COMMENTS NO. 8.2, 11.2: CalWEA (see Comments, pg. 42) and TURN (see Comments, pg. 67) state that onsite POU-owned generation being classified as bundled and qualifying for Portfolio Content Category (PCC) 1 will be confusing for customers hosting the generation in the sense that it's not clear which entity is benefiting from the environmental attributes or Renewable Energy Credits (RECs). CalWEA recommends that until stringent consumer protection and fair advertising standards have been established, met, and verified, no RECs associated with customer-sited generation serving onsite load should be counted toward a utility's RPS requirements. TURN recommends that POUs seeking to use onsite generation to satisfy its RPS procurement targets should provide affirmative notification of this arrangement to the customer hosting the generation. TURN lastly recommends that the Energy Commission establish a process for hearing private complaints and resolving attribution claims in the event that customers assert they are receiving renewable energy from onsite generation while the RECs are being claimed by another entity.

RESPONSE: No change to the regulations. The Federal Trade Commission deals with green marketing claims. The RPS program verifies whether a POU has procured and may claim the REC to meet its RPS compliance obligations.

An electricity product is categorized as PCC 1, PCC 2, or PCC 3 in accordance with Public Utilities Code section 399.16 (b) and the Energy Commission's regulations in section 3203. Bundled products are required for PCC 1 and PCC 2, because the definition of PCC 3 in Public Utilities Code section 399.16 (b)(3) specifically includes "unbundled RECs." PCC 1 and PCC 2 must exclude unbundled RECs to remain distinct categories and avoid a situation in which a REC could be classified in more than one PCC. In order for a REC to be considered "bundled," it must be procured bundled with the associated electricity by the POU retiring the REC for RPS compliance. A POU that has procured only RECs, unbundled from the associated electricity, cannot be credited with having procured a PCC 1 or PCC 2 product, because PCC 1 and PCC 2 both require bundled procurement. At best, a POU that has procured only RECs may be credited with having procured a PCC 3 product.

Public Utilities Code section 399.12 (f) defines "procure" for purposes of the RPS to mean "to acquire through ownership or contract." Therefore, when a POU owns onsite generation it is procuring that generation "bundled," since it is acquiring both the RECs and associated electricity by virtue of its ownership of the onsite electricity generating facility or system.

5. COMMENT NO. 2.1, 4.2, 8.1, 11.1, 16.2, 32.1, 35.2, 39.3: LSA (see Comments, pgs. 7 and 237), CalWEA (see Comments, pgs. 41 and 258), TURN (see Comments, pg. 65), UCS (see Comments, pg. 114), and IEP (see Comments, pgs. 12 and 223) argue that the changing of the definition of "bundled" to focus on ownership disregards how RECs are accounted for and may result in

“double counting” of generation used to meet onsite load. They say this can happen because onsite load served by onsite generation is typically not included in retail sales. IEP is concerned that a POU will be able to sell RECs associated with onsite load from its owned DG systems, and another POU will be able to purchase those RECs and count them as bundled. CalWEA is concerned that the host of customer-sited systems believe they are getting solar energy, whether or not they own the system or the REC.

LSA, IEP, and TURN suggest that if the Energy Commission upholds this change to the regulations, POUs should be required to include onsite generation in their retail sales. TURN requests that modifications to the definition of bundled should happen later as part of a program exemption to achieve the goal of 50 percent renewables for 2030. IEP states that POU-owned onsite generation should only be considered bundled if it’s being used to serve that POU’s retail sales.

RESPONSE: No change to the regulations. “Double counting” has a particular definition in the statute, which is for a seller of electricity to count one REC more than once toward the RPS or toward more than one RPS or voluntary REC program. There is the potential for a “double benefit” to a POU from onsite generation, in which the retail sales would be reduced while also increasing procurement, but only if the onsite use is in the POU’s own service territory.

In response to LSA and IEP’s suggestion that POUs should be required to include onsite generation in their retail sales, such onsite generation will be included in the retail sales if the onsite generation system is owned by the POU and the generation is being sold to a customer for onsite use. If the onsite generation system is owned by the POU and being used to satisfy the POU’s onsite load, the POU’s use of the generation would not be considered a retail sale.

6. COMMENTS NO. 2.1, 7.1, 16.1, 25.1, 32.3, 34.1, 35.1: LSA (see Comments, pgs. 7 and 326), IEP (see Comments, pg. 228), PG&E (see Comments, pgs. 33, 183, and 234), and UCS (see Comments, pg. 113) state that adopting the Energy Commission’s proposed amendment to the current definition of “bundled” would allow POU-owned net-metered renewable energy generation to count towards PCC 1, thereby representing a significant change in the rules of the RPS program that would only pertain to POUs. They are concerned that the new definition for bundled would result in an uneven playing field for retail sellers and POUs, is disruptive to the market, and undermines existing RPS contracts. UCS suggests that the Energy Commission hold off on any changes to how net-metered electricity until after the Legislature has a chance to address the issue. Also, any future policy reform needs to ensure that POUs are not receiving two forms of credit if net-metered facilities are also reducing the POU’s retail sales.

RESPONSE: No change to the regulations. The clarification to the definition of bundled pertains only to POU-owned systems, which would not be net metered. The Energy Commission and California Public Utilities Commission (CPUC) may adopt different rules for POUs and retail sellers if they find it appropriate. The clarification to the definition of “bundled” proposed will not cause market disruption because it only pertains to a claim made by a POU from a resource

owned by that POU. If the POU trades the REC associated with onsite generation to another utility, that REC could no longer be claimed as a bundled REC for the RPS.

7. COMMENT NO. 44.1: UCS (see Comments, pg. 278) states that, while they generally believe that the CPUC and the Energy Commission should have the exact same rules, the current change to the bundled definition could be an important tool to provide the POUs, especially smaller ones, some flexibility in the RPS. However, the UCS recommends that the megawatt hours that are classified as PCC 1 and behind-the-meter are added back into the retail sales calculation so there's no perception that the RECs are somehow being treated with extra compliance value.

RESPONSE: No change to the regulations. Behind-the-meter generation on a customer's site would already be included in retail sales in the example provided in the definition of "bundled" in section 3201(e). The only behind-the-meter generation from a POU-owned resource that could qualify as (PCC) 1 but would not be included in retail sales would be POU-sited generation serving the POU's own energy consumption load. It would be inappropriate, and inconsistent with the definition of retail sales, to count a POU's own energy consumption as retail sales. In addition, the statute does not currently allow for a retail sales correction for DG.

8. COMMENT NO. 5.2, 6.2, 9.3, 12.1, 14.1, 17.4, 18.1, 37.4, 38.2: CMUA (see Comments, pgs. 18 and 129), SCPPA (see Comments, pgs. 29 and 256), Small POUs (see Comments, pg. 69), NCPA (see Comments, pg. 126), SMUD (see Comments, pgs. 76 and 251) and LADWP (see Comments, pg. 48) state that a restriction based on ownership is inappropriate, and the new language in the definition of "bundled" should either be deleted or should be expanded to include procurement. The standard of ownership should have nothing to do with the criteria for determining whether a product from an eligible renewable resource is treated as bundled or unbundled. A product is bundled if the energy and the RECs are sold/resold together, and are linked together until the energy is consumed and the REC is retired in WREGIS. The restriction unfairly penalizes one of the most common financing structures for behind-the-meter generation, and ignores common industry practices.

RESPONSE: No change to the regulations. Contracts for electricity and RECs from customer-sited onsite generation should not be considered bundled, as the electricity is not available to be procured by the POU, since it is being used by the customer. Ownership may affect whether a product is treated as bundled or unbundled. In the case of onsite electricity consumption, a POU would only be able to procure bundled electricity if the POU actually owned the system. If the consumer owned the system and used the generation onsite, the POU could only procure the unbundled REC associated with the electricity used onsite by the customer, or, if the customer's system was net-metered, get credit for bundled electricity associated with the net surplus generation.



