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Sent Via E-mail Only: ***DOCKET@energy.ca.gov***

California Energy Commission
Docket No. 13-RPS-01
Docket Unit
1516 Ninth Street, MS-4
Sacramento, CA 95814-5504

Re: Comments of the Sacramento Municipal Utility District (SMUD) on the Proposed Regulations CEC-300-2013-02-SD *Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Utilities, Docket No. 13-RPS-01*

Gentlepersons:

Thank you for the opportunity to provide comments on the Proposed Regulations on ***Enforcement* Procedures *For the Renewables Performance Standard For Local Publicly Owned Electric Utilities (Proposed Regulations).*** SMUD thanks the CEC staff for their hard work on these regulations and associated guidebooks, appendices, and forms for implementation of the 33% RPS under Senate Bill X1 2 ("SBX1 2").

SMUD strongly supports many aspects of the Proposed Regulations. In particular, SMUD largely supports the regulations for the calculation and use of historical carryover and treatment of historical short-term contracts (less than 10 years) because the early procurement of eligible renewable resources should "count in full." In addition, SMUD supports the proposed regulatory treatment of Category 3 resources for purposes of calculating excess procurement. We also support proposed portfolio balance requirements among the three categories in SBX1 2 and their interaction with grandfathered "count in full" resources. With consideration of modifications detailed below, these provisions should be adopted as final regulations.

In addition, SMUD supports the CMUA comments on the Proposed Regulations.

However, SMUD continues to believe that two significant changes are needed in the draft regulations to implement a coherent regulatory scheme. First, unbundled RECs in Categories 1 and 2 should carry that renewable attribute. Second, the 36-month REC retirement limit in SBX1 2 should be applied prospectively once obligated entities have been given fair notice of the obligation. SMUD also comments on other issues in the Proposed Regulations below.

A. Change Course Regarding Regulatory Treatment Of Portfolio Content Categories.

SMUD urges the CEC to change course and interpret SBX1 2 to allow RECs to carry a Category 1 and Category 2 attribute. There are numerous advantages to this path. First, the law explicitly imbues eligible resources with Category 1 and Category 2 attributes. Second, the statutory language that defines a Category 1 or Category 2 product does not require bundled procurement of energy and RECs. Third, the definition of a Category 3 product does not require that all unbundled RECs be placed in that category, and indeed strongly implies the opposite. There are other policy and practical reasons to change paths here as well.

SMUD urges the CEC to use its own judgment, and not rigidly follow the CPUC on product content category definitions because California's publicly-owned utilities are differently situated than the investor-owned utilities. The CEC has differed from the CPUC in the past where law and good public policy support doing so. It makes sense to do so here, and the CEC should not double down on the CPUC logic. SMUD discusses below the problems with the CPUC's decision, and the reasons it makes sense to decide these issues differently.

SMUD requests that the CEC remove Section 3203(a)(3) and Section 3203(b)(4), along with any other language that restricts appropriate unbundled RECs from retaining their category status, from the Proposed Regulations, and revise Section 3203(c) to reflect these changes.

1. Standard Rules Of Statutory Construction Require Reading 399.16(b)(3) As Unambiguously Allowing Unbundled RECs With Category 1 and 2 Status.

As the California Supreme Court has instructed on many occasions, a public agency charged with implementing a statute must:

> ... look to the statute's words and give them their usual and ordinary meaning. The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the statutory language permits more than one reasonable interpretation, courts

> may consider other aids, such as the statute's purpose, legislative history, and public policy. . . .
>
> Where more than one statutory construction is arguably possible, our policy has long been to favor the construction that leads to the more reasonable result. This policy derives largely from the presumption that the Legislature intends reasonable results consistent with the apparent purpose of the legislation.[1]

Legally, the Proposed Regulations inappropriately expand the statutory definition of Category 3 resources to include some resources that meet the statutory requirements of Category 1 or Category 2. SBX1 2 provides specific requirements that must be met to be considered Category 1 and 2 resources. These new requirements are the attributes of a particular resource that define that resource as either a Category 1 or Category 2 resource. For example, a resource is Category 1 if it is interconnected to a California Balancing Authority. This means that the energy is likely, but not required, to be consumed by California ratepayers. This is an attribute that distinguishes Category 1 resources from other, less valuable renewable resources eligible for the California RPS. It is a differentiating renewable attribute that, once created via interconnection or scheduling of renewable generation, is not changed in any way by the unbundling of a REC, or the other renewable attributes associated with that generation. The intended benefits that come with those attributes, and the legislative purpose underlying them, is not extinguished by capturing the attribute in a REC. The REC merely serves as the record of the Category 1 benefit purchased by the procuring utility and enjoyed by California ratepayers.

