STATE OF CALIFORNIA
BEFORE THE CALIFORNIA ENERGY COMMISSION

In the matters of: Amendments to the Regulations Specifying Enforcement Procedures for the Renewable Portfolio Standard for Local Publicly Owned Utilities	))))))	**Docket No. 11-RPS-01** SMUD Pre-Workshop Comments On: *Proposed Amendments to POU RPS Regulations* May 11, 2015
California Air Resources Board Pre-Rulemaking to Consider Potential Regulations on Renewables Portfolio Standard Penalties for Local Publicly Owned Electric Utilities	)))))	

Comments of the Sacramento Municipal Utility District on the *Proposed Amendments to the Enforcement Procedures for the Renewable Portfolio Standard for Local Publicly Owned Utilities*

Thank you for the opportunity to provide comments on the topic of potential amendments to the regulations for the Enforcement of the Renewables Portfolio Standard (RPS) on Local Publicly Owned Utilities (POUs). The Sacramento Municipal Utility District (SMUD) generally supports most of the proposed amendments to the regulations, but suggests additional changes for CEC consideration.

SMUD suggests additional changes in the following five areas, and provides a detailed rationale for the changes in the sections below:

- **Bundled definition**: SMUD appreciates the change to the definition of "bundled," but believes the CEC should make additional changes to more broadly reflect DG as "bundled" or Product Content Category 1 (PCC1) procurement.

- **Definition of Retail Sales**: SMUD believes the definition of retail sales should be modified to allow subtraction of voluntary green program load prior to calculation of RPS obligations, per SB 43.

- **Pre June 1, 2010 Contract Amendments**: SMUD appreciates the added provision clarifying treatment of contractual amendments to non-grandfathered pre-June 1, 2010 contracts, but believes the CEC should establish an alternative clarification and include identical contract modification language for grandfathered procurement.

- **Excess Procurement and Contract Amendments**: SMUD agrees that the CEC should include clarification of how the term of contracts and contract amendments affect excess procurement calculations, but believes the proposed CEC clarification is too restrictive and suggests alternative language.

- **Enforcement and Penalty Changes**: SMUD appreciates the CEC's attempt to clarify the distinct compliance violation and penalty roles of the CEC and the ARB, but believes that the CEC's proposed clarifications are not allowed by the RPS legislation.

A. Proposed Change To Definition of "Bundled" – §3201(e)

SMUD appreciates the clarification in the proposed changes to the definition of "bundled". The proposed addition clarifies that, "… electricity products associated with electricity consumed onsite may be considered bundled electricity products." The proposed language explicitly rejects this "bundling" treatment for electricity products associated with electricity consumed on-site if not owned by a POU. SMUD does not understand this differential treatment because of "ownership", and continues to believe that the CEC should include more than this one case of on-site generation and consumption as a bundled, PCC1 electricity product. SMUD urges additional clarification on this point as described below.

The Initial Statement of Reasons (ISOR) provides the rationale for the proposed change--that as the owner of the system the POU is procuring both the electricity and the RECs, regardless of where the electricity is consumed. The ISOR goes on to indicate that if a third-party or a customer owns the on-site system, as opposed to a POU, the associated electricity products would be considered unbundled even though the POU would still be procuring the RECs. The ISOR indicates that this type of transaction violates Section 3203(a)(1) of the Regulations, which prevents a POU from buying RECs and energy and then selling the electricity back to the generator, keeping the RECs. SMUD believes that the underlying rationale for considering on-site systems bundled can be extended to additional cases, and disagrees with the CEC's limited interpretation of Section 3203(a)(1).

a) Clarification of "Electricity Consumed On-Site": SMUD believes that it is unclear what is meant by the term "… electricity consumed onsite …" in the CEC's proposed clarification here. It would appear that what is meant is electricity consumed on the same site as the eligible renewable resource itself. It is unclear whether the CEC is attempting to address a separately metered "buy all/sell all" situation with electricity consumed on-site, a net-metered situation with the same, or some other similar situation.