9. COMMENT NO. 9.4, 14.2, 37.3: LADWP (see Comments, pg. 49) and SMUD (see Comments, pgs. 77 and 250) state that the meaning of “electricity consumed onsite” in the “bundled” definition is unclear. If the Energy Commission believes that there should be some clarification of the “bundled” definition, LADWP suggests the following language as a replacement: “If the POU owns or procures the environmental attributes of the eligible renewable energy resource, then electricity products associated with electricity consumed onsite will be considered bundled electricity products.” SMUD requests clarification on whether “electricity consumed onsite” includes “buy all/sell all” situations, net-metered situations, or any other metering arrangements. SMUD assumes that the Energy Commission did not mean for the additional language in the definition of “bundled” to cover a standard net-metering situation.

RESPONSE: No change to the regulations. LADWP’s recommendation would change the meaning of the regulatory language by stating that if a POU owns the REC associated with electricity consumed onsite, the REC automatically qualifies as a bundled REC. This runs counter to the plain meaning of “bundled,” which requires that the POU procure both the REC and the underlying electricity under the same agreement. Regarding SMUD’s question, the answer is “no;” the example provided in the definition of “bundled” refers only to a system owned by a POU, so it does not include any net energy metering or buy all/sell all scenarios, all of which relate to customer-owned or third party-owned systems, not POU-owned systems.

10. COMMENT NO. 14.3, 37.5, 37.6, 43.2: SMUD (see Comments, pgs. 82, 252, and 271) and Small POUs (see Comments, pg. 275) state that the concern about “double counting” and “double benefits” is misplaced, and should not be accepted as having any bearing on the definition of “bundled.” The DG facilities being discussed still have the same metering requirements, and are still being tracked in the Western Renewable Energy Generation Information System (WREGIS). SMUD and the Small POUs state that customers telling their neighbors that they have solar on their roof is not double counting for purposes of the RPS because it is not a commercial claim. SMUD additionally suggests allowing DG to get full RPS credit, and then correct retail load by adding back in generation to retail sales.

RESPONSE: No change to the regulations. Energy Commission agrees that the retail sales reduction is not “double counting” or a “double benefit.” However, the Energy Commission disagrees with SMUD’s suggestion that all DG get classified as PCC 1 if the onsite generation is added to the POU’s retail sales calculation. The statute does not currently allow for a retail sales correction for DG.

11. COMMENT NO. 12.2, 43.1: Small POUs (see Comments, pgs. 70 and 275) state that there are transactions that procure all title to the output and RECs from behind-the-meter rooftop solar PV on a commercial business, and the POU supplies the business normal retail electric service.

In this arrangement, the gross retail load of the customer continues to be included in the utility's total retail sales. The Small POU coalition believes this should be categorized as PCC 1, and they would appreciate clarification in the regulations that this type of transaction would qualify.

RESPONSE: No change to the regulations. The rationale for a REC qualifying as bundled is not whether the underlying electricity is counted as retail sales, but whether the electricity and REC are procured, and available to be procured, by the POU. Electricity consumed onsite from a customer-owned or third party-owned system is not available to be procured by a POU, and therefore the associated REC would not qualify as bundled.

12. COMMENT NO. 14.4: SMUD (see Comments, pg. 84) states that market disruption concerns do not apply to the categorization of DG in the POU RPS market. A change in categorization of DG does not alter the eligibility of larger central station resources, does not change how resources participate in the market, nor how they structure such participation. The only market disruption that could occur is increased competition for DG, which would likely lower prices. This is not a reason for policy makers to avoid such a change in rules.

RESPONSE: No change to the regulations. No response needed.

13. COMMENTS NO. 19.1: Joint Comments of CalWEA, IEP, LSA (see Comments, pg. 140) state that the revised definition of "bundled" in the 15-Day Language perpetuates the same flaws as the earlier version in the Express Terms, and is not grounded in statutory law, rule, or common sense. They state that if electricity is used onsite to reduce a customer's load, the customer in effect claims the energy while the POU asserts ownership of the REC, making it an unbundled REC; the definition of "electrical corporation" and the California Public Utilities Commission's Self-Generation Incentive Program (SGIP) handbook are both quoted to support this position. They claim that, under the proposed definition, a POU can own a renewable facility located in Hawaii and consider it a PCC 1 product for the RPS. They are concerned that the example provided in the definition of "bundled" hinders clear understanding of the definition and should be removed, and that the following clause should be added to the definition: "if the electricity associated with that product is used to serve the POU's retail customers."

RESPONSE: No change to the regulations. There is no requirement for electricity to serve end use customers to qualify as a bundled product. It is not reasonable to tie an electricity product's PCC 1 eligibility to the product's use by a POU retail customer. The Energy Commission does not track which portions of a retail seller or POU's procured resources are used to satisfy the utility's retail sales load and which portions are used to satisfy the utility's consumptive load. A utility's procurement is tracked and verified separately from the utility's retail sales and consumptive load. The definition of electrical corporation and the SGIP handbook cited by the parties are unrelated to the portfolio content category requirements.

POU-owned resources in Hawaii will not qualify as eligible renewable energy resources for the RPS, because eligible renewable energy resources must be located within the service area of the Western Electricity Coordinating Council (WECC) in accordance with Public Utilities Code section 399.12 (e) and Public Resources Code section 25741 (a)(2). Public Utilities Code section 399.12 (e) defined an “eligible renewable energy resource” to mean an electrical generating facility that meets the definition of a “renewable electrical generation facility” in Public Resources Code section 25741. Public Resources Code section 25741 requires an electrical generation facility to be located within California or have its first point of interconnection to the transmission network within the service territory of WECC. WECC’s service territory includes the 14 western states and portion of Mexico (in northern Baja California) and Canada (in British Columbia and Alberta), but does not include Hawaii. Even if Hawaii is able to join the WECC, resources would still have to be scheduled into a California Balancing Authority in order to qualify for PCC 1.

14. COMMENTS NO. 20.3, 21.1, 22.1, 23.2, 24.1: CMUA (see Comments, pg. 170), NCPA (see Comments, pg. 151), LADWP (see Comments, pg. 156), SMUD (see Comments, pg. 178) and SCPPA (see Comments, pg. 174) support the revision to section 3201 (e) to remove an express statement classifying non-POU owned generation as unbundled, and recommend that the revised language be adopted by the Energy Commission. SCPPA also appreciates the Commission’s modification of the definition to offer an example of a contractual arrangement, rather than definitively limiting any and all potential future contractual arrangements outright.

RESPONSE: No change to the regulations. No response needed.

15. COMMENTS NO. 21.5, 23.1: LADWP (see Comments, pg. 157) and SCPPA (see Comments, pg. 174) recommend replacing “may” with “will” in the definition of “bundled” in order to provide more certainty and clarity on whether the electricity products would be considered bundled or not.

RESPONSE: No change to the regulations. There may be circumstances in which a REC that aligns with the definition is no longer bundled once it is claimed for the RPS. The determination of whether a claimed REC is bundled is made when the Energy Commission adopts the final verification report for the compliance period for which the REC was retired.

16. COMMENTS NO. 4.3: IEP (see Comments, pg. 13) recommends adding a new definition for “ownership” to clarify the treatment of resources owned by utilities vis-à-vis the PCCs: “If the POU owns an eligible renewable energy resource, the output of which is registered, metered, and tracked using a meter with a verified accuracy rating of 2 percent or better, is properly adjusted for transformation losses, and is subject to third-party verification and/or auditing, then the electricity products associated with the eligible renewable energy will be considered

bundled for purposes of that POU's RPS compliance obligation if the underlying energy is used to serve that POU's retail load."

