

BEFORE THE ENERGY COMMISSION
OF THE STATE OF CALIFORNIA

California Energy Commission

DOCKETED

14-RPS-01

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JUL 21 2015

In the matter of:)	Docket No. 14-RPS-01
)	
Amendments to Regulations Specifying Enforcement)	RE: Notice of 15-Day Comment Period
Procedures for the Renewables Portfolio Standard)	Regarding Modifications of Regulations
For Local Publicly Owned Electric Utilities)	Establishing Enforcement Procedures for
)	the Renewables Portfolio Standard for
)	Publicly Owned Electric Utilities

**COMMENTS FROM THE LOS ANGELES DEPARTMENT OF WATER AND POWER TO THE
CALIFORNIA ENERGY COMMISSION REGARDING NOTICE OF THE 15-DAY COMMENT PERIOD
REGARDING MODIFICATION OF REGULATIONS ESTABLISHING ENFORCEMENT PROCEDURES
FOR THE RENEWABLES PORTFOLIO STANDARD FOR LOCAL PUBLICLY OWNED ELECTRIC
UTILITIES**

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INTRODUCTION

The City of Los Angeles (City of LA) is a municipal corporation and charter city organized under the provisions set forth in the California Constitution. The Los Angeles Department of Water and Power (LADWP) is a proprietary department of the City of LA, pursuant to the Los Angeles City Charter, whose governing structure includes a mayor, a fifteen-member City Council, a five-member Board of Water and Power Commissioners (Board). LADWP is the third largest electric utility in the state, one of five California Balancing Authorities, and the nation's largest municipal utility, serving a population of over four million people.

LADWP is a vertically integrated utility, both owning and operating the majority of its generation, transmission and distribution systems. LADWP has annual sales exceeding 23 million megawatt-hours (MWhs) and has a service territory that covers 465 square miles in the City of LA and most of the Owens Valley. The transmission system serving the territory totals

more than 3,600 miles and transports power from the Pacific Northwest, Utah, Wyoming, Arizona, Nevada, and California to Los Angeles. LADWP appreciates the opportunity to provide feedback on the California Energy Commission (CEC) 15-Day Comment Period Regarding Modifications of Regulations Establishing Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities.

**LADWP APPRECIATES SEVERAL OF THE CHANGES IN THE 15-DAY EXPRESS TERMS,
BUT REMAINS CONCERNED ABOUT SEVERAL ISSUES**

After review of the revised Express Terms released on July 6, LADWP appreciates several of the new changes that were incorporated by the Energy Commission staff. However, LADWP remains concerned about the other issues identified in our initial comments that were not addressed in the new Express Terms.

LADWP appreciates the strikeout of the following language that was added to the definition of “bundled”:

If the POU does not own the eligible renewable resource, then electricity products associated with electricity consumed onsite will be considered unbundled.

By removing this rigid requirement of ownership, POUs will continue to have the flexibility to choose among various methods of renewable energy procurement such as ownership, shared ownership, long-term Power Purchase Agreements (PPAs), etc.

LADWP also appreciates the language modifications made in Section 3206(a)(1)(A)(3) regarding excess procurement. These changes will now allow for any procurement contract to qualify as an excess procurement contract once its terms are extended to or beyond 10 years, assuming that the contract already satisfies the other requirements in the section.

Below, LADWP identifies the issues of concern that we believe the CEC should reconsider before adopting the new Express Terms modifying the Enforcement Procedures for POUs.

SPECIFIC ISSUES RAISED BY LADWP THAT WERE NOT ADDRESSED IN THE MODIFIED EXPRESS TERMS

To supply fifty percent of power with renewables, distributed generation and rooftop solar, in particular, will play a large role. To the extent that rooftop solar is either excluded from renewable resources or devalued for purposes of meeting the RPS by being classified as portfolio content category (PCC) 3, the CEC will be tearing this valuable resource away from a much needed portfolio of resources to achieve the vision of fifty percent renewables. Similarly, the CEC's certification and audit requirements should pragmatically permit the participation of these resources. LADWP encourages the CEC to recognize the contractual and ownership structures under which distributed generation qualifies as PCC1. LADWP also encourages the CEC to consider further simplifications to the certification and reporting requirements, such that all utility customers can reasonably qualify their generating systems for the RPS and receive the full value of their generation.

Definition of "bundled" (Section 3201)

Although LADWP appreciates the removal of the last sentence in the definition of "bundled", the remaining language still needs further clarification. LADWP recommends that the "bundled" example be further clarified as follows:

For example, if the POU claiming an electricity product owns the associated eligible renewable energy resource, then all electricity products, including those associated with electricity consumed onsite **will** be considered bundled electricity products.

