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STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:	)	**Docket No. 16-RPS-02**
	)	
Appeal by LADWP re RPS Certification or Eligibility	)))))	**RE: LADWP's Reply Response to the Committee's Scoping Order dated July 27, 2016; Supporting Memorandum of Points and Authorities**

THE LOS ANGELES DEPARTMENT OF WATER AND POWER'S REPLY RESPONSE TO THE COMMITTEE'S SCOPING ORDER DATED JULY 27, 2016; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

September 21, 2016

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STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:	)	**Docket No. 16-RPS-02**
	)	
Appeal by LADWP re RPS Certification or Eligibility	)	**RE: LADWP's Reply Response to the Committee's Scoping Order dated July 27, 2016; Supporting Memorandum of Points and Authorities**

THE LOS ANGELES DEPARTMENT OF WATER AND POWER'S REPLY RESPONSE TO THE COMMITTEE'S SCOPING ORDER DATED JULY 27, 2016; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

LADWP submits the following Reply Response and Supporting Memorandum of Points and Authorities ("Reply Response") pursuant to the Committee Scoping Order dated July 27, 2016 (TN# 212485). LADWP's Reply Response is based on the points and authorities addressed below, the Third Supplemental Declaration of Louis C. Ting in 16-RPS-02 dated September 21, 2016, the Declaration of Robert Campbell in 16-RPS-02, the declarations and supporting evidence LADWP previously filed in 16-RPS-02, and any additional arguments or evidence that the Committee may hear and consider during the hearing on these issues. LADWP's Reply Response addresses the arguments raised in the Staff's Response to Committee Questions dated September 1, 2016, TN#213474, ("Staff's Response").

I. INTRODUCTION

Staff's Response significantly narrowed the scope of this dispute and the issues that the Committee must resolve in this proceeding. Staff's Response contains key admissions that confirm that Staff's interpretation and implementation of Public Utilities Code Sections 399.12(e), 399.16, and 399.12.6 are inconsistent with the plain language and legislative intent of SBX1-2 and AB 2196 and, therefore, must be rejected by the Committee.[1] Staff's Response admits that the City and LADWP's Board retained the discretion to determine the governing procurement and eligibility rules for LADWP's renewable resources and procurement contracts under Public Utilities Code Section 387. Staff also admitted that LADWP had no statutory obligation under Section 387 to certify its renewable resources under the CEC's RPS Eligibility Guidebook standards. Staff's Response admits that SBX1-2 created for the first time the statutory obligation for POUs, like LADWP, to certify renewable resources under the standards of Public Resources Code Section 25741 and the CEC's RPS Eligibility Guidebook standards. Taken together, these admissions confirm that the Staff's interpretation and implementation of SBX1-2 is based on Staff's ***retroactive*** application of the CEC's RPS Eligibility Guidebook standards to the renewable resources and procurement contracts that LADWP executed in 2007 for BC Hydro and in 2009 for biomethane.[2]

Staff's retroactive rulemaking is antithetical to the purpose of including grandfathering provisions in SBX1-2 and AB 2196. As the California Supreme Court explained: "the purpose of grandfather clause is to give those engaged in a business being brought under regulation the right to continue their existing business ***without being subjected to certification requirements***

[1] All code section references are to the Public Utilities Code, unless otherwise noted.
[2] All emphasis is added, unless otherwise noted.

***that would be applicable if the business were then being started for the first time*.**" *Golden Gate Scenic Steampship Lines, Inc. v. Pub. Util. Comm'n*, 57 Cal.2d 373, 379 (1962).

The Committee cannot accept Staff's interpretation of Sections 399.12(e)(1)(C) and 399.16(d) without express statutory language and clear legislative intent that the Legislature intended to apply SBX1-2 ***retroactively*** to the renewable resources and contracts that LADWP procured under its RPS Program adopted under Section 387. Here, the evidence LADWP submitted confirms exactly the opposite: the Legislature clearly expected that the new RPS requirements enacted under SBX1-2 would apply ***prospectively*** to LADWP's ***new*** renewable procurement. Moreover, the legislative history confirms that the Legislature added Section 399.12(e)(1)(C) and Section 399.16(d) to facilitate a "seamless transition" of LADWP's renewable resources and procurement contracts from a locally-controlled RPS program under Section 387 into the State's new mandatory RPS program administered by the CEC under SBX1-2.

Section 399.12(e)(1)(C) and 399.16(d) provided the necessary protections to ensure the renewable resources and procurement contracts that LADWP entered into in good faith and in reliance on the then-existing rules would be grandfathered into the RPS and count in full for the State's mandatory RPS-procurement requirements.

First, the Legislature amended the definition of an "eligible renewable energy resource" in Section 399.12(e)(1) to mandate that the facilities approved by LADWP's Board to "satisfy renewable energy procurement obligations adopted pursuant to former Section 387" be certified by the CEC as an "eligible renewable energy resource" as defined by the statute.

Second, the Legislature added Section 399.16(d) to confirm that "any contract or ownership agreement originally executed prior to June 1, 2010, shall **count in full** toward the

procurement requirements" if the "***renewable energy resource*** was eligible under the rules in place as of the date when the contract was executed." In contrast to the defined term "eligible renewable energy resource" used in Section 399.12(e)(1), Section 399.16(d) refers more broadly to a "renewable energy resource" eligible under the rules in place when the contract was executed. The omission of the defined term "eligible renewable energy resource" in Section 399.16(d) confirms that the Legislature intended to apply a different standard for the procurement that would count in full for the RPS-procurement obligations. The Legislature's use of different terms establishes that the Legislature intended to convey a different meaning and undercuts Staff's core argument that only the procurement from "eligible renewable energy resources" certified by the CEC "count in full" under Section 399.16(d).

Indeed, the statutory mandate under Section 399.16(d) to count in full the procurement from "a renewable energy resource" "eligible under the rules in place as of the date when the contract was executed" is separate and distinct from the statutory mandate to deem the facilities approved by LADWP's Board pursuant to Section 387 as "eligible renewable energy resource[s]" under Section 39.12(e)(1)(C). Staff's admissions confirm that the rules in place in 2007 and 2009 were the procurement rules and eligibility criteria established by the City and LADWP's Board under the RPS Policy adopted pursuant to Section 387.

Staff misleadingly suggests that renewable energy procured under the Powerex BC-Hydro PPAs cannot receive RPS credit because those facilities were not certified as "eligible renewable energy resources" by the CEC under its RPS Guidebook standards. Section 399.16(d)(1) does not require that LADWP certify the generating facilities owned by Powerex. Moreover, Powerex had no obligation to certify its generating facilities under the CEC's RPS Guidebook standards under the Powerex BC-Hydro PPAs, which expired in December 2011

shortly after SBX1-2 became effective. LADWP established that the Powerex BC-Hydro PPAs were eligible under the procurement and eligibility rules established by the City and LADWP's Board, which satisfied the requirements under Section 399.16(d) for the Committee to count in full the renewable energy procured under these contracts in 2011.

Similarly, LADWP established that the biomethane procured under the Shell and Atmos Agreements executed in 2009 were approved under the procurement and eligibility rules established by the City and LADWP's Board. Thus, this procurement also counts in full under Section 399.16(d)(1).

Moreover, LADWP owned the generating facilities that used the biomethane and requested that the use of the biomethane at these facilities be deemed "eligible renewable energy resources" as defined under Section 399.12(e)(1)(C). Staff, however, refused to certify the use of the 2009 biomethane at LADWP's in-basin generating facilities as eligible renewable energy resources as statutorily required. Staff's lynchpin justification for denying certification was that the biomethane procurement was not "used" at the generating facilities as they claim was required under Public Resources Code Section 25741.

Staff's Response confirmed that Staff's "use" argument is based solely on Staff's unsupported and subjective interpretation of how natural gas is transported in interstate gas pipelines and delivered into California. Indeed, Staff cites no legal authority or expert opinions supporting Staff's interpretation on the natural-gas transportation standards. Nor did Staff submit any ***admissible*** evidence substantiating the factual basis for Staff's flawed interpretation.

In contrast, LADWP cited the relevant legal precedent under the Natural Gas Act, federal regulations, and FERC precedent governing the federal standards for interstate-gas transportation. LADWP also submitted two ***unrebutted*** expert reports from a well-known and

respected natural-gas pipeline expert, Benjamin Schlesinger, Ph.D., providing explanation for how the interstate-gas pipeline system operates. See Schlesinger Decl. and Exhibits 344-346 (TN #s 213411, 213412, 213413, 213414). LADWP's submitted evidence establishing that the biomethane was injected into and transported on the interstate natural-gas pipeline, delivered into SoCalGas' local distribution system, and used at LADWP's in-basin generating facilities.

Having failed to establish any factual or legal basis for its subjective interpretation of well-defined natural gas standards, Staff resorts back to its flawed statutory interpretation that the "rules in place" when LADWP executed the Shell and Atmos Agreements in 2009 are based on the requirements contained in the CEC's RPS Guidebook. Section 399.12(e)(1)(C) and Section 399.16(d)(1) alone provide sufficient grounds for rejecting this argument. However, any reasonable doubt that the Legislature intended to grandfather LADWP's 2009 biomethane procurement is squarely resolved under Public Utilities Code Section 399.12.6(a).

AB 2196 addressed the delivery standards for pipeline biomethane. Similar to SBX1-2, the Legislature provided a statutory provision to grandfather all biomethane procured by LADWP under any contracts executed before March 29, 2012 and eligible under the rules in place on the date the contract was executed. Moreover, the Legislature confirmed that the new delivery standards for pipeline biomethane under Section 399.12.6(b) applied ***prospectively*** to biomethane procurement after March 29, 2012. AB 2196's legislative history further confirms that the Legislature intended to grandfather biomethane contracts under the rules in place on the date the contract was executed. The legislative history also addressed and rejected Staff's practice of applying the rules in place under the RPS Guidebook in effect on the date the CEC received the RPS-certification application.

Nonetheless, in the Executive Director's denial of LADWP's Motion for Reconsideration dated December 22, 2015 (TN#213437), and throughout Staff's discussions with LADWP leading up to the commencement of this proceeding, Staff fervently maintained that the ***Fourth*** Edition and ***Seventh*** Edition Guidebooks provided the applicable "rules in place" for determining the eligibility of the Shell and Atmos Agreements executed in 2009. The Commission adopted the Fourth Edition Guidebook in December 2010 and the Seventh Edition Guidebook in April 2013 making it ***legally impossible*** for the Fourth or the Seventh Guidebooks to provide the applicable "rules in place" back in 2009. Indeed, Staff's Response just acknowledged ***for the first time*** that the only RPS Guidebook that could possibly apply to the Shell and Atmos Agreements executed in 2009 was the Third Edition Guidebook, if at all.

Staff's Response admits, however, that the Third Edition Guidebook ***does not contain a single reference*** requiring that pipeline biomethane be delivered under firm or interruptible transportation agreements for each pipeline on a physical contract path from the landfill injection point to the delivery point in California. Indeed, the Third Edition does not refer to delivery agreements, firm or interruptible transportation agreements, or evidence of delivery on a physical contract path for every pipeline from the landfill injection point to the California delivery point.

Staff provides two explanations for this glaring omission. ***First***, Staff claims – without any supporting, admissible evidence – that Staff always understood that the "use" requirement meant that pipeline biomethane had to be delivered under firm or interruptible transportation agreements for each pipeline on a physical contract path from the landfill injection point to the delivery point in California. Staff claims that LADWP "would have known" about Staff's subjective and undisclosed biomethane requirements if LADWP had applied for RPS-certification in 2009, like other third parties who applied for certification under the Third Edition

Guidebook. However, California's Administrative Procedures Act plainly bars the enforcement or implementation of such undisclosed-agency interpretations, which the APA defines as underground regulations. *See Capen v. Shewry*, 155 Cal. App. 4th 378, 386 (2007).

Second, Staff argues that the Fourth Edition Guidebook references the delivery of gas through firm or interruptible transportation agreements. Despite the omission of these provisions in the Third Edition, Staff contends that the delivery requirements under the Third and Fourth Edition Guidebooks are largely the same. Staff provided no admissible evidence supporting Staff's interpretation. Indeed, Staff relies solely on a reference to a self-serving and hearsay statement in the Seventh Edition Guidebook adopted in April 2013.