SMUD believes that the CEC (and the CPUC) considers a transaction where a POU (or retail seller) procures all of the electricity and RECs from a system located on a customer site via a separate meter, and serves that customer's on-site load via a normal customer meter, as bundled, PCC1 procurement. Hence, SMUD believes that there would be no need to clarify the bundled nature of that transaction. Similarly, SMUD understands that the CEC (and the CPUC) do not consider a standard, customer or third party-owned net metered system as bundled (though SMUD has argued that these transactions can be considered "bundled"). Hence, SMUD does not believe that the CEC intends the clarification to cover a standard net-metering situation. So it appears that the CEC's clarification here reflects a situation where a POU is selling or providing electricity directly from an on-site system to the on-site customer, "behind the meter", but not net-metered. However, in all of the cases above, there is some "electricity consumed onsite" from the local system, making it unclear exactly what situation the CEC is attempting to clarify.

b) Procurement Cases and "Bundling": While SMUD still contends that SBX1 2 should ***not*** be interpreted as requiring all PCC1 products to be "bundled" procurements, we will not reiterate that argument here. Accepting for the purpose of discussion that PCC1 categorization requires bundling, SMUD remains of the opinion that all on-site generation within our service area can be considered "bundled". In particular, SMUD contends that ***all*** situations where a system is located on a customer site, but all energy from the system is sold to the POU, and the POU in return sells electricity to the customer, must be considered a "bundled" procurement, and do not violate section 3203(a)(1).

The following table comparing procurement cases, from pure unbundled RECs without energy delivery to a variety of on-site generation situations, illustrates this point. The first case shown is the case of procuring purely unbundled RECs without energy delivery. The second case involves selling electricity back to a generator outside one's service area (either with or without substitute energy). The third through fifth cases involve on-site generation within a POU service area with three different ownership/procurement models. The table also includes SMUD's understanding of the CEC's treatment of procurement in these cases as bundled or unbundled, along with a series of procurement "attributes" typically associated with PCC1 products, and finally SMUD's proposed "bundled" treatment of all of these cases. The table is color-coded to show where the procurement situations clearly comport with the concept of "bundled" procurement, where this is more uncertain, and where the situations comport with being "unbundled."

Comparison Table of Procurement Cases

Procurement Case ==➔ Bundled Attribute ‖ V	1. Utility procures Unbundled RECs from outside service area without electricity delivery	2. Utility procures Bundled RECs/energy from outside service area, sells energy back to generator	3. Utility procures RECs from customer or third-party owned on-site system under net metering agreement	4. Utility owns system on-site, sells energy from system to customer onsite (CEC clarification case)	5. Utility owns or procures all energy from on-site system, sells all electricity to customer through separate meter
A. CEC Proposed "Bundled" Treatment	Unbundled	Unbundled	Unbundled	Bundled	Bundled
B. Utility procures both energy and RECs, sells energy to customers	No	No	Procurement unclear due to net metering Energy sold to customers	Yes	Yes
C. Electricity Delivered to Service Area	No	No, unless utility procures & delivers associated substitute energy	Yes	Yes	Yes

D. Environmental Benefit in Service Area	Perhaps	Perhaps. Yes - with substitute energy delivery	Yes	Yes	Yes
E. Economic Development In Service Area	No	No	Yes	Yes	Yes
F. SMUD proposed revised “bundled” treatment.	Unbundled	Unbundled, or PCC 2 in some cases	Bundled	Bundled	Bundled

As one can see, from the color-coding as well as the cell contents in the Table, the last three procurement cases shown are consistent almost entirely (and SMUD believes entirely in cases 4 and 5) with the typical characteristics of “bundled” procurement. The CEC appears to be proposing adding case 4 to the “bundled” procurement category with the proposed change to the definition of “bundled”, consistent with the Table. SMUD contends that the CEC should also consider additional ownership structures under case 4 as bundled procurement. SMUD believes that the CEC should also consider case 3 as a “bundled” procurement, which is a much more significant case in terms of the amount of generation and systems installed. Based on the list of characteristics, considering case 3 as “bundled” makes more sense.

