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STATE OF CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of: Complaint Against Stockton Port District for Noncompliance With the Renewables Portfolio Standard	Docket No. 18-RPS-01

PORT OF STOCKTON RESPONSE TO JANUARY 9, 2019 BRIEFING ORDER

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The Port of Stockton ("Port") hereby submits this brief in response to the *Briefing Order* ("Order") issued on January 9, 2019. In the Order, the Committee directs each party to file a brief "addressing suggested penalties should the Committee find the Stockton Port District noncompliant."[1] While the Port provides this brief on the issue of suggested penalties, the Port maintains its position that it has substantially complied with the requirements for both a cost limitation and a delay of timely compliance under the renewables portfolio standard ("RPS"), and that the California Energy Commission ("Commission") should dismiss this Complaint on that basis.[2] Alternatively, the Port supports the recommendation of Commission Staff that this Complaint should be dismissed due to mitigating circumstances.

Based on the record in this proceeding and Commission Staff's evaluation of the Port's activities during Compliance Period 1, the Commission must find that no penalty may be levied against the Port. Pursuant to the bifurcated regulatory structure for penalties established for the

[1] Briefing Order at 1.
[2] *See generally,* Port of Stockton Brief Addressing Legal Issues Identified in September 7, 2018 Notice of Committee Hearing; Port of Stockton Reply Brief Addressing Legal Issues Identified in September 7, 2018 Notice of Committee Hearing.

RPS, the Commission should not refer a violation to the California Air Resources Board ("ARB") where the Commission has determined that no penalty is warranted. Beyond the mitigating factors that have been discussed in the Opening and Reply Briefs by the Port and Commission Staff, the Commission must additionally ensure that the ultimate penalty amount assessed on a publicly owned electric utility ("POU") is comparable to the penalties that would be assessed on a similarly situated retail seller. Because a similarly situated retail seller would be fully excused from penalties, the Commission must dismiss this Complaint.

I. RESPONSE TO BRIEFING ORDER

A. The Commission Has Broad Authority to Dismiss the Complaint.

When determining the scope of a state agency's regulatory authority, a key factor is whether the agency's authority is ministerial or quasi-legislative in nature. Courts have defined a ministerial act as:

> an act that a public officer is required to perform *in a prescribed manner in obedience to the mandate* of legal authority *and without regard to his own judgment or opinion concerning such act's propriety or impropriety,* when a given state of facts exists.[3]

In contrast,

> Quasi-legislative regulations are those adopted pursuant to the Legislature's express delegation of substantive rulemaking authority and are entitled to substantial deference by courts.[4]

The courts have clarified that "the formulation and adoption of rules is the clearest example of a quasi-legislative function performed by an agency, a form of substantive lawmaking delegated by the Legislature."[5]

[3] Carrancho v. California Air Res. Bd., 111 Cal. App. 4th 1255, 1267 (2003).
[4] Kawamura v. Organic Pastures Dairy Co. LLC, 160 Cal. App. 4th 1374, 1388 (2008).
[5] Carrancho v. California Air Res. Bd., 111 Cal. App. 4th 1255, 1266 (2003).

The Commission's authority under Public Utilities Code section 399.30(n) and (o) is clearly quasi-legislative because the Commission is expressly directed to adopt "regulations," and the statute does not prescribe the manner in which the Commission must perform this duty. Applicable to the question at issue in this brief, the Commission is directed to adopt "a public process under which the Energy Commission may issue a notice of violation and correction against a local publicly owned electric utility for failure to comply with this article, and for referral of violations to the State Air Resources Board for penalties pursuant to subdivision (o)."[6]

Where an agency is exercising quasi-legislative authority, that agency has broad discretion. The courts have clarified that:

> [t]he relevant requirements for a quasi-legislative determination are: "first, did the agency act within the scope of its delegated authority; second, did the agency employ fair procedures; and third, was the agency action reasonable. Under the third inquiry, a reviewing court will not substitute its independent policy judgment for that of the agency on the basis of an independent trial de novo. A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.[7]

Pursuant to this standard, the Commission has broad discretion to determine whether there is a violation, including a finding that no violation occurred based on relevant factors.[8] As clarified above, in exercising this discretion, the Commission's action must be within the scope of the statute, be determined through a fair process, and be reasonable.