Moreover, LADWP submitted admissions made by the CEC in its prior public notices and workshops discussing pipeline biomethane standards and AB 2196 that squarely contradict Staff's current interpretation. For example, the CEC's Notice of Staff Workshop re Pipeline Biomethane, stated that the "the law does not define the terms 'biomass,' 'digester gas,' or 'landfill has,' and is likewise ***silent as to whether these fuels must be used on the site of the fuel's production to generate electricity for purposes of the RPS. Nor does the law specify how these fuels, if produced offsite, should be delivered to a power plant for purposes of generating electricity***." (TN#213416 at LA001736-37.)

LADWP's Initial Response provides the only reasonable interpretation that harmonizes and gives meaning to Sections 399.12(e), 399.16(d), and 399.12.6. LADWP submitted evidence establishing that the Powerex BC-Hydro PPAs are grandfathered contracts and the procurement from those contracts must count in full for CP1. In addition, LADWP submitted evidence establishing that the Shell and Atmos Agreements are grandfathered contracts under SBX1-2 and AB 2196 that the Committee must count in full and certify the use of the biomethane procured

under those agreements. Moreover, if the Third Edition Guidebook does apply, then LADWP submitted evidence establishing that the transportation and delivery of that gas on the interstate gas pipeline satisfied the sole delivery requirement under the Third Edition Guidebook.

The Committee has a paramount duty to ensure that the RPS statutes in the Public Utilities Code are administered consistent with the enabling statutes. The law and evidence require that the Committee issue an order confirming that the Powerex BC-Hydro PPAs and the Shell and Atmos Agreements as grandfathered contracts that count in full for the RPS under SBX1-2 and AB 2196. These agreements are now expired and there is no basis for further delay, particularly since CP2 ends in December 2016. The Committee can and must resolve these issues now. LADWP and Staff need to move forward on the existing and future challenges facing both agencies, including the new mandates under SB 350 and other hallmark legislation.

II. REPLY ARGUMENTS

A. The Committee Must Reject Staff's Proposed Interpretation of Section 399.12(e)(1)(C), Section 399.12.6(a) and Section 399.16(d) under Well-Established Principles of California Law.

As discussed in detail below, Staff argues for an interpretation of Section 399.16(d)(1), Section 399.12(e)(1)(C), and Section 399.12.6(a) that is inconsistent with the plain language and expressed legislative intent behind including the grandfathering provisions included in SBX1-2 and AB 2196. As stated in a letter to Chairman Weisenmiller from a delegation of ten California Assembly Members (TN#211968):

> The passage of the California Renewable Energy Resources Act (SB X102) in 2011, for the first time, brought POUs, like LADWP, under state jurisdiction through the CEC. ***The CEC, after evolving its rulemaking over a number of years, is now considering applying those rules retroactively to investments made years ago***. If allowed to enforce retroactive rulemaking and LADWP's contracts

are not counted in full by the CEC LADWP ratepayers may face a potential liability of $130 million. ***Grandfathering provisions in SB X1-2 were intended by the Legislature to seamlessly transition from a voluntary program of renewable energy for POUs to a mandatory program.*** SBX1-2 also stipulated that ***the CEC 'shall' certify procured renewable energy resources under the rules in place at the time of contract execution***. The Legislature provided grandfathering language in SB X1-2 and later in Assembly Bill (AB) 2196, to ***expressly*** account for the investments made on behalf of the public by POUS ***to ensure those investments would be fully counted by the CEC***. AB 2196 ***expressly grandfathered*** pipeline biomethane procured under contracts executed before March 29, 2012.

Staff's interpretation ignores the Legislature's expressed intent to grandfather and count in full LADWP's renewable procurement under the Powerex BC-Hydro PPAs and the Shell and Atmos Agreements. Moreover, Staff's retroactive interpretation of the CEC's certification and eligibility standards to LADWP's grandfathered contracts has no support under the canons of statutory construction or the legislative history. As discussed below, LADWP established that the Powerex BC-Hydro PPAs and the Shell and Atmos Agreements are grandfathered contracts that count in full for the RPS.

1. <u>Staff's Interpretation of Section 399.16(d)(1) Applies *Retroactive* Standards and Renders Numerous Statutory Provisions Meaningless under the Canons of Statutory Construction.</u>

Staff argues that the only renewable procurement that "counts in full" for RPS credit under Section 399.16(d) is procurement from "eligible renewable energy resources" certified by the CEC under the CEC's RPS Eligibility Guidebook standards. Staff also contends that the reference in Section 399.16(d)(1) to the "rules in place as of the date the contract was executed" refers to the CEC's and the CPUC's eligibility rules, including the RPS Eligibility Guidebook,

that applied to "retail sellers" before SBX1-2's enactment. Staff's Response summarized the legal basis for Staff's flawed interpretation:

> Public Utilities Code Section 399.16 is part of the statutory requirements that specifically apply to retail sellers, not POUs. It therefore follows that ***the 'rules in place' should be interpreted to mean the rules adopted by the CPUC and the Energy Commission applicable to retail sellers***. These rules include the Energy Commission's RPS eligibility requirements, as specified in the RPS Eligibility Guidebook, in place at the time the contract or ownership agreement was executed, ***because these were the rules that applied to retail sellers prior to the enactment of SBX1-2***. This interpretation is consistent with the CPUC's interpretation of Public Utilities Code section 399.16(d) for retail sellers. Public Utilities Code section 399.16(d) does not apply directly to POUs. Public Utilities Code Section 399.16 is cross referenced in Public Utilities Code Section 399.30 (c)(3), which directs POUs to adopt procurement requirements 'consistent with Section 399.16.' ***If Public Utilities Code Section 399.16 (d) is interpreted to apply to POUs at all, it must apply the same way it applies to retail sellers and subject to the same 'rules in place.'*** (Staff's Response (TN#213474) at 35)

As explained below, Section 399.16(d) is not reasonably susceptible to Staff's interpretation under California law. Section 399.16(d) states:

> (d) Any contract or ownership agreement originally executed prior to June 1, 2010, shall count in full toward the procurement requirements established pursuant to this article, if all of the following conditions are met:
> (1) The renewable energy resource was eligible under the rules in place as of the date when the contract was executed.
> (2) For an electrical corporation, the contract has been approved by the commission [CPUC], even if that approval occurs after June 1, 2010.
> (3) Any contract amendments or modifications occurring after June 1, 2010, do not increase the nameplate capacity or expected quantities of annual generation, or substitute a different renewable energy resource. The duration of the contract

may be extended if the original contract specified a procurement commitment of 15 or more years.

As explained below, Staff's interpretation of Section 399.16(d) violates the established canons of statutory construction, renders numerous provisions meaningless, and applies the CEC's certification standards retroactively in a manner that is inconsistent with and contradicts the plain language and expressed legislative intent.

First, Staff's contention that the Committee can only count in full the renewable energy procured from "eligible renewable energy resources" certified by the CEC under Section 399.16(d)(1) ignores the Legislature's use of different terms in Section 399.16(d) and Section 399.12(e). Section 399.16(d)(1) refers to the term "renewable energy resource" and not the term "eligible renewable energy resource" as defined in Section 399.12(e)(1). The omission of the defined term "eligible renewable energy resource" in Section 399.16(d) undercuts Staff's primary argument for why the Committee cannot provide RPS credit to LADWP's BC Hydro procurement. *See Weinholz v. Kaiser Foundation Hosp.*, 217 Cal. App. 3d 1501, 1506 (1989) ("It is a well-recognized principle of statutory construction ***that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded***.").

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); *Rotolo v. San Jose Sports & Entm't, LLC*, 151 Cal. App. 4th 307, 324 (2007); *see also CPF Agency Corp. v. R&S Towing Servs.*, 132 Cal. App. 4th 1014, 1028 (2005) (under the maxim *expressio unius est*

exclusio alterius, if "a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others."). "[This] rule of statutory construction ***is applicable unless a contrary legislative intent is expressed in the statute or elsewhere***." *CPF Agency Corp.*, 132 Cal. App. 4th at 1028.

Here, there is no evidence that the Legislature intended to include the defined term "eligible renewable energy resource" in Section 399.16(d)(1). As the California Supreme Court explained: "Courts should generally assume that the Legislature knew what it was saying and meant what it said. And this is particularly true where the Legislature has omitted a provision which it has employed in other circumstances where the asserted effect is intended." *Dyna Med, Inc. v. Fair Employment & Housing Comm'n*, 43 Cal.3d 1379, 1389 (1987).

Second, Section 399.16(d) is not limited on its face to "contracts or ownership agreements" executed by "retail sellers." Nor does Section 399.16(d)(1) state that the "renewable energy resource" had to be eligible under the "rules in place" for "retail sellers" that were adopted by the CPUC and the CEC before SBX1-2's effective date. The Committee, therefore, must reject Staff's interpretation since the Committee cannot "***rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed***." *Cornette*, 26 Cal.4th at 73-74.

Moreover, if Section 399.16(d) applied only to "retail sellers, as Staff contends, there would be no need to distinguish the contracts entered into by "electrical corporations" in Section 399.16(d)(2). The requirement in Section 399.16(d)(2) that the CPUC approve contracts "for electrical corporations" would be unnecessary and superfluous, if, as Staff contends, Section 399.16(d) applied only to retail sellers. *Dyna Med,* 43 Cal.3d at 1387 (A "construction rending some words surplusage is to be avoided"); *Dept. of Water & Power, City of Los Angeles v.*

Energy Resources Conservation and Dev. Comm'n, 2 Cal. App. 4th 206, 223 (1991) ("An interpretation that renders related provisions nugatory must be avoided; each sentence must be read not in isolation but in light of the statutory scheme; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed.") (internal citations omitted). Public Utilities Code Section 399.12(j) defines "retail seller" to include an "electrical corporation" and expressly excludes from the definition a "local publicly electric utility." *See* Pub. Util. Code § 399.12(j)(1) ("retail seller" includes an "electrical corporation" as defined in [PUC] Section 218); *id.* § 399.12(j)(4)(C) ("retail seller" "does not include" a "local publicly owned electric utility"); *id.* § 218 (defining "electrical corporation"); *c.f., id.* § 224.3 (defining "local publicly owned electric utility").

Third, Staff confirms that its interpretation applies ***retroactive*** standards to LADWP's renewable procurement, specifically the "***the rules that applied to retail sellers prior to the enactment of SBX1-2***." Staff's Response (TN#213474) at 35. Staff, however, admitted that the "rules in place" in 2007 and 2009 were established by the City and LADWP's Board under the RPS Policy adopted consistent with Section 387. *See* Staff Response (TN#213474) at 43 ("RPS procurement requirements for POUs in 2009 would have been established by the POU itself as part of a POU's RPS program implemented pursuant to former Public Utilities Code section 387."); *id.* at 44 ("In 2007, POUs were not required to meet their RPS procurement requirements with electricity generation from facilities certified by the CEC."); *id.* at 56 ("While former Public Utilities Code section 387 did give POUs discretion to develop and implement their own RPS programs, the law [did] not require the CEC to certify all resources that were included in a POU's RPS program pursuant to section 387."); *see also* LADWP Initial Response (TN#213475)

at 41-42 (discussing the CEC's past admissions confirming that POUs had no obligation to certify renewable resources with the CEC under Public Utilities Code Section 387 and SB 1078).

As established in LADWP's Initial Response, California law bars the ***retroactive*** application of legislation absent express and clear legislative intent. *See* LADWP Initial Response (TN#213475) at 47-48; *see also City of Monte Sereno v. Padgett*, 149 Cal. App. 4th 1530, 1538 (2007) (a "***legislative enactment is presumed to operate prospectively and not retroactively unless a different intention is clearly expressed or implied from the legislative history of the context of the enactment***."); *Landraf v. USI Film Products*, 511 U.S. 244, 269 (1994) ("Every statute which takes away or ***impairs vested rights*** acquired under existing laws, or ***creates a new obligation***, imposes a new duty, or attaches a new disability in respect to transactions considered already past, ***must be deemed retrospective***."). The California Supreme Court described a "retroactive law" as "one that affects rights, obligations, acts, transactions and conditions which are performed or ***exist prior to the adoption of the statue***." *Evangelatos v. Supr. Ct.*, 44 Cal.3d 1188, 1206 (1988). "The rule that a statute is presumed to operate prospectively only, *unless an intent to the contrary clearly appears*, is especially applicable to cases where retroactive operation of the statute would impair the obligations of contracts or interfere with vested rights." *Bank of Am. Nat'l Trust & Sav. Assoc. v. Burg Bros.*, 31 Cal. App. 2d 352, 355 (1939) (emphasis in original); *see also Weinholz*, 217 Cal. App. 3d at 1501, 1506 (1989) "[A] statutory construction that would impair existing obligations is not favored, and ***statutory provisions will not be applied retroactively so as to impair existing obligations unless the intention of the Legislature demands it***.").

