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Comments of the Cities of Cerritos, Corona, Moreno Valley, Rancho Cucamonga and Victorville on 33 Percent Renewables Portfolio Standard Pre-Rulemaking Draft Regulations

I. INTRODUCTION

The Cities of Cerritos, Corona, Moreno Valley, Rancho Cucamonga, and Victorville (“Small POU Cities”) appreciate the opportunity to submit comments on the *33 Percent Renewables Portfolio Standard Pre-Rulemaking Draft Regulations*, issued by the California Energy Commission (“CEC”), Energy Efficiency and Renewable Energy Division (CEC-300-2012-001-SD) (“Draft Staff Report”). As described in earlier comments,¹ the Small POU Cities are among the smallest of California’s publicly owned utilities (“POUs”). The Small POU Cities are also unique in that they were established in the last decade (in response to the uncertainty and volatility created by the 2000-2001 energy crisis). The small size and unique attributes of the Small POU Cities, combined with their late start in developing electric generation resources, make it unduly burdensome for the Small POU Cities to implement the new renewables portfolio standard (“RPS”) described under Senate Bill (“SB”) X1-2 in the same way as the larger, older utilities in California. Accordingly, and consistent with applicable administrative law principles, the CEC should consider and adopt meaningful alternatives to allow the Small POU Cities to implement SB X1-2 in a way that is less burdensome but equally effective, and that preserves the role ascribed in SB X1-2 to the Small POU Cities’ governing boards. As requested in the Draft Staff Report, these comments describe these alternatives.

The Small POU Cities appreciate the extensive work of the CEC staff on the Draft Staff Report and subsequent workshops and meetings. This effort is consistent with SB X1-2, which contemplates a cooperative regulatory framework since the CEC and POU governing boards have both been tasked with new regulatory responsibilities, some of which might overlap if the parties do not work together to assure appropriate allocation of responsibilities.

The Small POU Cities support the comments of the California Municipal Utilities Association (“CMUA”). Key among CMUA’s comments is that the CEC regulations should assure consistency with the basic statutory framework for POU, with the POU governing boards maintaining primary regulatory authority for their community utilities, subject to oversight by the CEC. This dual, cooperative framework is consistent with the express language of SB X1-2.

¹ *Comments of the Small POU Cities on 33 Percent Renewable Portfolio Standard Publicly Owned Electric Utility Regulations Concept Paper*, September 12, 2011, Docket No. 11-RPS-01 (“Small POU Cities September Comments”)

As further described below, the Small POU Cities believe that the CEC regulations should be revised to clarify that the POU governing boards should, in the first instance, interpret and apply the new RPS requirements and demonstrate how they can meet the good faith intent of the statute or show cause why they cannot. Among other things, this would assure consistency with the cooperative regulatory framework reflected in SB X1-2, while additionally promoting administrative efficiency by reducing duplicative and unnecessary processes. In short, the POU governing boards should have the first chance to interpret and act on the RPS requirements because this is consistent with SB X1-2 as a legal matter, and as a practical matter these elected bodies are closest to the challenges of operating the utilities and responding to the interests of the people living in the affected communities. California's open meeting laws, and added public disclosure required in SB X1-2, ensure that these requirements are addressed in an open, local context, unlike investor-owned utilities which do not have public processes except through the California Public Utilities Commission ("CPUC") in San Francisco.

The Small POU Cities' governing boards understand that they are obligated to take all necessary actions to comply in good faith with the new RPS requirements. As a first and important step, notwithstanding the fact that the CEC has yet to adopt regulations, the Small POU Cities' governing boards have all adopted RPS enforcement plans under SB X1-2 and submitted the plans to the CEC.

II. COMMENTS ON THE DRAFT STAFF REPORT

A. The Little Hoover Commission's findings support the adoption of a regulatory framework that gives substantial deference to the findings of the Small POU Cities' governing boards in their interpretation and implementation of SB X1-2.

A regulatory framework that leaves most of the interpretation and alternatives for compliance in the hands of the Small POU Cities' governing boards is consistent with the findings of the Little Hoover Commission in its recent report on improving California's rulemaking processes.² The Little Hoover Commission's findings were codified into law in January 2012 through the enactment of SB 617.³ There are several administrative best practices identified by the Little Hoover Commission and incorporated in SB 617 that are applicable to this proceeding, and in particular to the CEC's regulations applicable to the Small POU Cities. Principal among these best practices is the need to avoid duplication with other regulations and to determine necessity, that is, whether the regulations are needed to carry out the purpose of the law.⁴ The proposed CEC regulations are duplicating functions which are

² The Little Hoover Commission, or the Milton Marks "Little Hoover" Commission on California State Government Organization and Economy, is an independent state oversight agency tasked with promoting efficiency, economy and improved service in California state government operations. See Cal. Gov. Code §§ 8501-8508. See "Better Regulation: Improving California's Rulemaking Process," October 2011, Little Hoover Commission ("Little Hoover Report").