B. The ARB's Role in the Penalty Process is Narrow and the Commission Cannot Delegate its Responsibility to the ARB.

Under the bifurcated roles established by Public Utilities Code section 399.30(o) and (n), the Commission is the primary agency in the POU penalty process. The Commission determines

[6] Cal. Pub. Util. § 399.30(n).
[7] Schwartz v. Poizner, 187 Cal. App. 4th 592, 598 (2010).
[8] *Id.*

whether there was a violation, establishes a complete and final factual record, assesses all mitigating factors and determines whether those factors justify dismissal of the complaint. In contrast, the ARB plays the very narrow role of establishing the penalty amount and collecting the penalties from the POU. The Legislature did not divide these roles up in this manner because the Commission was incapable of setting a penalty amount. Instead, the main reason was the lack of an existing regulatory framework for collecting fines from POUs and depositing them into a fund that would ultimately benefit POU ratepayers. Currently, any retail seller RPS penalties are deposited into the Electric Program Investment Charge Fund ("EPIC").[9] The EPIC program generally does not fund projects located in POU service territories, and thus it would be inappropriate for POU penalties to be put into that fund.

Based on this structure and intended roles, it is clear that the ARB cannot be solely charged with the responsibility to determine if mitigating factors justify dismissal of a complaint. Such a determination is properly within the role of the Commission. The Commission has the RPS expertise, verifies POU RPS compliance, certifies RPS-eligible facilities, and oversees the complaint hearing process. The Commission is best able to determine if mitigating factors justify the dismissal of a complaint. If the Commission were to recommend either a nominal penalty amount or a penalty amount of zero and still refer the violation to the ARB, it would be effectively ceding its statutorily established role to the ARB.

First, once a violation is referred to the ARB, ARB staff is free to ignore any recommendation made by the Commission. Therefore, a recommendation of a zero or nominal penalty would provide no guarantee of the ultimate penalty that would be levied by the ARB. This means that a POU could be forced to pay a substantial fine despite the Commission finding

[9] Cal. Pub. Util. Code § 399.15(b)(8).

that no penalty is warranted. This would expose a POU to unnecessary burden and does not create a fair process for a POU.

Additionally, ARB has clarified that it does not intend to readjudicate matters decided by the Commission.[10] If the Commission refers a violation to the ARB where it recommends a zero or nominal penalty, the Commission would necessarily be forcing the ARB to readjudicate these issues. As opposed to determining an appropriate penalty amount, determining if a waiver is justified would require ARB staff to independently determine if waiver or a functional waiver is merited based on the record. The POU would be forced to essentially start the complaint process over at a new agency, but with a much more limited ability to present its case. Such a repetitive and burdensome process is not a reasonable or fair implementation of Section 399.30(n) and (o).

C. In Determining Whether to Dismiss a Complaint, the Commission Must Consider What Penalty Would be Imposed on a Similarly Situated Retail Seller.

The primary guiding direction in setting a penalty amount for a POU is provided by Public Utilities Code section 399.30(o)(1), which states:

> [u]pon a determination by the Energy Commission that a local publicly owned electric utility has failed to comply with this article, the Energy Commission shall refer the failure to comply with this article to the State Air Resources Board, which may impose penalties to enforce this article consistent with Part 6 (commencing with Section 38580) of Division 25.5 of the Health and Safety Code. **Any penalties imposed shall be comparable to those adopted by the commission for noncompliance by retail sellers**.[11]

Pursuant to the clear language of Section 399.30(o)(1), the ultimate penalty assessed on a POU should be *comparable* but not the same as the penalties imposed on a retail seller by the California Public Utilities Commission ("CPUC"). This language clearly does not cede authority to the CPUC to actually set the penalty amount. Instead, the combined process of both the

[10] CEC 000595, Initial Statement of Reasons for Enforcement Procedures, March 2013, at 48.
[11] Cal. Pub. Util. Code § 399.30(o)(1) (emphasis added).