Replacing the word "may" with "will" provides more certainty and clarity on whether the electricity products would be considered "bundled" or not. "Will" defines clearly that these products would be considered "bundled", while "may" allows for loose interpretation which may have unexpected consequences in the future.

Definition of "resale" or "resold" (Section 3201)

The CEC adds the terms "resale" and "resold" to Section 3201 and defines these terms as

follows:

“Resale” or “resold” means the sale from any entity to a POU of part or all of the electricity products procured by the entity through an executed procurement contract, as opposed to an ownership agreement.

LADWP continues to recommend that this new definition be removed. The definition has the potential to create ambiguity as to its impact on wholesale transactions for electricity products. The “Initial Statement of Reasons” posted March 27, 2015 (“ISOR”), expressed a desire to clarify Regulation 3203. However, the definition may be limiting a POU’s ability to sell electricity products via wholesale on the open market, impacting in-state and out-of-state wholesale transactions differently. See Regulations 3202(a) and (b), in addition to 3203(a) (2) and (3).

In addition, the ISOR discusses the proposed new definition of resale in the context of Regulation 3203, but does not address the impact of the change to Regulation 3202. Specifically, the CEC 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 for “grandfathered” resources. There is some concern that the proposed definition may have the unintended consequence of affecting the count-in-full status of electricity products subject to Regulation 3202(a)(2)(A) following the acquisition of such an eligible renewable energy resource pursuant to a purchase option, security interest or other purchase opportunity vehicle included in the original contract or ownership agreement executed on or prior to June 1, 2010. This would be contrary to the existing legislative and regulatory framework. To avoid any confusion, DWP recommends that Regulation 3202 be revised to include the following clarification:

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).

Portfolio Content Category 0 Definition (Section 3202(a)(2))

In the 7th Edition of the Renewables Portfolio Standard Guidebook, Portfolio Content Category 0 was defined as follows:

Procurement claims from ‘count in full’ contracts are not classified in PCCs. Additionally, there is no delivery requirement for ‘count in full’ procurement. As such, there are no delivery or scheduling verification responsibilities associated with “count in full” procurement claims.

In the newly adopted 8th Edition of the Renewables Portfolio Standard Guidebook, this language was removed with the promise that the portfolio content category definitions for POUs would be relocated to the POU Enforcement Regulations. However, this language or any language similar to the excerpt above regarding PCC 0 has not been included in the Express Term modifications for the POU Enforcement Regulations. Therefore, LADWP recommends that language defining Portfolio Content Category 0 and its requirements (similar or identical to the excerpt above) should be added to section 3202 (a)(2).

Contract Amendments and Modifications (Section 3202(a)(3))

In this section, the CEC adds a new item (C) to identify contract amendments that would impact the eligibility of the facility’s electric products. Item 3202(a)(3)(C) states:

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 prior to June 1, 2010, shall be considered to meet the criteria of this section 3202 (a)(3) 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).

This new item ensures consistency with the guidelines identified for contracts described in

Section 3202(a)(2)(B). However, the language used for both sections 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. The renewable energy resource should only be reclassified when original contract terms no longer apply. LADWP recommends that the language in Section 3202(a)(2)(B) and 3202(a)(3)(C) be modified to only identify conditions in which a new contract or significant modification to an existing contract, such as including a new renewable energy resource, would cause the eligible renewable energy products to be reclassified into a PCC. Contract extensions, equipment efficiency upgrades, or facility expansions should not trigger a reclassification of renewable energy products.

**Additional Requirement for Demonstrating PCC1 Status for Out-Of-State Renewable Resources
(Section 3203(a)(D))**

In this section, the CEC adds the following requirement to 3202(a)(D) regarding proof of dynamic transfer agreements for out-of-state renewable resources to qualify as PCC1:

For purposes of this section 3203, electricity generated by the eligible renewable energy resource shall be scheduled into a California balancing authority area on an hourly or subhourly basis.

LADWP recommends that the CEC remove this additional language. The CEC’s Initial Statement of Reasons (ISOR) states that the proposed change is made to “bring electricity products procured under dynamic transfer agreements into alignment with other electricity products in PCC 1 in accordance with Public Utilities Code section 399.16(b)(1).” However, Public Utilities Code Section 399.16(b)(1)(B) clearly provides that an electricity product qualifies as PCC1 if the eligible renewable resource has “an agreement to dynamically transfer electricity to a California balancing authority.” There is no statutory requirement that dynamic transfer agreements schedule energy on an hourly or subhourly basis and, thus, no basis to add such a requirement into the regulations. Rather, the legislation is clear that the existence of a dynamic transfer agreement – by itself – is sufficient to establish PCC1 status.

