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on Proposed 45-Day Language Amendments to the Power Source Disclosure Regulations

Additional submitted attachment is included below.



July 3, 2024

California Energy Commission
Docket Unit, MS-4
Re: Docket No. 21-OIR-01
715 P Street
Sacramento, CA 95814-5512

RE: California Municipal Utilities Association Comments on Proposed 45-Day Language Amendments to the Power Source Disclosure Regulations [CEC Docket No. 21-OIR-01]

Dear Commission Staff,

The California Municipal Utilities Association (“CMUA”) respectfully submits these comments on the proposed *Amendments to the Power Source Disclosure Program* (“45-Day Language”), issued on May 17, 2024, and the *Staff Rulemaking Workshop on Updates to the Power Source Disclosure Regulations*, held on June 11, 2024.

I. INTRODUCTION

CMUA greatly appreciates both the Commission and staff’s significant efforts in developing the 45-Day Language. These proposed regulations reflect the extensive outreach and engagement by Commission staff during the pre-rulemaking phase. With each subsequent iteration of the proposed regulations, the changes made have demonstrated a careful consideration of stakeholder input, and in this current version, the majority of issues raised by stakeholders have been addressed. CMUA believes that the 45-Day Language achieves most of the goals of Senate Bill (“SB”) 1158 (stats. 2022, Ch. 367, Becker) in a manner that is consistent with California’s broader environmental and reliability goals. CMUA urges the Commission to address the outstanding issues in 15-day changes to the proposed amendments.

In these comments, CMUA identifies key provisions of the 45-Day Language that CMUA supports, as well as areas where CMUA still has concerns. CMUA also recommends certain limited modifications to the regulations. Specifically, CMUA’s comments recommend that the Commission:

- adopt the hourly accounting structure proposed in the 45-Day Language;
- adopt the proposed methodology for calculating the hourly emission factor for unspecified power;

- direct Commission staff to release a draft version of the unspecified power hourly emission factor values each year and provide the public an opportunity to provide input on these calculations;
- modify the line loss default factor to provide retail sellers with more flexibility;
- adopt the language recognizing the express exemption of small publicly owned utilities (“POUs”) from the requirements of SB 1158;
- base the new “Total Power Content” category of the power content label (“PCL”) on the resources used to meet all retail sales rather than loss adjusted load;
- create a simple process for Commission staff to update the explanatory note on unspecified power;
- continue to display the quantity of unbundled RECs matched to electricity products on the PCL; and
- modify the language for hydroelectric to recognize that large hydroelectric facilities can be categorized as eligible renewable resources under the Renewables Portfolio Standard Program (“RPS”).

II. COMMENTS ON THE 45-DAY LANGUAGE

A. The Commission Should Adopt the Structure of the Hourly Accounting Rules as Proposed in the 45-Day Language Because it is Consistent with the Plain Language and Statutory Intent of SB 1158.

CMUA strongly supports the overall structure of the hourly accounting rules as reflected in the 45-Day Language and urges the Commission to adopt this language as proposed. Under this structure, retail suppliers have the discretion to determine the stacking order of their resources,¹ the retail supplier will only be attributed the greenhouse gas (“GHGs”) emissions associated with resources used to serve their loss-adjusted load² (with the exception of coal),³ and GHGs attributed to a retail supplier’s oversupply will be used to calculate the emissions factor for unspecified power in that hour.⁴

This structure is (i) consistent with and authorized by Public Utilities Code sections 398.6, (ii) carries out the legislative intent of SB 1158, and (iii) supports California’s environmental goals and reliability needs. Specifically, Public Utilities Code section 398.6(b) directs retail suppliers to report their “sources of electricity used to serve loss-adjusted load for each hour during the previous calendar year.”⁵ The express statutory direction is for the retail supplier to report the sources of electricity that were used to serve loss-adjusted load, not what the retail supplier’s total portfolio of resources was during each hour. SB 1158 is clearly intended to ensure that all GHGs are accounted for through either matching with load or through being assigned to unspecified power.

¹ 45-Day Language, Section 1392(c)(3)(A).

² *Id.* at Section 1392(c)(7).

³ *Id.* at Section 1392(c)(1).

⁴ *Id.* at Section 1392(c)(7)(A).