³ See Little Hoover Report at 44 ("The Commission's recommendations are consistent with SB 617 (Calderon and Pavley), passed by the Legislature with bipartisan support and signed into law, which calls for strengthening the Administrative Procedure Act and updating requirements for regulatory impact analysis.").

⁴ See Little Hoover Report at 10.

the responsibility of the POU governing boards and they are not necessary to carry out the purpose of SB X1-2. As further discussed below, the interpretation of the requirements of SB X1-2 and the determination of how those requirements are implemented in the resource plans of the Small POU Cities are within the authority of the Small POU Cities' governing boards. Accordingly, it would be duplicative and unnecessary for the CEC to also carry out these responsibilities. While a certain measure of oversight by the CEC is appropriate, the draft regulations contain too much duplication and should be revised.

B. The CEC has administrative authority to differentiate the Small POU Cities in the regulations.

SB 617 implements the recommendations of the Little Hoover Commission by requiring regulatory agencies to conduct economic analyses “to determine whether the regulatory proposal is an efficient and effective means of implementing the policy decisions enacted in statute or by other provisions of law in the least burdensome manner.”⁵ Since the CEC must consider less burdensome alternatives, it must also have the administrative authority to design alternatives into its regulations, and, in particular, to consider the relative compliance burdens on the very small POU. SB 617 supports arguments of the Small POU Cities that the CEC has the discretion to differentiate the Small POU Cities based on their size.⁶ The new process established by SB 617 requires the CEC to include in its final statement of reasons accompanying the adopted regulation “ b) an explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses....”⁷ Consideration of small businesses and small governmental entities due to the disproportionate administrative costs they incur in complying with complex regulations is also a policy recognized at the Federal level and reflected in the Regulatory Flexibility Act.⁸ The policy reasons behind such statutes are well understood and broadly supported. In its first report on the state of small business in 1982, the Small Business Administration stated that the relative burden is much greater, because compliance costs cannot be spread out over larger quantities of output. Small business is at a competitive disadvantage because of the existence of efficiencies of scale in regulatory compliance.⁹

⁵ Cal. Gov. Code § 11347.3 (amended by SB 617)

⁶ See Small POU Cities September Comments at 2 (“Rulemaking bodies have a wide discretion in exercising the power to classify. As long as the rule works uniformly upon all persons in a class and the classification is based upon some natural or reasonable distinction, the classification is not invalid. Classifications will not be overturned unless plainly arbitrary.” Gen. Elec. Co. v. State Bd. Of Equalization, 111 Cal. App. 2d 180, 187 (1952)).

⁷ Cal. Gov. Code § 11346.2(b)(5)(B) (enacted by SB 617)

⁸ The Regulatory Flexibility Act (“RFA”) was enacted on September 19, 1980, and requires federal agencies to consider the impact of regulatory proposals on small entities and determine whether there are equally effective alternatives that would make the regulatory burden on small business more equitable. Pub. L. No. 96-354, 94 Stat. 1164 (1981), *amended by* Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified as amended at 5 U.S.C. §§ 601-612 (2000)).

⁹ U.S. Small Business Administration, “The State of Small Business: A Report Of The President” 13 (1982)

Regulations that provide no differentiation among the regulated entities, or at least deference to the governing boards with primary enforcement authority, despite the obvious differences among the entities, is simply not a reasonable application of administrative authority. The Small POU Cities respectfully request consideration of the following simpler and less burdensome alternatives by the CEC.

C. The CEC can limit the burden on the very small POU's by expressly acknowledging the authority of the very small POU's governing boards under SB X1-2.

The Small POU Cities appreciate the CEC's request for alternatives that could limit the compliance burden on the very small POU's (which includes the Small POU Cities).¹⁰ In Section D, below, the Small POU Cities suggest two alternatives that could be implemented by the CEC to achieve the stated purpose of limiting the burden on very small POU's. Before this, however, the Small POU Cities wish to stress the need for the CEC to expressly acknowledge in its final regulations the authority already vested in the very small POU's governing boards to reduce the impact of RPS compliance. Without assurance from the CEC on these key statutory provisions, very small POU's will unnecessarily be exposed to regulatory uncertainty, which would exacerbate, not limit, the burden on very small POU's.