Staff did not submit or cite to ***any*** evidence establishing any legislative intent to apply SBX1-2 retroactively. The Committee, therefore, has no factual or legal basis warranting the

retroactive application of SBX1-2 under well-established California law. *See id; see also Rosasco v. Comm'n on Judicial Performance*, 82 Cal. App. 4th 315, 322 (2000) (the "significant factor" in determining "retrospective application of a change in law" "is the unanticipated consequences that are frequently triggered by the application of a new, 'improved' legal principle *retroactively to circumstances in which individuals may have already taken action in reasonable reliance of the previously existing state of the law.*) (emphasis in original); *Evangelatos,* 44 Cal.3d at 1213-14 ("***The presumption of prospectivity assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance***.")

Moreover, as established in LADWP's Initial Response, ***all*** of the legislative history confirms that the Legislature intended to apply SBX1-2 ***prospectively*** to POUs' ***new*** renewable procurement going forward ***after*** SBX1-2's effective date of December 10, 2011. *See* LADWP Initial Response (TN#213475) at 52-59; *see also* SBX1-2 Legislative History (TN#213450) ("***Under the bill [SBX1-2], all existing renewable energy contracts signed by June 1, 2010 would be 'grandfathered' into the program. Going forward***, ***new renewable energy contracts*** must meet a 'loading order' that categorizes renewable resources."); SBX1-2 Legislative History (TN#213451) ("***This bill [SBX1-2] grandfathers all contracts consummated by an IOU, ESP, or POU prior to June 1, 2010.***"); AB 2196 Legislative History (TN#213453) ("***To finesse the transition from the 20% by 2010 RPS program to the 33% by 2020 program***, ***SBX1-2 grandfathered all RPS contracts entered into prior to June 1, 2010 and provided that those contracts will 'count in full' under the new program requirements***.").

Finally, Staff's argument that Staff can apply the CEC's RPS Eligibility Guidebook standards ***retroactively*** to LADWP's procurement because Section 399.16 "does not apply to

POUs" and is only "cross referenced in Section 399.30(c)(3)" is also misplaced. Even assuming that Section 399.16 did not apply to POUs, as Staff contends, the Legislature tasked the CEC with implementing and enforcing the RPS requirements for POUs, which are contained in Section 399.30. Section 399.30(c)(3) states that "[a] local publicly owned electric utility shall adopt procurement requirements consistent with Section 399.16." As discussed below, LADWP's 2011 RPS Policy ***did*** adopt procurement requirements consistent with Section 399.16. *See* 2011 RPS Policy (TN#212410). Staff, however, did not consider the relevant provisions in LADWP's 2011 RPS Policy that address the express procurement requirements that LADWP's Board adopted **consistent with** Section 399.16.

For example, Section 4 of the 2011 RPS Policy (Eligible Renewable Energy Resources) states, in relevant part, that:

> All renewable energy resources approved by the Board as part of its renewables portfolio in accordance with applicable law and the previous versions of this RPS Policy, including without limitation those on Appendix A, will continue to be eligible renewable energy resources. ***These renewable energy resources will count in full towards LADWP's RPS targets*** adopted in section 3 of this updated RPS Policy." (2011 RPS Policy (TN#212410) at § 4, LA000066.)

Section 7 of the 2011 RPS Policy (Portfolio Content Categories), in turn, states, in relevant part, that:

> [E]ligible renewable energy resources, procured on or after June 1, 2010, will be in accordance with PUC Sections 399.16(b) and (c)….LADWP will ensure that the procurement of its eligible renewable energy resources on or after June 1, 2010, will meet the specific percentage requirements set out in Section 399.16(c) for each bucket in each compliance period…. ***Subject to the provisions of PUC Section 399.16(d), renewable electricity products procured prior to June 1, 2010, are exempt from these portfolio content categories and will continue to***

count in full toward LADWP's RPS compliance targets. (2011 RPS Policy (TN#212410) at § 7, LA000067-68.)

Moreover, LADWP's Board Letter approving the 2011 RPS Policy provided additional discussion regarding the renewable energy resources that the Board approved under LADWP's previous RPS Policies that would count in full going forward ***after*** the effective date of SBX1-2. For example, LADWP's Board Letter explained that:

- All renewable energy resources adopted by LADWP as part of its renewables portfolio in accordance with previous versions of this RPS Policy will continue to be eligible renewable resources and count in full towards LADWP's future RPS targets adopted under this updated RPS Policy. (2011 RPS Policy (TN#212410) at LA000059.)

- For ***new*** RPS acquisitions, 'Eligible Renewable Energy Resource' means a generation facility that meets the criteria for a 'Renewable Electrical Generation Facility' set out in PUC Section 399.12 and in Section 25741(a) of the Public Resources Code. (2011 RPS Policy (TN#212410) at LA000059.)

- Eligible renewable energy resources, procured on or after June 1, 2010, will be in accordance with PUC Sections 399.16(b) and (c). Section 399.16(b) defines eligible renewable energy resources in three distinct portfolio content categories, commonly known as 'buckets'. LADWP will ensure that the procurement of its eligible renewable resources on or after June 1, 2010, will meet the specific percentage requirements set out in Section 399.16(c) for each bucket in the compliance period." (2011 RPS Policy (TN#212410) at LA000059.)

Thus, even assuming that the grandfathering protections provided in Section 399.16(d) did not apply to POUs – which is not the case – Section 399.30(c)(3) required Staff to implement the procurement requirements that LADWP's Board adopted **consistent with** Section 399.16 and

that are expressly identified in the 2011 RPS Policy. Staff's Response, however, provides no legal or factual basis necessary for the Committee to accept Staff's ***retroactive*** application of the CEC's RPS Eligibility Guidebook standards under Section 399.30(c)(3). *Evangelatos*, 44 Cal.3d at 1213-14; *In re Cindy B.*, 192 Cal. App. 3d 771, 779 (1987) ("It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.").

Indeed, the 2011 RPS Policy expressly addressed the contracts or ownership agreements executed before June 1, 2010, which count in full as renewable energy resources eligible under rules in place as of the date those contracts were executed (the rules established by the City and LADWP's Board). *See* 2011 RPS Policy (TN#212410). The Powerex BC-Hydro PPAs and the Shell and Atmos Agreements at issue in the proceeding are expressly identified in Attachment A of the 2011 RPS Policy as "renewable energy resources approved by LADWP's Board as part of its renewables portfolio in accordance with applicable law and the previous versions of this RPS Policy…." *Id.* at App. A, LA000071.

In sum, there is no legal or factual support for Staff's statutory interpretation and retroactive application of the CEC's RPS Eligibility Guidebook standards under either Section 399.16(d)(1) or Section 399.30(c)(3). As discussed below, LADWP's evidence confirms that the Powerex BC-Hydro PPAs and the Shell and Atmos Agreements are grandfathered contracts that count in full under Section 399.16(d)(1) and Section 399.30(c)(3).

2. <u>The Powerex BC-Hydro PPAs Are Grandfathered Contracts that Count in Full under Section 399.16(d)(1) and Section 399.30(c).</u>

As discussed in LADWP's Initial Response, LADWP established that the Powerex BC-Hydro PPAs were approved under the rules in place as established by the City and LADWP's Board, including the 2005 RPS Policy. *See* LADWP Initial Response (TN#213475) at 59-65;

Ting Decl. (TN#212401) at ¶¶ 4-12, Exs. 1-9 (TN#212402-TN#212410); Ting Decl. (TN#212401) at ¶¶ 14-22, Exs. 11-19 (TN#212412-TN#212420). The Powerex BC-Hydro PPAs, therefore, meet the statutory requirements under Section 399.16(d) and Section 399.30(c) for grandfathered contracts executed before June 1, 2010 that count in full for the RPS. As discussed above, Section 399.16 does ***not*** require that the CEC certify Powerex's BC Hydro generating facilities as a condition necessary for the CEC to count in full the BC Hydro RECs for 2011. LADWP had not statutory obligation to seek the CEC's certification under Section 387 or before SBX1-2's effective date, LADWP did not own the generating facilities, and the Powerex BC-Hydro PPAs expired in December 2011 and were not renewed.

Staff's Response raised questions regarding the RECs generated under the Powerex BC-Hydro PPAs and whether the energy renewable procured under the contracts was generated by small-hydro facilities or an alternative renewable resource, such as landfill gas or wind. Staff's Response (TN#213474) at 63. Contrary to Staff's contention, LADWP submitted evidence identifying the generating facilities designated for use under the Powerex BC-Hydro PPAs for the 2011 contract year. Supp. Ting Decl. (TN#213035) ¶ 44, Ex. 328 (TN#213387) (Powerex Designation Letter dated 11-29-10); *see also* Third Supplemental Declaration of Louis C. Ting in 16-RPS-02 (Third Supp. Ting Decl.") at ¶ 5, Ex. 395 (Powerex Designation Letter dated 12-07-09); Declaration of Robert Campbell in 16-RPS-02 ("Campbell Decl.") at ¶ 6, Ex. 395 (Powerex Designation Letter dated 12-07-09). LADWP submitted monthly REC attestations from Powerex confirming that all of the RECs generated in 2011 came from ***100%*** blend of renewable energy from ***the designated small-hydro generating facilities***. Batra Decl. (TN#213346) ¶¶ 30-41, Exs. 315-326 (TN#213374 to and including TN#213385) (Powerex Monthly REC Attestations for Jan. 2011 to Dec. 2011). LADWP submitted additional supporting evidence

from Powerex on these issues. *See* Campbell Decl. at ¶¶ 4- 8. In addition, in response to Staff's concern about the location of Powerex's generating facilities, Powerex provided a map identifying the locations of the designated BC Hydro generating facilities under the Powerex BC-Hydro PPAs for the 2011 contract year. *See* Campbell Decl. ¶ 9; Ex. 396 (LA002914); *see also* TN#213387; Ex. 395.

3. The Shell and Atmos Agreements Are Grandfathered Contracts that Count in Full under Section 399.16(d)(1) and Section 399.30(c).

As discussed in LADWP's Initial Response, LADWP established that the Shell and Atmos Agreements were approved under the rules in place established by the City and LADWP's Board in 2009. *See* LADWP Initial Response (TN#213475) at 65-72; Ting Decl. (TN#212401) at ¶¶ 4-12, Exs. 1-9 (TN#212402-TN#212410); Supp. Ting Decl. (TN#213035) at ¶¶ 3-43, Exs. 27-67 (TN#213036-TN#213076); Supp. Ting Decl. (TN#213035) at ¶¶ 50-56; Exs. 334-343 (TN#213395-TN#213402; TN#213410); Second Supp. Ting Decl. (TN#213415) at ¶¶ 9-10, Exs. 384-385 (TN#213443-TN#213444). The Shell and Atmos Agreements, therefore, meet the statutory requirements under Section 399.16(d) and Section 399.30(c) for grandfathered contracts executed before June 1, 2010 that count in full for the RPS. *See supra*, Section II.A(1).

4. Staff's Interpretation of Section 399.12(e)(1)(C) Applies the CEC's Certification Standards *Retroactively* and Renders the Grandfathering Provision Meaningless under the Canons of Statutory Construction.

Staff contends that the only resources that the CEC must certify as eligible renewable energy resources under Section 399.12(e)(1)(C) are the resources that meet the CEC's ***then-existing*** RPS Eligibility Guidebook standards. Similar to Section 399.16(d), Staff's interpretation of Section 399.12(e)(1)(C) results in the ***retroactive*** application of the CEC's RPS Eligibility Guidebook standards and renders numerous provision superfluous.