The statute defines Category 3 resources, and their attributes, *in the negative* as:

> 399.16(b)(3): Eligible renewable energy resource electricity products, or any fraction of the electricity generated, including unbundled renewable energy credits, **that do not qualify under the criteria of paragraph (1) or (2).** (Emphasis added.)

The Proposed Regulations, on the other hand, define Category 3 resources as:

> (c) Portfolio Content Category 3
>
> (1) All unbundled renewable energy credits and other electricity products procured from eligible renewable energy resources located within the

[1] *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal. 4th 381, 387-388. See also, e.g., *People v. Canty* (2004) 32 Cal.4th 1266, 1276; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.

> WECC transmission grid that do not meet the requirements of either Portfolio Content Category 1 or Portfolio Content Category 2 fall within Portfolio Content Category 3.

The Proposed Regulations change the statutory definition of Category 3 resources by going beyond the plain meaning of the law. Where the statute says, "*including* unbundled renewable energy credits," the Proposed Regulations read, "*All* unbundled energy credits" and then place this reframed phrase at the beginning of the definition, rather than in the supplemental position found in the statute. In addition, the Proposed Regulations add the word "other" in front of "electricity products," cementing the change that eliminates the original construction that some "unbundled energy credits" can meet the requirements of Categories 1 or 2. These changes add up to a misreading of the law that places "all" rather than some unbundled RECs into Category 3.

It is well established that when a statute has potentially conflicting forms of construction, preference is given to the interpretation giving effect to the entire statute, rather than an interpretation "which would destroy any portion of it and to that extent defeat, the legislative intent."[2] The CEC interpretation of the statute gives no weight to the last clause of paragraph 3, simply ignoring it with respect to unbundled RECs. The proper reading of the statute gives full weight to what is really the main defining characteristic of Category 3 – electricity products that: "… **do not qualify under the criteria of paragraph (1) or (2)**."

These paragraphs define Category 1 and 2 resources without any mention or concept of "bundling" or "unbundling" of RECs. Two of the criteria in paragraph 1 require only that a resource be interconnected to the distribution system within, or interconnected to, a California Balancing Authority ("CBA"), saying *absolutely nothing* about procurement being "bundled." The other two criteria for qualification to be Category 1 – either scheduled to a CBA without substitute power beyond hourly or sub-hourly ancillary services or dynamically scheduled to a CBA – imply that power and RECs are procured together, but say nothing about what happens once that power has been scheduled. Nothing in the text of the statute implies that the Category 1 attribute cannot be unbundled with the rest of the renewable attributes. And it is a reasonable interpretation of the statute that since the "scheduling" requirement has been fulfilled, like the qualifying fuel attribute, it can be transferred like other attributes already created. Paragraph 2 also requires scheduling into a CBA, but with "substitute" power, implying that the REC has already been unbundled and associated with other energy. Again, nothing in the statutory text implies that once the initial scheduling requirement is met

[2] See Cal. Civ. Code, § 3541 ("An interpretation which gives effect is preferred to one which makes void."); and Fay v. Dist. Ct. of Appeal, Second Appellate Dist., Division 2 (1927) 200Cal. 522, 896.

that the Category 2 attribute cannot be bundled into the REC and sold as a Category 2 resource.

The standard rules of statutory construction require that the plain meaning of words be honored, but leave room for using the law's purpose, legislative history, and public policy considerations if there is ambiguity. SMUD contends that there is no ambiguity here, and that the plain meaning of paragraphs 1 through 3 of Section 399.16(b) leaves room for Category 1 and Category 2 RECs to be unbundled and still meet the criteria for these categories and remain there. If there is ambiguity, however, consideration of the law's purpose, legislative history, and public policy support SMUD's interpretation of the statute to produce a reasonable result consistent with the apparent purpose of the legislation.

2. **The Legislative History Supports An Interpretation Allowing Unbundled Category 1 and 2 RECs.**

The Senate Energy Committee's February 15, 2011, legislative analysis of SBX1 2 is illustrative here. This legislative analysis states that SBX1 2:

> [E]stablishes procurement requirements for three product categories (or "buckets") as follows…:
>
> > Bucket #2 - Unbundled RECs from generators not directly connected to a CBA. Retail sellers and POUs can secure no more than 25% through 2013; 15% through 2016, and 10% thereafter.[3] (Emphasis added.)
> >
> > Bucket #3 - Energy not directly connected to a CBA or delivered in real time yet still providing electricity to the state. If unbundled RECs from Bucket #2 are not used then as much as 50% of generation can fill this bucket through 2013; 35% through 2016 and 25% thereafter. If Bucket #2 is full then the remaining generation needed to comply with the RPS could be applied to the criteria in this bucket.