⁵ Cal. Pub. Util. Code § 398.6(b)(1) (emphasis added).

The legislative history supports an implementation of SB 1158 that fairly attributes GHG emissions to those retail suppliers that are relying on unspecified power during a specific hour.⁶ A structure that takes the GHGs associated with all retail suppliers' oversupply and attributes those GHGs to procurement of unspecified power is consistent with this approach. Further, the 45-Day Language fairly allocates the zero carbon attributes of generation to the retail supplier that has paid for those attributes and avoids creating a disincentive for a retail supplier to bid fossil fueled generation to the market at times of system need. This is consistent with California's broader environmental policies and supports system-wide reliability.

B. The Commission Should Adopt the Proposed Methodology for Calculating the Emission Factor for Unspecified Power but Should Require Commission Staff to Make a Draft Version of the Annual Hourly Emission Factors Available for Public Input.

The 45-Day Language specifies that the Commission will calculate the GHG emissions intensity for unspecified power in each hour by calculating the sum of:

all GHG emissions associated with unspecified imports, unclaimed in-state natural gas resources, and oversupply in that hour divided by the sum of all MWh associated with unspecified imports, unclaimed in-state natural gas resources, and oversupply in that hour, taking cogeneration into account using the method provided in Section 1392(a)(9)(E).⁷

While CMUA supports this structure and general approach, the proposal lacks transparency regarding the manner in which the hourly GHG emissions intensities will be calculated. This will be a complex calculation involving significant supporting data. CMUA urges the Commission to develop these emission intensities through a transparent process that allows stakeholders and members of the public to fully understand each year's calculations and identify errors or inconsistencies in these calculations. As part of this process, the Commission can provide information on how "unclaimed natural gas resources" accounts for resources claimed by retail suppliers and entities not subject to the hourly data reporting requirements. This public process would provide an opportunity for the Commission to identify in much greater detail how the calculation is performed and what data is being relied upon. CMUA recommends that the Commission include express language in Section 1392(c)(6) directing Commission staff to release a preliminary draft of the hourly emissions intensities for unspecified power prior to the Commission releasing its aggregated summary of hourly GHG emission data and allow for stakeholder comments. Such a process would increase the transparency of these calculations and improve the accuracy hourly emission factors, while only imposing a minimal additional burden on Commission staff.

⁶ CMUA Comments on Pre-Rulemaking Proposed Updates to the Power Source Disclosure Regulations, Oct. 24, 2023, at 4-6.

⁷ Revised Proposed Updates, Section 1392(c)(6).

(6) Hourly unspecified power

(A) Energy Commission staff shall calculate hourly GHG emissions intensities for hourly unspecified power each year. Hourly GHG emissions intensities shall be calculated as the sum of all GHG emissions associated with unspecified imports, unclaimed in-state natural gas resources, and oversupply in that hour divided by the sum of all MWh associated with unspecified imports, unclaimed in-state natural gas resources, and oversupply in that hour, taking cogeneration into account using the method provided in Section 1392(a)(7)(E).

(B) Staff shall address any data gaps in calculating hourly unspecified power emissions intensities using the methods provided in Section 1393(c).

(C) Prior to publishing the aggregated summary of hourly GHG emission data pursuant to Public Utilities Code section 398.6(e), Staff shall publicly issue a preliminary calculation for each hourly GHG emission intensity, including the values used for each calculation, for hourly unspecified power for the applicable year and provide an opportunity for retail suppliers and members of the public to review and identify errors.

C. The Commission Should Modify the Distribution and Transmission Loss Factor Provisions to Provide More Flexibility.

CMUA supports the intent of the Section 1392(c)(8), which provides a default line loss factor with an option for the retail supplier to provide an alternative line loss factor, subject to providing substantiating documentation. This optionality will help to achieve more accurate data. However, CMUA recommends that the Commission amend the current language to provide more flexibility and clarity to retail suppliers.

The 45-Day Language proposal would utilize the most recent transmission and distribution loss factor for the retail supplier's planning area for the IEPR Demand Forecast as the default loss factor. While this may be a reasonable starting point for many retail suppliers, relying on this single approach as the primary default is problematic. This loss factor is both a forecast and is used for system planning purposes, both of which suggest an inherent skewing in favor of a larger assumed loss factor. Additionally, this is an entirely new process and retail suppliers do not have any experience with making these alternative demonstrations.