Staff's Response explains its rationale for its retroactive interpretation of Section 399.12(e)(1)(C):

> The CEC is required to certify only those POU resources that meet the provisions of Public Utilities Code section 399.12(e)(1)(C). Had the Legislature intended the provisions of Public Utilities Code section 399.12(e)(1)(C) to apply to all procurement approved by a POU prior to June 1, 2010, as LADWP has argued, then portions of the POU-specific exceptions granted under Public Utilities Code sections 399.30(g), (h), (i), (j), (k), and (l) and portions of the RPS eligibility criteria in section 399.12(e)(1)(A), applicable to hydroelectric generations units not exceeding 40 MW that are operated as part of water supply and conveyance system, would not have been necessary because these resources would have been already grandfathered by virtue of Public Utilities Code section 399.12(e)(1)(C). (Staff Response (TN#213474) at 56-57.)

First, Staff's argument regarding the amendment under SBX1-2 that increased the capacity of small hydroelectric generating units up to 40 MWs is not rendered superfluous under LADWP's interpretation. Section 399.12(e)(1)(D) applies eligibility requirements for POUs ***and retail sellers***. Section 399.12(e)(1)(D)(i) states that:

> A small hydroelectric generation unit with a nameplate capacity not exceeding 40 megawatts that is operated as part of a water supply or conveyance system is an eligible renewable energy resource only for ***the retail seller*** or local publicly owned utility that procured the electricity from the unit as of December 31, 2005. No unit shall be eligible pursuant to this subparagraph is an application for certification is submitted to the Energy Commission after January 1, 2013. Only one ***retail seller*** or local publicly owned electric utility shall be deemed to have procured electricity from a given unit as of December 31, 2005.

Section 399.12(e)(1)(C) applies only to the facilities approved by POUs' governing boards to satisfy procurement obligations under Section 387. Section 387 applied to POUs and

not retail sellers. In contrast, Section 399.12(e)(1)(D) applies to **POUs *and retail sellers***. Thus, Section 399.12(e)(1)(D) is not rendered superfluous under LADWP's interpretation.

Second, Staff's argument regarding the exceptions in Section 399.30 actually support LADWP's argument that the language in Section 399.12(e)(1)(C) referencing a "renewable electrical generating facility" as defined in Public Resources Code Section 25741 was intended to address large hydroelectric generating facilities, which other POUs (but not LADWP) included as eligible resources under their voluntary RPS programs adopted under Section 387.

Section 399.12 states that "[f]or purposes of this article, the following terms have the following meanings[.]" Section 399.12(e) defines the term "eligible renewable energy resource" and provides in relevant part the following:

> 'Eligible renewable energy resource' means an electrical generating facility that meets the definition of a 'renewable electrical generation facility' as defined in *Section 25741 of the Public Resources Code*, subject to the following:
> (1)(C) A facility approved by the governing board of a local publicly owned electric utility prior to June 1, 2010, for procurement to satisfy renewable energy procurement obligations adopted pursuant to former Section 387, shall be certified as an eligible renewable energy resource by the Energy Commission pursuant to this article, if the facility is a 'renewable electrical generation facility' as defined in *Section 25741 of the Public Resources Code*. (emphasis in original)

LADWP's Initial Response explained that the reference to Public Resources Code Section 25741 was intended to exclude generation from large hydroelectric generating facilities as a grandfathered resource under SBX1-2. LADWP Initial Response (TN#213475) at 46-47. Section 399.30(j) provides support for this interpretation: Section 399.30(j) states:

> A local publicly owned electric utility in a city and county that only receives greater than 67 percent of its electric sources from hydroelectric generation

located within the state that owns and operates, and that does not meet the definition of a 'renewable electrical generation facility' pursuant to *Section 25741 of the Public Resources Code*, shall be required to procure eligible renewable energy resources, including renewable energy credits, to meet only the electricity demands unsatisfied by its own hydroelectric generation in any given year, in order to satisfy its renewable energy procurement obligations. (emphasis in original)

Section 399.12(e)(1)(C) and Section 399.30(j) both refer to a "renewable electrical generation facility pursuant to Section 25741 of the Public Resources Code." Section 399.30(j) provided an exception to the RPS mandates under SBX1-2 for POUs that relied upon large hydroelectric generation, including the City and County of San Francisco. For this POU, the Legislature included a carve-out that limited the RPS-procurement obligation to the generation needed to support the load unsatisfied by the large hydroelectric generation owned and operated by the City and County of San Francisco. In the case of Section 399.30(j), the Legislature provided an exception addressing generation procured from large hydroelectric generating facilities that did not meet the definition of a renewable electrical generating facility as defined in Public Resources Code Section 25741.

The fact that certain POUs treated generation from large hydroelectric generation as an eligible resource under their voluntary RPS programs adopted under Section 387 was a well-known fact. The CEC's December 2008 Consultant Report: *The Progress of California's Publicly Owned Utilities in Implementing Renewables Portfolio Standard* (TN#212421) discussed POUs' varying treatment of large hydroelectric generation under Section 387:

> ***State law provides the governing board of each POU with the authority to determine the resource eligibility rules under its RPS program.*** Although this report is not intended to provide a comprehensive review of POUs' resource

> eligibility rules, ***Table 1 summarizes POUs' differing approaches to one particular resource eligibility issue: the treatment of output from large hydroelectric facilities*** (which, for the purpose of establishing resource eligibility rules for the state's IOUs, ESPs, and CCAs, the Energy Commission generally considers hydroelectric facilities greater than 30 MW to be large hydroelectric and not eligible for the RPS). ***At least 22 POUs, representing 62 percent of statewide POU retail sales, allow some large hydroelectric plants to qualify toward their RPS targets***. (TN#212421 at LA000291).

LADWP's Initial Response also submitted evidence of LADWP's presentations to its City Council in July and August 2004 regarding the standards for hydroelectric generating facilities, including the eligibility of energy produced from the Hoover large hydroelectric generating facility. *See* LADWP Initial Response (TN#213475) at 5-7; *see also* Supp. Ting Decl. (TN#213035) at ¶¶ 44-47, Exs. 328-331 (TN#213387 and TN#213389 to TN#213391) LADWP's 2004 hydro presentations, noted, for example, that generation from Hoover was considered an eligible renewable resource by all of the other POUs that owned interests in, or received electricity from, Hoover. *Id.* at TN#213387; TN#213389. On October 15, 2004, the LA City Council adopted a motion defining the eligibility standard for hydroelectric generating facilities under LADWP's 2005 RPS Policy, which excluded Hoover as an eligible resource under LADWP's RPS Policy. *Id.* at TN#213391.

LADWP provided an interpretation that gives meaning to Section 399.12(e)(1)(C) and effectuates the Legislature's expressed intent to provide a "seamless transition" of POUs' renewable programs by grandfathering POUs' renewable resources and contracts under SBX1-2. LADWP's interpretation is consistent with the purpose of a grandfather clause as explained by the California Supreme Court: "The ***purpose of a grandfather clause*** is to give those engaged in a business being brought under regulation the right to continue their existing business ***without***

being subjected to certification requirements that would be applicable if the business were then being started for the first time." *Golden Gate Scenic Steampship Lines, Inc. v. Pub. Util. Comm'n*, 57 Cal.2d 373, 379 (1962); *Rich v. State Bd. of Equalization*, 235 Cal. App. 2d 591, 605 (1965).

In contrast, Staff interpretation renders Section 399.12(e)(1)(C) a nullity and requires the Committee to apply the CEC's RPS Eligibility Guidebook standards ***retroactively***. Staff contends that Public Utilities Code Section 399.25(a) tasks the CEC with the responsibility for determining the whether a particular resource satisfies the definition in Section 399.12(e). Staff's Response stated that:

> If each POU had discretion to determine which renewable resources qualify as a 'renewable electrical generation facility' for purposes of the RPS under Public Resource Code section 25741(a), there could be 44 different sets of rules for making this determination; one set of rules for each POU in California. SBX1-2 repealed Public Utilities Code section 387 and any discretion the POUs might have had in this regard, and established a single, statewide RPS program applicable to all retail sellers and POUs. By charging the CEC with sole responsibility for determining which renewable resources qualify as 'renewable electrical generation facility' and for certifying such resources as eligible for the RPS, the Legislature placed retail sellers and POUs on equal footing and subjected them to one set of rules – the CEC's rules - for determining which renewable resources qualify as a 'renewable electrical generation facility' for the RPS program. (Staff Response (TN#213474) at 58-59.)

Staff's interpretation gives no meaning to Section 399.12(e)(1)(C). Section 399.12(e) defines an "eligible renewable energy resource" as "a facility that meets the definition of a renewable electrical generation facility as defined in Section 25741 of the Public Resources Code, ***subject to the following***" exceptions identified in subsection (e)(1). To give the phrase

"subject to the following" any meaning, the Legislature must have understood that the standard in Section 399.12(e)(1)(C) included a different standard from the general definition. *See Walsh v. Bd. of Admin. of Pub. Emp. Retirement Sys.*, 4 Cal. App. 4th 682, 706 (1992) ("Generally, a qualifying phrase applies to the word, phrase or clause immediately preceding it, unless context or evident meaning require a different construction."). Staff applies the ***same*** certification standards – the CEC's then existing requirements under the RPS Eligibility Guidebook and Public Resources Code Section 25741 – regardless of whether a POU's governing board approved a facility under Section 387 before or after June 1, 2010.

Moreover, SBX1-2 amended Section 399.25 to include POUs. If, as the CEC contends, SBX1-2 established a single statewide standard that applied ***retroactively*** to POUs' procurement under Section 387, then there would be no need for the Legislature to craft the exception to grandfather POUs' renewable facilities under Section 399.12(e)(1)(C). Moreover, as discussed above, Staff provides no factual or legal basis permitting the Committee to apply the CEC's RPS Eligibility Guidebook ***retroactively*** to LADWP's renewable procurement. *See supra* at 14-16; *see also* California Legislature Letter to Chairmen Weisenmiller (TN#211968) ("***Grandfathering provisions in SB X1-2 were intended by the Legislature to seamlessly transition from a voluntary program of renewable energy for POUs to a mandatory program.***").

Staff's argument the "Legislature repealed Section 387" when enacting SBX1-2 does not establish a presumption of retroactivity. *See Bear Valley Mut. Water Co. v. County of San Bernardino*, 242 Cal. App. 2d 68, 71 (1966). In *Bear Valley*, the court considered whether the repeal of a statute and enactment of new legislation permitted "the destruction of rights existing under the former statute." *Id.* The court found that the new legislation "must be construed to

operate prospectively and not retrospectively" and stated that "[s]tatutes are presumed to so operate unless the Legislature has clearly expressed a contrary intention." *Id.* As the court explained in *Bear Valley*: "An express saving clause in a repealing statute is not required in order to prevent the destruction of rights existing under the former statute, if the intention to preserve and continue such rights is otherwise clearly apparent. Thus, if it can be gathered from any act on the same subject passed by the legislature at the same session that it was the legislative intent that pending proceedings should be saved, it will be sufficient to effect that purpose." *Id.*; *see also In re Cindy B.*, 192 Cal. App. 3d 771 (1987) ("***The amended statute contains no express language providing for retroactivity. That would appear to settle the question, as this court has noted, [t]he Legislature is well acquainted with the rule requiring a clear expression of retroactive intent***.") (internal quotations omitted). Here, SBX1-2 repealed former Section 387, but the Legislature expressly added Section 399.12(e)(1)(C) and Section 399.16(d) to grandfather and protect POUs' prior investments and reliance on the then-existing law under Section 387.

LADWP does not dispute that SBX1-2 established a ***prospective*** uniform statewide standard for the procurement of energy from eligible renewable energy resources following SBX1-2's effective date. Indeed, LADWP's 2011 RPS Policy expressly acknowledges the new definition of an eligible renewable energy resource for LADWP's **new** renewable procurement after SBX1-2's effective date. *See* Ting Decl. (TN#212401) at ¶ 12, Ex. 08 (TN#212410) (2011 RPS Policy) at § 4, LA000066. ("For RPS resources procured after the effective date of [SBX1-2], 'eligible renewable energy resource' means a generation facility that meets the eligibility criteria under applicable law, including a 'Renewable Electrical Generation Facility' as defined in Section 25741(a) of the Public Resources Code….").