Here, the analysis inadvertently juxtaposed Categories 2 and 3, but this error does not affect the legislative purpose apparent from the analysis. First, the analysis indicates that Category 3 (called "Bucket#2" in the analysis) is comprised of "…**unbundled RECs from generators not directly connected to a CBA**." This statement strongly suggests that unbundled RECs that ***are*** from generators directly connected to a CBA (or to a distribution system within a CBA) must necessarily be considered as a Category 1

[3] Senate Energy, Utilities and Communications Committee Legislative Analysis of SBX1-2 (February 15, 2011, p. 4)

product, as SMUD has argued above. If the Senate Energy Committee had shared the view taken by the Proposed Regulations, then it would have defined Category 3 RECs simply as "unbundled RECs." In addition, the analysis indicates that Category 2 products (called "Bucket#3" in the analysis) are not directly connected to a CBA or 'delivered in real time,' yet still provide electricity to California. This statement clearly implies that the renewable REC is unbundled from its underlying energy when procured, and associated with 'substitute' energy.

In addition, SB 722, the predecessor bill to SBX1 2 which nearly passed in 2010, included the buckets finally enacted in with the passage of SBX1 2 in 2011. The Senate Third Reading Analysis of SB 722 (as amended August 16, 2010) states that:

> SB 722 restricts the ability for utilities to use <u>out-of-state</u> renewable energy credits (RECs) to not more than 10% of its procurement target.[4] [5]

Again, there is slight error in the legislative analysis, as Category 3 is not defined in the law as relating specifically to "out-of-state" unbundled RECs, but as relating to electricity products not meeting paragraph 1 and 2 criteria, and these criteria allow ample use of out of state renewable energy. However, this slight error does not affect the important point that the analysis suggests that the law would **not** impose restrictions on the use of unbundled renewable energy credits from Category 1 or 2 resources (representing energy that was initially interconnected to or scheduled to a CBA).

3. **An Interpretation Allowing Unbundled Category 1 and 2 RECs Is Required To Be Consistent With The Legal Definition Of RECs:**

SBX1 2 continues a practice in California renewables law that indicates that RECs include and contain the attributes that come with the underlying renewable energy, with described exceptions. Section 399.12(h)(2) states:

> "Renewable energy credit" includes ***all*** renewable and environmental attributes associated with the production of electricity from the eligible renewable energy resource, except for an emissions reduction credit issued pursuant to Section

[4] Senate Third Reading Analysis of SB 722 (Simitian) As Amended August 16, 2010, p. 4

5 Section 399.16(b)(3) of SB 722 As Amended August 16, 2010, is the same language as was adopted by the Legislature in SBX1 2. Both Sections 399.169b)(3) read: "(3) Eligible renewable energy resource electricity products, or any fraction of the electricity generated, including unbundled renewable energy credits, that do not qualify under the criteria of paragraph (1) or (2)."

> 40709 of the Health and Safety Code and any credits or payments associated with the reduction of solid waste and treatment benefits created by the utilization of biomass or biogas fuels. (Emphasis added.)

Section 399.16 of SBX1 2 goes on to create the three portfolio content categories discussed here. SBX1 2 favors Category 1 and to a lesser extent Category 2 products because of the localized benefits that these types of resources provide to California in comparison to renewable generation that is neither interconnected to, nor scheduled to, a California Balancing Authority ("CBA"). These benefits, including in-state emission reductions and in-state electricity reliability benefits, are wholly realized when the electricity products are originally procured as Category 1 or 2 products, and are not diminished as these originally delivered products are "unbundled." These localized benefits are no less attributes associated with these particular kinds of renewable generation than is the type of fuel used. Section 399.12(h)(2) requires those attributes to be associated with the RECs created, and follow those RECs through their use until retirement. Hence, once a REC has been created for a Category 1 or 2 resource, that REC includes the category characteristic, and cannot lose that characteristic and be placed in another category without violating Section 399.12(h)(2).