Given the uncertainty around the alternative demonstration process, CMUA recommends that the Commission include as express options in the regulations to allow other verifiable sources of loss factors that may be utilized by retail suppliers. Specifically, CMUA recommends that the regulations expressly acknowledge that retail suppliers may use either (1) the loss factor or calculated losses reported by the individual retail supplier in Form 1.2 of the retail supplier's most recent Integrated Energy Policy Report Electricity Demand Forecast Forms; or (2) for retail suppliers that receive distribution service from a Transmission Owner through a FERC-approved Wholesale Distribution Tariff ("WDT"), then those retail suppliers may utilize the loss factor specified in the applicable WDT.

Utilizing the data from Form 1.2 of the IEPR Demand Forecast Report provides several benefits over the default proposed by staff. This data is specific to the individual retail supplier, uses actual data rather than forecast data, and is supported by a methodology explaining how these losses are calculated. Further, because this data is specific to an individual retail supplier, it avoids duplicate accounting for losses that are already accounted for through settlements with the applicable transmission provider or balancing authority. For retail suppliers taking distribution service under a WDT, losses are accounted for in a unique manner, which should be recognized in this reporting. The loss factors for these retail suppliers are already vetted through the tariff adoption process and should be treated as an acceptable option.

Finally, based on the initial feedback that CMUA has received from its members, the alternative loss factor demonstration process should allow retail suppliers to report alternative loss factor(s) at either a system level or for some or all individual resources. This flexibility is necessary because an accurate single system-level loss factor generally implies the need to estimate losses associated with all individual resources, but there may be significant complexities or data limitations depending on the individual resources. CMUA recommends that the regulatory language expressly acknowledge that making this demonstration fully or partially on a resource basis is an acceptable approach. To the extent the Commission is concerned about retail suppliers “cherry picking” which loss factors to report on an individual basis, CMUA recommends that the retail supplier provide an explanation of its selection of resource-specific loss factors as part of the supporting documentation.

CMUA recommends the following amendments to Section 1392(a)(8):

(8) Transmission and distribution losses

(A) To calculate loss-adjusted load, a transmission and distribution loss factor shall be applied to increase the retail supplier’s total load.

(B) Each retail supplier shall ~~use~~ designate one of the following as the transmission and distribution loss factor for calculating the retail supplier’s loss-adjusted load:

1. ~~†~~The transmission and distribution loss factor for its planning area under the Integrated Energy Policy Report Demand Forecast. CEC staff shall provide a list of the most recent loss factors for each retail supplier in the annual resource report.
2. A loss factor calculated as the percentage difference between the “total sales” and “total energy to serve load” for the most recent year for which there is actual data, as reported on Form 1.2 of the retail supplier’s most recent Integrated Energy Policy Report Electricity Demand Forecast Forms.
3. For a retail supplier taking distribution service pursuant to a Wholesale Distribution Tariff approved by the Federal Energy Regulatory Commission, the loss adjustment factor identified in the applicable Wholesale Distribution Tariff.

(C) As an alternative to the loss factors under subdivision (a)(8)(B), a retail supplier may calculate and report its transmission and distribution loss factor directly, on either a resource specific basis, a retail supplier system basis, or a combination of the two. The retail supplier must provide substantiating documentation supporting the loss factor claim.

D. CMUA Supports the Express Regulatory Language in the 45-Day Language Recognizing that Certain Small Utilities are Exempt from the Hourly Accounting Requirements.

SB 1158 expressly exempts certain small utilities from the reporting, evaluation, and progress assessment requirements associated with the legislation. Specifically, Public Utilities Code section 398.6(j) states that the hourly GHG reporting requirements do not apply to “Local publicly owned electric utilities that are not subject to the requirements of Section 9621.” Public Utilities Code section 9621 provides the Integrated Resource Plan requirements for POUs and specifies that the requirements are applicable to a “local publicly owned electric utility with an annual electrical demand exceeding 700 gigawatthours, as determined on a three-year average commencing January 1, 2013.”⁸

The 45-Day Language includes Section 1392(h), which expressly exempts small POUs from the requirements of SB 1158. This provision is consistent with SB 1158 and CMUA strongly supports its inclusion in the regulations.