Finally, Staff's argument that there were at least 44 different POUs when SBX1-2 became effective reinforces why the Legislature needed to include a grandfathering provision in Section 399.12(e)(1)(C). The Legislature mandated that the CEC shall certify as "eligible renewable energy resources" facilities "approved by the governing board of a local publicly owned electric utility prior to June 1, 2010, for procurement to satisfy renewable energy procurement obligations adopted pursuant to former Section 387…." The CEC's responsibility was limited to confirming that the POUs' governing board approved the facilities before June 1, 2010 to satisfy procurement obligations under Section 387, with the sole exception for the large hydroelectric generating facilities discussed above. *See City of Alhambra v. County of Los Angeles* , 55 Cal.4th 707, 726 (2012). ("The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act."); *see also* California Legislature Letter to Chairmen Weisenmiller (TN#211968) ("***SBX1-2 also stipulated that the CEC 'shall' certify procured renewable energy resources under the rules in place at the time of contract execution***.").

Staff's Response stated that Staff could not confirm whether LADWP's BC-Hydro PPAs and Shell and Atmos Agreements satisfied the requirements under Section 399.12(e)(1)(C). Specifically, Staff's Response provided the following:

> Staff cannot speak to whether LADWP approved the procurement of electricity from the BC Hydro facilities prior to June 1, 2010 to satisfy renewable energy procurement obligations adopted by LADWP pursuant to former Public Utilities Code section 387. LADWP's Renewables Portfolio Standard Policy, dated May 23, 2005, appears to have been adopted pursuant to section 387. This policy was

> in effect when LADWP executed its BC Hydro agreements with Powerex Corp. in March 2007. (Staff's Response (TN#213474) at 62)
>
> Staff has no basis for determining whether the biogas procured under the 2009 Shell and Atmos contracts satisfied the requirements in LADWP's Renewable Portfolio Standard Policy, as amended in April 2008, or whether the electricity generation resulting from Scattergood, Harbor, Valley, and Haynes facilities satisfied procurement requirements under LADWP's policy. (Staff's Response (TN#213474) at 23.)

LADWP's Initial Response submitted conclusive evidence establishing that LADWP's BC-Hydro PPAs and Shell and Atmos Agreements were approved under the governing rules established by the City and LADWP's Board to satisfy LADWP's renewable procurement obligations under LADWP's RPS Policy (as amended) adopted pursuant to Section 387. *See* LADWP Initial Response (TN#213475) at 59-72; *see e.g., supra*, Section II.A(2-3). Moreover, the biomethane procured under the Shell and Atmos Agreements was used at LADWP's in-basin generating facilities, ***which have already been certified by the CEC as eligible renewable energy resources*** for the use of biomethane procured under the agreement that LADWP and Shell Energy executed in December 2011. *See* Staff's Response (TN#213474) at 68 ("The Scattergood, Harbor, Valley and Haynes facilities are currently certified for the RPS by the CEC based on the use of biomethane procured under LADWP's 2011 Shell contract."); TN#213404 (CEC RPS Certificates for Scattergood, Harbor, Valley, and Haynes Generating Facilities).

5. Staff's Interpretation of Section 399.12.6(a) Is Based on a Flawed Interpretation of the Meaning of the Rules in Place in 2009 When LADWP Executed the Shell and Atmos Agreements.

Staff's Response admitted the following facts relevant to the Committee's assessment of Section 399.12.6(a):

> According to the 2009 Shell and Atmos contracts, the biomethane procured thereunder is produced from landfill gas, so it meets the definition 'biomethane' in Public Resources Code Section 25741 as required under section 399.12.6(a)(1). Additionally, the biomethane was procured under contract executed by LADWP in 2009 and reported to the CEC as part of an application for RPS certification submitted in July 2011, and therefore before the March 29, 2012 deadline specified in Public Utilities Code section 399.12.6(a)(1). Also, the biomethane procured under the 2009 Shell and Atmos contracts may come from landfills that were producing the gas and injecting it into a common carrier pipeline on or before April 1, 2014, thereby satisfying the requirements of Public Utilities Code section 399.12.6(a)(1). (Staff Response (TN#213474) at 29)

Therefore, the ***sole*** issue for the Committee's determination under Section 399.12.6(a) is whether the Shell and Atmos Agreements were "eligible under the rules in place as of the date of contract execution…." On this issue, Staff's interpretation of the meaning of the "rules in place" is premised on the same flawed interpretation Staff applied under Section 399.16(d)(1). Specifically, Staff argues that the rules in place refer to the CEC's rules under the RPS Eligibility Guidebook.

Staff's Response, however, admitted that the "RPS procurement requirements for POUs in 2009 would have been established by the POU itself as part of a POU's RPS program implemented pursuant to former Public Utilities Code section 387." Staff's Response (TN#213474) at 43. Similar to Section 399.16(d)(1), Staff's interpretation of Section

399.12.6(a) applies the CEC's RPS Eligibility Guidebook standards retroactively to LADWP's 2009 procurement contracts. Thus, Staff's interpretation fails for the same reasons discussed above. *See supra* at 14-16; 25-26; *see also Hassan v. Mercy American River Hosp.*, 31 Cal.4th 709, 716 (2003) ("[W]ords should be given the same meaning throughout a code unless the Legislature has indicated otherwise.").

As discussed in LADWP's Initial Response, AB 2196's legislative history confirms that the Legislature intended to grandfather biomethane procurement contracts based on the rules in place on the date the contracts were executed, and not on the date the CEC received the application for RPS certification. LADWP Initial Response (TN#213475) at 47-59; *see also* AB 2196 Legislative History (TN#213453) ("The Senate amendments clarify that ***electric generation that relies on procurement of biomethane from a contract executed***, by a retail seller ***or local publicly owned utility*** and reported to PUC or Energy Commission, prior to March 29, 2012, ***counts in full, as eligible generation for purpose of complying with the RPS***."); California Legislature Letter to Chairmen Weisenmiller (TN#211968) ("***The Legislature provided grandfathering language in SB X1-2 and later in Assembly Bill (AB) 2196, to expressly account for the investments made on behalf of the public by POUs to ensure those investments would be fully counted by the CEC. AB 2196 expressly grandfathered pipeline biomethane procured under contracts executed before March 29, 2012***.").

Moreover, the CEC's *Concept Paper for the Implementation of Assembly Bill 2196 for the Renewables Portfolio Standard* (TN# 213287) stated:

> The Energy Commission's practice has been to determine a facility's RPS eligibility based on the RPS Eligibility Guidebook rules in place at the time an application for certification is received by the Energy Commission. However, by referencing the 'rules in place as of the date of contract execution,' AB 2196

> modifies the Energy Commission's existing practice and requires the Energy Commission to determine a facility's RPS eligibility based on the RPS Eligibility Guidebook rules in place when the biomethane contract was executed.

Staff's remaining argument for applying the CEC's RPS Eligibility Guidebook standards is the reference in Section 399.12.6(a) to the Fourth Edition Guidebook. However, Staff's Response admitted that interpreting the Fourth Edition Guidebook standards to apply to all biomethane procurement contracts would be inconsistent with the plain language of the statute and the canons of statutory construction. Specifically, Staff's Response acknowledged that:

> Construing 'including the Fourth Edition' language as imposing the requirements of the Fourth Edition Guidebook on all existing biomethane procurement contracts, irrespective of contract execution date, would render meaningless the 'contract execution' language in Public Utilities Code section 399.12.6(a)(1). The language of section 399.12.6(a)(1) should not be construed in a way that renders parts of the statute surplusage. (Staff's Response (TN#213474) at 31.)
>
> Moreover, had the Legislature wanted to subject all existing biomethane contracts to the requirements of the Fourth Edition Guidebook, it could have stated this plainly in the language of Public Utilities Code section 399.12.6(a)(1), but it did not. (Staff's Response (TN#213474) at 31).

Staff nonetheless contends that that the reference to the RPS Guidebook in Section 399.12.6(a) should be construed "as requiring the application of one of several possible Editions of the RPS Eligibility Guidebook" including the Second or Third Edition Guidebook. Similar to Section 399.16(d), there is no factual or legal support for Staff's interpretation and the Committee cannot "rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed." *Cornette*, 26 Cal.4th at 73-74.

In sum, Section 399.12.6(a) provides a second statutory basis under AB 2196 for the Committee to grandfather and count the renewable procurement under the Shell and Atmos Agreements. Moreover, as discussed in the sections below, Staff's arguments for denying the RPS-certification of the Shell and Atmos Agreements under the Third Edition Guidebook and Staff's interpretation of the term "use" in Public Resources Code Section 25741 must also be rejected by the Committee.

B. The Third Edition Guidebook Contains No Written Standard Requiring the Delivery of Gas on the Interstate Pipeline Via a Physical Contract Path for Every Pipeline from the Landfill Injection Point to California.

Staff's Response admits that the Third Edition Guidebook ***does not contain a single reference*** requiring that pipeline biomethane be delivered under firm or interruptible transportation agreements for each pipeline on a "physical contract path" from the landfill injection point to the delivery point in California. *See* Staff's Response (TN#213474) at 10. The Third Edition Guidebook does ***not*** include express terms regarding delivery agreements, firm or interruptible transportation agreements, or evidence of delivery of the gas on the interstate pipeline via on a "physical contract path" for every pipeline from the landfill injection point to the California delivery point.

The Third Edition Guidebook contains ***one delivery standard*** - the biogas "must be injected into a natural gas pipeline system that is either within the WECC region or interconnected to a natural gas pipeline system in the WECC region that delivers gas into California." Third Edition Guidebook (TN#213454) at LA002744). LADWP submitted evidence regarding the injection of metered landfill gas into the interstate pipelines, the transportation and delivery of that biomethane on the interstate pipeline to the delivery point at

Opal, Wyoming, the delivery of biomethane under LADWP's KRT Firm Transportation Agreements from Opal to SoCalGas's delivery points at Kramer Ridge or Wheeler Junction, and the delivery of the biomethane on SoCalGas's local distribution system to LADWP's Scattergood, Valley, and Haynes generating stations. *See* Supp. Ting Decl. (TN#213035) at ¶¶ 3-43, Exs. 27-67 (TN#213036-TN#213076); Supp. Ting Decl. (TN#213035) at ¶¶ 50-56; Exs. 334-343 (TN#213395-TN#213402; TN#213410); Second Supp. Ting Decl. (TN#213415) at ¶¶ 4-7, Exs. 348-350, 355 (filed under seal); Masuda Decl. (TN#213079) at ¶¶ 4-224, Exs. 68-286 (TN#213080-TN#213213; TN#213224-TN#213245; TN#213252-TN#213283; TN#213300-TN#213319; TN#213321-TN#213336); Grueter Decl. (TN#213339) at ¶¶ 4-7, Exs. 287-290 (TN#213340-TN#213341; TN#213344).

This evidence established – without a doubt – that the biomethane procured under the Shell and Atmos Agreements was "injected into the natural gas pipeline system interconnected to a natural gas pipeline system in the WECC region that delivers gas into California." *See id.*; *see also* Schlesinger Decl. (TN#213411) at ¶ 12; *see also* Schlesinger Expert Report (TN#213413); Schlesinger Supp. Expert Report (TN#213414). Thus, while the Third Edition Guidebook does not provide the applicable rules in place for determining the RPS-eligibility of the Shell and Atmos Agreements, LADWP submitted evidence that confirms that the Shell and Atmos Agreements satisfy the sole delivery requirement expressly addressed in the Third Edition Guidebook, if it were to apply at all. *See e.g., id.*

Staff also contends that the Third Edition Guidebook includes ***implied*** and ***unexpressed*** delivery requirements, despite Staff's admission that the Third Edition does not contain express provisions requiring evidence of firm or interruptible delivery contracts. Staff's Response (TN#213474) at 9-10 ("The CEC considers the biogas delivery requirements in the Third Edition

Guidebook and Fourth Edition Guidebook to be largely the same….”). Staff's evidence in support of Staff's purported “understanding” of the biomethane delivery standards back in 2009 is a reference to a self-serving and inadmissible hearsay statement in the ***Seventh*** Edition Guidebook adopted in April **2013**. *Id.* at fn6.

