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Submitted On: 7/21/2022  
Docket Number: 21-OIR-03*

**on 2nd 15-Day Language Revisions to the Regulatory Language for  
the Load Management Standards**

*Additional submitted attachment is included below.*

STATE OF CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of:

2022 Load Management Rulemaking

Docket No. 21-OIR-03

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**COMMENTS OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION  
ON 2<sup>ND</sup> 15-DAY LANGUAGE REVISIONS TO THE REGULATORY LANGUAGE FOR  
THE LOAD MANAGEMENT STANDARDS**

The California Municipal Utilities Association (“CMUA”) appreciates the opportunity to provide comments to the California Energy Commission (“Commission”) on the proposed Second 15-Day Language Revisions to the Regulatory Language for the Load Management Standards (“2<sup>nd</sup> 15-Day Language”), issued on July 6, 2022.

While CMUA continues to support the stated purpose of this proceeding, the 2<sup>nd</sup> 15-Day Language does not address the substantive flaws that CMUA has previously raised in comments on the proposed regulation. Namely, the 2<sup>nd</sup> 15-Day Language fails to resolve the proposed regulations’ clear interference with and infringement upon the ratemaking authority of the governing boards of the affected publicly owned electric utilities (“POUs”). As proposed, the regulations would mandate that the affected POUs must develop compliant tariffs and present these tariffs to their governing boards<sup>1</sup> in strict accordance with a tariff adoption plan approved by the Commission.<sup>2</sup> The Commission would have the sole authority to grant delays, modifications, or exemptions from these requirements.<sup>3</sup> If adopted, these regulations would

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<sup>1</sup> Proposed Regulations at Section 1623(a).

<sup>2</sup> *Id.* at Section 1621(d).

<sup>3</sup> *Id.* at Section 1621(e).

impermissibly enlarge the Commission’s authority beyond the scope of what is authorized by the applicable enabling statute.

In prior comments in this proceeding, CMUA and other stakeholders put significant efforts into developing proposed amendments to the regulations that would allow the Commission to achieve the same program goals and results, while not exceeding the authority provided by the enabling statute. To achieve this result, the regulations must be amended to authorize the POU governing boards of the affected POUs to approve a delay, modification, or exemption from the regulations *at any point* in the process and without seeking the approval of the Commission. The 2<sup>nd</sup> 15-Day Language does not meet this minimum standard.

## **I. COMMENTS ON THE PROPOSED REGULATIONS**

### **A. Each Element of the Proposed Regulations Must Be Consistent with and Authorized by the Enabling Statute.**

To be valid, any regulation adopted by the Commission must be consistent with and authorized by the relevant enabling statute. Government Code section 11342.2 provides that “. . . no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.”<sup>4</sup> The California Supreme Court has expanded upon this direction, clarifying that “[a]dministrative regulations that alter or amend the statute or *enlarge or impair its scope* are void and courts not only may, but it is their obligation to strike down such regulations.”<sup>5</sup> Therefore, the Commission must ensure that each element of the proposed regulation is authorized by the relevant enabling statute and does not expand or enlarge the Commission’s authority beyond the scope of that statute.

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<sup>4</sup> Cal. Gov. Code § 11342.2.

<sup>5</sup> *Morris v. Williams*, 67 Cal. 2d 733, 748 (1967) (citing *Whitcomb Hotel v. Cal. Emp. Com.*, 24 Cal.2d 753, 757 (1944); *Hodge v. McCall* 185 Cal. 330, 334 (1921); *Boone v. Kingsbury* 206 Cal. 148, 161—162(1928); *First Industrial Loan Co. of California v. Daugherty* 26 Cal.2d 545, 550 (1945); see *Brock v. Superior Court* 11 Cal.2d 682, 688 (1938)) (emphasis added).

**B. The Enabling Statute Does not Authorize the Commission to Independently Mandate Compliance With the Load Management Standards.**

1. The Original Version of the Enabling Statute did not Grant the Commission the Authority Necessary for the Proposed Regulations.

The enabling statute for the proposed regulations is Public Resources Code<sup>6</sup> section 25403.5, which was enacted in 1976 by Assembly Bill (“AB”) 4195 (stats. 1976). Section 23403.5 does not, and has never, granted the Commission plenary authority to mandate the development of specific rate structures for the POU. Instead, the Commission’s authority has always been subject to the broad discretion of the POU governing boards. This includes *all aspects* of the rate development process, not just the ultimate decision to adopt or reject specific tariffs. As demonstrated below, the Commission’s load management standard authority has only been *reduced and narrowed* by the Legislature since Section 23403.5 was first enacted and has never provided the authority necessary for the currently proposed regulations.