As SMUD has said before, examples have developed under SBX1 2 where Category 1 resources become "unbundled" in effect, but retain their Category 1 status, implying of course that Category 1 is considered an attribute of the REC. For example, when a utility procures Category 1 RECs, banks them, and carries them forward from one compliance period to the next, these RECs are unbundled from the underlying generation. When the banked RECs are associated with subsequent or substitute energy in the compliance period when claimed for compliance, they do not lose their Category 1 compliance status. No one in these proceedings has suggested that this unbundling removes the Category 1 attribute. Also, when a Category 1 resource generates within California, but is procured by an entity that cannot get transmission from the eligible resource to its load, the generation is sold into the ISO market or a similar market, and the RECs from the unconnected resource are associated with other energy purchased to serve load. Again, no one suggests that this "within-the-state-market-transaction" unbundling removes the Category 1 attribute. In both cases, the procuring entity keeps the REC, although the REC is unbundled from the underlying energy. There is nothing in the statutory definition of a REC that supports the proposed policy that an unbundled REC keeps its Category 1 attribute if retained for compliance by the initial procuring entity, but loses that attribute if resold by that entity and used for another entity's compliance. There is no ambiguity in the definition of a REC that allows or supports this interpretation.

A third example of a Category 1 resource where RECs are procured but are not clearly "bundled" with the underlying energy arises with behind-the-meter distributed generation

resources. Here, it is indisputable that distributed, behind-the-meter, generation in SMUD's and other electricity service provider service territories in California are "interconnected to a distribution system within a CBA." As discussed above, the statute does not imply or require that RECs and energy be "bundled" to qualify as a Category 1 resource. These behind the meter resources fully satisfy the statutory requirement yet the Proposed Regulation would deny Category 1 credit because in some instances the energy is used on site. However, delivery or scheduling of such energy to a California Balancing Authority is not a requirement for such resources to count in Category 1, nor does use of the energy on site disqualify the resource as Category 1. Rules of statutory construction do not permit the CEC to impose a bundling requirement where none exists in the statute. These behind-the-meter RECs should have the Category 1 status deserved by meeting the interconnection criterion in the law.

4. **Valid Public Policy Considerations Support Changing Paths With Respect To Category Definitions.**

Allowing RECs to carry the Category 1 and 2 attribute has several public policy benefits for the RPS – it reduces costs, preserves the value of preferred resources, eases renewable development prospects, and reduces administrative complexity.

First, the Proposed Regulations exacerbate the incentive to avoid procurement of Category 1 products beyond that necessary to ensure compliance, because Category 1 RECs cannot be traded in the market and retain their value. The Proposed Regulations only allow Category 1 RECs to be used for Category 1 compliance by the initial procuring entity (even when implicitly unbundled by banking) and the sale of future Category 1 products to be used by the second procuring entity for Category 1 compliance. However, the Proposed Regulations do not allow the validly procured Category 1 RECs to be explicitly unbundled and sold to another entity for Category 1 compliance, which reduces their value for the initial procuring entity. Changing course to allow the sale of these unbundled RECs as Category 1 products preserves that value, and thereby the incentive for procurement of additional Category 1 products to ensure compliance.

Second, changing course to allow Category 1 and 2 RECs to retain their category attribute when unbundled and resold implies increased supply of these RECs in the market, rather than being withheld from the market and locked up in entity "category" banks. The increased market liquidity gained by allowing retention of the Category 1 attributes will tend to reduce the cost of Category 1 resources and lower overall RPS compliance costs. Thus, allowing RECs to carry the category attribute will further the state policy goal of minimizing ratepayer costs.

Third, allowing RECs to carry their category attribute when subsequently "unbundled" allows the category status of a REC to be determined at the time of generation and initial procurement, rather than significantly after the fact through examination of contractual terms. Procuring entities will know what they are purchasing, thus reducing the risk that excess procurement will be devalued because of regulatory rules not reflected in the law. Financing for renewable development will be easier as values of resources will be more predictable.

Fourth, SMUD's recommended interpretation will reduce the administrative complexity of verifying and enforcing the 33% RPS requirements. WREGIS certificates can track the category attributes of Categories 1 and 2 resources. The CEC will not need to examine complicated contract structures over time to determine in which category a REC resides, as this will be defined at the time of initial procurement and scheduling. The reduction in administrative complexity is significant and will lead to quicker verification and lower RPS costs overall.

Fifth, failing to reflect the appropriate Category 1 treatment of behind-the-meter distributed generation, when these resources clearly meet the criteria of the law, is inconsistent with Governor Brown's goal of having 12,000 MW of distributed renewable generation in California by 2020. Where a choice is feasible and allowed by law, the State should not choose an action that would remove existing value streams for these resources. Not providing these resources with the Category 1 attribute they clearly deserve removes substantial potential value from these resources. State public policy goals would be advanced more cost-effectively if the CEC changes course on the category treatment of these distributed generation resources.