The ISOR also states that the proposed modification is consistent with the requirements established by the CPUC as discussed in Decision 11-12-052. However, that Decision does not support this contention. For example, Decision 11-12-052 states, among other things, the following regarding dynamic transfer agreements:

- A separate criterion for this portfolio content category is that the RPS eligible generation facility providing the electricity '[h]as an agreement to dynamically transfer electricity to a California balancing authority.' The term 'dynamic transfer' refers to a range of methods by which a balancing authority receiving electricity generated in another balancing authority area may provide some or all of the functions and services typically provided by the balancing authority in which the generation facility is interconnected. (D.10-03-021 at 32-34.) As several parties point out, the actual dynamic transfer arrangement is made between the balancing authorities, not the generator and the buyer. The statutory direction should therefore be understood to mean the generation claimed for RPS compliance in accordance with this criterion is covered by an agreement that was executed by a California balancing authority, before the electricity is generated, to dynamically transfer electricity from the RPS-eligible generator outside a California balancing authority into the California balancing authority area during the time period in which the RPS-eligible electricity is generated. Because the techniques and protocols for dynamic transfer are evolving, it is most reasonable to read this criterion broadly, as applying to those arrangements accepted by a California balancing authority as providing for dynamic transfer. (Decision 11-12-052, § 3.5.2 at 27-28).
- If dynamic transfer is being used, an IOU's upfront showing must provide appropriate documentation of the dynamic transfer agreement, that the generation is included within the scope of the agreement, and that the agreement will be in operation at the time of the generation covered under the contract. At the stage of compliance determination, all retail sellers claiming generation under this criterion must be able to demonstrate that the dynamic transfer mechanism was in place and effective at the

time of the generation claimed, and that the generation was actually dynamically transferred. Such a demonstration is required in addition to the report that retail sellers provide to the CEC for verification of generation. (Decision 11-12-052, § 3.5.5 at 47.)

Decision 11-12-052 reinforces the fact that the requirement to have a dynamic transfer agreement in place as referenced in Section 399.16(b)(1)(B) should be broadly construed to give California balancing authorities the flexibility needed to define these agreements as necessary. Dynamic transfer agreements have different requirements based on the preferences and capabilities of each balancing authority. Not all dynamic transfer agreements follow the same framework, and the CEC should not interfere with contractual arrangements already in effect. Nor has the CEC offered a compelling reason justifying this change. Therefore, the CEC should delete the proposed modification to ensure that the regulations remain consistent with Section 399.16(B)(1)(B).

Optional Compliance Measures Regarding Delay of Timely Compliance (Section 3206(e) & (f))

In (e) and (f) of Section 3206, the CEC outlines possible scenarios in which POU's could be forgiven for shortfalls in their RPS procurement requirements and/or portfolio balance requirements. Both of these sections reference 3206(a)(3) as containing the list of acceptable reasons in which a delay of timely compliance could be forgiven.

LADWP believes that the reasons for delay of timely compliance should not be restricted to the reasons listed in Section 3206(a)(3) of this regulation. Other reasons should be acceptable for a delay in timely compliance such as "force majeure" (natural or manmade disasters) and "regulatory delays". These two terms should be incorporated into Section 3206(a)(3) and clearly defined in Section 3201 Definitions. LADWP supports the detailed SCPA comments on this issue.

New Reporting Requirement for Energy Consumption by the POU (Section 3207(c)(2)(I))

In section 3207, CEC adds the following requirement to the annual compliance reporting

for POU's:

- (l) A description of the energy consumption by the POU, including any electricity used by the POU for water pumping, the purpose of this consumption, the annual amount in MWh, and the annual amount in MWh being satisfied with electricity products.

LADWP recommends that the requirement to itemize water pumping consumption be removed. Water pumping loads are typically not metered separately from an entire facility. Metering is not designed to provide that kind of detail. Total overall POU consumption numbers are available and reported to other agencies in various forms. However, LADWP would not be capable of fulfilling this new reporting requirement in the form that it has been written. LADWP suggests that the CEC remove this additional reporting or rewrite the requirement with more clarification on the specific type of data needed and for what purpose it is required.