c) Addition of Third Party-Owned Systems to Case 4. In SMUD’s view, there is no difference, from a “bundled procurement” perspective, between the case of a POU-owned and a third party-owned system when the POU has contracted for the system to be built and provides service to an on-site customer of the POU or to a POU on-site load (such as a municipal building). As with a POU-owned system, procurement from a POU-contracted third party-owned system in this case involves a POU retail load being served by: 1) metered, bundled procurement of energy and RECs; 2) energy delivered to the service area; 3) an environmental benefit within the service area; and 4) economic development within the service area. None of these attributes are found with unbundled RECs procured outside the service territory; whereas all are found with the described third party-owned, on-site procurement, just as for POU-owned systems.

In contrast to the ISOR argument, the generation from the on-site system is not being sold back to the generator in violation of Section 3203(a)(1) in one case, and sold to a POU customer in the other case. In fact, in both cases the generation is procured as a bundled product and sold to the host POU customer to cover their retail load, not back to the generator, just like any other renewable procurement serving retail load.

The CEC is asserting that with third-party ownership, the structure is identical to procurement case 2 in the Table. The situation is sharply different from procurement case 2, where energy is sold back to a generator outside the POU service area, and where none of the generated electricity goes toward the POU's retail load, as can be seen in the Table. In this example, POU ownership of the system changes no characteristic that appears to make a difference with respect to bundled procurement or resale to the generator. The CEC is asserting a false difference with respect to bundled treatment between the functionally equivalent transactions of, "ownership agreement" and "procurement contract" – a difference that is not there.

In addition, the ISOR argument that in the third-party case the generation is "unavailable" to the POU is inaccurate. The POU has contracted for the system to be built and make generation available to a retail customer. That the electrons cannot be shown to go "up the line" to a POU substation and back "down the line" to the customer is immaterial because the "green" electrons cannot be traced in any case. More to the point, solar generation is constantly varying with solar insolation, as is on-site load. The supply and demand vary differently and rarely coincide, even for short intervals. Thus, generation from the on-site system is flowing onto the grid from moment to moment, and as capacity adjusts electrons flow back to the POU customer at other moments. The generation *is* available to the POU throughout the day and is delivered to the POU throughout the day, even though the net energy delivery may match over long periods of time. Nothing in the law prevents a POU from making electricity available to retail customers by procuring that generation from a third-party generator on those customers' sites.

The CEC can further clarify the definition of bundled as follows:

> "Bundled" means an electricity product that, when procured by the POU claiming the electricity product to satisfy its RPS procurement requirements, includes both the electricity and the associated renewable energy credits from an eligible renewable energy resource. <u>If the POU owns or contracts for generation from the eligible renewable energy resource, then electricity products associated with electricity consumed onsite may be considered bundled electricity products. If the POU does not own or contract for generation from the eligible renewable energy resource, then electricity products associated with electricity consumed onsite will be considered unbundled.</u>

d) Even Net-Metered Systems Should Be Bundled: It is also clear from the procurement case Table that even the "net-metered" procurement case 3 has much more in common with the attributes of "bundled" procurement than of "unbundled" procurement. SMUD has long advocated for net-metered systems to be considered bundled procurement and PCC1 procurement. The procurement table simply shows the consistency in characteristics between net-metered generation and PCC1 generation, with the only "question" whether the net-metered generation can be considered to involve "bundled" procurement of both RECs and energy from the eligible renewable resource.

With net-metered procurement where the POU gains the RECs (which is most of SMUD's net-metered procurement), the POU is in effect buying the electricity along with the REC at the customer's retail rate, and selling that electricity to our retail customers under the net-metering agreement. When an on-site system is exporting to the grid, the POU is procuring the electricity at retail cost, and the RECs, and the procured electricity is available to other retail customers. When an on-site system is generating to serve on-site load, the POU is procuring the RECs and the generation is made available to the POU's on-site customer and to other POU customers as the generation exceeds load from time to time throughout the day. The contractual relationship is the net metering agreement that permits the on-site system to interact with the POU grid to make the generation reliably available to the on-site customer, as well as to other POU customers.

