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on Proposed Modifications to the Enforcement Procedures for the Renewables Portfolio Standard for POUs

Additional submitted attachment is included below.

June 22, 2020 | Submitted Electronically

Docket Unit
California Energy Commission
Docket No. 16-RPS-03
1516 Ninth Street, MS-4
Sacramento, CA 95814

RE: Comments of the Joint Publicly Owned Utilities on the Proposed Amendments to the Renewables Portfolio Standard (RPS) Regulations for Publicly Owned Utilities (POUs) [CEC Docket #16-RPS-03]

Dear Commissioner Douglas and Commission Staff,

The California Municipal Utilities Association (CMUA), Modesto Irrigation District (MID), M-S-R Public Power Agency (M-S-R), Northern California Power Agency (NCPA), Southern California Public Power Authority (SCPPA), Sacramento Municipal Utility District (SMUD), and Turlock Irrigation District (TID) (collectively the "Joint POUs") respectfully submit these comments to the California Energy Commission (Commission) on the proposed *Modification of Regulations Specifying Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* ("Proposed Regulations"), issued on May 7, 2020. The *Notice of Proposed Action* ("NOPA"),[1] requested that stakeholders file initial comments by June 1, 2020 in order for those comments to be considered at the *Lead Commissioner Workshop/Hearing*, which was held on June 8, 2020 ("June 8 Workshop"). CMUA filed initial comments on June 1 ("June 1 Comments") that identified areas of support and areas of concern, as well as posing a number of clarifying questions. During the June 8 Workshop, Commission staff responded to these clarifying questions.

[1] *See* California Energy Commission, "Notice of Proposed Action, Modification of Regulations Specifying Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities," issued on May 7, 2020 at 2 ("If possible, please submit written comments to be considered at the workshop/hearing by June 1, 2020.").

In these comments, the Joint POUs supplement and expand upon the June 1 Comments filed by CMUA, and make specific recommendations that are informed by Commission staff's responses during the June 8 Workshop.

I. INTRODUCTION

The Joint POUs greatly appreciate the Commission's efforts in producing the Proposed Regulations. As described in the June 1 Comments, the Commission must implement the relevant RPS legislation in a manner that gives a reasonable and commonsense interpretation that is consistent with the Legislature's purpose.[2] This implementation should be practical rather that overly technical and should seek to harmonize individual provisions with the overall statutory structure.[3] Further, the Joint POUs also seek to ensure that the implementation of the Commission's regulations do not result in harm to the POU customers or the communities that they serve. To protect these communities, the Joint POUs seek to maintain the full flexibility authorized by the relevant legislation and to maintain the authority of their locally elected governing boards.

The specific purposes of the RPS Program are set forth in Public Utilities Code section 399.11(b) and include promoting stable rates,[4] adding new renewable generating facilities,[5] displacing fossil fuel consumption,[6] reducing air pollution,[7] and meeting the state's greenhouse gas (GHG) reduction goals.[8] Public Utilities Code section 399.11(e) further clarifies that

> [s]upplying electricity to California end-use customers that is generated by eligible renewable energy resources is necessary to improve California's air quality and public health, particularly in disadvantaged communities identified pursuant to Section 39711 of the Health and Safety Code, and the [California Public Utilities Commission (CPUC)] shall ensure rates are just and reasonable, and are not significantly affected by the procurement requirements of this article.[9]

While this subdivision specifically references the CPUC, it is clear that the Legislature's overall purpose includes increasing the amount of renewable generation that is serving California, with a particular emphasis on encouraging generation that provides benefits to disadvantaged communities, but in a manner that does not significantly affect rates. Many POUs have high percentages of customers that require rate assistance and/or live in economically depressed areas, including in disadvantaged

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[2] Hubbard v. California Coastal Com. (2019) 38 Cal.App.5th 119, 135–136 [250 Cal.Rptr.3d 397, 409] (emphasis added), citing *Pasadena Metro Blue Line Construction Authority v. Pacific Bell Telephone Co.* (2006) 140 Cal.App.4th 658, 663–664, 44 Cal.Rptr.3d 556 (*Pasadena Metro Blue Line*) and *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1275, 109 Cal.Rptr.2d 611.

