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**on the 15-Day Language Modifications to Proposed Amendments to
the RPS Regulations for POU**

Additional submitted attachment is included below.



August 5, 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 15-Day Language Modifications to 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 POU’s”) respectfully submit these comments to the California Energy Commission (Commission) on the proposed *15-Day Language Modification of Regulations Specifying Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* (15-Day Language), issued on July 21, 2020.

I. COMMENTS ON 15-DAY LANGUAGE

A. The Joint POU’s Support the Proposed Regulations as Modified by the 15-Day Language, Subject to the Commission Addressing Certain Necessary Areas of Clarification.

The 15-Day Language addresses a significant number of the issues identified by stakeholders in both oral and written comments on the *Modification of Regulations Specifying Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* (“45-Day Language”), which was issued on May 7, 2020. These changes adequately resolve many of the key areas of concern for the Joint POU’s, and thus, the Joint POU’s generally support the proposed regulations, as modified by

the 15-Day Language. However, the Joint POU's have identified several areas where additional clarifications are necessary, as discussed further below. If the Commission adopts the proposed regulations without any further changes, then the Joint POU's request that the Commission provide these clarifications as part of the Final Statement of Reasons (FSOR). However, if the Commission does determine that it will issue a second set of 15-Day Language, then the Joint POU's urge the Commission to directly address these areas of clarification in modified regulatory language.

B. The Joint POU's Generally Support the Changes in the 15-Day Language.

In both oral and written comments provided during the 45-day comment period, numerous stakeholders identified areas where the specific provisions of the 45-Day Language were either unclear or could lead to unintended consequences that were inconsistent with the overall intent of the RPS Program. The 15-Day Language addresses several of these issues and generally resolves or strikes an appropriate balance in addressing opposing stakeholder views. This section provides a list of the key changes that the Joint POU's support.

1. Resales of Long Term Procurement From One POU to Another POU

Section 3204 (d)(2)(A)2. of the 45-Day Language allowed 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. However, the 15-Day Language has narrowed this to only apply to resales between POU's and not between a POU and a retail seller. While the Joint POU's would strongly prefer the broader proposal, the narrower proposal of the 15-Day Language still provides significant flexibility while supporting the overall purpose of the RPS.

As stated in the Initial Statement of Reasons (ISOR), “the primary additional function of the long-term procurement requirement, as it applies to POU's, 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.”¹ The 15-Day Language proposal is fully consistent with and directly supports this purpose. Where a POU has purchased or executed a long term contract with a renewable generating facility, that 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 another 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. The Joint POU's support this proposal in the 15-Day Language and urge the Commission to adopt it.

2. Meaning of Continuous For Purposes of Long Term Procurement

Section 3204(d)(2)(A) of the 15-Day Language requires that to qualify as a long term contract, the contract must specify the procurement of electricity products for a duration of at least 10 “continuous”

¹ ISOR at 41-42.

years, subject to certain exceptions. Section 3204(d)(2)(C) of the 15-Day Language clarifies that, in order to meet the “continuous” element of a long term contract, the agreement must specify some level of procurement in each year or compliance period throughout the contract term. This would prevent a POU from treating as long term procurement, a contract where the quantity amount could be zero for an entire compliance period. The Joint POUs believe that this strikes an appropriate balance of specifying minimum quantity terms without unnecessarily restricting contracting structures.

3. Eligibility of PCC3 Contracts to Qualify as Long Term Procurement

Several stakeholders requested that the Commission expressly clarify that a contract to purchase portfolio content category (PCC) 3 electricity products can qualify as long term. The 15-Day Language adds Section 3204(d)(2)(G), which provides this express clarification. The Joint POUs appreciate the express acknowledgement that PCC3 contracts can qualify as long-term.