This is in contrast to the true "unbundled REC" procurement case – case 1 in the Table. In the net-metered case 3, the utility is procuring RECs and electricity from a DG resource, and the distribution customers of the utility (including the on-site customer) are receiving that electricity. In the unbundled RECs case 1, the utility is only procuring RECs, and their distribution customers do not receive any electricity whatsoever from the underlying resource. This is a fundamental difference that is essentially ignored in the current framework.

To correct to the most reasonable definition of "bundled", the CEC should modify the definition as follows:

> "Bundled" means an electricity product that, when procured by the POU claiming the electricity product to satisfy its RPS procurement requirements, includes both the electricity and the associated renewable energy credits from an eligible renewable energy resource. <u>If the POU owns or contracts for generation from the eligible renewable energy resource, including under a net-metering agreement, then electricity products associated with electricity consumed onsite may be considered bundled electricity products. If the POU does not own or contract for the generation from the eligible renewable energy resource, then electricity</u>

products associated with electricity consumed onsite will be considered unbundled.

e) No Concern About "Double Benefit": Some stakeholders at the April 9th workshop on the draft regulations expressed concern about even the highly limited proposal to consider "bundled" on-site systems owned by a POU. These stakeholders maintained that if the CEC provided PCC1 status to such on-site systems (and by extension the broader accommodation of on-site PCC1 categorization recommended by SMUD above), this would effectively be a "double benefit", since the generation from the system already reduced retail load, and hence already provides an "RPS benefit". This concern is misplaced, and should not be accepted by the CEC as bearing on the categorization issue.

First, the RPS impact of the reduction in retail load is much less than the impact of full RPS crediting of the DG resource. At a 33% RPS, the credit for reducing retail load is one third the credit from counting the generation, not "double". Prior to reaching 33%, the credit from retail load reduction is even smaller in comparison to counting the generation. Second, the question of "double" or extra benefit from retail load reduction is not related to the "bundling" question, since distributed generation is already eligible and already providing retail sales reduction credit. The CEC is not proposing a change to this structure in their amendments at this point in time. The "retail load credit" of concern to these stakeholders is in no way commensurate with the differential value in the market of PCC1 resources versus PCC3 resources – it is obviously more important to receive PCC1 credit. The following table illustrates the effect on the RPS of 20 GWh of DG under different treatments for the DG as eligible or ineligible, and treatments of the retail load served by the DG.

Illustrative Effect of Net-Metered Distributed Generation on RPS Need

	(1) With No DG	(2) Current Standard Calculation	(3) Renewable DG Counts, And In "Retail Sales"	(4) Renewable DG Counts, But Not In "Retail Sales"
Example Gross Retail Sales	300	300	300	300
Example Renewable DG		20	20	20

Net Retail Sales	300	280	300 (DG sales added back in)	280
33% RNS Amt.	99	92	79 (99-20)	72 (92-20)
Result ---		DG lowers RPS by **7K** GWh (33% of DG energy)	RPS lowered by **20K** GWh (100% of DG energy counts)	RPS lowered by **27K** GWh (100% of DG energy counts, and lowers retail sales)

- The column labeled (1) illustrates the RPS with no DG. DG was not considered eligible in the pre-SBX1 2 years.
- The column labeled (2) illustrates the impact on renewable need when DG occurs, but is not included as eligible generation. Again, DG was not considered eligible in the pre-SBX1 2 years, but does lower retail sales in the calculation.

- The column labeled (4) illustrates what happens when DG occurs AND is considered eligible, but without adjusting retail load to reflect this. This is the current state policy, and provides both benefits from renewable DG – load reduction and renewable eligibility.

- Finally, the column labeled (3) illustrates what happens when retail load is “corrected” by including the distributed generation as serving retail load (which it in effect does). This path provides the full GWh benefit of renewable DG, but nothing extra.