As originally enacted in 1976, AB 4195 directed the Commission to develop load management standards as part of its power plant siting authority.<sup>7</sup> Under the original version of the statute, a utility would need to certify that it had complied with the Commission’s load management standards as part of the process for applying for siting a new power plant. Crucially, however, even this original version of the statute granted express and broad authority to the governing boards of POU to determine that the Commission’s load management standards were unsuitable for the POU. The original penalty language enacted by AB 4195 was the following:

No site or related facility shall be certified pursuant to Chapter 6 (commencing with Section 25500) of this division, unless the applicant certifies to the satisfaction of the commission that the load management standards adopted by the commission have been complied with; *or, with respect to a publicly owned*

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<sup>6</sup> Unless otherwise noted, all code section references shall be to the California Public Resources Code.

<sup>7</sup> CAL. PUB. RES. CODE § 25403.5(e) (1976) (amended 1980).

*utility, that the governing body thereof has found such standards, or a portion thereof, unsuitable* and has reported such finding and the reasons therefor to the Legislature.<sup>8</sup>

As originally enacted, AB 4195 did not authorize the Commission to mandate that a POU develop a specific tariff and present such tariff to its governing board for approval or rejection. Similarly, the Commission was not authorized to mandate that a POU apply to the Commission for approval of a tariff adoption plan. Instead, the POU governing board had complete and independent authority to determine at any point that the Commission's load management standards were unsuitable. Further, the Commission's load management standard authority was *conditional*. A POU that was not applying to site a new power plant had no independent obligation to implement the Commission's load management standards, and the Commission had no enforcement authority to require any such independent compliance.

This legislative history is essential to understanding the authority of the Commission because it was at this point that the Commission's authority was broadest. Subsequent legislation has only reduced this authority. Yet, even at its broadest point, the Commission would have still lacked the authority to adopt the load management standard as proposed in the current rulemaking.

2. The Subsequent Amendment to the Enabling Statute Narrowed the Commission's Authority.

In 1980, AB 3062 (ch.1196, stats. 1980) was enacted by the Legislature to reduce the Commission's authority under Section 23403.5 by eliminating the siting penalty for non-compliance with the Commission's load management standards. Instead, AB 3062 replaced the penalty provision that had previously been in Section 23403.5(e) with the following new reporting requirement in Public Resources Code section 25300:

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<sup>8</sup> *Id.* (emphasis added).

Every electric utility in the state shall prepare and transmit to the commission on or before March 1, 1976, and every two years thereafter, a report specifying 5-, 12-, and 20-year forecasts or assessments of loads and resources for its service area, the report shall set forth the facilities which as determined by the electric utility, will be required to supply electric power during the forecast or assessment periods. The report shall be in a form specified by the commission and shall include all of the following:

...

(h) Certification by the utility that aggressive conservation programs in the residential, commercial, and industrial sectors are being pursued, including load management standards adopted by the commission pursuant to Section 25403.5; and a statement specifying the extent to which such programs are achieving enhanced energy efficiency and conservation and the extent to which such programs do not in the utility's evaluation, mitigate the need for additional facilities or, ***with respect to a publicly owned utility, that the governing body thereof has found the load management standards, as prescribed by the commission pursuant to Section 25403.5, or a portion thereof are unsuitable, together with an explanation of why the standards or portions thereof are unsuitable.***<sup>9</sup>

AB 3062's author described the effect of the legislation as follows in a letter to the Governor: "AB 3062 eliminates the requirements for new power plant sites or facility certification that applicants demonstrate that their load management programs are being satisfactorily implemented by their customers and would instead, have applicants certify that they are pursuing load management programs and have the utility provide an explanation as to why these programs do not mitigate the need for additional facilities."<sup>10</sup> In the Ways and Means Staff Analysis, the staff described the bill's fiscal impact as follows: "No major fiscal impact, except that there may be a minor reduction in workload because the Commission would no longer be required to actually prepare regulations containing load management standards."<sup>11</sup>

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<sup>9</sup> CAL. PUB. RES. CODE § 25403.5(e) (1980) (amended 2001) (emphasis added).

<sup>10</sup> See Letter from Mel Levine, Assemblyman for the Forty-Fourth District of California, to Edmund G. Brown Jr., Governor of California (Sept. 5, 1980).

<sup>11</sup> WAYS AND MEANS STAFF ANALYSIS, POWERPLANT CERTIFICATION: LOAD MANAGEMENT STANDARDS. The Analysis stated: "The apparent purpose of this bill is to relieve utilities from the burden of carrying out

As highlighted in the statutory language above, the new reporting obligation in Section 25300 preserved the same authority of a POU governing board to determine that the Commission's load management standards were unsuitable for the POU. As with the original version of the enabling statute, this narrower version does not provide the Commission with the authority to mandate the actions required in the proposed regulations. Again, it is the POU governing board that is authorized to make a determination about the suitability of the Commission's load management standards at any point in the process.