5. **The CEC Can Decide Category Definitions With A Different Position Than the Incorrectly-Decided CPUC Decision.**

SBX1 2 establishes an RPS structure where POUs and retail sellers are similarly obligated but does not require exact equivalency between the two groups. The CPUC has adopted a decision (D.11.12-052) about the structure of portfolio content category procurement for retail sellers, but it is the POU Governing Board and the CEC's responsibility to do so for POUs. Simply because the CPUC has decided this issue already does not imply that the CEC has to follow the positions adopted there, particularly when there are ample reasons to decide differently and when the logic behind the CPUC decision is demonstrably incorrect in several ways.

First, the CPUC decision is legally incorrect by not following the standard rules of statutory construction. It is well established that when a statute has potentially conflicting forms of construction, preference is given to the interpretation giving effect to the entire statute, rather than an interpretation "which would destroy any portion of it

and to that extent defeat, the legislative intent."[6] The CPUC interpretation of the statute with regard to category treatment gives no weight to the last clause in Section 399.16(b)(3), simply ignoring it with respect to unbundled RECs. The proper reading of the statute, as discussed above, gives full weight to what is really the main defining characteristic of Category 3 – electricity products that: "… **do not qualify under the criteria of paragraph (1) or (2)**."

Second, the CPUC decision ignores the legislative history described above that suggests the intent of the law includes unbundled Category 1 and 2 RECs. The CPUC decision arbitrarily rejects the legislative committee analysis cited above because it: 1) "does not use terminology consistent with the terminology of § 399.16(b)(2) and § 399.16(b)(3) as enacted" and 2) "nor does it effect any change in the language of SB 2." However, the first assertion rests on the slender reed that there was an inadvertent juxtaposition of numbering in the legislative analysis, as noted above. In fact, the legislative analysis reasonably summarizes the actual legislation. The second assertion that the analysis did not "effect any change in the language of SB2" is nonsensical. As the first analysis of SBX1 2 after it was introduced, it would be explanatory of, and reflect changes in. the entire legislation. The first legislative analysis of a proposed bill cannot "effect any change" in the bill's language because it explains that language.

Third, the CPUC decision gives no weight to the public policy goals noted above. To the extent that there is any ambiguity in the legislation, the legislative history cited above and the public policy considerations described above must point toward the reasonable interpretation asserted by SMUD. While the CPUC decision states a need for a "bright line" to distinguish among portfolio content categories, it choose the wrong "bright line," and ignores the complexities of establishing a category treatment where procurement crosses that bright line as it changes from one category to another after being procured.

B. Do Not Apply 36-Month REC Retirement Limit Retroactively To Circumstances Where Such Retirement Was Not Feasible.

SBX1 2 contains a provision that requires a REC to be retired within 36 months of the original generation of the energy if it is to be used for RPS compliance. The Proposed Regulations appropriately apply this provision to actual procurement of generation and RECs from January 1, 2011 on, the defined compliance period timeframe of SBX1 2. However, Sections 3202 (a)(2)(A), §3202(c), and §3206(a)(5)(E), inappropriately apply this provision retroactively to that historical procurement carried forward into the SBX1 2

[6] See Cal. Civ. Code, § 3541 ("An interpretation which gives effect is preferred to one which makes void."); and Fay v. Dist. Ct. of Appeal, Second Appellate Dist., Division 2. (1927) 200 Cal. 522, 896.

compliance periods. The CEC should delete or appropriately revise these provisions, as the 36-month retirement requirement should not be applied retroactively to situations where a POU was unaware of the retirement obligation. SMUD appreciates the CEC recognizing that historical carryover should "count in full," so that any excess historical procurement continues to have full value going forward for RPS compliance, and believes that the CEC should not surprise early adopters by retroactive application of the 36-month retirement provision of SBX1 2.

The Proposed Regulations define 'retire' to mean:

> **3201(cc) --"Retire"** means to claim a renewable energy credit in the tracking system established by the Commission pursuant to Public Utilities Code section 399.25 (c) and thereby commit the renewable energy credit to be used for compliance with the RPS.