Staff also claims – without any supporting, admissible evidence – that Staff always understood that the term “use” in Public Resources Code Section 25741 required that pipeline biomethane be delivered under firm or interruptible transportation agreements for each pipeline on a physical contract path from the landfill injection point to the delivery point in California. Staff's Response (TN#213474) at 9-10 (“The Third Edition Guidebook contains a use requirement for eligibility, which Staff interpreted to require a contractual arrangement between buyer and seller for the transport of the biogas from the point of injection to the delivery point in California.”).

But as discussed in LADWP's Initial Response, the CEC's prior statements in public notices for workshops discussing pipeline biomethane directly contradict Staff's contention in this proceeding that Staff always understood that the Third Edition Guidebook imposed strict requirements for the delivery of pipeline biomethane under firm transportation agreements for each pipeline on a physical contract path from injection point to California. *See* LADWP Initial Response (TN#213475) at 93-97. The CEC's public notices include express written admissions that declare the CEC's ***then-existing understanding of the law*** and the requirements for biomethane in 2011 and 2012, including the following examples:

> SBX1-2 defines a ‘renewable electrical generating facility’ as a facility that uses, among other technologies and fuels, biomass, digester gas, and landfill gas, and any additions or enhancements to the facility using that technology. These provisions have not changed since the law established the RPS with passage of

Senate Bill 1078 in 2002. The law does not define the terms 'biomass,' 'digester gas,' or 'landfill has,' and ***is likewise silent as to whether these fuels must be used on the site of the fuel's production to generate electricity for purposes of the RPS. Nor does the law specify how these fuels, if produced offsite, should be delivered to a power plant for purposes of generating electricity***. (CEC Notice of Staff Workshop re Pipeline Biomethane dated 8-16-11 (TN#213416) at LA001736-37.)

The current RPS Guidebook [Fourth Edition] does not require that the use of biomethane displace fossil fuel consumption or reduce air pollution. It does not require a showing that the use of biomethane results in GHG reductions. And ***it does not establish rigorous requirements to verify that the claim quantity of biomethane was actually used by the designated power plant***, or that the necessary biomethane attributes were transferred to the power plant operator for purposes of the RPS and not double counted for other purposes. (CEC Notice of Business Meeting re Biomethane dated 3-16-12 (TN#213445) at LA002843).

Biomethane that is injected into a natural gas pipeline system for delivery to a designated power plant in accordance with the RPS Guidebook [Fourth Edition] may not displace in-state fossil fuel consumption. ***It may, in fact, not be physically delivered to the purchasing power plant***, or even to the state, and may not even be used to produce electricity. This is true for several reasons. First, the natural gas pipeline system is a non-dedicated transportation system. ***Once the biomethane is injected into the pipeline system it is commingled with fossil fuels in the natural gas in the pipeline***. Second, ***the gas within the pipeline does not consistently flow in one direction***. Lastly, there could be multiple extraction points on the pipeline system between the point of injection of the biomethane and the extraction point for the designated power plant. (CEC Notice of Business Meeting re Biomethane (TN#213445) at LA002843.)

Unlike other renewable resources that are located at the site of the power plant, such as wind, solar, hydroelectric or geothermal resources, ***biomethane originates***

> ***offsite and is delivered via a non-dedicated natural gas pipeline system. This makes its use for the RPS more difficult or impossible to verify*** and introduces the possibility of fraud. (CEC Notice of Business Meeting re Biomethane (TN#213445) at LA002843.)

To the extent that Staff "understood" that the term "use" under Section 25741 and the RPS Guidebook standards imposed strict requirements for the delivery of pipeline biomethane via a "physical contract path" on each pipeline from the landfill injection point to California, that understanding was apparently not provided to the CEC or the Commission to include in the CEC's public notices regarding the then-existing status of biomethane. Alternatively, if Staff did provide that understanding, the CEC or the Commission rejected the understanding in favor of the statements that were included in the CEC's public notices. Either way, the Committee should not permit Staff to take a position that contradicts the CEC's past admissions and statements regarding the delivery requirements for biomethane.

Staff also argued that LADWP "would have known" about Staff's undisclosed and implied delivery requirements if LADWP had applied for RPS-certification in 2009, like other third parties who applied for certification under the Third Edition Guidebook. Staff's Response (TN#213474) at 15-20. However, California law bars the enforcement of agency interpretations that are not adopted consistent with the public notice and rulemaking requirements under the Administrative Procedures Act (Gov. Code § 11340 *et seq.*). One purpose of the APA is "to ensure that those persons or entities whom a regulation will affect have…notice of the law's requirements so that they can confirm their conduct accordingly." *See Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 568 (1996).

The APA defines an "underground regulation" as "any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule

governing a state agency procedure, that is a regulation as defined in Section 113242.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA." 1 C.C.R. § 250(a); *Capen v. Shewry*, 155 Cal. App. 4th 378, 386 (2007); The APA prohibits the enforcement of such underground regulations. *Tidewater*, 14 Cal.4th at 569; *Cal. Advocates for Nursing Home Reform v. Bonta*, 106 Cal. App. 4th 498, 507 (2003); *see also Bonta*, 106 Cal App 4th at 505 ("The APA was designed to prevent the use by administrative agencies of "underground" regulations.). The "APA establishes that 'interpretations' typically constitute regulations and that ***an unwritten policy*** generally applied, ***amounts to a 'regulation'***." *See Capen*, 155 Cal. App. 4th at 386.

Public Resources Code Section 25747(a) provides that any guidelines adopted pursuant to Section 399.25 of the Public Utilities Code shall be exempt from the requirements of the APA. Staff contends that the RPS Eligibility Guidebook falls within this exception. However, the Third Edition Guidebook does not contain an express written requirement that pipeline biomethane be delivered into California through firm or interruptible transportation service agreements via a physical contract path from the landfill injection point to the delivery point in California. Therefore, the Commission's approval of the Third Edition Guidebook did not expressly adopt Staff's implied "understanding" of the Third Edition Guidebook's delivery requirements under Public Resources Code Section 25747(a). Accordingly, Staff's "understanding" of the delivery requirements under the Third Edition Guidebook constitutes an agency interpretation that – if accepted by the Committee – would constitute an underground regulation, which is unenforceable under the APA. *See Capen*, 155 Cal App. 4th at 386; *see also*

Naurist Action Committee v. Dep't of Parks and Rec., 175 Cal. App. 4th 1244, 1250 (2009) (the APA bars enforcement of underground regulations).

C. **Staff's Interpretation of Use Has No Factual or Legal Basis and Contradicts Federal and State Natural Gas Standards.**

Staff also argues that the Shell and Atmos Agreements do not satisfy the "use" requirement under Public Resources Code Section 25741. Staff's interpretation of "use" is based solely on Staff's subjective interpretation of natural gas terms that lacks any legal or factual support. Staff contends that the Shell and Atmos Agreements cannot satisfy the use requirement because the biomethane procured under the Shell and Atmos Agreements were transported on the interstate pipeline via an exchange, which does not result in the actual delivery of the landfill gas direct to the generating facility. Staff's interpretation of use literally requires an ***impossible*** tracing of natural gas molecules from the landfills to the generating stations. Schlesinger Decl. ¶¶ 5, 11. Ex. 346 (LA001710) TN#213414. Moreover, as discussed below, Staff's interpretation contradicts binding federal precedent under the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, and FERC precedent and, if adopted by the Committee, would be expressly preempted under federal law.

Indeed, FERC – and not Staff – defines what constitutes "transportation" of gas on the interstate pipeline. FERC defines transportation to "include[] storage, *exchange*, backhaul, displacement, or other methods of transportation." 18 C.F.R. § 284.1(a) (emphasis added). This broad definition is purposeful. It ensures that FERC has the "authority to comprehensively administer open access transportation and to promote competition." *Williams Nat. Gas Co.*, 61 FERC ¶ 61,205, at p. 61,764 (1992) ("*Williams*") (explaining why backhauls constitute interstate transportation even if the molecules delivered in a backhaul transaction are produced,

transported, and consumed entirely within state lines), *aff'd sub nom.*, *Okla. Nat. Gas Co. v. FERC*, 28 F.3d. 1281 (1992). *See* Schlesinger Decl. (TN#213411) at ¶¶ 1-4, ¶ 11;9 (explaining that "North American gas pipelines function as an interconnected grid, under 'open access' rules" operating, "essentially, as a unified grid."). FERC has found that NGA Section 16 supports its broad "transportation" definition by permitting FERC to prescribe rules and regulations that "define accounting, *technical and trade* terms used in [the NGA]." . at 61,763 (quoting 15 U.S.C. § 717(o).

As noted above, Staff's interpretation requires an impossible tracing of gas molecules within the pipeline to confirm that the gas is "used" at the generating facility. Schlesinger Decl. ¶¶ 5, 11. Ex. 346 (LA001710) TN#213414. Staff's interpretation conflicts with the FERC's regulations and standards for interstate gas transportation. Schlesinger Decl. ¶¶ 12-15. Ex. 346 TN #s 213411, 213414. "An exchange is a valid form of pipeline transportation." *See* 18 C.F.R. § 284.1(a); *Williams*, 61 FERC ¶ 61,205, at p. 61,764; Schlesinger Decl. (TN#213411) at ¶¶ 12-13. Accordingly, Staff's interpretation – if adopted by the Committee – would be expressly preempted under federal law. *Iroquois Gas Transmission Sys., L.P.*, 59 FERC ¶ 61,094, at p. 61,360 (1992) (FERC regulations of interstate natural gas pipeline transportation preempt "state and local law to the extent the enforcement of such laws or regulations would conflict with the [FERC]'s exercise of its jurisdiction under the [NGA]."); *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 699 (1984) (federal regulations have the same preemptive effect as federal statutes); *see also United Dist. Cos. v. FERC*, 88 F.3d 1150, 1155 (D.C. Cir. 1996) (holding that "federal preemptive authority may be exercised not only though federal statutes but also regulations issued by administrative agencies.").

Indeed, an interpretation of use similar to Staff's interpretation was expressly rejected by FERC in proceeding involving Washington Gas Light Company and the Transcontinental Gas Pipe Line Co., LLC. *Transco. Gas Pipe Line Co., LLC*, 128 FERC ¶ 61,255 (2009) ("*Transco*"). In *Transco*, the pipeline sought authorization from FERC to construct two bidirectional interconnections to allow it to receive and deliver natural gas from and to another pipeline system connected to a liquefied natural gas ("LNG") import facility. Washington Gas alleged that by transporting the regasified LNG from the pipeline as part of a mixed gas stream, "Transco will be eliminating or severely curtailing a domestic-only supply option." *Id.* at 18. It also alleged concerns with gas quality. FERC responded that "with respect to Washington Gas" desire to maintain its 'domestic supply option,' given the highly-integrated nature of the national gas grid, unless a shipper is directly-connected to its source of supply, ***it is virtually impossible to insure that it will receive the same supply molecules for which it contracted***." *Id.* at 27; *see also Associated Gas Distrib. v. FERC*, 899 F.2d 1250, 1254, n.1 (D.C. Cir. 1990) ("[s]ince natural gas in fungible, its 'transportation' does not always take the form of the physical carriage of a particular supply of gas from its starting point to its destination."); *El Paso Natural Gas Co.*, 145 FERC ¶ 61,040 at P 247 (2013) (noting that "displacement plants an important role in the operation of El Paso's system…although displacement is not relied upon for contracting purposes," and also acknowledging "the ***impossibility of tracking every molecule***."); *Nat. Gas Pipeline Co. of Am.*, 92 FERC ¶ 61,221, at p. 61,740 (2000) (explaining that "it is not possible to trace molecules of gas transported under any specific [pipeline] rate schedule in order to determine their end-use after they enter the [pipeline's] and the [local distribution company's] systems and are commingled."); *Tex. Gas Serv. Co. v. El Paso Natural Gas Co. , L.L.C.*, 143

FERC ¶ 61,200 at P 6 (2013) (FERC "does not require the tracing of gas molecules."); *see also* Schlesinger Decl. (TN#213411) at ¶¶ 13-14.