Commission and ARB should look to similar considerations for setting not only the per renewable energy credit ("REC") dollar amount penalty, but also to related rules that would reduce or eliminate a penalty for a retail seller.

This broader approach to assessing comparability is demonstrated by the clear language of the relevant statutes. Importantly, section 399.30(o)(1) uses the broader concept of "penalties ***imposed***" rather than a narrower term referring only to the dollar per REC penalty amount. If the Legislature had intended the comparability analysis to narrowly focus on the dollar per REC amount, section 399.30(o)(1) would have referenced the "schedule of penalties" that the CPUC must adopt pursuant to Section 399.15(b)(8).[12] By referencing the penalty that is actually imposed, it is clear that the comparability analysis should be focused on the end result rather than the starting point.

Therefore, both the Commission and ARB in their respective roles must ensure that the end result for a POU is comparable to what the end result would be for a similarly situated retail seller. In Decision ("D.") 14-12-023 and D.18-05-026, the CPUC adopted: (1) a per REC penalty amount for both a procurement quantity requirement deficiency and/or a portfolio balance requirement deficiency; (2) an overall penalty cap; and (3) an after-the-fact process for seeking waiver of penalties.

For the ARB, this does not mean that ARB must utilize the same dollar per REC penalty amount, but instead that ARB should look to similar considerations and policies as what the

[12] Cal. Pub. Util. Code § 399.30(b)(8) ("If a retail seller fails to procure sufficient eligible renewable energy resources to comply with a procurement requirement pursuant to paragraphs (1) and (2) and fails to obtain an order from the commission waiving enforcement pursuant to paragraph (5), the commission shall assess penalties for noncompliance. A schedule of penalties shall be adopted by the commission that shall be comparable for electrical corporations and other retail sellers. For electrical corporations, the cost of any penalties shall not be collected in rates. . . . .").

CPUC relied upon. D.14-12-023 finds that the goals of both the penalty amount and penalty cap are to "encourage compliance with the RPS procurement obligations, increase regulatory certainty, and promote a fair and efficient administration of the RPS Program."[13] Therefore, it is appropriate for the ARB to set a penalty amount that encourages compliance, while still being fair in relation to the cost of compliance.

For the Commission, the comparability analysis should not look to the actual penalty amount, but should instead focus on the CPUC's process for dismissing a violation without issuing any penalties. Specifically, the Commission should consider whether a similarly situated retail seller would be excused from penalties under the CPUC process. As described in D.14-12-023, the CPUC's primary analysis of mitigating circumstances occurs when a retail seller files a request for waiver, generally based on the delay of timely compliance provisions provided in Section 399.15(b)(5). D.14-12-023 provides:

> [t]he statutory provisions for waiver of enforcement on [procurement quantity requirement] and reduction of [portfolio balance requirement] **direct the [CPUC] to consider a range of factors that focus heavily on whether the retail seller took all actions within its control that would have helped it comply**. It is at the stage of deciding on a request for waiver or reduction that the Commission will consider in some detail the behavior of the retail seller, not at the time a penalty is imposed for any deficits that may remain after a decision on the waiver or reduction request.[14]

D.14-12-023 expands on this, clarifying that this analysis will be broad:

> [t]he requirement that a retail seller must show that it took all reasonable steps to avoid failing to attain its [procurement quantity requirement] or procure within its [portfolio balance requirement] **allows the retail seller to show exactly what it did, and why those actions did not work, to avert the procurement deficit.** In this demonstration, the retail seller will have the opportunity to bring out a number of circumstances that show the efforts it made, which of course will also show the nature of the problems the retail seller faced.[15]

[13] D.14-12-023 at 72-73.
[14] *Id.* at 39-40.
[15] *Id.* at 36.

If a retail seller that had the same characteristics as a POU and that took the same actions as a POU would be granted a waiver of its penalties, then the comparability analysis would require a similar dismissal. Rather than amounting to a penalty amount that the Commission would recommend to the ARB, the appropriate procedure is for the Commission to simply dismiss the Complaint.