E. The Commission Should Base the “Total Power Content” Category of the PCL on Retail Sales.

The proposed regulations would add a new column to the PCL referred to as the “Total Power Content.” This column would include the resource mix and GHG emissions intensity for all resources needed to serve a retail supplier’s total “loss-adjusted load,” which includes the load needed to meet annual retail sales after transmission and distribution losses are accounted for, as well as any load associated with self-consumption. The Commission errs in using loss-adjusted load as the basis for this category because the plain language of Public Utilities Code section 398.4 clearly specifies that the PCL should be based on “retail sales” and not any other standard, such as loss adjusted load.

In the *Initial Statement of Reasons, Rulemaking to Amend Regulations Governing the Power Source Disclosure Program* (“ISOR”), published on May 17, 2024, Commission staff provides the following support for utilizing loss-adjusted load as the basis for the Total Power Content category:

The CEC has found that attempts to reconcile the discrepancy between the PSD program’s two layers of disclosure—retail sales to consumers and total electricity purchases—has produced a PCL that does not meet the program’s legislative

⁸ Cal. Pub. Util. Code § 9621(a).

purpose of providing information that is accurate, reliable, and simple to understand.⁹

As CMUA has raised in prior comments, when the Commission implements a statute, it must follow the established rules of statutory construction. California’s courts have given the following guidance for interpreting a statute:

“We begin by examining the statutory language, giving the words their usual and ordinary meaning.” **If the language of a statute is clear, we must follow its plain meaning.** “If, however, the language is susceptible to more than one reasonable interpretation, then we look to ‘extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.’”¹⁰

Thus, under the rules of statutory construction, if the meaning of a statute is clear, no further analysis is necessary to determine the intent of the Legislature. In this case, the clear language of Public Utilities Code section 398.4 requires retail sales to be in the denominator for the PCL. Specifically, Public Utilities Code section 398.4(d) states that the disclosures in the PCL must be “made separately for each portfolio offering made by the retail supplier.” Public Utilities Code section 398.4(g) goes on to specify the requirements for disclosing the fuel mix of the customer’s portfolio offering. Public Utilities Code section 398.4(k)(1) provides the parallel requirements for the GHG emission intensity:

(1) Each retail supplier shall disclose both the greenhouse gas emissions intensity of any electricity portfolio **offered to its retail customers** and the Energy Commission's calculation of greenhouse gas emissions intensity associated with all **statewide retail electricity sales**, consistent with the requirements of this subdivision.¹¹

The ISOR does not identify where in the statutory language there is an ambiguity that would justify an analysis of legislative intent, nor a deviation from that plain meaning. Further, the Commission previously evaluated the same question in the rulemaking implementing Assembly Bill (“AB”) 1110 (stats. 2016) and did not find any ambiguity. In the Final Statement of Reasons (“FSOR”) for the Modification of Power Source Disclosure Program, in Docket No. 16-OIR-05, issued on May 8, 2020, the Commission responded to various stakeholder comments urging the Commission to include line losses and total procurement in the PCL:

COMMENT NO. 21A4, 21C3, 21B3, 21D3: The commenter urged the CEC to include transmission and distribution losses in the GHG emissions intensity calculations. Doing otherwise, the commenter noted, would underreport GHG emissions.

⁹ ISOR at 50.

¹⁰ Park Med. Pharmacy v. San Diego Orthopedic Assocs. Med. Grp., Inc., 99 Cal. App. 4th 247, 251 (2002) (internal citations omitted) (emphasis added).

¹¹ Cal. Pub. Util. Code § 398.1(k)(1) (emphasis added).

COMMENT NO. 33B19: The commenter requested clarification on whether a net purchase of, for example, 1.2 kilowatts factors in all the costs and line losses that entail delivery of 1 kilowatt.

RESPONSE: No change to the regulations. Public Utilities Code section 398.4(k)(1) establishes electricity associated with retail sales as the denominator in the calculation of the GHG emissions intensity of an electricity portfolio. Grid losses are not included in retail sales, so GHG emissions associated with grid losses are not included in the GHG emissions intensity associated with electricity associated with retail sales.