Moreover, FERC issued a Policy Statement in 2006 discussing the commingling and interchangeability of natural gas. *See Policy Statement on Provisions Governing Natural Gas Quality and Interchangeability in Interstate Natural Gas Pipeline Tariffs*, 115 FERC ¶ 61,325 (2006) ("Natural Gas Interchangeability Policy Statement"). Under the Policy Statement, FERC explained that the term "pipeline quality" natural gas "is defined in each individual pipeline's tariff, and these definitions vary widely from pipeline to pipeline." *Id.* at 4. FERC also explained that "only natural gas quality and interchangeability specifications contained in a Commission-approved gas tariff can be enforced." *Id.* at 29.

FERC encourages quality and interchangeability provisions to be flexible to permit pipelines "to balance safety and reliability concerns with the importance of maximizing supply, while recognizing the evolving nature of the science underlying gas quality and interchangeability specifications." *Id.* at 30. FERC also noted that "[r]igid gas quality and interchangeability requirements could ***unnecessarily restrict*** the introduction of new sources of supply, which is ***inconsistent*** with the Commission's policy of encouraging new supplies and the construction of infrastructure to bring new supplies to market." *Id.* at 33.

FERC, therefore, gives pipelines the discretion "to decide when and how much to allow exceptions to gas quality and interchangeability specifications to accommodate production that may not have convenient access to gas processing." *Id.* at 39. This pragmatic discretion allows the gas pipeline to operate in an optimal manner. FERC encourages pipelines "to allow blending, pairing, and other strategies, to the extent these can be implemented on a non-discriminatory basis and in a manner that is consistent with safe and reliable operations. This is

consistent with the Commission's policy of minimizing any unnecessary restrictions on the supplies available to the national gas market." *Id.* at 41. Staff's interpretation of "use" contradicts these federal principles.

Moreover, as discussed in LADWP's Initial Response, Staff's interpretation also contradicts natural-gas delivery standards adopted by CARB and the CPUC. *See* 17 C.C.R. § 95131(i)(2)(D)(1) (CARB's MRR provides that for "biomethane and biogas, the verifier must examine all nomination, invoice , scheduling, allocation, transportation, storage, in-kind fuel purchase and balancing reports from the producer to the reporting entity and have reasonable assurance that the reporting entity is receiving the identified fuel"); *see also* TN#213436 at LA002537 ("Biomethane nominated to a pipeline is identical to fossil-fuel derived natural gas; therefore the actual molecules of biomethane may not be combusted by the operator with a purchase contract.").

Staff's interpretation conflicts with the gas transportation standards on SoCalGas's local distribution system. Under SoCalGas Rule No. 30, the amount of gas that is redelivered is thermally equivalent to the amount that was delivered into the system: "[SoCalGas] will accept such quantities of gas from the customer or its designee and redeliver to the customer on a reasonably concurrent basis an equivalent quantity, on a therm basis, to the quantity accepted." Supp. Ting Decl. (TN#213035) at ¶ 27, Ex. 51 (TN#213060) at LA000671-73. Rule 30, addressing "Customer Owned Gas," specifically states that SoCalGas has no requirement to deliver the "identical" gas purchased. *Id.* at LA000671-79. SoCalGas Rule 30.B.1 further explains that due to operating conditions there may be a difference between the amount of gas a customer delivers into the SoCalGas system and the amount of gas that is delivered to the customer on a given day. *Id* at LA000678.

In sum, Staff's proposed interpretation of use contradicts well-established federal and state law and has no factual basis to support Staff's subjective interpretation and implementation and the molecule-tracing delivery standard imposed by Staff.

D. Staff's Interpretation Raises Unnecessary Constitutional Questions Regarding Retroactive Rulemaking, Federal Preemption under the Supremacy and Commerce Clauses, Contractual Impairment, and Other Due Process Concerns.

"A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws" [Cal. Const, Art. I § 7] "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" U.S. Const. Amend. 14, § 1.

SBX1-2 mandates that POUs, such as LADWP, establish the RPS-procurement requirements through obtaining RECs. Pub. Util. Code § 399.30(a). The RECs were to be audited, verified, and accounted for, with potential penalties associated with failing to account for them accordingly. PUC §§399.25, 399.30 subs. (o) and (p). As authorized by state law, POUs could purchase and trade RECs on the open market, similar to a form of currency, to satisfy its RPS. *Id.* §§ 399.30, 399.31; *see also* CPUC Decision R.06-02-012 (TREC Decision). Each REC was to represent one megawatt of energy. Pub. Util. code § 399.12 subd. (h). Furthermore, the Legislature grandfathered RECs, specifically resources procured "prior to June 1, 2010," to be counted "in full" towards the RPS targets. *Id.* §§ 399.16(d), 399.30 (b). Emerging case law regarding RECs also considers them property or "assets." *See Wheelabrator Lisbon v. Conn. Dept. of Pub. Util. Ctr.*, 531 F.3d 183 (2nd Cir. 2008); *Morgantown Energy Assoc. v. PSC*, 2013 U.S. Dist. Ct. LEXIS 140220 (S.D. W. Va 2013); *American Ref-Fuel Co.*,

105 F.E.R.C. ¶61,004 (2003). Therefore, RECs are a cognizable property interest for a POU under California law.

Due process "guarantees a fundamentally fair decision making process." *People v. Ramos* (1984) 37 Cal. 3d 136, cert. denied, *California v. Ramos* (1985) 471 U.S. 1119 (1985); *see also* Cal. Const. Art. I, § 7. Furthermore, California's Constitution requires the uniform operation of laws to apply substantially the same standards. *See* Cal. Const. Art I § 7; U.S. Const., 14th Amend; *Cohan v. Alvord*, 162 Cal App 3d 176, 208 (1984).

Staff's retroactive application of the RPS legislation enacted under SBX1-2 and AB 2196 raises due process concerns regarding retrospective legislation, contractual impairment, *Ex Post Facto* laws, and preemption concerns under the U.S. Supremacy and Commerce Clauses. Where a municipality challenges the action of a state other than "its creator" the municipality is entitled to due process protections. *River Vale v. Orangetown*, 403 F.2d 684, 686 (2d Cir. N.Y. 1968).

Here, Staff expressly admits that "LADWP may not have been informed of the CEC's requirements for certifying facilities based on the use of biomethane, or how these requirements were being interpreted and applied by Staff." (Staff's Response (TN#213474) at 20). Staff further states that the only way LADWP would have known of Staff's interpretations was if LADWP had applied for certification, even though, LADWP was not required to apply to the CEC for RPS certification; "since at that time [prior to SBX1-2] the law did not require POUs to certify their facilities through the CEC." (Staff's Response (TN#213474) at 20).

If a POU, such as LADWP, were required to certify its facilities, or procure renewable energy only from certified facilities in 2003, the Legislature would have clearly stated as such, and LADWP would have been on notice of the law. However, Section 387 enacted a voluntary and not mandatory RPS program for POUs, like LADWP. Under California's Constitution and

the U.S. Constitution, LADWP would have to have been provided with notice as to how Staff was applying the law, including its interpretations of regulations. Explaining that had LADWP applied for certification it would have known how Staff could have interpreted its regulation is not only insufficient notice, but is creating an impossible standard and one created more than a decade after LADWP first engaged Powerex and over six years after LADWP entered into the Shell and Atmos Agreements.

There was no statutory requirement for certification at the time LADWP entered into the Powerex BC-Hydro PPAs or the Shell and Atmos Agreements. The CEC had no statutory mandate to administer or enforce LADWP's voluntary RPS program. The retroactive interpretation by Staff is entirely arbitrary and capricious and amounts to a blatant violation of basic due process protections under the California and U.S. Constitutions.

Staff defends its position denying RECs for the Powerex-BC Hydro PPAs through its significant repetition of the Second Edition Guidebook, stressing the different eligibility requirements placed on hydroelectric facilities located outside of California. (Staff's Response at 65 (TN#213474)). Staff claims that it is unable to determine whether the BC Hydro facilities, located in the Canadian provinces of British Columbia or Alberta, "satisfy the requirements in Public Resources Code section 25741(a)(2) or (3) for electrical generating facilities located out-of-state or out-of-country." (Staff's Response at 65 (TN#213474)).

Staff's attempted retroactive application of the CEC's RPS Guidebook standards on the Powerex-BC Hydro PPAs also raises unnecessary constitutional concerns regarding the potential violation of the North America Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 289, 299 (1993) ("NAFTA"). Staff's interpretation of the Second Edition Guidebook does not give parity to power purchased from Canadian power sources with power purchased

from within the State of California and from other states within the United States. As described below, NAFTA applies to the energy purchased by LADWP from Powerex and BC Hydro.

Article 301 of NAFTA requires each NAFTA party to accord "national treatment" to the goods of the other NAFTA parties in accordance with Article III of the General Agreement on Tariffs and Trade ("GATT"). NAFTA art. 301(1); General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (hereinafter GATT). National treatment means, "with respect to a state or province, treatment no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive or substitutable goods." *Id.* art. 301(2). Chapter 6 of NAFTA relates to energy goods, and "applies to measures relating to energy and basic petrochemical goods originating in the territories of the Parties and to measures relating to investment and to the cross-border trade in services associated with such goods." *Id.* art. 602(1). Electricity is considered an "energy good." An "energy regulatory measure" is "any measure that "directly affects the transportation, transmission or distribution, purchase or sale, of an energy or basic petrochemical good." *Id.* art. 609. NAFTA Article 606 requires NAFTA parties to accord national treatment to "energy regulatory measures." *Id.* art. 606(1)(a). Finally, Article 1001 states that NAFTA's national treatment requirement applies to measures adopted or maintained by the treaty signatories relating to federal and state government procurements. *Id.* art. 1001(1). Additionally, this chapter requires the signatories to accord the goods of the other signatories treatment no less favorable than the most favorable treatment that the party accords to its own goods and the goods of another NAFTA party. *Id.* art. 1003(1).

NAFTA incorporated by reference the provisions in GATT "with respect to prohibitions or restrictions on trade in energy." *Id.* art. 603(1). One of the GATT's most important provisions, as applied to energy, is the national treatment of goods. *See generally*, GATT art. III.

Hence, it follows that parties subject to GATT are not permitted to discriminate in their enacted laws and regulations, or retroactive interpretation of laws, on the basis of national origin of the energy. *See id.* Imports into one country must be accorded treatment no less favorable than the treatment given to similar domestic products in the laws, regulations, and other requirements concerning their sale, distribution, or use. GATT's provisions apply to governmental agency procurements for commercial resale or with a view to use in the production of goods for commercial sale. *See id.* art. III, para. 8(a).

Both the United States and Canada are signatories of NAFTA, and, thus, federal and state entities of both countries are subject to the provisions of NAFTA. NAFTA art. 1001(1). Powerex and its parent, BC Hydro, are both owned by the Province of British Columbia. BC Hydro has been determined to be a foreign sovereign under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611 (2012), (*See Cal. Dep't of Water Resources v. Powerex Corp.*, 533 F. 3d 1087 (9th Cir. 2008)). The U.S. Department of State, and well as the Governments of Canada and British Columbia, supported the determination of BC Hydro as a foreign sovereign.

LADWP purchased power from Powerex and BC Hydro for commercial resale to its customers. Hence, this purchase fell within the parameters of NAFTA and GATT. LADWP provided the Powerex contracts with parity when it executed the contracts over a decade ago. Power obtained from entities within Canada was afforded parity with entities with the U.S. and the State of California ***at the time*** the contracts were executed. *See* GATT article III, para. 8(a).

This requirement extends to actions by the State of California, including the compliance and certification obligations imposed by the Staff for power procured by LADWP for its renewable portfolio standards. NAFTA art. 606(1)(a). Staff's retroactive interpretations for

certification as they claim are required by the CEC's Second Edition Guidebook are an "energy regulatory measure," defined in Chapter 6 of NAFTA. Yet, the Staff's interpretations, for the electricity purchases from Powerex and BC Hydro, make compliance with NAFTA impossible. The CEC, as a governmental regulatory body, must accord electricity of a NAFTA party treatment that is no less favorable than it accords, in like circumstances, to electricity obtained from within California and from other states within the U.S. *Id.* art. 301(2).