RESPONSE: No change to the regulations. As discussed in comment no. 4 above, the definition of "procure" in Public Utilities Code section 399.12 (f) already includes owned resources, so a separate definition of "ownership" is unnecessary.

17. COMMENTS NO. 4.4: IEP (see Comments, pg. 14) recommends adding a new definition for "double-counting": "To the extent that behind-the-meter energy (MWh) is used to lower an LSE's retail sales and the same supply "MWh" is used to create a REC, then for purposes of calculating an LSE's RPS obligation, that amount of energy (MWh) used to serve the behind-the-meter load will be added to the individual LSE's retail sales calculation used to set its RPS compliance obligation."

RSEPNSE: No change to the regulations. The regulations do not include the term "double-counting." The Energy Commission does not have statutory authority to add the amount of energy used to serve the behind-the-meter load to the retail sales of a POU or other load serving entity. Furthermore, Public Utilities Code section 399.21 (a) specifies that the Energy Commission ensure that RECs are not double counted by any seller of electricity within the service territory of the WECC. "Double counting" under the statute refers to counting the same REC more than once for the RPS or counting the same REC for the RPS and another mandatory or voluntary renewable energy program. Therefore, it would not be appropriate to add a definition of double counting to the regulations that differs from the RPS statute.

18. COMMENTS NO. 6.3, 9.10, 21.11, 23.4, 38.3: LADWP (see Comments, pgs. 54 and 162) and SCPPA (see Comments, pgs. 29, 175, and 256) recommend that definitions of "force majeure" and "regulatory delay" be added to section 3201, and defined as qualifying factors that can delay timely compliance.

RESPONSE: No change to the regulations. The regulations do not use the terms "force majeure" and "regulatory delay," so a definition is unnecessary. Public Utilities Code section 399.30 (d)(2) allows POUs to establish rules for the delay of timely compliance of the RPS "consistent with subdivision (b) of section 399.15." Public Utilities Code section 399.15 (b) in turn states that the reasons for a delay may include inadequate transmission, permitting, interconnection, or other circumstances that delay procured eligible resources, and unanticipated curtailment to address the needs of a balancing authority. Furthermore, Public Utilities Code section 399.15 (b) does not list "force majeure" or "regulatory delay" as a reason for a delay.

However, POU's are not precluded from asserting "force majeure" or "regulatory delay" as mitigating factors in response to a complaint of noncompliance filed pursuant to section 1240 of the Energy Commission's regulations. Specifically, section 1240 states that a POU's answer to a complaint may include "information deemed relevant by the local publicly owned electric

utility to support findings of fact regarding any mitigating or otherwise pertinent factors related to any alleged violation ...”

19. COMMENT NO. 9.5, 21.6: LADWP (see Comments, pgs. 49 and 158) recommends striking the new resale definition because the definition creates ambiguity as to its impact on wholesale transactions for electricity products. They are also concerned that the Energy Commission does not explain how the proposed resale definition affects electricity products procured pursuant to a contract or ownership agreement executed prior to June 1, 2010.

RESPONSE: No change to the regulations. Energy Commission staff believe the definition does not create ambiguity, and section 3202 (b) clarifies how the Energy Commission handles resales from contract in full contracts executed prior to June 1, 2010.

20. COMMENT NO. 4.5, 19.2: IEP (see Comments, pg. 15) and Joint Comments of CalWEA, IEP, and LSA (see Comments, pg. 144) state that the revised definition of resale creates a condition in which RECs associated with the energy from a POU resource by definition will always be treated as bundled, even if the REC is separated from the associated energy and resold. The Joint Parties do not believe that the term “resale” merits definition in the regulations, but if it is they recommend crossing out “as opposed to” and adding “or.” IEP recommends adding the following to the end of the resale definition: “...if the product (in part or in whole) is sold to a separate entity other than the entity having an Ownership interest in the resource.”

RESPONSE: No change to the regulations. The regulations do not currently allow a REC to be classified as bundled if the REC is sold separately from the energy. The purchase of electricity products from an entity that owns the facility is a sale, not a resale. Both sales and resales are covered by the same rules governing the portfolio content categories; the definition of resale does not determine how an electricity product will be categorized.

21. COMMENTS NO. 14.5, 18.10: SMUD (see Comments pg. 84) and CMUA (see Comments, pg. 137) recommend that the Energy Commission take notice of a new provision in state law that allows retail sellers to subtract the retail sales in voluntary green pricing or procurement programs from overall retail sales, and to allow a similar reduction in retail sales for POUs.

RESPONSE: No change to the regulations. When the NOPA, Express Terms, and ISOR for the subject regulations were published in March 2015, the law did not permit a POU to exclude customers under a green pricing program from the POU’s retail sales for purposes of calculating the POU’s RPS obligations. At that time, the law only addressed the green pricing programs of electrical corporations in accordance with Public Utilities Code section 2833 (t). Under Public Utilities Code section 2833 (t), an electrical corporation with 100,000 or more customer accounts may exclude from its retail sales for purposes of the RPS the sales to

customers under the electrical corporation's Green Tariff Shared Renewables program. Public Utilities Code section 2833 (t) does not apply to POU green pricing programs.

However, amendments to the RPS statute under SB 350 now permit a POU to exclude sales to customers under a green pricing program from the POU's retail sales for purposes of calculating the POU's RPS obligations. Specifically, Public Utilities Code section 399.30 (c)(4) now provides as follows:

(4) Beginning January 1, 2014, in calculating the procurement requirements under this article, a local publicly owned electric utility may exclude from its total retail sales the kilowatthours generated by an eligible renewable energy resource that is credited to a participating customer pursuant to a voluntary green pricing or shared renewable generation program. Any exclusion shall be limited to electricity products that do not meet the portfolio content criteria set forth in paragraph (2) or (3) of subdivision (b) of Section 399.16. Any renewable energy credits associated with electricity credited to a participating customer shall not be used for compliance with procurement requirements under this article, shall be retired on behalf of the participating customer, and shall not be further sold, transferred, or otherwise monetized for any purpose. To the extent possible for generation that is excluded from retail sales under this subdivision, a local publicly owned electric utility shall seek to procure those eligible renewable energy resources that are located in reasonable proximity to program participants.

Public Utilities Code section 399.30 (c)(4) became effective on January 1, 2016, after the Energy Commission adopted the subject regulations on October 14, 2015. Once the subject regulations are finalized and approved by the Office of Administrative Law, the Energy Commission intends to initiate a new rulemaking to implement Public Utilities Code section 399.30 (c)(4) as well as other sections in the law amended by SB 350.

22. COMMENTS NO. 20.4, 22.4, 23.3: CMUA (see Comments, pg. 171), NCPA (see Comments, pg. 151), and SCPPA (see Comments, pg. 175) recommend a minor modification to the proposed language for the retail sales definition so that the newly added text would read: "that was purchased by the customer from the POU," or CMUA and SCPPA recommend "that was purchased by the end-use customer from the POU." This clarification would ensure that "customer" does not include the POU's own load. NCPA recommends that the proposed 15-day revisions to the definition of "retail sales" 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. SCPPA would prefer that "that was not sold to the customer by the POU" be stricken altogether. CMUA recommends an example or language in the FSOR to demonstrate that generation from a POU-owned eligible renewable energy resource that is interconnected behind the customer's meter and provides onsite generation to the end-use customer would qualify as PCC 1.

RESPONSE: No change to the regulations. The suggested changes have the same meaning as the existing language. In addition, the change to the definition of retail sales in the Express Terms has no bearing on the definition of bundled or on PCC classifications.