[3] *Id.*

[4] Cal. Pub. Util. Code § 399.11(b)(5).

[5] Cal. Pub. Util. Code § 399.11(b)(2).

[6] Cal. Pub. Util. Code § 399.11(b)(1).

[7] Cal. Pub. Util. Code § 399.11(b)(3).

[8] Cal. Pub. Util. Code § 399.11(b)(4).

[9] Pub. Util. Code § 399.11(e)(1) (emphasis added).

communities.[10] The Commission's RPS Regulations should ensure that POUs serving areas with high levels of poverty and unemployment have the flexibility and tools to protect these most vulnerable customers. Additionally, other unanticipated circumstances unique to each POU such as widespread electrification, changes to service boundary contracts, departing load, or other issues that could cause undue hardship, should be afforded the same flexibility. This also includes unforeseen events such as the COVID-19 pandemic that has had such a profound impact on electricity consumption and usage patterns. This flexibility includes ensuring that POU governing boards have the full discretion to set a cost limitation level that effectively avoids disproportionate rate impacts, as well as flexibility in other areas, such as the long term contracting requirements and excess procurement rules. The Commission should avoid any implementation that strands a POU with unnecessary costs or devalues the reasonable prior investments funded by POU ratepayers.

II. COMMENTS ON PROPOSED REGULATIONS

A. The Proposed Regulations Correctly Implement the Long-Term Procurement Requirement as an Independent Compliance Requirement that is Subject to the Delay of Timely Compliance Optional Compliance Mechanism.

The Joint POUs support an independent application of the long term procurement requirement where compliance is assessed separately from the procurement quantity requirement and portfolio balance requirement. An independent application provides a simpler implementation and gives the POUs clear direction on their compliance obligations, without lessening or devaluing the impact or prominence of the long-term procurement requirement as part of the overall RPS Program objectives.

However, the Joint POUs only support an independent application of the long term procurement requirement to the extent that all optional compliance mechanisms, including the "delay of timely compliance" mechanism, can be utilized to excuse noncompliance. Sections 3204 (d) and 3206 (a)(2) of the Proposed Regulations correctly implement the long term procurement requirement to both assess compliance independent of the other procurement requirements and to allow a POU to excuse noncompliance due to a delay of timely compliance condition. This implementation is supported by the overall statutory structure of the RPS program as well as the relevant legislative history.

During the Pre-Rulemaking phase of this proceeding, the stakeholders discussed whether the language of Public Utilities Code section 399.15(b)(5), which specifies the requirements for the delay of timely compliance optional compliance mechanism, could be read such that this provision would not apply to the long term procurement requirement, found in Public Utilities Code section 399.13(b). Specifically, Public Utilities Code section 399.15(b)(5) states that the CPUC "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 . . . ." The question arose because the long term procurement requirement is located in Section 399.13, not in Section 399.15. While Section 399.15(b)

[10] *See* Office of Environmental Health Hazard Assessment, Update to the California Communities Environmental Health Screening Tool, CalEnviroScreen 3.0, January 2017, *available at*: https://oehha.ca.gov/media/downloads/calenviroscreen/report/ces3report.pdf.

is specific to the CPUC's requirements for retail sellers, the POU requirements in Public Utilities Code section 399.30(d)(1)-(2) cross references these code sections, and thus it is directly applicable to POUs and the Commission's RPS Regulations. In comments filed by the Joint POUs on January 8, 2020, the Joint POUs provided a legal and policy rationale that clearly supports applying the delay of timely compliance provisions to the long term procurement requirement. These comments reiterate the rationale from those prior comments.

1. The Relevant Legislative History and Structure of the RPS Program Supports Applying the Delay of Timely Compliance Mechanism to the Long Term Procurement Requirement.