Despite NAFTA and GATT's national treatment requirements, Staff's interpretations of the Second Edition Guidebook's requirements for certifying small hydroelectric facilities to be eligible for inclusion in a renewable portfolio standard differ depending upon whether the facilities are located (a) within the State of California, (b) out-of-state, but with their first point of interconnection to the WECC transmission system outside the state (treated as "in-state" facilities), (c) out-of-state without a first point of interconnection to the WECC transmission system ("other out-of-state"), or (d) outside of the U.S.

It is undeniable that the Second Edition Guidebook provided the most favorable treatment to in-state facilities seeking to be certified as an eligible facility. Other out-of-state facilities were required to demonstrate that they did not cause or contribute to any violation of a California environmental quality standard or requirement. Facilities located outside of the U.S., however, were required to meet far stricter and more onerous standards in addition to the standards applicable to in-state facilities. These included: (1) a comprehensive list and description of all California environmental quality laws and regulations that would apply to the facility if it were located within California (the location within California to be selected by the applicant): (2) an assessment as to whether the facility's development or operation would cause or contribute to a violation of any of California's law or regulations; and (3) an explanation as to how the facility's

developer and/or operator would meet California's laws and requirements in developing or operating the facilities, including whether the developer and/or operator would secure and put in place mitigation measures to ensure that California's laws and regulations were complied with by the facility even though it was located outside of California. *See* Second Edition Guidebook (TN#213298) at 34-41.

According to Staff, facilities located outside of the U.S. were required to demonstrate that they were constructed and operated in a manner that was as protective of the environment as a similar facility in California, (just not powerhouses used by the City and County of San Francisco). Similar requirements, however, were not placed on other out-of-state facilities. Accordingly, out-of-country facilities were required to meet a higher standard than in California historically or presently, and a higher standard than facilities located out-of-state, but within the U.S.

Application of the Second Guidebook retroactively would lead to absurd results. For example, the City and County of San Francisco's large hydroelectric generation derived from the damming of the Hetch Hetchy Valley in Yosemite National Park would not be certified.[3] See *United States v. San Francisco*, 310 U.S. 16 (1940). Moreover, the additional requirements for out-of-country facilities in the Second Edition Guidebook are arbitrary. Per the CEC's own admission, the applicable laws and regulations for a given facility will vary depending on the facility's location because the laws and regulations across California are different. (Staff's Response at 54, 78 (TN#213474)). The Second Edition Guidebook did not provide any guidance as to exactly how an applicant would pick a location in California to meet the certification

[3] The Hetch Hetchy Power System is composed of the Moccasin, Kirkwood, and Holm powerhouses with a combined output of over 400 MWs, yet was deemed to offset any additional RECs needed by the POU – in essence a "count in full" legislative determination. See Restore Hetch Hetchy Comments on Initial Study Report, Attachment 7, filed with FERC, Project No. 2299-075, (2013)(for MW output); PUC§399.30(j).

requirements. Additionally, the Second Edition Guidebook did not provide any specifics as to which laws would be applicable to such a similar fictitious facility.

In fact, based on a generic analysis of the environmental laws of California and British Columbia, the CEC found that facilities located in British Columbia were "not inherently eligible" for certification because there were "substantial differences between the levels of environmental protection required in British Columbia and California, including the fact that British Columbia does not have a stand-alone endangered species act." (Staff's Response at 65 (TN#213474)) (citing CEC, *Analyzing British Columbia Run-of-River Facilities For The California Renewables Portfolio Standard* at 2, Pub. No. CEC-300-2013-011-CMF (Jan. 2014)). Staff determined that facilities located in British Columbia "would have great difficulty demonstrating that they are as protective of the environment as a similar facility would be if located in California," as it interpreted the Second Edition Guidebook's mandate. (*See id.*) The CEC unilaterally determined that BC Hydro facilities "do not meet the definition of a 'renewable electrical generation facility'" and Staff is attempting to apply this fiat retroactively without any specific analysis of BC Hydro's facilities. (Staff's Response at 88 (TN#213474)).

The retroactive imposition of additional and more onerous requirements for power generated in Canada versus power generated in the State of California or power generated in another U.S. state violates the U.S.'s commitments under NAFTA. The Second Edition Guidebook, as interpreted by Staff retroactively to BC Hydro and Powerex, fails to give parity to power purchased from Canadian power sources with power purchased within the State of California and from other states within the U.S. As a state governmental entity, the CEC must accord electricity of another NAFTA party treatment that is no less favorable than it accords, in like circumstances, to electricity obtained from within California and from other states. In order

to avoid this conflict with treaty rights, the CEC should recognize the electricity purchased by LADWP from Powerex and BC Hydro to count in full to fulfill LADWP's renewable portfolio standard. Otherwise, under the standards in the Second Edition Guidebook, as interpreted by the CEC, Powerex or BC Hydro could be entitled to file a claim under Chapter 11 of NAFTA alleging a violation of NAFTA's national treatment requirement. Any such claim or action necessarily would implicate the federal government of the United States.

E. The Committee Has the Authority to Resolve the Issues in this Proceeding.

The Committee has the statutory authority to address the questions regarding Staff's interpretation and implementation of SBX1-2 and AB 2196, and to resolve the issues regarding the RPS-eligibility and certification of the biomethane procurement under the Shell and Atmos Agreements, and the RPS-eligibility of the RECs procured under the Powerex BC Hydro PPAs and through the use of biomethane at LADWP's in-basin generating facilities.

The Commission's June 14, 2016 Order Establishing Committee states that the "Committee shall have the authority and duties necessary to conduct this proceeding as set forth in Energy Commission regulations, including the authority of a presiding member to manage the proceeding in accordance with California Code of Regulations, title 20, section 1203. The Committee is authorized to and may hear and act on any subsequent RPS certification or eligibility appeals, motions, or requests filed by LADWP seeking action by the full Commission." *See* Order No. 16-0614-2a, Docket No. 16-RPS-02.

The presiding member shall have the power to "[r]egulate the conduct of the proceedings and hearings, including, but not limited to, disposing of procedural requests, ordering the consolidation or severance of any part, or all, of any proceeding or hearing, admitting or excluding evidence, designating the subject matter, scope, time of presentation, and order of

appearance of persons making oral comments or testimony, accepting stipulations of law or fact, and continuing the hearings." 20 C.C.R. § 1203(c); *see also* 20 C.C.R. § 1210 ("in an adjudicative proceeding the presiding member may regulate the proceedings, and any parts thereof, in any manner that complies with the Administrative Adjudication Bill of Rights…."). In addition, "[a]ny party may request the presiding member or, where applicable, the commission, to ***issue orders*** or rulings, including but not limited to… ***requests for adjudication of procedural or substantive issues***." 20 C.C.R. § 1211.5(a), in relevant part.

Also, Public Resources Code Section 25218(e) states "the commission may do any of the following: Adopt any rule or regulation, ***or take any action***, it deems reasonable and necessary to carry out this division." Furthermore, "[t]he provisions specifying ***any power or duty of the commission shall be liberally construed***, in order to carry out the objectives of this division." Public Resources Code Section 25218.5. The "division" refers to Division 15 of the Public Resources Code, which includes the Commission's Renewable Energy Resources Program in Chapter 8.6 (Pub. Res. Code §§ 25740 *et seq.*), and the Commission's related duties under the California Renewable Energy Resources Act (Pub. Util. Code §§ 399.11 *et seq.*) enacted under SBX1-2 and related RPS-legislation.

The Commission has a ***paramount*** duty to ensure that SBX1-2 and AB 2196 are interpreted and implemented in a manner that is consistent with the statutory provisions and expressed legislative intent. *See Morris v. Williams*, 67 Cal.2d 733, 748 (1967); *Assoc. for Retarded Citizens v. Dep't of Dev. Servs.,* 38 Cal.3d 384, 391 (1985); *E.g.,* Gov. Code §§ 11342.1-11342.2. Accordingly, the Committee has the authority to issue a decision in this proceeding addressing the legal and factual questions relating to the LADWP's grandfathered biomethane and BC Hydro procurement.

Staff's Response argues that the Committee's decision in this case cannot rewrite the RPS Guidebook Standards or the RPS Regulations for POUs. Staff's Response states:

> If the Committee determines that the CEC interpreted the RPS statute incorrectly in adopting the RPS eligibility guidelines or the POU RPS regulations, then the CEC should be directed to initiate new proceeding(s) to revise the eligibility guidebook and/or the POU RPS regulations as appropriate. (Staff's Response (TN#213474) at 88.)
>
> The POU RPS regulations have been developed pursuant to a public process in accordance with the Administrative Procedures Act and can only be changed through the same process, not through this Appeal by LADWP re RPS Certification or Eligibility proceeding. Therefore, if amendments to the CEC's POU RPS regulations are necessary, Staff should be directed to initiate a separate rulemaking proceeding to propose the amendments, rather than address the amendments as part of a POU-specific appeal proceeding, such as the subject proceeding for the LADWP Appeal. Staff's Response (TN#213474) at 89-90.

The Committee's authority to issue a decision resolving the issues in this proceeding, however, does not constitute a regulation subject to the APA. California law is clear that agency "***interpretations that arise in the course of case-specific adjudication are not regulations***, though they may be persuasive as precedents in similar subsequent cases." *Tidewater*, 14 Cal.4th at 571; *see also Corrales v. Bradstreet*, 153 Cal. App. 4th 33, 57 (2007) (same). As established above, there is no question that the Committee has the authority to address and resolve the substantive legal and factual questions raised in this proceeding.

Moreover, as discussed during the CEC's September 14, 2016 Business Meeting, Staff is currently planning to seek approval of the Ninth Edition RPS Guidebook and amendments to the RPS Regulations for POUs. To the extent that Staff believes that a decision in favor of LADWP

requires amendments to the RPS Regulation for POUs or changes to the RPS Eligibility Guidebook, Staff should defer seeking the Commission's approval of the Ninth Edition Guidebook and the amendments to the RPS Regulations for POUs until ***after*** the Commission adopts a final decision in this proceeding.

III. ANTICIPATED EVIDENTIARY OBJECTIONS

As LADWP noted during the September 6, 2016 CSC Hearing, LADWP objected to Staff's failure to meet the basic evidentiary requirements the evidence that Staff submitted in support of Staff's Response. Indeed, Staff did not submit a single witness declaration in the proceeding, failed to authenticate documents or provide foundational support, and improperly relied on hearsay statements. Staff also submitted unrelated, third-party biomethane contracts in support of its arguments. *See e.g.,* TN#213345 (PG&E Microgy Contract); TN#213360 (Calpine EIF KC Biogas Purchase Agreement); TN#213364 (SMUD Shell Transaction Confirmation); TN#213394 (Supporting Letters from PG&E, Shell, and Others). Staff provided no basis for authenticating these documents, has not turned over the complete set of documents relating to these contracts, and should be precluded from introducing speculative and prejudicial arguments based on Staff's interpretation of these contracts.

On September 7, 2016, the Committee issued a Summary of Committee Orders and Report After September 6, 2016, Closed Session, TN# 213513, ("CSC Order"). Paragraph 3 of the CSC Order provided that "Staff shall address LADWP's concerns about a lack of foundation for specified staff documents by declaration(s) meeting evidentiary standards or other appropriate means." 20 C.C.R. Section 1212(c)(1) states that "[d]ecisions in adjudicative proceedings shall be based on the evidence in the hearing record…." Section 1212(c)(2)

confirms that such "evidence ***does not include***, among other things, ***speculation, argument, conjecture, and unsupported conclusions or opinions***."

LADWP expressly reserves the right to file evidentiary objections and/or a motion to strike pursuant to Section 1212(a)(2) following the filing of Staff's Reply Response to the extent Staff's Reply filings do not cure the evidentiary deficiencies in Staff's submissions in 16-RPS-02.

IV. CONCLUSION

LADWP thanks the Committee for its time and attention to these matters. For the reasons discussed in LADWP's Initial Response and this Reply Response, and based on the evidence LADWP submitted in 16-RPS-02, LADWP established the legal and factual basis for confirming that the Powerex BC-Hydro PPAs and the Shell and Atmos Agreements are grandfathered contracts under SBX1-2 and AB 2196 that count in full for the RPS.

Dated: September 21, 2016 Respectfully submitted,

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