23. COMMENTS NO. 46.1: Joint Comments of CalWEA, IEP, and LSA (see Comments, pg. 288) urge the Energy Commission to defer adoption of the proposed definition of “bundled”. The newly signed SB 350 adds language that specifically references the California Public Utilities Commission (CPUC) Decision 11-12-052 that classifies renewable energy credits from generation on the customer side of the meter as unbundled, potentially qualifying for the RPS only under PCC 3. The new definition of “bundled” is unclear and could be interpreted in a way that markedly differs from the rules that apply to retail sellers.

RESPONSE: No change to the regulations. The clarification to the definition of “bundled” only concerns generators owned by the POU retiring the associated RECs.

SB 350 amended Public Utilities Code section 399.21 (a)(6) to state: “Nothing in the amendments to this article made by the Clean Energy and Pollution Reduction Act of 2015 (Senate Bill 350 of the 2015-16 Regular Session) is intended to change commission [CPUC] Decision 11-12-052 regarding the classification of renewable energy credits from generation on the customer side of the meter.” CPUC decision 11-12-052 does not address or contemplate RECs from utility-owned DG systems; i.e., generation from systems on the customer side of the meter. The decision only addresses RECs from customer-owned DG systems. Moreover, the decision only applies to retail sellers, not POUs.

## **Section 3202**

24. COMMENT NO. 9.7, 21.8: LADWP (see Comments, pgs. 50 and 159) states that the language in both 3202 (a)(3)(C) and 3202 (a)(2)(B) should be modified in order to better define a significant contract amendment or modification that would require the eligible renewable energy products to be reclassified into a PCC. LADWP recommends that the language be modified to only identify conditions in which a new contract or significant modification to an existing contract would cause the resource to be reclassified into a PCC. Contract extensions, equipment efficiency upgrades, or facility expansions should not trigger a reclassification.

RESPONSE: No change to the regulations. The language of the regulations mirrors the language of the statute. Public Utilities Code section 399.16 (d) expressly lists an increase of the nameplate capacity or expected quantities of annual generation as reasons for triggering a reclassification, and specifies that contracts may only be extended and still count in full if the original contract term is 15 or more years.

25. COMMENT NO. 6.4, 9.6, 23.5: LADWP (see Comments, pg. 50) and SCPPA (see Comments, pgs. 30 and 175) recommend that the following language be added to 3202 to ensure that electricity products continue to count in full toward RPS requirements: "Electricity products associated with generation from an eligible renewable energy resource that meet the requirements of Section 3202 (a)(2)(A) shall continue to "count in full" toward the RPS procurement requirements following the acquisition by a POU of such eligible renewable energy resource after June 1, 2010, if such acquisition is pursuant to a purchase option, security interest, or other purchase opportunity vehicle contemplated in the original contract or ownership agreement executed on or prior to June 1, 2010, provided, however, that a POU may voluntarily request that any such electricity products be classified into a Portfolio Content Category and follow the Portfolio Balance Requirements of Section 3204 (c)."

RESPONSE: No change to the regulations. Section 3202 (b) is based on the requirements of Public Utilities Code section 399.16 (d), which applies to the POUs in accordance with Public Utilities Code section 399.30 (c)(3), which directs POUs to adopt procurement requirements "consistent with Section 399.16." Public Utilities Code section 399.16 (d) provides that procurement from all contracts or ownership agreements "originally executed prior to June 1, 2010, shall count in full towards the procurement requirements established pursuant to this article, if all of the following conditions are met: . . . (3) Any contract amendments or modifications occurring after June 1, 2010, do not increase the nameplate capacity or expected quantities of annual generation, or substitute a different renewable energy resource. The duration of the contract may be extended if the original contract specified a procurement commitment of 15 or more years." Public Utilities Code section 399.16 (d) specifies how additional resources under count in full contract should be addressed, and does not permit a POU to choose or "request" whether an electricity product is classified as count in full or into a portfolio content category.

26. COMMENTS NO. 14.6, 24.3, 37.1: SMUD (see Comments, pgs. 85, 178, and 247) states that the language in section 3202 (a)(3) appears to suggest that changes can be made to a contract but not affect the classification until the original term of the unmodified contract expires. SMUD suggests a change to clarify what happens if the contract capacity or generation amounts are expanded even when the term is not, and also clarify what happens if a contract is amended but the amended terms do not go into effect until a future date as specified in the amendment. Also, SMUD believes it is unclear what "procured prior to" means, as well as "remaining procurement." They would like clarification on whether these terms refer to the date June 1, 2010, the date that a contract amendment is signed, or the date on which the contract amendment takes effect. SMUD suggests that the language should be interpreted to mean that the energy procured under the terms in place prior to June 1, 2010 are grandfathered for the remainder of the contract, while the energy procured after the amended terms take effect is not, and SMUD would appreciate confirmation of their interpretation.



RESPONSE: No change to the regulations. The language of 3202 (a)(3)(C) makes clear that only the generation procured prior to June 1, 2010 would be exempt from the portfolio balance requirements. If the contract capacity or generation amounts are expanded, the additional amount will be re-categorized into the PCCs, while the energy procured under the original terms will continue to be categorized as count in full for the remainder of the contract. The existing language of section 3202 (a)(2) and (3) is consistent with statute and the rules established by the CPUC, and has been in place since the Energy Commission's original regulations were adopted in 2013.

27. COMMENTS NO. 21.7, 23.6: LADWP (see Comments, pg. 159) and SCPPA (see Comments, pg. 175) recommend adding language to define Portfolio Content Category 0 and its requirements to section 3202 (a)(2). They believe this is necessary because similar language was included in the 7<sup>th</sup> edition of the *RPS Eligibility Guidebook*, but was removed in the 8<sup>th</sup> edition of the *RPS Eligibility Guidebook* and the Energy Commission had indicated it would be added to the Regulations.

RESPONSE: No change to the regulations. The term "Portfolio Content Category 0" is not used in the regulations, and therefore does not need to be defined.

## Section 3203

28. COMMENTS NO. 1.1, 5.1, 6.1, 9.1, 12.3, 13.2, 17.5, 18.3, 21.3, 33.1, 38.1, 40.2, 45.1: Desert Coalition (see Comments, pgs. 1 and 282), CMUA (see Comments, pgs. 17, 130, and 228), SCPPA (see Comments, pgs. 27 and 255), LADWP (see Comments, pgs. 48 and 157), Small POU's (see Comments, pg. 71), NCPA (see Comments, pg. 126), CCSF (see Comments, pg. 73), and City of Vernon (see Comments, pg. 262) state that all renewable distributed generation within a California balancing authority should be counted as a PCC 1 resource. Classification of DG as PCC 3 encourages procurement of large and out-of-state projects over generation that is located close to load, forcing ratepayers to finance distant renewable projects with a greater environmental impact. Classification of DG as PCC 1 encourages in-state development, supports the state's DG goals, and is consistent with Public Utilities Code section 2827, which addresses the requirements for net energy metering. There is a clear difference between DG RECs and other unbundled REC transactions.

RESPONSE: No change to the regulations. Electricity from a customer-owned or third party-owned DG resource consumed onsite cannot be procured bundled with the associated REC because the customer is consuming the electricity, making the REC unbundled and thus classifiable as PCC 3. Electricity consumed onsite does reduce the retail sales of the POU and consequently lowers the POU's RPS procurement target, providing an additional benefit. Excess

electricity from the DG resource that is not consumed onsite may be procured by a POU and could thereby qualify as PCC 1 if the electricity and REC were procured bundled. If bundled RECs are sold to the POU under provisions requiring the associated electricity to be immediately sold back to the customer, the RECs would most likely be classified as PCC 3, because the customer is effectively selling only the REC to the POU and retaining the associated electricity for the customer's use. Classifying the REC in these types of transactions as PCC 3 is consistent with section 3203 (a)(1), which provides that a bundled electricity product may be classified as PCC 1 if the POU does not resell the underlying electricity from the product back to the generator from which the electricity was procured.