When SBX1 2 was enacted on April 12, 2011, it was not clear that historical procurement would be allowed as the law was implemented. SMUD had excess procurement due to early action on renewables, but was fighting to get this early action recognized, and was considering the value these RECs would command in the market should they not be recognized. Even today, the CEC's regulations to implement SBX1 2 are not finalized, and hence there remains some uncertainty about whether SMUD's early procurement will be recognized. As the regulatory process has unfolded since enactment of SBX1 2, there has not been a clear direction that retirement of any RECs was necessary at the beginning of the new RPS. In fact, the Sixth Edition of the CEC's RPS Eligibility Guidebook, adopted in August 2012, stated that entities should not retire RECs until the Seventh Edition of the Guidebook was adopted – and this has not yet occurred. The lack of clarity and the potential loss of value here are ample reasons for the CEC to only apply the 36-month retirement requirement to RECs generated after January 1, 2011.

In the years just prior to 2011, POUs were not required, as were retail sellers, to participate in the CEC's tracking system, whether in WREGIS or through the Interim Tracking System. Thus, retirement in WREGIS or through the Interim Tracking System would not have been an action that POUs were likely to take. But more importantly, it was not until passage of SBX1 2 that POUs were aware of the 36-month obligation and not until the CEC draft regulations that they were aware of an historical obligation to retire RECs. It is not reasonable for an agency to impose an obligation on a regulated party that is impossible to meet. Likewise, it serves no public policy goal to impose that obligation to historical carryover, long after POUs can respond with appropriate behavior. When the CPUC adopted the 36-month retirement obligation on the retail sellers in March 2010, under prior law, it explained that the limit struck a balance "between maintaining market liquidity and discouraging hoarding of TRECs":

> Allowing market participants to hold RECs indefinitely without committing them to RPS compliance would undermine both liquidity in the market and compliance planning by RPS-obligated LSEs. On the other hand, in order to have a liquid TREC market, it is necessary to keep RECs available in active WREGIS sub-accounts for a long enough period of time that trading within the market will be efficient, without providing incentives to keep TRECs out of the market. (D.10-03-021; p. 68)

The CPUC explained that the 36-month time frame would "allow an LSE holding TRECs to make a good estimate of its future compliance needs, and either commit or sell its TRECs." In other words, the point of the policy, like most good public policy, was to encourage desired behavior in the regulated entities. The CEC should follow the CPUC's lead in this regard and only apply the legal requirement prospectively to procurement starting in 2011, when POUs had notice of the new requirement. If the CEC persists with application of the 36-month retirement requirement to historical carryover, SMUD contends that the CEC should consider a broader definition of "retirement" for this category, as there is ample historical information available and the CEC can work with POUs to confirm that there is no double counting of RECs occurring in this one-time application.

C. Allow Full Accounting Of Historical Procurement In The Calculation Of Historical Carryover.

The Proposed Regulations define historic carryover as:

> **3201(m) -- "Historic carryover"** means a POU's procurement that satisfies the following criteria: 1) the procurement is for electricity and the associated renewable energy credit generated in 2004 - 2010 by an eligible renewable energy resource that met the Commission's RPS eligibility requirements in effect when the original procurement contract or ownership agreement was executed by the POU, 2) the original contract or ownership agreement was executed by the POU prior to June 1, 2010, and 3) the procurement is in excess of the sum of the 2004 – 2010 annual procurement targets defined in section 3206 (a)(5)(D) and was not applied to the RPS of another state or to a voluntary claim.

This definition appears fine to SMUD, and reflects the argument that procurement from contracts signed prior to June 1, 2010 should "count in full" for the RPS. This implies that procurement from contracts signed between June 1, 2010 and January 1, 2011 does not have "count in full" status, and hence is not to be included in historical carryover. However, Section 3206(a)(5)(B) of the Proposed Regulations carries this

treatment of procurement from June 2010 to January 2011 contracts beyond historic carryover to procurement used prior to 2011, stating: "Both the historic carryover **and the procurement applied to the POU's annual procurement targets** must be procured pursuant to a contract or ownership agreement executed before June 1, 2010, …" There is no valid reason to exclude the procurement from contracts signed between June 1, 2010 and January 1, 2011 from being applied to the procurement target in 2010 – this is a perfectly valid use for this procurement. It is only the historical carryover that is required to come from contracts signed prior to June 1, 2010, not all historic procurement.

D. The CEC Should Allow Procurement Of A REC For Compliance Period That Precedes The Date Of Generation Underlying The REC.