The topic of long term procurement has historically been addressed in Section 399.13 because that section dealt with planning, procurement, and solicitations. Further, prior to Senate Bill (SB) 350 (stats. 2015), there was not a mandate for long term procurement in the same sense that there was for the procurement quantity requirement or portfolio balance requirement. Instead, SB 107 (stats. 2006) put limitations on the CPUC's ability to approve short term contracts of investor owned utilities ("IOUs"). Specifically, the CPUC could only approve these IOU short term contracts, if it had established minimum procurement requirements for long term procurement. Thus, long term procurement was dealt with in Section 399.13 because it was tied to authorizing short term procurement. When the long term procurement requirement was restructured to be a standalone requirement, it remained in Section 399.13 because that is where the relevant language was already located. Nothing in any of the legislative history suggests that this drafting decision was intended to eliminate the optional compliance mechanisms that would apply to this modified requirement.

Additionally, under the RPS program, the delay of timely compliance provision serves an essential function as the mechanism where a violation or penalty can be waived if the affected entity demonstrates that good cause justifies waiver and that the noncompliance was caused by events outside the entity's control. As explained by the CPUC in Decision (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 states:

> [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.[11]

D.14-12-023 expands on this, clarifying what goes into this analysis:

> [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

[11] D.14-12-023 at 39-40.

> 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.[12]

If the delay of timely compliance optional compliance mechanism did not apply to the POU long term procurement requirement, then the Commission's enforcement process would be lacking essential fairness and process protections. A POU could be in violation of the RPS and face penalties even if the noncompliance resulted from events completely outside the control of the POU and despite the POU taking all reasonable actions to ensure compliance. Further, because the CPUC applies the long term procurement requirement differently (dependently rather than independently), a retail seller would still have access to the delay of timely compliance mechanism. This would mean that a POU would face a penalty where a similarly situated retail seller would be excused. That would create a misalignment in the RPS. The Legislature would not have left such a major distinction between POUs and retail sellers to mere inference, and instead such an issue, if so intended, would have been expressly stated.

Finally, applying the delay of timely compliance mechanism to the long term procurement requirement is supported by the rules of statutory construction, which provide that the statutory language must be given "a reasonable and commonsense interpretation that is consistent with the Legislature's apparent purpose and intention" and that the interpretation should result in "wise policy, not mischief or absurdity."[13] The delay of timely compliance optional compliance mechanism expressly includes the *exact occurrences* that are most likely to cause a project under development to be delayed, including "permitting, interconnection, or other circumstances. . . ."[14] If the delay of timely compliance optional compliance mechanism did not apply to long term procurement, then a POU would only be able to excuse noncompliance if it suffered unexpected delays associated with the construction of a new project for a *short term* contract. This is an absurd result because Public Utilities Code section 399.15(b)(5) would serve only to protect failures of short term contracts, but not long term contracts. It would simply not be reasonable to assume that the Legislature intended to encourage greater long-term commitments, but not to afford the parties entering into such arrangements the same level of protections afforded to short-term commitments.

In light of the preceding discussion, The Proposed Regulations have correctly implemented the delay of timely compliance mechanism as applying to the long term procurement requirement.

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[12] *Id.* at 36.

[13] Hubbard v. California Coastal Com. (2019) 38 Cal.App.5th 119, 135–136 [250 Cal.Rptr.3d 397, 409] (emphasis added), citing *Pasadena Metro Blue Line Construction Authority v. Pacific Bell Telephone Co.* (2006) 140 Cal.App.4th 658, 663–664, 44 Cal.Rptr.3d 556 (*Pasadena Metro Blue Line*) and *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1275, 109 Cal.Rptr.2d 611.