SMUD has commented in previous proceedings that it would be best to structure the RPS so that DG gets full credit, and retail load is “corrected” by adding back in the generation to retail sales. After all, the generation is serving retail customers, and unlike most other self-generation, is doing so through net-metering, where a portion of on-site generation is typically exported and serves other customers. SMUD has also commented, here and previously, that DG should be considered a PCC1 procurement by virtue of its interconnection to a distribution grid within a California balancing authority.[1]

[1] Pub. Util. Code §399.16(b)(1): “Eligible renewable energy resource electricity products that meet either of the following criteria: …have a first point of interconnection with distribution facilities used to serve end users within a California balancing authority area …”

While it is true that without the correction to retail sales (adding the DG back into retail sales) there is an "extra" benefit for DG, this is not a reason to deny DG PCC1 categorization – a sharp devaluation in an attempt to compensate for the marginal benefit. There are two preferred alternatives. First, retail sales can easily be corrected by adding back in the generation from the distributed net metered systems. Second, the "extra" benefit can simply be considered as that – and extra benefit afforded to distributed generation in light of the state's policy preference for distributed generation, and similarly to the extra credits provided to DG in other RPS structures around the country.

f) **Market Disruption**: Stakeholders at the April 9th workshop also argued that the CEC should refrain from changing the rules for DG due to the potential for "market disruption" as rules change and as rules differ between the retail seller and the POU RPS market structures. It is true that certainty in the RPS market is important, and that there is concern about rule changes that materially affect an entity's participation in the RPS, as for example by making the resource more or less eligible, or by increasing transaction costs or hurdles for participation for the resource or entity. These concerns do not apply to the decision that the CEC is to make about the categorization of distributed generation in the POU RPS market.

A change in categorization of distributed generation does not alter the eligibility of a larger central station resource. Such a change does not alter the manner in which such a resource participates in the RPS market, nor the structure of such participation. A change in DG categorization does not change the rules that apply to larger generators at all. Nor would a change in how DG interconnected in POU service areas is categorized change how retail sellers participate in the RPS market – they have the same procurement rules and choices as before.

The one "market disruption" that can be asserted with categorizing DG as PCC1 is increased competition in the RPS market for resources of that category. Such increased competition is likely to lower prices available in the RPS market for these resources, so it is understandable that they would raise the "market disruption" card in order to protect themselves against that increased competition. While understandable, it is not a reason for policy makers to avoid such a change in rules. Rather, this is the kind of "market disruption" that the CEC should foster, not disfavor, in order to help achieve a least-cost RPS market. In fact, even retail sellers could enjoy lower costs for RPS procurement with a CEC decision to categorize more DG as PCC1.

B. Alter Definition of Retail Sales In Section 3201(cc)

SMUD suggests that the CEC 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. Senate Bill 43 from the 2013-2014 session enacted provisions that require investor owned utilities to establish voluntary green procurement programs, such as community shared solar programs, for their customers. In addition, the law included the following provision:

> 2833. (t) In calculating its procurement requirements to meet the requirements of the California Renewables Portfolio Standard Program (Article 16 (commencing with Section 399.11) of Chapter 2.3 of Part 1), a participating utility may exclude from total retail sales the kilowatt-hours generated by an eligible renewable energy resource that is credited to a participating customer pursuant to the utility's green tariff shared renewables program, commencing with the point in time at which the generating facility achieves commercial operation.

SMUD believes that the CEC should take the opportunity to count retail sales similarly in the enforcement procedures for publicly owned utilities. SMUD has two voluntary green pricing programs: Greenergy and an expanding SolarShares program. The Greenergy program provides SMUD customers with a voluntary option of having all of their power supplied by renewable resources. When the retail sales for these customers are included in overall retail sales, SMUD is effectively procuring renewable resources twice for these customers – once as part of the 100% renewable procurement in the program, and then again up to the required RPS percentage for the retail sales to these customers when included in overall retail sales. SMUD's expanding SolarShares program is based on the concepts that the new solar resources procured for these customers will not be part of SMUD's RPS resources, and that the customers' retail sales will not incur an RPS obligation for SMUD to procure additional renewables on top of the solar supplied to them.