Section 3202(d) of the Proposed Regulations state that a POU may not use a REC to meet its RPS procurement requirements for a compliance period that predates the date of generation for the underlying energy. However, nothing in SBX1 2 prohibits this action. SBX1 2 does not require the RECs used for compliance in a compliance period to come from actual generation within that period. In fact, it allows generation (RECs) to be banked in one compliance period and used in a subsequent period. It also explicitly allows compliance using unbundled RECs, and states that a REC must be retired for compliance within 36 months of generation. The Initial Statement of Reasons indicates that the rationale for Section 3202(d) is that the statute does not allow for retirement before the date of generation. SMUD agrees with that, but contends that the statute does not prohibit retiring a REC after the date of generation, but designated for compliance in a previous compliance period. This would allow a path to compliance for an entity, which inadvertently came up short on compliance in a period due to unforeseen circumstances, to procure RECs generated in the following compliance period, but the entity can only use this path practically prior to filing its compliance report with the CEC following the compliance period. This seems like a reasonable accommodation to SMUD, allowing entities to achieve compliance and avoid filing for relief via the delay for timely compliance provisions in Section 3206(a)(2), should that relief be applicable.

E. The CEC Should Revise Treatment Of Category 2 Resources To Allow Substitute Energy To Be Scheduled From Within A California Balancing Authority; To Be Scheduled Other Than Within The Same Calendar Year As They Proposed Generation; And To Be Resold To The Generating Resource.

1. **Portfolio Content Category 2 Resources Should Be Allowed Substitute Energy From Within A California Balancing Authority.**

The Proposed Regulations indicate in subsection 3203(b) (A) state that:

> 3203(b)(A): The first point of interconnection to the WECC transmission grid for both the eligible renewable energy resource and the resource providing the substitute electricity must be located outside the metered boundaries of a California balancing authority area.

There are two problems with this portion of the Proposed Regulations. First, there is no aspect of the SBX1 2 that requires that the substitute electricity must be located outside CBAs – the law only requires that that energy be "incremental" to the POU that is procuring the power. The statute does say that the electricity must be scheduled "into" a CBA, but this scheduling can occur via transmission scheduling from a resource located outside a CBA or generation scheduling from a resource located inside a CBA. In both cases, the energy is scheduled 'into' a CBA.

Second, should the CEC continue to read the word "into" as not including the word "in" -- that is, as requiring transmission scheduling from the outside to the inside of a CBA, the Proposed Regulations should allow such scheduling from one CBA to another. SBX1 2 does not state that that the electricity must be scheduled from outside all CBAs, it merely asks that it be scheduled "into" a CBA. This can occur from one CBA to another while meeting the stricter interpretation taken of what is meant by "into". Hence, the proposed regulation should not require the first point of interconnection of a substitute power resource to be "… outside the metered boundaries of a California Balancing Authority …", but rather, with this interpretation, "… outside the metered boundaries of the CBA to which the electricity is scheduled…"

2. **The CEC Should Include A Different Timing Restriction On The Scheduling Of Category 2 Substitute Energy.**

The Proposed Regulations continue to impose an additional "timing" restriction not found in the statute for Category 2 resources. The Proposed Regulations state that substitute energy must be procured within the same calendar year as the Category 2 renewable generation. This requirement is not found in the statute and is not consistent with the "compliance period' structure of the RPS or of the statute. Such a constraint creates "bottleneck" issues near the end of the calendar year, when late December Category 2 generation must be paired with sufficient "substitute power" by close of business December 31 of each year.

SMUD contends that there is no need to suffer these "bottleneck" issues, as the important distinction here is that the "substitute power" be delivered within the same compliance period as when the Category 2 generation is claimed for compliance, so that the generation can be distinguished from Category 3 resources. Section 399.16(b)(2) only requires that Category 2 electricity be "scheduled into a CBA" without

any specific timing requirement. No finer degree of timing is required by law, and the Energy Commission has not expressed a valid public policy goal for imposing an annual "matchup" requirement here.

Again, the purpose of requiring a timing match between the Category 2 generation and the associated substitute energy appears to be so that the generation can be easily distinguished from Category 3 generation – which has no substitute energy requirement. It is sufficient for purposes of determining between these categories to track substitute energy on a compliance period basis, as, with that timing, one can clearly distinguish between the Category 2 energy with substitute power and the Category 3 energy without that power. There are two ways for this compliance period "match" to happen. First, the "substitute power" could be delivered within the same compliance period that the renewable power is generated. Second, the renewable generation could be claimed for RPS use in a different compliance period than generated, but associated with "substitute power" within that compliance period (for example, in the next compliance period after actual generation). Both of these options should be allowed for maximum flexibility to procure power consistent with the varying market needs and procurement timing practices of each POU. Such treatment should minimize or eliminate the 'bottlenecks' where substitute energy for Category 2 resources is constrained by the calendar end of the year, as well as the longer compliance period.