4. Long Term Procurement Treatment of Capacity Expansions to Projects

Section 3204(d)(H)1.-2. of the 45-Day Language would have only allowed 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 long term procurement requirement) in circumstances where the increase was “specified” in the original contract. As the Joint POUs identified in comments filed on June 22, 2020, this direction created ambiguity because it was unclear what was meant by “specified” given that existing contracts take a wide variety of approaches to these types of provisions. Additionally, the 45-Day Language proposal would have presented significant administrative burdens and complexity by potentially requiring the electricity products from a single project to be divided into both long term and short term RECs.

The 15-Day Language resolves these issues by amending Section 3204(d)(J)(1) to clarify that any expansion of an existing project will be treated as part of the original agreement without limitation. This is consistent with the overall purpose and intent of the RPS program because it increases the amount of renewable generation at a likely reduced cost and at a lower risk of failure. Expanding existing projects generally presents a more efficient use of resources and should be encouraged. The Joint POUs strongly support the proposed change in the 15-Day Language.

5. Long Term Treatment of Substitutions of a Different Renewable Energy Resource

As proposed in the 45-Day Language, Section 3204 (d)(2)(H)3. would have treated any substitution of a different renewable energy resource, other than what was specified in the original contract, as a new agreement for purposes of determining the status for the long term procurement requirement. In comments filed by the Joint POUs on June 22, 2020, the Joint POUs recommended that the Commission clarify that the original contract only needed to specify the *ability* to substitute and not specify that exact resource to be substituted.

The 15-Day Language has adopted this approach and has added a new Section 3204 (d)(2)(H)3.i., which adds the following condition to the requirements for treating a substitution of a new resource as part of the original agreement: “The original long-term contract or ownership agreement specifies the ability to add or substitute resources.” The Joint POUs strongly support this modification and urge the Commission to adopt it.

C. The Commission Must Address Certain Areas of Necessary Clarification Through Either the FSOR or Through a Second Set of 15-Day Language

This section provides changes or clarifications that the Joint POUs recommend that the Commission make either in the FSOR, if the current version of the regulations is adopted, or in the regulations, if a second set of 15-Day Language is issued.

1. Substitution of a Different Renewable Energy Resource

Section 3204(d)(2)(J)3.ii. of the 15-Day Language requires that if a contract is amended to add or substitute a different renewable resource, then the seller must use a resource that the Seller already owns or has a long-term contract with. The Joint POUs request that the Commission clarify that this would only apply to a circumstance where the primary generating facility in a contract is being completely replaced for the remainder of the contract term and that it does not apply to a clause in a contract where a seller can mitigate lowered energy deliveries during periods of certain types of outages or other underperformance by supplying the buyer with replacement RECs and electricity.

As the Joint POUs described in comments filed on June 22, 2020, there are many contract structures that provide a Seller with various options to mitigate penalties that the Seller could face for the underperformance of a generating facility. For example, a seller may be able to make up for generation that falls below certain guaranteed levels during a specific time period by purchasing replacement RECs and electricity from a comparable renewable energy resource. Similarly, a seller may have the option to provide replacement RECs and electricity during an extended outage for maintenance or repairs. Provisions such as these provide stability to these types of agreements by limiting the penalty exposure that a seller could face and reducing the likelihood that an agreement may be terminated for underperformance during a discrete period. Therefore, these contract provisions support the broader goals of the RPS Program and should be encouraged.

However, given the nature of these types of provisions, where a seller is making up for a temporary shortfall in an individual year, it is unlikely that the seller will be able to solely source the replacement RECs from existing owned and long term contracts. This would be very restrictive and would make the use of these clauses extremely expensive or impossible. Additionally, many renewable energy projects are owned by special purpose entities that will by their nature not own or have contracts with any other facilities. Finally, there are serious practical challenges if the limitations of Section 3204(d)(2)(J)3.ii. are applied to these types of short term replacement provisions. If all substitutions of a new generating facility are treated as creating a new agreement, even if there is only a short term replacement, it would lead to absurd results, not consistent with the intent or purpose of the long term procurement

requirement. For example, if in year 12 of a 20 year contract, the seller provides a limited number of replacement RECs to address an individual shortfall, would this action sever the contract such that the remaining 8 years of original contract term no longer qualifies as long term? Such an absurd result demonstrates why these types of replacement provisions should be distinguished from a full substitution of a new generating facility for the remainder of the contract term.