The proposed implementation in the 45-Day Language exceeds the Commission’s authority under the authorizing statute. Indeed, using loss-adjusted load would be explicitly inaccurate based on the statute. CMUA urges the Commission to base the proposed Total Power Content category on the total retail sales of all offerings consistent with the authorizing statute.

F. The Commission Should Apply the Same Treatment for Eligible Firmed and Shaped Resources in Both the Annual and Hourly Accounting Rules.

The Commission’s regulations for annual accounting provide an express adjustment for certain eligible firmed and shaped resources. Specifically, for the deliveries from transactions that qualify as firmed and shaped and are associated with transactions or ownership agreements executed prior to January 1, 2019, the retail supplier only reports the emissions associated with the renewable resource and not the substitute energy. Doing otherwise would overestimate the emissions associated with that transaction, as the original energy at the point of generation would become “lost” in the renewable resource accounting and be inaccurately regarded as unspecified power. This treatment aligns with other related regulations, including the RPS and California Air Resource Board Cap-and-Trade Program.

In order to align with the PCL, RPS, and Cap and Trade programs, the Commission should apply the same treatment to the hourly accounting rules. Specifically, if a Retail Supplier has a resource that meets the requirements of Section 1393.1(d)(2)(A), then the Retail Supplier should only have the renewable resource included as part of its resource stack and only the emissions associated with the renewable resource attributed to its load.

G. The Commission Should Update the Explanatory Note for Unspecified Power Based on Actual Data.

The 45-Day Language would add the following explanatory parenthetical to the resource identification included in the PCL for unspecified resources: “Unspecified Power (primarily fossil fuels).”¹² The ISOR states that:

The CEC has determined that providing more context about the sources of unspecified power is critical to ensure that the PCL is accurate, reliable, and simple to understand for consumers. Some clean energy may feed into unspecified

¹² 45-Day Language, Section 1393.1(c)(1)(J).

power, but overwhelmingly unspecified power will be derived from in-state or imported fossil fuel generation. The PCL is required to display the percentage of unspecified power a retail supplier purchased, but without context this category is inherently obscure to consumers. Providing basic insight into the category of unspecified power is necessary to improve the PCL as a consumer information tool.¹³

CMUA does not dispute the Commission’s analysis or conclusions as it pertains to the current sources of Unspecified Power as set forth in the ISOR. However, the 45-Day Language states as fact a speculation about how unspecified power will be derived in the future, and therefore would hardwire a factual conclusion into the regulations without any ability to modify this conclusion as the facts change. Updates to the Power Source Disclosure Regulations occur infrequently and typically take multiple years to conclude. While unspecified power is currently primarily power generated using fossil fuels, this may change as California progresses towards its renewable and zero carbon goals. These regulations should provide a mechanism to adjust this statement based on changed facts without requiring an amendment to the regulations.

CMUA recommends the following amendment to Section 1393.1:

(c) Each retail supplier shall disclose the following information for all electricity portfolios it offers, except for custom electricity portfolios, on a single power content label: (1) Fuel mix information of each electricity portfolio, total power content, and of California total statewide retail electricity sales shall be provided using the fuel type categories listed in this subdivision:

- (A) Biomass and biogas
- (B) Geothermal
- (C) Small hydroelectric
- (D) Solar
- (E) Wind
- (F) Large hydroelectric
- (G) Nuclear
- (H) Natural gas
- (I) Coal and petroleum
- (J) Unspecified power (~~primarily fossil fuels~~)
- (K) Other, if applicable

...

(m) The power content label shall include the following statements and information in footnotes:

...

¹³ ISOR at 56-57.

(4) “Unspecified power is electricity that is primarily derived from natural gas and other fossil fuels and is purchased through an open market but is not traceable to a specific generation source.

(A) Energy Commission staff shall assess the accuracy of the preceding footnote each year and may update the language to reflect current market conditions, including by expressly stating the percentage of unspecified power that was derived from natural gas and other fossil fuels for the applicable reporting year.