3. **The CEC Should Allow Resale of Renewable Energy Back To The Facility When Considering Category 2 Procurement.**

The Proposed Regulations include subsection 3203(b)(2)(E), which states that electricity from the Category 2 renewable resource must be "available to be procured by the POU" and may not be sold back to the resource. This appears to be a nod back to a dispute under the old RPS as to whether such a transaction constituted an unbundled REC or a bundled, delivered purchase. However, the issue is no longer relevant under the new RPS, and the clause should be removed.

Under the old RPS, all energy was to be delivered to California, and there was a significant debate about what transactions constituted unbundled RECs, which were not clearly eligible initially, and which did not. The debate centered on this transaction – the purchase of energy and RECs, reselling of the energy directly back to the facility, and associating the RECs with other, "firmed and shaped" delivered energy for RPS purposes. The CEC maintained in its Guidebook that this transaction was a valid "bundled" firming and shaping transaction, while the CPUC maintained that the transaction was an unbundled REC transaction. While SMUD believes that the CEC was conceptually correct in this debate, the point is moot and the debate no longer necessary in the new RPS.

There are now three post-June 1, 2010, categories of resources, and the issue of whether energy is sold back to the facility which generated it is no longer an important debate. Category 1 resources are clearly separated in the new scheme, so there is no chance that a transaction such as this could be found to be a higher valued Category 1 resource. This was the main issue in the past, with different 'terms,' when there were only two categories of resources – bundled and unbundled. In addition, the distinction between Category 2 and Category 3 resources centers not on what happens to the underlying renewable energy after purchase but rather on the timing and structure of the substitute energy associated with a Category 2 resource. Category 2 requires this energy to be 'incremental,' and if this is not met per the interpretation of CEC's regulations, then the transaction becomes Category 3 (the "all other transactions" category). What happens with the initial renewable energy should have no bearing, as it is unimportant for these category determinations.

Given this, all that the CEC will accomplish by including subsection 3203(B)(2) (E) in the final regulations is an increase in the cost of Category 2 resources without any beneficial effect. Costs will increase any time an option is limited, and here the limitation essentially requires contracting with a separate party in cases where that may not be necessary. Such additional contract requirements are in most cases going to add costs to the transaction. There is no material difference in electricity flows overall, as in any case the underlying renewable electricity will be sold locally – either through the facility or some other intermediary – and the RECs associated with substitute energy per Category 2 requirements. Again, the added part (E) should be removed in the final regulations.

F. Increases in Category 3 Procurement Should Be Allowed When Category 1 Procurement Is Lowered.

The July Draft Regulations implemented a provision of law allowing for the reduction of the portfolio balance requirement for Portfolio Category 1 procurement, pursuant to PUC Section 399.16(e). Section 399.16(e) states that a retail seller may apply for a reduction in the procurement content requirements of "subdivision (c)." This refers to Section 399.16(c), which includes both the requirement that certain minimum percentages of post-June 1, 2010, contract procurement be met by Category 1 procurement, as well as that certain maximum percentages of post-June 1, 2010, procurement be met by Category 3 resources. The July Draft Regulations only address the former requirement.

SMUD believes that this partial implementation of Section 399.16(e) in the July Draft Regulations is in error. The law clearly refers to the Section 399.16(c) as a whole, not just Section 399.16(c)(1), which covers the minimum percentage requirement for

Category 1 procurement. The intent is to allow the reduction or 'relaxation' of the procurement limitations in the portfolio balance structure under certain circumstances. A reduction or relaxation of the portfolio Category 1 minimum requirement is clearly envisioned – Section 399.16(e) explicitly limits the potential relaxation here in later compliance periods. However, it is reasonable to also allow the "relaxation" or "reduction of" the limitation on portfolio Category 3 under the law, for the law applies equally to this part of Section 399.16(c). Here, the "reduction of" the limit is implemented by increasing the percentage requirement allowed for this Category. This is what must happen to effectuate a "reduction" in the procurement content requirement in this case, and the CEC errs by not implementing the portion of 399.16(e) that refers to this requirement.

To do otherwise sharply limits the application of the law here, which intends to allow compliance in a situation when the specific limitations of Section 399.16(c) cannot be met. It makes little sense to ignore the limitation on portfolio Category 3 procurement here, as this is the clearest course to achieve compliance in these limited circumstances. Reducing the percentage requirement for Category 1 procurement may not help if there is little Category 2 procurement available, and the limit on Category 3 procurement is not also "reduced". The CEC's "halfway" implementation here in effect blocks the intent of the law, and should be expanded to include a possible reduction in the limit for Category 3 procurement.

Thank you again for the opportunity to comment.

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cc: Corporate Files