The Joint POU's recommend that the Commission clarify, through the FSOR or through a second set of 15-Day Language, that the requirements of Section 3204(d)(2)(J)3.ii. only applies to the full substitution of a different generating facility for the remainder of the contract term and not for temporary replacements to mitigate a generation shortfall.

2. Third Party Submission of Documents

The 15-Day Language adds a new Section 3207(c)(2)(G)1., which authorizes a third party to submit contracts directly to the Commission to support a claim that the Third Party's underlying contracts are long-term. The Joint POU's are concerned that the affected POU's would potentially lack the ability to review contracts that are necessary to demonstrate its own compliance and could potentially lead to a finding of noncompliance for the POU. The Joint POU's encourage additional discussion on how this process would work. Specifically, the Joint POU's, at a minimum, want the ability to participate directly in this process to a sufficient degree the POU can defend itself and provide its own supporting documentation, if available.

3. Excess Quantity

The 15-Day Language adds a new Section 3204(d)(2)(E), which adds the following new provision: "Electricity products procured in excess of the quantity that is specified in a long-term contract shall be classified as short-term." The Joint POU's have significant concerns with this proposed language, because most contracts will provide a process where the Buyer is authorized to receive all electricity/RECs above expected amounts, including sometimes at a reduced price. An overly broad interpretation of this language would have significant negative consequences on the economic value of the contracts that POU's have already executed by essentially eliminating a key negotiated term.

The Commission should clarify that this provision only applies to the very narrow circumstance where the original contract expressly provides *no right* (even an optional right) for the POU to procure electricity/RECs above the amount specified in the contract. Additionally, some contracts may identify expected annual generation that is based on the capacity of the project and expected capacity factor. The Commission should recognize that these values are not intended to represent maximum annual deliveries under the contract, but merely estimates used for benchmarking purposes and that actual annual deliveries may be higher, or lower, depending on actual conditions any given year. The Commission should clarify that annual deliveries in excess of these projections are not automatically deemed "excess generation" and therefore classified as short-term.

4. Financial Assignments of Existing Contracts or Ownership Agreements

In comments filed on June 22, 2020, the Joint POU's supported amending Section 3202 (a)(2)(B) to clarify that assignments for financial purposes, where the purchasing POU and generating facility remains the same, do not impact the count in full or long-term nature of the initial contract or ownership agreement executed before June 1, 2010. However, the 15-Day Language did not make any modification to Section 3202 (a)(2)(B). If the Commission's position is that such an amendment is unnecessary because the existing language already addresses this concern, then the Joint POU's request that the Commission include an express statement to this effect in the FSOR. Such a statement would provide valuable regulatory certainty to the many market participants that are potentially affected by this issue and such clarification would likely result in cost savings to electric customers.

5. Adjustments for Qualifying Gas-Fired Power Plants

NCPA, Redding, and Roseville each filed comments on June 22, 2020 that identified that the 45-Day Language had incorrectly implemented Senate Bill (SB) 1110 (stats. 2018) by only applying the adjustment to RPS procurement requirements if the POU met the capacity factor requirement throughout an entire compliance period. As NCPA, Redding, and Roseville each noted, the language and intent of SB 1110 clearly only requires a POU to meet the capacity factor requirement as assessed over an individual year. While the 15-Day Language did modify the wording of this provision, those modifications still do not result in an annual assessment and will continue to frustrate the intent of SB 1110. The Joint POU's urge the Commission to adopt the proposed amendment to Section 3204 (b)(11)(B) as proposed in comments filed individually by NCPA concurrent with these comments.

II. CONCLUSION

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