The Draft Staff Report states as follows with respect to existing provisions in SB X1-2:

There are, however, provisions in [SB X1-2] that allow for the adoption of compliance measures, such as reasons for delay of timely compliance, cost limitations, and procurement category reductions. These measures may help reduce the impact of RPS compliance on POU's that would otherwise encounter significant impacts.¹¹

What is missing from this statement, and which is needed for regulatory certainty, is an acknowledgement by the CEC that these existing statutory provisions may be implemented by the very small POU's governing boards without unnecessary second-guessing by the CEC. Below, the Small POU Cities provide a description of two provisions in SB X1-2 and how the very small POU's governing boards may implement these provisions in a manner to reduce the impact of RPS compliance. The Small POU Cities respectfully request that the final CEC regulations include clear statements that determinations of the very small POU's governing boards in this regard will not, absent extraordinary circumstances, be subjected to second-guessing by the CEC.

¹⁰ See Attachment A to the Draft Staff Report; Section C.1. ("Are there any additional alternatives that are available and that the Energy Commission should consider to limit the burden on very small POU's?").

¹¹ Attachment A to the Draft Staff Report; Section C.

1. The governing boards of the very small POU's have authority to allow 100% reliance on renewable energy credits.

In previous comments, the Small POU Cities described the rights of their governing boards to alter the procurement content requirements of Section 399.16.¹² Section 399.16(e) permits a retail seller to apply to the CPUC for a deviation from the procurement content category percentage requirements. Since the governing boards of the Small POU Cities stand in the place of the CPUC under the structure of SB X1-2, it is clear that Section 399.16(e) grants the governing boards of the Small POU Cities the discretion to similarly adjust the percentage requirements for the reasons provided by that section, including inadequate supply of the nature and type fit for the very small POU's (i.e., small, incremental portions of resources or contracts). The CEC should expressly acknowledge the governing boards' authority in this regard.

In previous comments, the Small POU Cities also stated that the governing boards of the very small POU's may look to Section 399.18, together with Section 399.16, as authority for their determination that their respective POU's may rely 100% on renewable energy credits.¹³ Section 399.18, which cross-references Section 399.16, provides an exemption from the procurement content category requirements of section 399.16 for the very small investor-owned utilities.¹⁴ Because of the inter-relation between Section 399.16 and Section 399.18, Section 399.18 is rightly interpreted as also applying to the very small POU's. Section 399.30(c)(3) directs POU's to adopt "procurement requirements consistent with section 399.16." The rules of statutory construction provide that provisions in statutes, if related to the same subject, should be construed together and harmonized.¹⁵ A reasonable application of this principle would be to look not only to Section 399.16 but also to those provisions in the RPS statutory scheme that reference Section 399.16. One key provision referencing Section 399.16 is Section 399.18. Moreover, application of Section 399.18 is very similar to and consistent with the application of Section 399.15(e) (discussed in the first paragraph of this section), which also allows a deviation from the procurement content category percentage requirements. Accordingly, as a legal matter it is reasonable to apply Section 399.18 as a basis on which the very small POU's' governing boards may determine that a deviation from the procurement content category requirements of section 399.16 is appropriate.

Additionally, as a policy matter, the same policy rationale and justification that would exempt small investor-owned utilities from the procurement content category requirements of section 399.16, would equally apply to the very small POU's. There is no other basis or justification for the special treatment of the small investor-owned utilities in SB X1-2 except their small size.

¹² Small POU Cities September Comments at 6. Unless otherwise noted, all further statutory references are to the California Public Utilities Code.

¹³ See Small POU Cities September Comments at 7.

¹⁴ The relevance of the cross-referencing to Section 399.16 was also previously discussed by the Small POU Cities. (See Small POU Cities September Comments at 7.)

¹⁵ See, e.g., In re First Nat. Bank in Oakland, 96 Cal. App. 107, 111 (1928).

This is particularly important since special consideration for small entities is now required under the Administrative Procedures Act, which specifically requires that the CEC justify its reasons for rejecting proposed alternatives that would lessen the adverse economic impact on small entities.¹⁶ Accordingly, the CEC should expressly acknowledge the authority of the very small POU's governing boards to apply Section 399.18 in this manner.

2. The governing boards of the very Small POU's have authority to apply the cost limitation provision in a manner that allows procurement to be apportioned among the three portfolio content categories.