[14] Cal. Pub. Util. Code § 399.15(b)(5)

B. The Proposed Regulations Properly Treat Resales from a POU or Retail Seller for Long-Term Characterization.

Section 3204 (d)(2)(A)2. of the Proposed Regulations correctly allow a POU to treat as long-term any purchases from either a retail seller or POU, where the underlying contract meets the long term duration requirement, regardless of the length of the resale agreement. As stated in the Initial Statement of Reasons (ISOR):

> A value of long-term utility contracts to developers is the creditworthiness of a utility with a customer base. Absent a long-term commitment for the output of a facility, investors and lenders may be unwilling to commit funds for new projects or require higher rates of return, which may increase costs for ratepayers.[15]

Consistent with this determination, the ISOR concludes that the "the primary additional function of the long-term procurement requirement, as it applies to POUs, is to provide a long-term commitment from a utility which may be relied upon for developing new or repowering existing eligible renewable energy resources."[16] Section 3204 (d)(2)(A)2. of the Proposed Regulations is fully consistent with and directly supports this purpose.

Once a retail seller or POU has executed a long term contract with a renewable generating facility, that retail seller or POU has provided the necessary financial commitment and associated customer base that supports the financing of the construction and ongoing operation of the facility. Any subsequent resale of the output of this facility to a POU has no negative impact on the developer or financial institutional owner of the facility, nor does it diminish or otherwise negate achieving the legislative intent to encourage long-term contracts. Indeed, long term power purchase agreements typically authorize the buyer to resell the output without limitation. Further, Section 3204 (d)(2)(A)2. of the Proposed Regulations actually provides greater stability to a project developer because it reduces the chances that a buyer would seek to exit a contract due to loss of load or other factors that make a project no longer valuable to a retail seller or POU. In such a case, the retail seller or POU would simply be able to sell the unneeded output of the facility to a POU. Further, because of the long lead times necessary to develop new renewable projects, a POU's resource portfolio can be misaligned from its load needs. For example, a POU may over-procure to protect against the risk of project delay or failure and end up with too much generation. Section 3204 (d)(2)(A)2. of the Proposed Regulations provides the necessary flexibility for POUs and retail sellers with excess generation to sell that output and still retain the value of the long term nature of the procurement, which provides additional ratepayer protections. This proposal would also provide the necessary flexibility for POUs with highly variable loads to cost-effectively manage the unexpected increases or decreases in load. Additionally, this will also provide flexibility to POUs that have a small number of contracts and thus may struggle to find sufficient replacement generation if an existing project fails near the end of a compliance period.

[15] ISOR at 41 (internal citations omitted).
[16] ISOR at 41-42.

The Joint POUs strongly support this proposal as consistent with the purpose of the long term procurement requirement and overall purpose of the RPS program, while also providing much needed flexibility for meeting the long term procurement requirement.[17]

C. The Proposed Regulations Incorrectly Require that for a Contract Between a Third Party and a POU to Qualify as Long Term, the POU Must Demonstrate that All of the Third Party's Underlying Contracts are Also Long Term.

Section 3204 (d)(2)(A)3. of the Proposed Regulations imposes a new restriction that applies if a POU signs a long term contract with a third party, where that third party sources the generation from multiple different projects/contracts. In such a case, the POU would need to demonstrate to the Commission that the third party has a long term contract or ownership shares for all of the different projects that it uses to provide generation to the POU. The Joint POUs oppose this restriction and urge the Commission to reconsider this proposal. As described below, this restriction could have unintended consequences, impede existing agreements, and restrict the ability of parties to build reasonable protections into their contracts, resulting in increased costs to ratepayers. The Joint POUs generally agree with the comments filed by Shell Energy North America (US), L.P. (Shell) on June 1, 2020, that state that Shell opposes Section 3204 (d)(2)(A)3. on the basis that it is contrary to the relevant statutory language and inconsistent with the CPUC's implementation of the long term procurement requirement.[18]

D. The Proposed Regulations Should Be Amended to Expressly Recognize that a PCC3 Contract Can Qualify as Long Term Regardless of the Timing of the Distribution of RECs to the POU.