29. COMMENTS NO. 7.2, 9.8, 21.9, 34.2, 39.1: CalWEA (see Comments, pg. 258), LADWP (see Comments, pgs. 51 and 160), and PG&E (see Comments, pgs. 34 and 235) state that dynamic transfers should not include the requirement of hourly scheduling because there is no such requirement in the legislation. Hourly deliveries and those that are subject to dynamic transfers are distinctly different, and a simple dynamic transfer agreement should be enough. LADWP was also concerned that this new requirement is not consistent with the CPUC's Decision 11-12-052.

RESPONSE: No change to the regulations. The Commission is not requiring a comparison of hourly meter and hourly scheduling data for dynamic transfers, which is required for electricity scheduled into a California Balancing Authority under a static schedule. The Commission requires only eTags to show that the electricity under a dynamic transfer is actually being scheduled into a California Balancing Authority. This change brings electricity products procured under dynamic transfer agreements into alignment with the other electricity products in PCC 1 in accordance with Public Utilities Code section 399.16 (b)(1). Furthermore, the CPUC's Decision 11-12-052 is silent on how the CPUC will verify dynamic transfers.

30. COMMENTS NO. 5.3, 14.1, 18.2: CMUA (see Comments, pgs. 21 and 129) and SMUD (see Comments, pg. 79) recommend that the Commission clarify that a retail sale to a customer that has a DG facility that is selling its output to the POU does not violate the prohibition of resales back to the generator. In this situation, the customer is a retail customer receiving electric service like any other retail customer. CMUA recommends adding the following sentence to section 3203 (a)(1): "For purposes of this section 3203, a retail sale to a customer is not a resale of the underlying energy resource back to the eligible renewable energy resource."

RESPONSE: No change to the regulations. The Energy Commission disagrees that the scenario posed in the comment would not qualify as a resale of electricity to the eligible renewable energy resource. Any RECs procured under such an arrangement would likely be considered unbundled and as such only qualify as PCC 3.

## Section 3204

31. COMMENTS NO. 13.1: CCSF (see Comments, pg. 73) supports the use of the twenty year average as it better aligns with the long-term historical average production from hydro taking into account not only drought conditions but also years of above average precipitation. The CCSF proposed the following clarification to the justification in the ISOR: “the better average period is twenty years, because it *better reflects the long-term historical production by balancing out* ~~will capture more~~ fluctuations in production from the facility as a result of drought years *and years of above-average precipitation.*” The CCSF lastly appreciates that the twenty-year eligibility requirement only applies prospectively.

RESPONSE: No change to the regulations. The Energy Commission agrees with CCSF’s characterization and clarified the explanation in the ISOR for section 3204 (a)(7)(C).

32. COMMENTS NO. 3.1, 26.1: Senator Cannella (see Comments, pgs. 9 and 202) states that the proposed language does not meet the stated provisions in Public Utilities Code section 399.30 (k), and that the legislature intended that Merced Irrigation District (Merced) be provided real and consistent relief on an annual basis. Senator Cannella’s office requests that the Commission follows the intent of the bill.

RESPONSE: No change to the regulations. Public Utilities Code section 399.30 (k) does not include “in any given year” (from section 399.30 (j)), or similar language, that would qualify Merced for an annual RPS requirement. Section 399.30 (k) instead refers to the compliance period targets established for the majority of POU.

33. COMMENTS NO. 3.1, 15.5, 18.7, 26.1, 27.2, 28.4: Merced (see Comments, pgs. 106, 207 and 212), Senator Cannella (see Comments, pgs. 9 and 202), and CMUA (see Comments, pg. 136) state that applying the portfolio balance requirements to Merced is incorrect and inconsistent with both the structure of SB 591 and the implementation of the CCSF alternative compliance obligation. Merced makes the following arguments: 1) SB 591 creates an alternative method for calculating the RPS procurement requirements, which is a self-contained, separate obligation that does not reference the portfolio balance requirements (PBR). Merced mentions section 399.30 (i) as a contrasting example of an exemption that creates a minor modification that does not otherwise alter the applicable POU procurement requirements; 2) the CCSF’s language “including renewable energy credits” has no relevance to the applicability of the portfolio balance requirements, but is instead a standard phrase used in the RPS to describe renewable procurement, used in 399.30 (a) and applies to all POUs; 3) all of the justifications the Energy Commission used when it adopted the exemption for CCSF also apply to Merced; 4) implementing SB 591 without the portfolio balance requirements will allow Merced to invest in

its community. Senator Cannella's office requests that the Energy Commission follows the intent of the bill, which was to provide Merced real and consistent relief on an annual basis.

RESPONSE: No change to the regulations. As discussed in the ISOR, Merced is subject to the PBR pursuant to Public Utilities Code sections 399.30 (c)(3) and 399.16. It is not exempt from the PBR by virtue of Public Utilities Code section 399.30 (k). There are no explicit provisions in section 399.30 (k) exempting the qualifying POU from PBR, nor can such an exemption be implied by the express provisions of section 399.30 (k). Section 399.30 (k) does not make reference to the PBR or otherwise state that the qualifying POU may satisfy its procurement obligations by procuring only renewable energy credits (RECs). By contrast, Public Utilities Code section 399.30 (j), applicable to CCSF, includes explicit provisions which support an implied exemption from the PBR. Specifically, section 399.30 (j) states that the qualifying POU is required to procure eligible renewable energy resources, "including renewable energy credits, to meet only the electricity demands unsatisfied by its hydroelectric generation in any given year..." Additionally, section 399.30 (j) requires that the qualifying POU's exemption be applied annually, stating that the POU shall meet "only the electricity demands unsatisfied by its hydroelectric generation in any given year ..." This annual requirement makes it more difficult for the qualifying POU under section 399.30 (j) to plan for any needed renewable energy procurement, since it may not know until the end of a given year whether its hydroelectric generation will be sufficient to meet its electricity demands for that year.

Had the legislature intended to exempt Merced from the PBR, it would have included language in Public Utilities Code section 399.30 (k) supporting such an exemption, as it had for CCSF (in Public Utilities Code section 399.30 (j)) and other utilities, such as Kirkwood Meadow Public Utilities District (in Public Utilities Code section 399.18 (b)).

Senator Cannella sponsored SB 591 with the intent of assisting Merced. However, the bill as introduced by Senator Cannella on February 22, 2013 was significantly different than the bill ultimately enacted by the legislature. When the bill was introduced it included language that mirrored the RPS exemption for CCSF in Public Utilities Code section 399.30 (j). Specifically, proposed Public Utilities Code section 399.30 (k) provided:

(k)(1) A local publicly owned electric utility that receives 50 percent or greater of its consumption load demand from hydroelectric generation and other renewable energy resources *shall be required to procure eligible renewable energy resources, including renewable energy credits to meet only the electricity demands unsatisfied by its hydroelectric generation in any given year to satisfy its renewable energy procurement requirements.*

(2) For the purposes of this subdivision, "hydroelectric generation facility" means a hydroelectric facility satisfying all of the following:

(A) Is owned solely and operated by the local publicly owned electric utility as of 1967.

(B) Has a distribution system demand of less than 150 megawatts.

(C) Involves a contract in which an electrical corporation receives the benefit of the electric generation through June of 2014, at which time the benefit reverts back to the ownership and control of the local publicly owned electric utility.