The Draft Staff Report acknowledges that the cost limitation provision in SB X1-2 can "reduce the impact of RPS compliance on POU's that would otherwise encounter significant impacts."¹⁷ The Small POU Cities agree, and request the CEC to expressly acknowledge the authority of the very small POU's governing boards to apply the cost limitation provision in a variety of manners. One manner being considered by the Small POU Cities is to use the cost limitation provision to first set a dollar amount that may be spent on products within the three procurement content categories. The Small City would first forecast retail sales for each year of the compliance period and determine the estimated procurement quantity requirement for the period. The Small City would then apportion procurement among the three portfolio content categories to meet its procurement quantity requirement without exceeding the established cost limitation value for the compliance period. In effect, the cost limitation provision would be used in a manner similar to Section 399.16(e), described above. So, for example, instead of determining that inadequate supply required deviation from the procurement content category percentage requirements, the governing board would determine that application of the cost limitation required deviation from the percentage requirements applicable to the procurement content categories. As currently drafted, Sections 3206(a)(4)(B) and (C) would require complex calculations for reduction of compliance obligations in each of the content procurement categories, instead of simply allowing the Small City to apply its available funds among the content procurement categories until it reaches its cost limitations. In its final regulations, the CEC should expressly acknowledge the authority of the very small POU's governing boards to flexibly apply the cost limitation provision in this manner.

D. The Small POU Cities have compliance alternatives which are consistent with the intent of SB X1-2 and less burdensome than the draft regulation proposed by the CEC.

1. The CEC can design its procedures for enforcement under Section 399.30(n) to exempt the Small POU Cities from a finding of failure to comply due to cost and the de minimis contribution of the Small POU Cities to California's RPS goals.

Section 399.30(n) provides the basis for the CEC's enforcement authority and provides discretion on the part of the CEC as to whether a violation is noticed and ultimately referred to

¹⁶ See SB 617 (16)(b).

¹⁷ Attachment A to the Draft Staff Report; Section C.

the California Air Resources Board (“ARB”). The Small POU Cities have previously stated that the CEC has relatively broad authority to make reasonable distinctions in its enforcement rules on the basis of the size of the POU.¹⁸ As such, the Small POU Cities believe that the CEC can design its enforcement regulations to exempt very small POU’s from a finding of non-compliance if, among other things, the very small POU’s use good faith efforts to meet the RPS requirements. The CEC has the authority to differentiate the Small POU Cities based on their size and other factors. As described in the Small POU Cities’ opening comments,¹⁹ the Small POU Cities, on average, have annual retail sales of approximately 85,000 MWhs, well below the 200,000 MWhs threshold established by the ARB for partial exemption under the Renewable Electricity Standard.²⁰ The ARB found that the compliance costs of the small POU’s are at least twice that of other utilities.²¹ It is likely significantly more than that for the Small POU Cities since they were not even in operation until 2003 and 2004, and most other POU’s and investor-owned utilities have already met the goals of the first compliance period.

The CEC could require reporting on the very small POU’s’ good faith compliance efforts as part of the regulations, but without imposing the financial risk associated with potential referral to the ARB for penalties. This would provide the very small POU’s with more flexibility in the event they do not achieve the amount of resources matching the procurement content categories on the schedule described in SB X1-2. Such a result would preserve the intent of SB X1-2 without imposing administratively challenging regulations and risky procurement requirements on the very small POU’s.

2. The CEC can adjust the starting point for the Small POU Cities to reflect that they were formed out of SCE’s service territory and their customers have been paying the cost of existing renewable resources for many years through SCE rates and exit fees.

A key distinguishing feature of the Small POU Cities relevant to this proceeding is that all the Small POU Cities entered into agreements with SCE which required the cities to pay so-called exit fees.²² A portion of those exit fees was attributable to the above-market costs of SCE’s renewable resources. When the Small POU Cities’ electric utility divisions were formed, SCE was well on its way to meeting the now required renewable resource goals. Through their

¹⁸ See Small POU’s September Comments at 2 (citing Gen. Elec. Co. v. State Bd. of Equalization, 111 Cal. App. 2d 180, 187 (1952)).

¹⁹ *Opening Comments of the Cities of Cerritos, Corona, Moreno Valley and Victorville On the Renewables Portfolio Standard Regulations*, July 8, 2011, Docket # 03- VII-5RPS-1078.