Modifications to Renewables Portfolio Standard Enforcement (Section 1240)

For local publicly owned electric utilities ("POUs") the Legislature identified and divided the roles for administering California's Renewables Portfolio Standard Program ("RPS") among POU's, the California Energy Commission ("CEC"), and California Air Resources Board ("ARB"). The Legislative obligations for the RPS on a POU are primarily self-administered. Just about each obligation begins with a phrase akin to "the governing board shall" or "each local publicly owned electric utility shall." See subsections (a) through (l) of PUC Section 399.30.

The Legislature essentially identified six factors, found in PUC section 399.30(a) through (f), to guide a POU's administration of the RPS. A POU was required to identify (a) a plan, (b) targets, (c) quantities of resources to procure, (d) optional measures, to help with its compliance, (e) a program for enforcement, and (f) a notification process to the CEC and the public of its plans.¹ With respect to POU's, specifically, the CEC's role is limited to fact finding,

¹ See PUC Section 399.30(a) – (f) (A POU's "renewable energy resources procurement plan" [399.30(a)], "procurement targets" [399.30(b)], procured quantities of eligible renewable energy resources[399.30(c)], optional compliance measures, such as "delaying timely compliance" [399.30(d)], meeting, "adopt a program for the

issuing a notice of violation, issuing a notice of correction, and for referral of violations to the ARB for penalties,² but the CEC's and the ARB's roles for POU's are not identified until 399.30 subsections (m) and (n).

Public Utilities Code Sections 399.30(m) and 399.30(n)(1) delineate separate and distinct responsibilities for the CEC and ARB. The CEC is responsible for determining whether a POU is sufficiently engaged to meet a POU's compliance with its RPS obligations. In the event the CEC determines that a POU violated its RPS obligations, the ARB is responsible for determining whether and to what extent the ARB should impose penalties, if any, against a POU for the particular violations. Under Section 399.30(e), a POU is tasked to "adopt a program for enforcement of this article" while Section 399.30(m) provides that the CEC "shall adopt regulations specifying procedures for enforcement of this article." (emphasis added). A POU has a self-governed program, while the CEC has a due process regime.

"The regulations shall include a public process under which the [CEC] may issue a notice of violation and correction against a [POU] for failure to comply with this article, and for referral of violations to the [ARB] for penalties pursuant to subdivision (o)." Section 399.30(n)(1), in turn, provides that "[u]pon a determination by the [CEC] that a [POU] has failed to comply with this article, the [CEC] shall refer the failure to comply with this article to the [ARB], which may impose penalties to enforce this article consistent with Part 6 (commencing with Section 38580) of Division 25.5 of the Health and Safety Code. Any penalties imposed shall be comparable to those adopted by the [PUC] for noncompliance by retail sellers."

Sections 399.30(m) and 399.30(n)(1) do not – on their face – authorize the CEC to recommend suggested penalties under the Health & Safety Code. Nor can such a right reasonably be implied when construing Section 399.30 as a whole because penalties are always referenced in the context of the ARB's discretion or enforcement authority. See e.g., Pub. Util.

enforcement of this article" [399.30(e)], and notification process when a POU will "deliberate in public on its renewable energy resources plan" [399.30(f)].

² To "adopt regulations specifying procedures for enforcement" for Article 16 of Chapter 2.3, Part 1, Division 1 of the Public Utilities Code. PUC Section 399.30(m).

Code § 399.30(n)(2) (If Division 25.5 of the Health & Safety Code is suspended or appealed, the “[ARB] may take action to enforce this article on [POUs] consistent with [H&S Code § 41513], and impose penalties on a [POU] consistent with” specific provisions under the Health & Safety Code); *Id.* § 399.30(n)(4) (“If the [ARB] has imposed a penalty upon a [POU] for the utility’s failure to comply with this article, the [ARB] shall not impose an additional penalty for the same infraction”); *Id.* § 399.30(n)(5) (“Any penalties collected by the [ARB] pursuant to this article shall be deposited in the Air Pollution Control Fund”).

Under well-established principles of statutory construction, “when one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning.” *Cornette v. Dep’t of Transp.*, 26 Cal.4th 63, 73 (2001); *Klein v. U.S.*, 50 Cal.4th 68, 80 (2010) (same). “[This] rule of statutory construction is applicable unless a contrary legislative intent is expressed in the statute or elsewhere.” *CPF Agency Corp. v. R&S Towing Servs.*, 132 Cal. App. 4th 1014, 1028 (2005). Here, there is nothing in Section 399.30 that demonstrates that the Legislature intended the CEC to have a role in recommending suggested penalties for a POU’s noncompliance with the RPS standards. *See Dyna Med, Inc. v. Fair Employment & Housing Comm’n*, 43 Cal.3d 1379, 1389 (1987) (“An administrative agency cannot by its own regulations create a remedy which the Legislature has withheld.”).