Section 3204 (d)(2)(A) of the Proposed Regulations requires that to qualify as long term, the commitment must be for ten "continuous" years, however, the regulatory language and ISOR do not provide detailed guidance on this issue. In CMUA's June 1 comments, CMUA asked how the "continuous" requirement would be interpreted in the case of a PCC3 contract, where the contract allows for RECs to be delivered in batches, for example, once every year or once every compliance period. During the January 8 Workshop, Commission staff indicated that this question was still under consideration.

The Joint POUs urge the Commission to amend the Proposed Regulations to provide a clarifying example that would specify that a PCC3 Contract can qualify as long term even where the timing of the distribution of RECs may be once per compliance period. An unreasonably strict limit on PCC3 Contracts that does not recognize how these contracts differ in nature from PCC1 and PCC2 contracts could function as a bar to using PCC3 RECs to meet the long term procurement requirement, and result in electricity customers having to pay for needless compliance costs. These increased compliance costs would result both because PCC3 RECs are generally substantially cheaper than PCC1 and PCC2 RECs, and also because the procurement process for PCC3 RECs is far quicker and simpler, allowing POUs to

[17] Section 3204(d)(2)(A) and (C): references to "(i) – (iii)" should be changed to "1. through 3." to be consistent with the numbering used in the regulation.
[18] Shell Comments at 3-4.

cost-effectively address unexpected shortfalls in procurement from other resources in full compliance with the applicable statutory and regulatory requirements. Further, the Proposed Regulations would have the effect of functionally increasing the long term procurement requirement from 65 percent to 75 percent, despite there being no basis in the statutory language for such a limitation. If the Legislature had intended to prohibit PCC3 RECs from counting towards the long term procurement requirement, it would have expressly done so.

E. The Proposed Regulations Should be Amended to Clarify that the Term "Jointly Negotiated" Includes Joint Solicitations, Even Where the Individual PPAs Do Not Reference Each Other.

The Joint POUs strongly support Section 3204 (d)(2)(H)4. of the Proposed Regulations, which allows POUs that jointly negotiated a contract to reallocate the output of the underlying project among each other without affecting the long term status of the contract. This provision will help provide necessary flexibility for all POUs. For smaller POUs in particular, this proposal will help address challenges resulting from smaller resource portfolios and higher variability in load. However, as currently drafted the Proposed Regulations do not define "jointly negotiated." A key challenge is that many contacts have already been executed that did not have the benefit of knowing what the exact regulatory language would be for the long term procurement requirement. There may be contacts that were jointly negotiated, but where each individual PPA stands on its own without a cross reference to the other PPAs. The Joint POUs recommend that the Proposed Regulations provide an example clarifying that "jointly negotiated" includes, but it is not limited to, a circumstance where multiple POUs, or a joint powers agency on behalf of multiple POUs, issued a joint solicitation and the POUs that will utilize the provision all successfully executed contracts with the developer, even if the individual PPAs do not cross reference each other.

F. The Proposed Regulations Should be Amended to Clarify that Only the *Ability* to Substitute a New Resource Must be Specified in the Original Contract in Order for the Substitution to Not Be Treated as a New Agreement.

Section 3204 (d)(2)(H)3. of the Proposed Regulations would treat any substitution of a different renewable energy resource, other than what was specified in the original contract, as a new agreement. For this new agreement, the remaining term would need to be at least 10 years in order for the contract to continue to be considered long term. During the January 8 Workshop, Commission staff clarified that, as currently proposed, Section 3204 (d)(2)(H)3. would require that the original contract would need to *expressly name the specific resource* to be substituted in order for the substitution of a new resource to not be treated as a new agreement. Commission staff also indicated that this was necessary to ensure that the objectives of the long term procurement requirement were met, which is to encourage long-term procurement. However, that restrictive interpretation is not necessary to carry out these objectives.