SMUD recommends that the enforcement procedures be modified as follows:

(cc) **"Retail sales"** means sales of electricity by a POU to end-use customers and their tenants, measured in MWh. This does not include energy consumption by POU, electricity used by a POU for water pumping, <u>electricity sold to customers as part of a voluntary green pricing program</u> <u>that is sourced from eligible renewable generation</u>, or electricity procured for on-site consumption (self-generation).

C. Proposed Clarification of Treatment of Contract Amendments for Resources Subject to Section 3202(a)(3)

SMUD appreciates the clarification of the treatment of contract amendments for resources subject to Section 3202(a)(3) – resources procured prior to June 1, 2010 but which were not eligible under the RPS at the time of procurement. While there is not very much generation from these resources, in SMUD's experience, we agree that it is important to clarify the issue.

However, SMUD has two concerns or issues with the proposed additional language.

First, the language appears to suggest that changes can be made to a contract and be ignored from the perspective of product content categorization until the original term of the un-modified contract expires. For example, an entity could add capacity or generation in an amended contract, starting prior to the expiration of the original term, and continuing either to the end of the original term or to a new term as specified in the amendment. SMUD likes the specificity of the language, but believes the specifics on this issue should be slightly different. SMUD suggests the following:

> (C) If contract amendments or modifications after June 1, 2010, increase nameplate capacity or expected quantities of annual generation, increase the term of the contract, or substitute a different eligible renewable energy resource, only the MWhs or resources procured *under the terms of the original contract signed* prior to June 1, 2010~~,~~ shall be considered to meet the criteria of this section 3202 (a)(3)*, for as long as those terms continue to apply under the amended contract.* ~~for the term of the contract executed prior to June 1, 2010.~~ The remaining procurement~~, or any electricity products procured after the end of the original contract term,~~ must be classified into a portfolio content category and follow the portfolio balance requirements in accordance with section 3204 (c).

SMUD's suggested change will 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.

Second, SMUD notes that the CEC's proposed language (as well as SMUD's) is different from the language of similar intent found in Section 3202(a)(2)(B), which applies to the much larger set of "grandfathered", or PCC0 resources. The ISOR indicates that one reason for the proposed change is to provide clarity about changes to these resources "… in a manner consistent with the requirements of Section 3202(a)(2)(B)." However, the language for the earlier section 3202(a)(2)(B) is not identical to the proposed addition in 3202(a)(3)(C), and is not as specific as the proposed addition, leaving lack of clarity in this more important area. For example, it is unclear what, "… procured prior to …" means, as well as, "… remaining procurement…" Do 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 submits that the correct interpretation is the latter, and suggests that SMUD's proposed language be included in Section 3202(a)(2)(B) as well is in the proposed Section 3202(a)(3)(C).

D. Proposed Change to Treatment of Less-Than 10 Year Contracts – Amendments to those Contracts 3206(a)(1)(A)(3)

SMUD supports clarification of how amendments to contracts will be treated with respect to potential impacts on the calculation of excess procurement. SBX1 2 requires generation from contracts of less than 10 years to be subtracted from procurement totals prior to calculating excess procurement. The CEC and the CPUC have exempted short-term contracts for eligible resources that were signed by June 1, 2010 from this excess procurement calculation impact, reasoning that SBX1 2 mandates that these resources must “count in full” for the RPS. While the field has then been clear to stakeholders for these two types of contracts, it has ***not*** been clear for contract amendments in either case.

The original intent of the Legislature in placing the restriction on less than 10-year contracts appears to have been that long-term contracts are “better” for inducing new development of high capital, low operating cost resources such as renewables, allowing for less costly financing of these projects. Long term contracts do seem likely to help reduce financing costs in the case of development of new renewable projects, but the rationale does not apply to contract extensions for projects that are already built. In that case, the length of a contract extension is irrelevant to the prior development financing. Restricting contract amendments for already existing resources simply reduces their options to most effectively sell their product and remain in business generating renewable energy. The proposed regulation change – that contract amendments be at least 10-years in length in order to avoid punitive reductions from surplus procurement calculations – is counterproductive to the overall goal of fostering smooth growth and least cost development and operation of the renewable industry in California.