3. Subsequent Legislation Further Narrowed the Commission's Load Management Standard Authority.

In 2002, Senate Bill ("SB") 1389 (ch. 568, stats. 2002) eliminated the entire chapter in the Public Resources Code that contained Section 25300 and replaced it with the Integrated Energy Policy Report process. As part of this overhaul, the obligation of utilities to report on compliance with the load management standards that was contained in Section 25300(h) was eliminated. Instead, SB 1389 added a new Section 25303, which states in part:

(a) the commission shall conduct electricity and natural gas forecasting and assessment activities to meet the requirements of paragraph (1) of subdivision (a) of Section 25302, including but not limited to, all of the following:

...

(5) Evaluation of the potential impacts of electricity and natural gas ***load management efforts***, including end user response to market price signals, as a means to ensure reliable operation of electricity and natural gas systems.<sup>12</sup>

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load management standards imposed by the Commission as a condition of granting an N.O.I. or AFC. It provides a simpler and fairer approach, putting the responsibility on the applicant to demonstrate that even with conservation measures (such as load management) power demand is such that a new powerplant is needed." *Id.*

<sup>12</sup> Cal. Pub Res. Code § 25303(a).



Additionally, SB 1389 created a new section 25305, which states:

The commission shall rely upon forecasting and assessments performed in accordance with Sections 25301 to 25304, inclusive, as the basis for analyzing the success of and developing policy *recommendations* for public interest energy strategies. Public interest energy strategies include but are not limited to . . . implementing load management.<sup>13</sup>

This new statutory language does not in any way suggest an expansion of the Commission’s load management authority, and instead characterizes load management as a “policy recommendation.” The obligation of utilities to report on compliance with the Commission’s load management standards was simply removed. Because of the removal of any express reporting obligation on compliance with the Commission’s load management standards, the language clarifying that a POU governing board could determine that the Commission’s load management standards were unsuitable for the POU was no longer necessary. The current statutory language clearly demonstrates a *narrowing* of the Commission’s authority.

However, the Commission’s proposed regulations rely on an interpretation that by deleting this reporting obligation, the Legislature’s true intent was to grant plenary authority to the Commission to mandate compliance with the load management standards. The proposed regulations assert that the Commission would be able to direct POUs to go through any tariff or rate development process without any discretion for the POU governing board to determine that such obligations are unsuitable for the POU, except for the ability to reject the final proposed tariff. This is an unreasonable and unsupported interpretation of the relevant legislative history. As demonstrated above, at each stage in the enabling statute’s history, the Legislature has narrowed the Commission’s load management standard authority. It would be irrational to assert that the Legislature’s intent in adopting SB 1389 was to eliminate the discretion of a POU

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<sup>13</sup> Cal. Pub Res. Code § 25305.

governing board to determine that the Commission's load management standards are unsuitable for the POU.

4. Any Load Management Standards that do not Recognize the Authority of POU Governing Boards to Determine that Compliance with Such Regulations is Unsuitable for the POU would Impermissibly Enlarge the Scope of the Commission's Authority.

As demonstrated by the legislative history above, the Legislature has always preserved the right of the POU governing boards to make the ultimate determination about the suitability of pursuing load management standards. This is consistent with the long-standing principle that POU's have exclusive authority over their ratemaking process. If the Commission adopts the proposed regulations, it would be granting itself broad and unjustified new authority to insert itself into the POU rate development process. The Commission would be able to require POU's to develop rates and tariffs under the Commission's direction and following the tariff adoption plan directed and approved by the Commission, not the POU governing board. Further, as proposed in the 2<sup>nd</sup> 15-Day Language, the suitability of a pilot program would be left to the sole discretion of the Commission, not the POU governing board.

These requirements would clearly enlarge the Commission's authority beyond anything that was ever granted or contemplated in the current version, or any prior version, of Section 25403.5. As such, the proposed regulations would be in clear violation of Government Code section 11342.2. To remedy this violation, the proposed regulations must ensure that the POU governing boards have the clear authority to determine the suitability of the load management standards for their POU. As CMUA has previously proposed, this could take the form of authorizing the POU governing boards to approve any delay, modification, or exemption to the regulations, at any time during the tariff development process. At a minimum, the regulations must adopt flexibility for POU's to implement programs, rather than specified rate designs, to

achieve the goals of the load management standards. These suggested amendments would recognize the limits on the Commission’s authority, while still supporting the objectives of this rulemaking.

## II. CONCLUSION

CMUA appreciates the opportunity to provide these comments on the 2<sup>nd</sup> 15-Day Language. CMUA also recognizes the comments submitted by its members, the Sacramento Municipal Utility District and the Los Angeles Department of Water and Power, and urges the Commission to work with stakeholders to make the necessary changes to the 2<sup>nd</sup> 15-Day Language.

Dated: July 21, 2022

Respectfully submitted,

*/s/ Justin Wynne*

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