(D) Has a maximum penstock flow capacity of no more than 3,000 cubic feet per second and includes a regulating reservoir with a small hydroelectric generation facility producing fewer than 20 megawatts with a maximum penstock flow capacity of no more than 2,700 cubic feet per second.

The above italicized language mirrored the RPS exemption language for CCSF in Public Utilities Code section 399.30 (j), which provides as follows:

(j) A local publicly owned electric utility in a city and county that only receives greater than 67 percent of its electricity sources from hydroelectric generation located within the state that it owns and operates, and that does not meet the definition of a “renewable electrical generation facility” pursuant to Section 25741 of the Public Resources Code, *shall be required to procure eligible renewable energy resources, including renewable energy credits, to meet only the electricity demands unsatisfied by its hydroelectric generation in any given year, in order to satisfy its renewable energy procurement requirements.*

The pertinent language in the enacted version of SB 591 provides as follows:

(k) (1) A local publicly owned electric utility that receives greater than 50 percent of its annual retail sales from its own hydroelectric generation that is not an eligible renewable energy resource *shall not be required to procure additional eligible renewable energy resources in excess of either of the following:*

(A) *The portion of its retail sales not supplied by its own hydroelectric generation. For these purposes, retail sales supplied by an increase in hydroelectric generation resulting from an increase in the amount of water stored by a dam because the dam is enlarged or otherwise modified after December 31, 2012, shall not count as being retail sales supplied by the utility’s own hydroelectric generation.*

(B) *The cost limitation adopted pursuant to this section.*

(2) For the purposes of this subdivision, “hydroelectric generation” means electricity generated from a hydroelectric facility that satisfies all of the following:

(A) Is owned solely and operated by the local publicly owned electric utility as of 1967.

(B) Serves a local publicly owned electric utility with a distribution system demand of less than 150 megawatts.

(C) Involves a contract in which an electrical corporation receives the benefit of the electric generation through June of 2014, at which time the benefit reverts back to the ownership and control of the local publicly owned electric utility.

(D) Has a maximum penstock flow capacity of no more than 3,200 cubic feet per second and includes a regulating reservoir with a small hydroelectric generation facility producing fewer than 20 megawatts with a maximum penstock flow capacity of no more than 3,000 cubic feet per second.

*(3) This subdivision does not reduce or eliminate any renewable procurement requirement for any compliance period ending prior to January 1, 2014.*

*(4) This subdivision does not require a local publicly owned electric utility to purchase additional eligible renewable energy resources in excess of the procurement requirements of subdivision (c).*

34. COMMENTS NO. 15.2, 28.1: Merced (see Comments, pgs. 98 and 208) supports the proposed language to determine whether a POU qualifies for section 399.30 (k). However, Merced does not think it is necessary to also average Merced's retail sales over 20 years, as these were stable and isn't needed to smooth out hydro's variability.

RESPONSE: Change to the regulations. Removed averaging of retail sales to meet the criteria in Public Utilities Code section 399.30 (k).

35. COMMENTS NO. 15.3: Merced (see Comments, pg. 99) does not object to determining eligibility for section 3204 (a)(10) at the beginning of each compliance period. However, the Energy Commission should revisit this issue if future legislation creates multi-year compliance periods after 2020 to ensure that it does not result in any unintended consequences or lead to results clearly at odds with the purpose of the statute.

RESPONSE: No change to the regulations. No response needed.

36. COMMENTS NO. 15.4, 28.2: Merced (see Comments, pgs. 103 and 208) states that SB 591 should be applied on an annual basis instead of a compliance period basis for the following reasons: 1) the only reason why the exemption for CCSF was "in any given year" is because it is based on electricity demand instead of retail sales, and this difference in statutory language is not a reason to interpret the exemptions differently; 2) the reference to section 399.30 (c) in SB 591 is not relevant, and was only included to protect against a circumstance where Merced's RPS obligation could be interpreted as higher than other POU; 3) applying SB 591 to other multi-year compliance periods will likely lead to results that are clearly inconsistent with the express language of SB 591.

RESPONSE: No change to the regulations. The language allowing CCSF to use electricity demand rather than retail sales to calculate its RPS targets is the change in language from "retail sales" to "electricity demand," not the addition of "in any given year." Including "in any given year" changes CCSF's requirement from a compliance period to annual. The reference to section 399.30 (c) ties Merced's RPS requirements to the requirements established for other POUs, which supports the Energy Commission's interpretation that Merced's requirements are not stand alone requirements like those for CCSF under Public Utilities Code section 399.30 (j).

37. COMMENTS NO. 15.1, 27.1, 28.3, 29.1, 30.1, 31.1, 33.3: Merced (see Comments, pgs. 93, 204, 209), CMUA (see Comments, pg. 231), Merced County (see Comments, pg. 215), Between Friends (see Comments, pg. 220), and Label Technology (see Comments, pg. 218) state that Merced has a number of unique challenges that distinguish it from retail sellers and other POU's. These challenges include being one of the most economically disadvantaged counties in the state, Merced's customer base being disproportionately made up of a few large commercial and industrial customers, Merced having to compete for all its customers with Pacific Gas and Electric Company (PG&E), and being a relatively new electric utility. All of these challenges result in Merced facing difficulty entering into long-term renewable energy contracts, and from installing utility scale renewable energy generation within its community. Merced argues that the legislative intent of SB 591 was to provide consistent and significant relief, and is supported by both the final senate floor analysis and final assembly floor analysis. This relief was to be consistent and not a rare occurrence tied to unusually high hydro generation years. Merced County, Between Friends, and Label Technology state that the ability of Merced to provide lower cost power is an important economic development retention tool and important to the success of businesses located in Merced.

RESPONSE: No change to the regulations. Merced's challenges can be addressed through optional compliance measures adopted in accordance with section 3206. Specifically, Merced may adopt cost limitations as specified in section 3206 (a)(3), which provides that a POU may adopt a cost limitation on eligible renewable energy procurement, and that the adopted limitation must be set to prevent disproportionate rate impacts, must include the costs of all RPS procurement, and must not include indirect expenses. Also refer to responses to comments nos. 32, 33, and 36.

38. COMMENTS NO. 10.1: Farm Bureau (see Comments, pg. 62) supports the methodology and parameters which Merced has proposed to be utilized for applying SB 591.

RESPONSE: No changes to the regulations.

39. COMMENTS NO. 7.3, 25.2: PG&E (see Comments, pgs. 36 and 183) states that the Energy Commission's proposed language in section 3204 (a)(10) is not supported by the statute. PG&E states that the statute clearly says that the criterion for the exemption is a POU that actually *receives* greater than 50% of its *annual retail sales* from its own qualifying hydroelectric generation, and that if a POU cannot meet this criterion it should not be eligible for the exemption. If Merced is selling its hydroelectric generation to another utility, it is not receiving the hydroelectric generation and is instead purchasing other sources of non-renewable power to satisfy its own retail sales need. PG&E states the proposed language enables Merced to avoid purchasing renewable energy and to instead purchase fossil-fueled electricity to meet unmet electricity needs. PG&E recommends that the Energy Commission remove the sentence "The

POU is not required to apply the electric generation from the facility toward its own load to meet this criterion.”

RESPONSE: No change to the regulations. The only POU that may use generation from Merced’s qualifying large hydroelectric facility to reduce its RPS procurement requirements is Merced itself. PG&E’s proposal would effectively prevent Merced from meeting the provisions of section 399.30 (k), due to existing contracts for the qualifying hydroelectric generation and how power from the Merced’s qualifying large hydroelectric facility may be transmitted to Merced’s customer. This is contrary to the intent of the statute, which was to reduce the RPS requirements for Merced in years with high generation from a qualifying hydroelectric facility. No other POU or load serving entity may use generation from Merced’s qualifying large hydroelectric facility to satisfy an RPS procurement obligation.