Consider the market dynamics and hypothetical situations. There is little, if any, policy need to be restrictive about short-term contract amendments. In general, it reduces transaction costs and procurement costs and provides increased certainty for both buyer and seller to sign longer term contracts, so these tend to be heavily favored in the market. One can look historically at renewable contracts and find very few short-term contracts, even prior to the less than 10-year restriction in place in California today. Long term contracts are the norm in the market, and really need no policy “shoring-up”. There is no incentive to incur the costs and uncertainties of multiple short-term contract extensions on either the buyer’s or seller’s part – this just doesn’t happen in the general marketplace.

On the other hand, there are situations where a shorter-term contract amendment may make sense for both buyer and seller. A buyer may have a procurement need for just a few years of additional renewable energy to achieve compliance as other contracted resources get built and start producing under long-term contracts. A seller may have a “window” of a few years where their generation is without contract, in between an initial long-term contract and a second contract with another buyer that begins a few years after the end of the first (because the buyer wanted product then, not needing it in the intervening years). A renewable project may find itself with a few years of additional marketable generation at the end of a long term contract but before the end of the useful life of the project. However, if a prospective buyer (in either situation above) has any prospect of surplus procurement for a compliance period under the CEC’s proposed language, these cost-effective “market-making” opportunities will simply not be pursued – the value is at best then highly uncertain. The CEC’s inflexible interpretation does not consider the marketplace and will simply raise RPS costs and cause premature retirement of renewable projects.

Rather than the proposed language, SMUD recommends the following:

3. Electricity products procured under contracts of less than 10 years in duration shall be subtracted from the calculation of excess procurement, unless the electricity product meets the criteria in section 3202(a)(2). *If electricity products are procured under a contract that has been amended to extend the term, the term of the amended contract will be calculated from the the original contract execution date to the amended contract end-date.*

E. The CEC's Proposed Modifications to the RPS Enforcement Regulations in Section 1240(d) and (g) Are Inconsistent with the Limited Role Assigned the CEC under the Law.

SMUD generally concurs with comments being submitted by CMUA, NCPA and SCPPA. As these comments demonstrate, most POUs in California disagree with the expanded enforcement role sought by the CEC, and are quite concerned that the CEC is attempting to exert influence over the California Air Resources Board's (ARB) penalty decisions. Consequently, SMUD requests that the CEC reconsider its proposed modifications and respect the limits placed on its authority by the Legislature in SBX1 2. Public Utilities Code subsection 399.30(m) grants the CEC authority to determine compliance with the RPS program. Subsection (n) gives the ARB exclusive purview over enforcement of violations found by the CEC through existing ARB penalty authority. The statute separates the roles of the two agencies into a liability determination by one agency and a penalty determination by the other. The basis for this structure is inherent from the nature of publicly owned electric utilities.

Although various POUs have their genesis under different laws, they are all local government agencies. Either directly or indirectly, they are run by elected officials who are answerable to the voters. They have a special duty to serve the public interest and carry out their duties in relative transparency because of laws such as the Brown Act and the Public Records Act. Thus, as democratically elected governments who conduct business in an open and public way, they are entitled to substantial deference when implementing their statutory responsibilities.

The Legislature recognized the governmental nature of POUs in several ways when it passed SBX1 2. For example, that statute allows the governing boards to adopt renewable energy procurement plans and implement procurement targets.[2] The governing boards must also adopt their own enforcement plans, which the CEC may not

[2] Pub. Util. Code §399.30(a) and (b).

change or approve.[3] The governing boards may also adopt rules for delaying timely compliance and cost limitations on procurement.[4] Clearly, the Legislature has invested the POUs with substantial authority to implement their own RPS programs, and enforce their RPS programs. This structure is quite different from the paradigm of governmental regulation of private corporations, which is typified by public utility commission oversight. Instead, the RPS statutes entrust the POU governing boards with a first line enforcement role, and charge the CEC with the second line of responsibility to determine when the POU has not met its renewable procurement targets. That limited role is evident in the division of responsibility between the CEC and ARB in subsections (m) and (n), because by dividing the enforcement roles, the Legislature deliberately diluted the CEC's power in deference to POU self-governance. The Legislature was careful not to set up the CEC as a pseudo-PUC over the POUs.