D. A Similarly Situated Retail Seller Would Be Granted a Waiver of Penalties Based on the Commission Staff's Evaluation of the Port's Actions During Compliance Period 1.

Pursuant to the CPUC's waiver process established in D.14-12-023, a retail seller is provided with the opportunity to file a motion for waiver no later than 30 days after the CPUC Energy Division Director has made a final determination of compliance for the relevant compliance period.[16] D.14-12-023 goes on to state that the determination as to whether a waiver will be granted is made based on the retail seller meeting the requirements Section 399.15(b)(5) pertaining to delay of timely compliance.

Pursuant to the findings in the *Commission Staff's Evaluation of Port of Stockton's Applied Optional Compliance Measures for the 2011-2013 Compliance Period* ("Staff Evaluation"), Commission Staff found that the Port met every single requirement in Section 399.15(b)(5)(B), which could be the ***entire*** analysis that would be applicable to granting a waiver for a retail seller. The following table provides each element of Section 399.15(b)(5)(B) and the corresponding Commission Staff determination for that element:

[16] D.14-12-023 at 12.

Element of Section 399.15(b)(5)(B)	Excerpt from Commission Staff Evaluation
§399.15(b)(5)(B): The commission shall waive enforcement of this section if it finds that the retail seller has demonstrated any of the following conditions are beyond the control of the retail seller and will prevent compliance: (B) Permitting, interconnection, or other circumstances that delay procured eligible renewable energy resource projects, or there is an insufficient supply of eligible renewable energy resources available to the retail seller. In making a finding that this condition prevents timely compliance, the commission shall consider whether the retail seller has done all of the following:	The Port addressed the requirement to demonstrate that it would have met its RPS procurement requirements but for the cause of delay. . . . [T]he Port anticipated that the 20 MW solar project would provide sufficient electricity products to meet its full RPS procurement requirements; however, due to circumstances beyond its control, the project was cancelled. The Port then pursued a smaller, 1.5 - 2 MW solar project, the output of which it intended to supplement with REC purchases, but this project, too, was delayed for reasons beyond the Port's control and ultimately suspended in favor of more cost-effective options.[17]

[17] Exhibit F, CEC 000134.

§399.15(b)(5)(B)(i) - Prudently managed portfolio risks, including relying on a sufficient number of viable projects.	The Port addressed the requirement to prudently manage portfolio risks, including but not limited to holding solicitations and relying on a sufficient number of viable projects to achieve the RPS procurement requirements. As discussed in Requirement 2, the Port anticipated that the 20 MW solar project was viable and the output would fully satisfy its RPS procurement requirements. (Updated RPS Procurement Plan, p. 3) However, due to circumstances beyond the Port's control, including a delayed system impact study conducted by PG&E and the project's exclusion from a CAISO cluster study required pursuant to the Port's interconnection agreement with PG&E, the project fell through. (Updated RPS Procurement Plan, p. 3; RPS Procurement Plan Section 111, pp. 5-6) The Port then sought new projects to meet its RPS procurement requirements, indicating it solicited offers for RPS-eligible resources. The Port considered multiple proposals for developing or purchasing the output from eligible renewable energy resources, including roof- and ground- mounted solar systems ranging from 0.5-2 MW in size and a large biomass facility. (Supplemental Narrative, pp. 3-4; Narratives, p. 2, 4) The Port ultimately pursued development of a smaller 1-2 MW local solar project, the output of which it intended to supplement with REC purchases (Port Response dated August 17, 2017, p. 2); however, after encountering schedule delays and reevaluating the project's cost-effectiveness, the Port suspended project development, as discussed in Requirement 2 above.[18]
§399.15(b)(5)(B)(ii) - Sought to develop one of the following: its own eligible renewable energy resources, transmission to interconnect to eligible renewable energy resources, or energy storage used to integrate eligible renewable energy resources. . . .	The Port addressed the requirement to seek to develop either its own RPS-eligible resources, transmission to connect to RPS-eligible resources, or energy storage used to integrate RPS-eligible resources. The Port demonstrated efforts to develop its own renewable energy resources, which included reviewing multiple proposals for utility owned generation. (Port Response dated August 17, 2017, p. 2; Supplemental Narrative, pp. 3-4) The Port pursued development of a 1.5 MW PV project, including completing the system impact studies required by PG&E. (Port Response dated August 17, 2017, p. 2; RPS Procurement Plan Section V, p. 10) However, study-related delays set back the project and the Port ultimately found it would no longer be cost-effective. (Updated RPS Procurement Plan, pp. 3-4; Narratives, p. 4)[19]

[18] Exhibit F, CEC 000135.
[19] Exhibit F, CEC 000135.