40. COMMENTS NO. 16.4, 44.2: UCS (see Comments, pgs.114 and 280) agrees with the Energy Commission that there are no explicit provisions in section 399.30 (k) exempting a qualifying POU from the portfolio balance requirements. UCS believes that the Express Terms provides Merced with very valuable compliance relief by ensuring that Merced is not going to have to purchase renewables to satisfy its load that would otherwise be able to be satisfied with low cost hydro power generation. The portfolio balance requirements are a necessary and important part of the RPS.

RESPONSE: No change to the regulations. No response needed.

41. COMMENTS NO. 2.2, 7.4, 16.3, 34.3, 35.3, 39.2: CalWEA (see Comments, pg. 258), LSA (see Comments, pgs. 8 and 238), UCS (see Comments, pg. 114), and PG&E (see Comments, pgs. 37 and 235) state that the Merced Irrigation District must demonstrate each and every year that it has served 50% or more of its retail sales with large hydro in order to qualify for the exemption in section 3204 (a)(10), and not just a 20 year average. They state that the statute does not support using the amount of hydroelectricity that was generated 20 years ago to determine a POU’s RPS target for the current compliance period. The change to a 20 year averaging period softens the regulations to help POUs maintain compliance through drought years thus discouraging the opportunity for these POUs to replace the lost generation with other renewable resources. PG&E also points out that the power from Merced’s New Exchequer hydroelectric facility was procured by PG&E during some of the last 20 years, and not Merced.

RESPONSE: No change to the regulations. The 20 year average does not affect Merced’s procurement target in any given compliance period, only whether it qualifies for the exemption in section 3204 (a)(10)(A). This averaging of hydroelectric generation is consistent with the averaging of CCSF’s qualifying hydroelectric generation to meet the criteria for Public Utilities Code section 399.30 (j).



42. COMMENTS NO. 47.1: Merced (see Comments, pg. 290) requests that the Energy Commission delay adoption of the proposed regulations to allow full consideration of the impact of SB 350. Specifically, Merced believes that the amendments to subdivision (l) of Public Utilities Code section 399.30 provide strong support that subdivision (k) should be implemented as a stand-alone, alternative compliance obligation that does not include an obligation to comply with the procurement requirements of Public Utilities Code section 399.16. Merced states that under the current proposed regulations, Merced is singled out for worse treatment than all other similarly situated POUs that qualify for 399.30 (l).

RESPONSE: No change to the regulations. SB 350 made no changes to Public Utilities Code section 399.30 (k). The amendments to Public Utilities Code section 399.30 (l) specifically state that it does not “modify the compliance obligation of a [POU] to satisfy the [portfolio balance] requirements.” Merced asserts that the absence of this language in section 399.30 (k) means that the legislature does not mean to apply the PBR to Merced. There is no legal or legislative support for Merced’s assertion. The amendments made to Public Utilities Code section 399.30 (l) do not cross reference the provisions in section 399.30 (k) applicable to Merced, or include other language that might suggest the legislature’s intent to excuse Merced from the PBR. Had the legislature intended to excuse Merced from the PBR or any other requirements it would have included express language in SB 350 for this purpose. The legislature clearly chose to exclude Merced from section 399.30 (l), because it included language in the section stating the exemption for large hydroelectric generation “does not include any resource that meets the definition of hydroelectric generation set forth in subdivision (k).” Subdivision (k) applies to Merced, so its large hydroelectric generation is expressly excluded from the exemption in Public Utilities Code section 399.30 (l).

## Section 3206

43. COMMENTS NO. 5.6, 9.9, 14.7, 17.6, 18.6, 33.4, 36.1, 37.2, 42.1: CMUA (see Comments pgs. 23, 134, and 232), LADWP (see Comments, pg. 53), NCPA (see Comments, pg. 126), NCPA & MSR (see Comments, pg. 241), and SMUD (see Comments, pgs. 86, 249, and 267) recommend that the Express Term’s new language in section 3206 (a)(1)(A)(3) either be removed, or revised to calculate contract length from the original contract term instead of the amendment date. The purpose of the long-term contracting requirement is to incentivize new construction, and the proposed language in the Express Terms does not support this purpose.

RESPONSE: Change to the regulations. Revised to calculate the amended contract length from the original contract execution date to the end of the amended term for purposes of calculating excess procurement.

44. COMMENTS NO. 20.5, 21.2, 22.2, 23.9, 24.2: CMUA (see Comments, pg. 171), NCPA (see Comments, pg. 152), LADWP (see Comments, pg. 156), SMUD (see Comments, pg. 178), and SCPA (see Comments, pg. 176) support the 15 day changes to the language in section 3206 (a)(1) regarding the calculation of contract length for purposes of excess procurement. They state that the changes acknowledge industry practices as well as the need for retail sellers to alter or amend existing contracts to meet need created by dynamic renewable energy and electricity markets, and correctly calculate the eligibility of electricity products for excess procurement purposes.

RESPONSE: No change to the regulations. No response needed.

45. COMMENTS NO. 5.7, 6.5, 9.10, 21.10, 23.7, 40.1, 41.1: LADWP (see Comments, pgs. 54 and 162), SCPA (see Comments, pgs. 30 and 175), City of Colton (see Comments, pg. 265), CMUA (see Comments, pg. 23), and City of Vernon (see Comments, pg. 259) recommend that the Energy Commission provide examples of “other circumstances” that would allow for a delay of timely compliance to give more certainty to POUs that may need to rely on such circumstances to not be found in violation of the RPS. They recommend that “force majeure” and “regulatory delay” be added to section 3206 (a)(2) as cause for delay of timely compliance. They recommend that the Energy Commission recognize “any” disproportionate rate impact methodology or procedure that exceeds approval from a local governing body. SCPA suggests that the language of section 3206 (a)(2)(A) be modified to read “Such a finding might include, but is not limited to,…”

RESPONSE: No change to the regulations. Public Utilities Code section 399.30 (d) allows POUs to establish rules for the delay of timely compliance “consistent with subdivision (b) of section 399.15.” Public Utilities Code section 399.15 (b) does not include “force majeure” or “regulatory delay” as an allowable cause for the delay of timely compliance. The Energy Commission could find no reason for holding POUs to a different standard than retail sellers regarding rules for delaying timely compliance. However, the Energy Commission’s regulations do not preclude a POU from considering factors other than those specified in the regulations. Refer also to response to comment no. 18.

46. COMMENTS NO. 6.6, 23.8: SCPA (see Comments, pgs. 30 and 176) recommends a modification to section 3206 (a)(4)(C) to allow for a POU to reduce PCC 1 procurement under 65% if a POU can demonstrate circumstances beyond its control, such as a resource that will no longer qualify as PCC 1.

RESPONSE: No change to the regulations. The 65% lower limit for reduction of the PCC 1 requirement is set by Public Utilities Code section 399.16 (e), which provides that the CPUC shall not, under any circumstance, reduce the PCC 1 obligation specified in section 399.16 (c)(1) “below 65 percent for any compliance period obligation after December 31, 2016.” Section

399.16 (e) applies to POU in accordance with Public Utilities Code section 399.30 (c)(3), which requires POU to adopt procurement requirements consistent with section 399.16.

47. COMMENTS NO. 36.2: NCPA & MSR (see Comments, pg. 242) request an example of when the new provisions in section 3206 (e) will be applied.

RESPONSE: No change to the regulations. The existing language only addressed a full waiver of compliance, and the Express Terms attempt to clarify that a POU could, if it only has rationale to excuse a portion of its shortfall, submit a request for waiving a portion of the shortfall rather than the entirety.