However, by voluntarily undertaking the responsibility of "making findings … upon which the [ARB] may rely in assessing penalties" and voluntarily making decisions that could "include suggested penalties for the [ARB] to consider", the CEC is assuming both roles in conflict with the will of the Legislature. Concentration of such authority in the CEC is inconsistent with the division of labor evident in subsections (m) and (n), and inconsistent with the enforcement authority retained by the POUs.

The concern that the CEC is aggregating complete enforcement authority to itself is not overstated. The CEC's Initial Statement of Reasons (ISOR) buttresses the POUs' concerns:

> 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 Energy Commission's final decision and supporting record will serve as the basis for any subsequent ARB penalties assessed against a POU. 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. Consequently, it is in a POU's interest, when providing an answer to an Energy Commission complaint, to identify any and all mitigating or otherwise pertinent factors related to any alleged violation or a possible monetary penalty that may be imposed by the ARB for noncompliance with the RPS. The changes to subdivision (d)(1) will encourage

[3] Pub. Util. Code §399.30(e).
[4] Pub. Util. Code §399.30(d).

POUs to consider and address all mitigating and pertinent factors when answering an Energy Commission compliant.[5]

The text supports the conclusion that the CEC is declaring its intention to influence the ARB's penalty decision. The ISOR quite plainly states that the CEC intends to find facts to support a recommendation of a penalty. The ISOR also says that the ARB does not intend to "re-adjudicate" decisions or findings of facts that serve as the basis for ARB penalties. The appearance this gives is that discussions have taken place between the two agencies and some kind of agreement has been reached that ARB will defer to a recommended penalty by the CEC. Even if this text does not reflect such an agreement, the *de facto* influence of the one agency upon the other cannot be denied. Should the CEC collect "mitigating or otherwise pertinent factors related to … a possible monetary penalty" and offer its recommendation, is it very likely that the ARB will defer in some measure to the CEC out of respect for its sister agency, especially one with more experience with POUs than itself. Such a "recommendation" is more than just that; it is a finding that the ARB will find hard to ignore.

It is hard to avoid the conclusion that by assuming the liability and penalty functions over the POUs, the CEC is attempting to broaden its role into that of a pseudo-PUC. Based upon the proposed section 1240(d) and (g), and the CEC's statements in the ISOR, this is a reasonable concern. SMUD requests that the CEC recalibrate its vision of enforcement of POU RPS programs, and revise its proposed modifications to Section 1240 as follows:

(d)(1) …The answer may also 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 ~~or to a possible monetary penalty that may be imposed for noncompliance. The information included regarding any mitigating or otherwise pertinenet factors may describe all relevant circumstances, including, but not limited to, the following:~~

~~(A) The extent to which the alleged violation has or will cause harm.~~

~~(B) The nature and expected persistence of the alleged violation.~~

~~(C) The history of past violations.~~

~~(D) Any action taken by the local publicly owned electric utility to mitigate the alleged violation.~~

[5] ISOR, at p. 13.

~~(E) The financial burden to the local publicly owned electric utility.~~

(g) ~~The decision will include all findings, including fidnings regarding mitigating and aggravating factors, upon which the Air Resources Board may rely in assessing a penalty against a local publicly ownded electric utility pursuant to Public Utilities Code section 399.30, subdivisions (m) and (n). The decision may also include suggested penalties for the Air Resources Board to consider, as appropriate. Any suggested penalties shall be comparable to penalties adopted by the California Public Utilities Commission for noncompliance with a Renewables Portfolio Standard requirement for retail sellers.~~

Thank you again for the opportunity to comment.

/s/

WILLIAM W. WESTERFIELD, III
Senior Attorney
Sacramento Municipal Utility District
P.O. Box 15830, MS B406
Sacramento, CA   95852-0830

/s/

TIMOTHY TUTT
Government Affairs Representative
Sacramento Municipal Utility District
P.O. Box 15830, MS A404
Sacramento, CA   95852-0830

cc:	Corporate Files (LEG 2013-0212)