§399.15(b)(5)(B)(iii) - Procured an appropriate minimum margin of procurement above the minimum procurement level necessary to comply with the renewables portfolio standard to compensate for foreseeable delays or insufficient supply.	The Port addressed the requirement to procure an appropriate minimum margin above the level necessary to comply with the RPS to compensate for foreseeable delays or insufficient supply. As discussed in Requirement 2 above, the Port could not have reasonably foreseen the exclusion of its 20 MW solar project, with which it anticipated it could satisfy the entirety of its RPS procurement requirements. (Port Response dated August 17, 2017, pp. 1-2) Thus, it is appropriate that the Port did not attempt to procure additional resources above the level necessary to comply with the RPS. Furthermore, the Port attempted to make up for part of the lost generation by pursuing a smaller 1-2 MW project. (RPS Procurement Plan Section V, p. 10) However, this project was also delayed due to changes to the scope of the system impact study required by PG&E, which was unforeseen and outside of the Port's control. (Narratives, p. 4)[20]
§399.15(b)(5)(B)(iv) - Taken reasonable measures, under the control of the retail seller, to procure cost-effective distributed generation and allowable unbundled renewable energy credits.	The Port addressed the requirement to take reasonable measures to procure cost-effective distributed generation and allowable unbundled RECs. The Port reported receiving multiple proposals for renewable energy facilities located at the Port facilities, including a 500 kW solar rooftop system and 1.5 MW ground based solar project. (Supplemental Narrative, pp. 3-4) The Port indicated that it sought to develop cost-effective distributed generation through the local renewable projects described in its RPS procurement plans, including the 1.5 MW ground based solar project, but ultimately determined that these projects were not cost-effective. (RPS Procurement Plan Section V, p. 10; Port Response dated September 5, 2017, p. 1) The Port sought to obtain and did procure unbundled RECs, as confirmed in its Renewables Portfolio Standard Verification Results: Port of Stockton, Compliance Period 1 Report. (Supplemental Narrative, p. 4) The Port stated that the quantity of RECs purchased in 2012 was reflective of its PCC3 balance requirement, based on the soft target in 2012. (Narratives, p. 3) The Port did not explain why it did not seek to procure additional unbundled RECs beyond the PCC 3 balance limitation for the 2012 soft target. However, it is a reasonable conclusion that the Port procured a limited amount of unbundled RECs, because, as it retired no PCC 1 or 2 RECs, only 25 percent of unbundled RECs retired would be allowable for compliance.[21]

[20] Exhibit F, CEC 000136.
[21] Exhibit F, CEC 000136.

As demonstrated in the preceding table, the Port met every element that would be necessary for the CPUC to grant a waiver to a retail seller. If the Commission refers the Complaint to ARB for an assessment of penalties, the Commission will not be applying comparable penalties as those that have been adopted by the CPUC for retail sellers. Therefore, the Commission must dismiss the Complaint against the Port.

II. CONCLUSION

The Commission has broad authority to dismiss a complaint alleging a violation of the RPS by a POU. In considering the appropriate penalty, the Commission's primary role should be to determine if mitigating circumstances merit a full dismissal. As part of this consideration, the Commission must determine whether a similarly situated retail seller would have its penalties waived. Based on Commission Staff's Evaluation, it is clear that if the Port were a retail seller, its penalties would be waived. Based on this comparability analysis and based on the extensive discussion of other relevant mitigating factors throughout this proceeding, the Commission should dismiss this complaint and not refer this matter to the ARB.

Dated: January 23, 2019

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