There are a wide variety of contract structures that allow the energy and associated attributes from a different generating facility to be used under limited specified circumstances to meet certain minimum contract obligations. These types of contract provisions are intended to provide buyers with greater

certainty and predictability of the output expected from a contract, and provide the seller with options to avoid being in breach of contract or paying liquidated damages. These types of contract provisions can be structured as a full substitution of a resource for the remainder of the contract term or as short term limited supply of make-up/replacement energy and associated attributes when the underlying facility fails to perform as expected under the contract.

The Proposed Regulations do not clarify how broadly the term "substitute" will be interpreted for purposes of Section 3204 (d)(2)(H)3, and in particular, whether this restriction would apply to more narrow make-up/replacement provisions. Make-up/replacement clauses, in particular, provide significant value because they can be structured to allow a seller to provide the buyer with make-up/replacement energy, RECs, and/or capacity attributes in certain circumstances, such as if the output of a facility is falling below specified guaranteed production quantities or if there is an unexpected extended outage that is needed to allow necessary maintenance. These provisions have narrowly structured triggers, but do not necessarily specify the exact source of the substitution or make-up/replacement energy and attributes, as it is not possible to know what resources would even be available at the time it may be necessary to invoke the contract provision. These clauses not only provide value to the buyer and seller, but also support the overall purpose of the RPS Program. These types of clauses lower the risk of a contract being terminated and thus make it more likely that a project will be successfully constructed and continue to operate. The Commission should not inhibit or discourage buyers and sellers from crafting reasonable contract terms that provide RPS compliance certainty, reduced risks, and lower costs for ratepayers. The Proposed Regulations should clarify that the restrictions of Section 3204 (d)(2)(H)3. do not apply to make-up/replacement clauses that apply to short term outages and/or underperforming resources, and instead only applies to the complete substitution of a new generating facility for the remainder of the contract term.

If the requirements of Section 3204 (d)(2)(H)3. are interpreted as applying to short term make-up/replacement provisions, this would present major practical challenges for POUs. What would happen if in year 5 of a 10 year contract, the seller exercised an existing contract clause that authorized the seller to provide make-up/replacement PCC1 RECs and energy for a 3 month period, and after this period, output from the original facility resumed? As described by staff, if the make-up/replacement resource was not specifically named in the original contract, then this contract would cease to count as long term as soon as deliveries start during the 3 month substitution period. When output from the original facility resumes, would that then be treated as a new contract again, or will it still be treated as long term? A narrow interpretation could threaten the long term status of a contract due to the exercise of relatively minor (but valuable) contract provision. This example demonstrates the confusion and negative consequences that can result from this interpretation.

The Joint POUs urge the Commission to clarify that Section 3204 (d)(2)(H)3. only applies to the complete substitution of a resource for the remainder of the contract term and that the original contract only needs to specify the *ability* of the seller to use substitute resources under certain conditions rather than require that the actual resource to be substituted be named.

G. The Proposed Regulations Should Be Amended to Clarify that the Restriction on Third Party Contracts in Section 3204 (d)(2)(A)3. Does Not Apply to a Substitution of a Resource as Authorized in Section 3204 (d)(2)(H)3.

As described above, the Joint POUs oppose the proposed new requirement in Section 3204 (d)(2)(A)3., which would require that if a POU has a long term contract with a Third Party, then the POU would need to demonstrate that any underlying contracts between the Third Party and the resources used for the POU contract would also need to be long term. The Joint POUs recommend that the Commission eliminate this provision. However, if Section 3204 (d)(2)(A)3. remains in any form, the Commission should clarify that this restriction does not apply to a substitution clause as commonly exists in renewable PPAs, and is referenced in Section 3204 (d)(2)(H)3. of the Proposed Regulations.

As described above, Section 3204 (d)(2)(H)3. clarifies that an amendment to a contract that substitutes a different renewable energy resource can still qualify as long term if the substitution was specified in the original contract. If Section 3204 (d)(2)(A)3. were applied to the contract substitution requirement, then a seller would only be able to source substitute energy and RECs from resources that the seller has an ownership share of or long term contract with. This will likely differ from exiting practice and expectations of these sellers. Further, such a restriction is unreasonable given the nature of these types of clauses, which are intended to provide stability in the event of unexpected problems with a facility. These substitution clauses reduce the likelihood of contracts failing and lower costs for ratepayers. Therefore, the Commission should clarify that this restriction does not apply to substitutions.