H. The PCL Should Continue to Display the Quantity of Unbundled RECs Matched to Electricity Products

The 45-Day Language would shift the quantity of unbundled RECs associated with each electricity portfolio to a footnote and modify the prior footnote language to clarify that unbundled RECs are not reflected in the fuel mix or GHG intensities on the PCL.¹⁴ The ISOR states the updated language and location of information about unbundled RECs are necessary to improve clarity.¹⁵ CMUA disagrees that the changes to location of this information are necessary or would improve clarity. The existing footnote already made clear that unbundled RECs do not contribute to RPS compliance, and the Commission’s proposed changes would further clarify that unbundled RECs do not contribute to the fuel mix or GHG intensity of the portfolio. However, moving the information about the quantity of unbundled RECs associated with an electricity portfolio to a footnote would make contractual features of a given electricity portfolio less transparent and accessible to customers. This is a particular concern for customers that purchase voluntary electricity products, including Green-e certified voluntary products, that include unbundled RECs matched to some or all of the electricity they receive. CMUA urges the Commission to retain the current location of unbundled RECs on the PCL and recommends the following amendments to Section 1393.1 (j) and (m)(1):

(j) The Energy Commission shall generate power content labels on behalf of each retail supplier or provide a power content label template on the Energy Commission website for each retail supplier to generate its power content label. The label or template may display some of the data graphically, including but not limited to information provided under subdivision (c) of this section. The label shall display, for each electricity portfolio, the quantity of unbundled RECs retired in association with the portfolio.

...

(m)(1) This label does not reflect compliance with the Renewables Portfolio Standard (RPS), which measures the retirement of tracking instruments called renewable energy credits (RECs). Unbundled RECs (credits without electricity) can be used for RPS compliance, but they are not reflected in the power mix or GHG emissions intensities above.” ~~[This footnote shall also list the percentages of unbundled RECs retired in association with each electricity portfolio.]~~

¹⁴ 45-Day Language, Section 1393.1 (m)(1).

¹⁵ ISOR at 42.

I. The Commission Should Ensure that the PCL Recognizes that Hydroelectric Generation With a Capacity Exceeding 30 MW Can Be RPS-Eligible.

The 45-Day Language replaces the term “eligible hydroelectric” with “small hydroelectric” as it is reported in the fuel mix and as it will appear on the PCL.¹⁶ The ISOR states that this was “necessary to improve clarity; because the broader category of Eligible Renewables was removed, the term ‘eligible hydroelectric’ is less clear to consumers.”¹⁷ The existing regulations define “large hydroelectric” as “hydroelectric generation that is not eligible renewable”¹⁸ and do not provide a definition for “small hydroelectric” or “eligible hydroelectric.” Small hydroelectric generation generally refers to facilities with a capacity of 30 megawatts (“MW”) or less.¹⁹

This proposed change would result in reporting of inaccurate information and could lead to customer confusion regarding their retail seller’s procurement because the simple distinction between large and small hydroelectric generation does not accurately convey the meaning and significance of those terms. Specifically, the RPS program treats the output of certain hydroelectric facilities as RPS-eligible even if the capacity of that facility exceeds 30 MW. This includes certain facilities operated as part of water supply conveyance systems,²⁰ existing small hydroelectric facilities where the efficiency was improved,²¹ and where qualifying efficiency improvements were made to large hydroelectric facilities.²² If retail suppliers were required to report the output of one of these RPS-eligible facilities as “large hydroelectric” generation on the PCL this would incorrectly convey to that retail supplier’s customers that this generation was not RPS-eligible. That could conflict with governing board policies or commitments to customers regarding their portfolio mix.

CMUA recommends that the Commission amend the terms used to ensure that accurate information is conveyed to the customers of retail suppliers with eligible large hydroelectric generation. This could include subclassifying hydroelectric generation as either “small and other eligible hydroelectric” or “other hydroelectric.”

III. CONCLUSION

CMUA appreciates the opportunity to provide these comments to the Commission. Thank you for your time and attention to these comments.

¹⁶ 45-Day Language, Section 1393(c)(1)(C).

¹⁷ ISOR at 37.

¹⁸ Section 1391.

¹⁹ Cal. Pub. Res. Code § 25741(a)(1).

²⁰ Cal. Pub. Util. Code § 399.12(e)(1)(D).

²¹ Cal. Pub. Util. Code § 399.12.5(a).

²² Cal. Pub. Util. Code § 399.12.5(b).