## **Section 3207**

48. COMMENTS NO. 6.7, 9.11: LADWP (see Comments, pg. 55) and SCPA (see Comments, pg. 31) recommend modifying section 3207 (c)(2)(F) to add “but is not limited to” to allow for other forms of documentation to verify PCC status.

RESPONSE: Change to the regulations. Section 3207 (c)(2)(F) was modified to add “but is not limited to” to allow other forms of documentation to verify PCC status. This clarifies that the Energy Commission may accept additional forms of documentation to verify PCC status.

49. COMMENTS NO. 20.6, 22.3, 23.10, 38.4: CMUA (see Comments, pg. 171), NCPA (see Comments, pg. 152), and SCPA (see Comments, pgs. 176 and 257) support the 15-day language addition of “but is not limited to” to section 3207 (c)(2)(F). The new language clarifies the scope of potential documentation that can be used by a POU in its compliance filings, and ensures that POU are not limited to the list of acceptable documentation provided in the regulation to support the PCC designation set forth in those filings.

RESPONSE: No change to the regulations. No response needed.

50. COMMENTS NO. 9.12, 18.9, and 21.12: CMUA (see Comments, pg. 136) and LADWP (see Comments, pgs. 55 and 162) recommend striking “water pumping” from the retail sales definition and energy consumption reporting section, or clarifying that water pumping is not unique among all POU consumption in being excluded from retail sales. LADWP explains that water pumping loads are typically not metered separately from an entire facility, that metering is not designed to provide that kind of detail, and that they would not be capable of fulfilling this new reporting requirement. Lastly, CMUA also recommends that “the annual amount in

MWh being satisfied with electricity products” should be deleted because POU’s are not likely to track POU owned or contracted renewable generation that serves that POU’s own load.

RESPONSE: No change to the regulations. If a POU is subtracting water pumping load from its reported retail sales, that load should be appropriately metered and tracked. However, the Energy Commission will continue to work with the POU’s to determine how information will be reported, and whether estimates will be sufficient in certain cases.

51. COMMENTS NO. 6.8, 17.3, 18.8, 20.7, 38.5: CMUA (see Comments, pg. 136), NCPA (see Comments, pgs. 124 and 152), and SCPPA (see Comments, pgs. 31 and 257) recommend that the new reporting requirement in section 3206 (c)(2)(I) not be adopted, and that the Energy Commission carefully consider any additional requests for information, in order to ensure that the information sought is both necessary and unique, in that it is not already provided to the Energy Commission under an existing reporting requirement. The parties are concerned that the addition of section 3206 (c)(2)(I) imposes a reporting burden on POU’s, and that the Energy Commission should be able to find the requested information from the Department of Water Resources, the Energy Commission’s Power Source Disclosure report, or other reports already submitted to the Energy Commission. Since this consumption data is already excluded from the reported retail sales value, there is nothing upon which to compare the POU consumption data for purposes of verification. NCPA fears that POU consumption information could result in an erroneous calculation of the POU’s retail sales, especially without an explanation on how retail sales is verified. SCPPA requests the Energy Commission to work with stakeholders to determine how best to address and satisfy the need for this information, while minimizing the reporting burden. NCPA suggests addressing the collection of additional data in the Power Source Disclosure report, rather than the regulations.

RESPONSE: No change to the regulations. The additional data being required in section 3206 (c)(2)(I) is needed to determine whether POU’s are appropriately and consistently identifying their own electricity consumption and excluding it from reported retail sales. It is not appropriate for Energy Commission staff to search for information that needs to be reported and attested to by the POU for the purposes of satisfying the POU’s RPS requirements. If the POU has already reported the requested data to the Energy Commission, it can be identified as specified in section 3207 (c) to reduce the POU’s reporting burden.

52. COMMENTS NO. 36.3: NCPA & MSR (see Comments, pg. 243) would like additional information on what the Energy Commission envisions the POU energy consumption reporting will look like, and when the additional reporting requirements will be clarified.

RESPONSE: No change to the regulations. This comment is not directed at the proposed regulations or the process by which the regulations were adopted. The reporting forms are part of the Energy Commission’s *RPS Eligibility Guidebook* and are outside the scope of this

rulemaking. The Energy Commission will provide additional information, and seek stakeholder input, on energy consumption reporting before the 2015 annual reports are due on July 1, 2016.

## Section 1240

53. COMMENTS NO. 5.4, 6.9, 9.13, 14.8, 17.1, 18.4, 20.1, 21.13, 22.5, 23.11, 33.5, 36.4, 38.6, 42.2: NCPA (see Comments, pgs. 118, 148, and 245), CMUA (see Comments, pgs. 22, 131, 172, and 233), LADWP (see Comments, pgs. 56 and 163), SCPPA (see Comments, pgs. 31, 176, and 257), and SMUD (see Comments, pgs. 88 and 268) recommend that the Air Resources Board (ARB) remain independent in its statutory responsibilities to level penalties for RPS noncompliance, and that the Energy Commission not suggest penalty amounts to ARB in any notices of violation. They state the Energy Commission has no authority regarding a potential monetary penalty and that the Energy Commission would need to evaluate the criteria of the Health & Safety Code, an area in which the Energy Commission has neither expertise nor legal authority. Commenters believe that 15-day language added some clarification, but the changes fail to adequately address the unlawful expansion of the Energy Commission's role.

RESPONSE: No changes to regulations. The Energy Commission is under no obligation to make penalty recommendations to the ARB, and the ARB is under no obligation to consider or accept the Energy Commission's penalty recommendations. To address some of the parties' concerns, the Energy Commission has clarified the ISOR explanation of original Express Terms for section 1240 (d).

The second paragraph of the ISOR explanation of the original Express Terms for section 1240 (d) stated: "The Energy 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 will rely in assessing a penalty. ... The ARB does not intend to re-adjudicate the Energy Commission's final decisions, any POU violations set forth in the decisions, or any findings of fact regarding the decisions."

The clarified explanation is as follows: "The Energy Commission's final decision regarding any complaint issued pursuant to section 1240 will include all findings of fact to support the decision. The final decision also will include findings regarding any mitigating and aggravating factors that relate to noncompliance with the RPS, and may include finding regarding mitigating and aggravating factors that the ARB may consider in assessing a penalty. Additionally, the ARB does not intend to re-adjudicate the Energy Commission's final decisions regarding noncompliance with the RPS, any POU violations set forth in the decisions, or any findings of fact regarding determination of noncompliance in the decisions."

54. COMMENTS NO. 5.5, 9.14, 17.2, 18.5, 20.2, 21.14, 23.11, 36.5: LADWP (see Comments, pgs. 59 and 167), NCPA (see Comments, pgs. 119, 149, and 246), SCPPA (see Comments, pg. 176), and CMUA (see Comments, pgs. 22 and 132) state that the answer to a complaint for non-compliance is an inappropriate way to provide information on mitigating factors, as the assumption of guilt is being made. The role of the Energy Commission in reviewing compliance is not based statutorily on review of any of the mitigating factors, and therefore mitigating factors are irrelevant to the Energy Commission's determination of noncompliance. NCPA appreciates the clarification that the provision of information regarding mitigating factors is in the event that noncompliance "is determined pursuant to this section," but requiring a POU to include any information that is solely relevant to a penalty determination exceeds the Energy Commission's statutory authority.

RESPONSE: No change to the regulations. The proposed regulations allow, but do not require, a POU to address mitigating factors in its answer to an Energy Commission complaint. A POU may choose whether or not to address mitigating factors in its answer. If the POU does not address mitigating factors in its answer, then the Energy Commission will not consider mitigating factors in adjudicating the complaint. Also see response to comment no. 53.