Similarly, the ARB is responsible for enacting rules and regulations relating to the enforcement of Division 25.5 of the Health & Safety Code (commencing with Section 38500), which includes the rules for imposing penalties for violations of “emissions reduction measures” pursuant to Health & Safety Code Section 38580. Section 399.30(n)(1) states that the ARB “may impose penalties to enforce this article” which connotes that the imposition of penalties is discretionary and not mandatory. Consistent with this discretion, the ARB must implement a rulemaking proceeding to establish the criteria upon which penalties may be imposed under the Health & Safety Code. It is unclear how the CEC could reasonably recommend proposed penalties when the ARB has not commenced a rule-making proceeding to determine how the penalty structure will fit within the existing statutory framework under

the Health & Safety Code. For example, the ARB may need to establish rules permitting a penalty structure based on multi-year compliance periods, as opposed to a penalty structure based on daily violations. In addition, consistent with Section 399.30(n)(4), the ARB must implement rules to ensure that a POU is not penalized twice for the same infraction under the Division 25.5 of the Health & Safety Code. The Legislature did not authorize the CEC to determine how RPS-related penalties will fit within the existing Health & Safety Code regulations.

Furthermore, the CEC's Initial Statement of Reasons (ISOR) suggests that the CEC intends to assume or usurp the ARB's statutorily-delegated responsibilities:

The Energy Commission's final decision regarding any complaint issued pursuant to section 1240 will include all findings of fact, including any findings regarding 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 facts related to any alleged violation or a possible monetary penalty that may be imposed by the ARB for noncompliance with the RPS. (ISOR at 13)

There is nothing in Section 399.30 that would permit the ARB to delegate or allow the CEC to assume or usurp the ARB's responsibilities under the Health & Safety Code. Thus, the proposed modifications to Section 1240 – if enacted – could potentially run afoul of Government Code Section 11342.2, which prohibits the adoption of regulations that are inconsistent with the enabling statute.³

³ The current version of Section 1240(g) provides, in relevant part, that the CEC's decision will include all findings, including findings regarding mitigating and aggravating factors, upon which the [ARB] may rely in assessing a penalty against a POU..." The ISOR, in contrast, states that the ARB will rely upon the CEC's findings.

Furthermore, POU's should not have to address evidence relating to penalties until after a final determination has been made regarding a POU's noncompliance with its program for enforcement of its RPS standards. Assuming that there is a final determination finding noncompliance, a POU should be permitted to introduce any mitigating evidence to the ARB relevant to the imposition and/or amount of penalties.

Finally, the existing regulations already address mitigating factors relating to findings of noncompliance. For example, Section 3208(b) provides that the CEC may issue a complaint against a POU for the failure to comply with the RPS procurement targets or the portfolio balance requirements for reasons "other than the POU's adopted cost limitations and/or delay of timely compliance rules" as specified in Sections 3206(a)(2) and (3). Section 1240(d)(1) also provides that a POU's answer to a complaint may "include information deemed relevant by the [POU] to support findings of fact regarding any mitigating factors related to any alleged violation." Thus, to the extent the proposed modifications seek to address mitigating evidence relating to alleged violations of the RPS requirements, the modifications are redundant and unnecessary. To the extent the proposed modifications seek to address penalties, the modifications should be deleted for the statutory and prudential reasons listed above.

Accordingly, LADWP recommends that the CEC delete all proposed modifications to Section 1240.

CONCLUSION

In closing, LADWP appreciates this second opportunity to comment on the California Energy Commission's Express Term Modifications to the Renewables Portfolio Standards Regulations for local Publicly Owned Utilities. We look forward to continue working with the California Energy Commission to help shape the creation of good regulation that will advance the success of California's Renewables Portfolio Standard Program.

Dated: July 21, 2015

Respectfully Submitted,

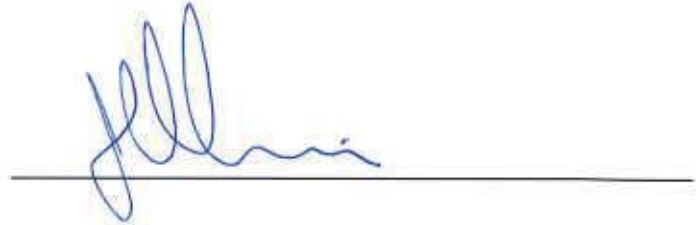
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CONCLUSION

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