H. The Proposed Regulations Should Be Amended to Eliminate the Requirement that the Addition of New Capacity Must be Specified in the Original Contract in Order for the Expanded Capacity to Not Be Treated as a Separate Agreement.

Section 3204(d)(H)1.-2. of the Proposed Regulations would only allow the output associated with the addition of new capacity to an existing project to not be treated as a new agreement (and thus independently subject to the 10 year requirement) in circumstances where the increase was "specified" in the original contract. First, it is unclear what level of detail is required to meet the "specified" requirement. Some contracts may only specify that an expansion is *contemplated* and that the parties will negotiate in good faith to amend the contract to address the expansion. If the Commission does keep this requirement, "specified" should be interpreted broadly.

However, the Joint POUs recommend that the Commission simply eliminate this requirement and treat all expansions of existing projects as part of the original contract regardless of whether the expansion was referenced in the original contract. Expanding existing facilities is consistent with the overall purpose of the RPS program because it increases the amount of renewable generation at a likely reduced cost and at a lower risk of failure. An expansion of an existing project can provide significant efficiencies and cost savings because the parties already have a base contract and an existing financial relationship (simplifying the contracting process), the project likely already has the necessary infrastructure (meaning less development costs), and the site has already met various environmental and

permitting requirements (meaning project failure is less likely). Section 3204(d)(H)1.-2. would only serve to discourage this type of expansion and would not provide any offsetting benefit.

Additionally, the Proposed Regulations do not address how a single project would be divided into both long term and short term RECs if the whole project shares one meter. Resolving this problem will likely be administratively complex and burdensome for both POUs and Commission staff. However, this problem is completely avoided if the Commission simply treats all expansions of an existing project as part of the original agreement.

I. The Commission Should Clarify that Financial Assignments Do Not Impact the Grandfathered or Long-Term Nature of Contracts or Ownership Agreements Executed before June 1, 2010.

Section 3202 (a)(2)(B) correctly characterizes the treatment of amendments or modifications to contracts or ownership agreements executed before June 1, 2010 for purposes of determining if the contract continues to qualify for count in full treatment under Public Utilities Code section 399.16(d). Unless changes to those contracts "increase nameplate capacity or expected quantities of annual generation, increase the term of the contract except as provided in section 3202 (a)(2)(C), or substitute a different eligible renewable energy resource," they have no impact on the long-term nature of the POU's original agreement. However, the Joint POUs believe that the Commission's RPS Regulations would benefit from further clarification that expressly recognizes that any other contract amendments or modifications, including assignments for financial purposes where the purchasing POU and generating facility remains the same, do no impact the count in full or long-term nature of the initial contract or ownership agreement executed before June 1, 2010.

One way that the Commission can further this clarification is to include "assignments" and a clarification in the text of section 3202(a)(2)(B), as follows:

> (B) If contract amendments, assignments, or modifications after June 1, 2010, increase nameplate capacity or expected quantities of annual generation, increase the term of the contract except as provided in 3202 (a)(2)(C), or substitute a different eligible renewable energy resource, only the MWhs or resources procured prior to June 1, 2010, shall count in full toward the RPS procurement targets. Contract amendments, assignments, or modifications that do not otherwise alter (i) the POU receiving the renewable resources or (ii) the renewable generation source, do not alter the eligibility under 3202(a)(2)(A), or the classification of those agreements as long term under 3204(d).

This proposed change is consistent with the language used in section 3204(d) regarding the long-term procurement requirements. The Joint POUs also recommend that the Commission clarify this distinction in the Final Statement of Reasons.

III. CONCLUSION

The Joint POUs appreciate the opportunity to provide these comments to the Commission. Thank you for the time and attention to these comments.