²⁰ California Environmental Protection Agency, Air Resources Board, Proposed Regulation for a California Renewable Electricity Standard, Staff Report: Initial Statement of Reasons, June, 2010, at VII-5 (“The analysis shows that retail sellers that qualify for the partial exemption are so small that they do not have the staffing or budget to absorb the administrative burden of compliance with a 33 percent renewables requirement. Requiring these entities to spend additional funds to procure renewable energy or RECs would create a disproportionate use of resources relative to the environmental benefits.”).

²¹ *Id.* at ES7

²² See, e.g., CPUC Resolution E-4256.

payment of exit fees, the Small POU Cities contributed to the cost of these resources, at least for resources included within SCE's generation mix as of 2004.

The governing boards of the Small POU Cities should be able to assume that their RPS obligation starts where SCE's stops. For example, since SCE had a generation mix in 2004 that reflected an RPS percentage of approximately 15%, the obligation of the Small POU Cities would start at 5% in the 2013-2016 compliance period, and increase proportionately in subsequent compliance periods. This is a reasonable alternative, and one that the CEC should consider as part of its final regulations. Moreover, this is a reasonable alternative that could be considered by the Small POU Cities' governing boards and adopted as part of their procurement plans.

E. The Small POU Cities will have a disproportionate economic impact resulting from administrative costs of compliance with the draft regulations.

Attachment B of the Draft Staff Report requests information from the POU's on economic impacts of the new rules for the 33 Percent Renewables Portfolio Standard as proposed in the staff draft regulations. The Small POU Cities are in the process of gathering the information requested in Attachment B. While the Small POU Cities have not completed their investigation, the following two points can be made at this juncture. First, unmitigated implementation of the RPS requirement, and associated compliance costs, will result in a significant, disproportionate rate impact for the Small POU Cities. This is particularly true for the first compliance period, since (as noted previously) the Small POU Cities are trying to overcome their late start (2003 and 2004) and their early contribution to SCE's renewable resources through the exit fee payment. Second, unmitigated application of the CEC's extensive regulatory and reporting requirements will result in a significant, disproportionate burden on the Small POU Cities. Even trying to respond to the request in the Staff Report to forecast and determine the administrative costs of compliance with the regulation is a significant burden on the staff of the Small POU Cities. This is true because, on average, the Small POU Cities only have two full-time equivalent administrative employees, and a significant burden would be placed on these employees to fully review, implement and monitor the draft regulations, including the reporting requirements and revisions to the draft regulations.

The Small POU Cities request that the CEC use the extensive data already available and used for years to support differentiation of small businesses in regulatory proceedings to support a similar differentiation for the Small POU Cities in this proceeding. Such data is substantiated in several studies by the Small Business Administration ("SBA") and used to support continued differentiation in regulatory treatment of small businesses at the Federal level and in most states. The SBA study confirmed the following:

America's smallest firms bear a disproportionately large share of regulatory costs. The most recent study indicates that firms with fewer than twenty employees spend \$7,647 per employee each year to comply with federal rules, while companies with 500 or more employees spend \$5,282 per employee. This research, which updates similar 1995 and 2001 reports, suggests that small business shoulder a forty-five

percent greater regulatory burden per employee than their large business competitors.²³

This data clearly supports creating less burdensome regulations for the Small POU Cities, and the Small POU Cities ask that such data be considered as the CEC works to revise its proposed regulations.

III. CONCLUSION

The Small POU Cities appreciate the efforts of CEC staff to make themselves available to representatives of the Small POU Cities. The small size and unique attributes of the Small POU Cities make it unduly burdensome for the Small POU Cities to implement the new RPS in the same way as the larger, older utilities in California. As a result, reasonable accommodations and alternatives are required. The current draft of the CEC's proposed regulations does not include reasonable alternatives, nor does it reflect the cooperative regulatory framework in SB X1-2 with respect to the roles of POU governing boards and the CEC. Accordingly, the CEC should revise its proposed regulations to reasonable accommodations and alternatives. Moreover, the CEC should revise its proposed regulations to clearly acknowledge the discretion provided in SB X1-2 for the governing boards of the Small POU Cities to interpret, apply and act in good faith to meet the new RPS requirements.

Thank you for your consideration of these comments.

Respectfully,



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²³ W. Mark Crain, *The Impact Of Regulatory Costs On Small Firms* 5 (2005), available at <http://www.sba.gov/advo/research/rs264tot.pdf> (written for the Office of Advocacy, U.S. Small Business Administration), as quoted in Holman, Keith W. (2006). "[The Regulatory Flexibility Act at 25: Is the Law Achieving its Goal?](#)". *Fordham Urb. L.J.* (33): 1119.