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STATE OF CALIFORNIA
CALIFORNIA ENERGY COMMISSION

IN THE MATTER OF:	DOCKET NO. 21-OIR-01
Rulemaking to Amend Regulations Governing the Power Source Disclosure Program	RE: Power Source Disclosure

CALIFORNIA COMMUNITY CHOICE ASSOCIATION'S COMMENTS ON PROPOSED AMENDMENTS TO POWER SOURCE DISCLOSURE PROGRAM REGULATIONS

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The California Community Choice Association[1] (CalCCA) submits these Comments pursuant to the *Notice of Proposed Action*, published May 17, 2024, regarding the California Energy Commission's (Commission's) proposed amendments to the Power Source Disclosure (PSD) Program regulations (Amendments).[2]

I. INTRODUCTION

The PSD program was first established by Senate Bill (SB) 1305[3] in 1997, adding sections 398.1 through 398.5 to the Public Utilities Code. The Commission proposes to amend its PSD regulations to incorporate new legislation – Assembly Bill (AB) 242[4] establishing deadlines for the Power Content Label (PCL), and SB 1158[5] adding the reporting of hourly data

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[1] California Community Choice Association represents the interests of 24 community choice electricity providers in California: Apple Valley Choice Energy, Ava Community Energy, Central Coast Community Energy, Clean Energy Alliance, Clean Power Alliance of Southern California, CleanPowerSF, Desert Community Energy, Energy For Palmdale's Independent Choice, Lancaster Energy, Marin Clean Energy, Orange County Power Authority, Peninsula Clean Energy, Pico Rivera Innovative Municipal Energy, Pioneer Community Energy, Pomona Choice Energy, Rancho Mirage Energy Authority, Redwood Coast Energy Authority, San Diego Community Power, San Jacinto Power, San José Clean Energy, Santa Barbara Clean Energy, Silicon Valley Clean Energy, Sonoma Clean Power, and Valley Clean Energy.

[2] 20 California Code of Regulations (CCR) §§ 1390-1394.3. The Commission proposes to amend and reorganize Sections 1391, 1391.1, 1392, 1393, 1393.1, 1394, 1394.1, and 1394.2.

[3] SB 1305 (Figueroa, Ch. 796, Stats. 1997).

[4] AB 242 (Holden, Ch. 228, Stats. 2021).

[5] SB 1158 (Becker, Ch. 367, Stats. 2022).

in addition to the current requirements to report calendar year data.[6] The Commission also proposes other changes to the regulations to further clarify the PSD and PCL requirements, and ensure accuracy and consistency.[7] CalCCA appreciates the continuing opportunity to provide input on the Commission's proposed regulation amendments. The following comments recommend three modifications to (1) ensure proper allocation of resources among retail sellers, (2) apply the Amendments prospectively, and (3) ensure the PCL accurately characterizes electricity sources.

First, the Commission should remove the requirement in Amendments section 1393(e)(1) to proportionally allocate Power Charge Indifference Adjustment (PCIA) resources along with Cost Allocation Mechanism (CAM) resources given the statutory requirements and these programs' fundamental differences in allocation of costs and benefits. Proportional allocation makes sense for CAM resources, as they are procured by investor-owned utilities (IOUs) as directed by the California Public Utilities Commission (CPUC) for all customers pursuant to Public Utilities Code section 365.1(c), and are "attributed" to specific retail sellers pursuant to section 365.1(c)(2)(B). PCIA resources are subject to an entirely different program, are not governed by section 365.1(c), and fully remain under IOU ownership and available for bundled retail service. The Commission should therefore only adopt the reporting of the proportional allocation of CAM resources and not PCIA resources.

Second, the Commission must ensure the regulations only apply prospectively. The Commission is requiring retail sellers to report on "loss-adjusted load" for each *calendar year*

[6] Prior to opening the current formal rulemaking to incorporate SB 242 and SB 1158, the Commission issued two sets of pre-rulemaking amendments on September 20, 2023, and January 31, 2024, and on which parties including CalCCA provided comments. *See* Docket 21-OIR-01.

[7] Docket 21-OIR-01, *Initial Statement of Reasons + Economic Analysis,* at 1-2 (May 17, 2024) (ISOR).

along with SB 1158's requirement for such reporting on an *hourly* basis. The regulations as currently written will improperly and inequitably apply this *calendar year* requirement for the upcoming 2025 disclosures for the 2024 calendar year. This application is despite the new *hourly* reporting not being required until 2028 (for the 2027 calendar year). Applying the *calendar year* requirement for 2024, a year already half complete and by the time the regulations are adopted likely in the past, constitutes impermissible retroactive rulemaking prohibited by a long line of United States Supreme Court and California caselaw. The Amendments as written will impermissibly harm retail sellers by retroactively altering the guideposts for PSD and PCL reporting by attaching new consequences to transactions already complete.

Third, the Commission should require accurate descriptions of retail sellers' portfolios on the PCL. The Commission should ensure that its label for "unspecified power" on the PCL not only states that such power constitutes "primarily fossil fuels" but also "may include other resources" to ensure accuracy consistent with Public Utilities Code section 398.1.

Accordingly, the Commission should modify the Amendments to:

- Remove the requirement in Amendment section 1393(e)(1) for IOUs to proportionally allocate PCIA resources in the PSD/PCL in the same manner as CAM resources;
- Ensure the new *calendar year* reporting requirement on "loss-adjusted load" for the PSD and PCL disclosures is not effective until 2026 (for the 2025 calendar year), or until retail sellers have a full year of procurement after the Amendments are adopted to avoid impermissible retroactive rulemaking; and
- Add to the PCL's description of "unspecified power" from "primarily fossil fuels" that such power "may include other resources" to ensure accuracy in accordance with Public Utilities Code section 398.1.

II. SECTION 1393(E)(1)'S REQUIREMENT FOR IOUS TO ONLY REPORT THEIR PORTION OF "ATTRIBUTABLE" PROCUREMENT SHOULD ONLY APPLY TO CAM, AND NOT PCIA, RESOURCES

The requirement for IOUs in Amendment section 1393(e)(1) to proportionally allocate PCIA resources in the same manner as CAM resources should be removed. PCIA resources cannot and should not be allocated proportionally like CAM resources in the PSD/PCL because they are fundamentally different programs with different allocation of costs and benefits. The current Amendments correctly require IOUs to only include their load ratio share of CAM resources given the costs and benefits of such resources are *shared* among retail suppliers. PCIA resources, on the other hand, were procured to meet and continue to meet the IOUs' bundled retail load needs. The Amendments should therefore be modified to remove reference to PCIA resources in section 1393(e)(1), and require IOUs to account in full for all PCIA resources.

Proposed section 1393(e)(1) states:

> For resources that [IOUs] have been directed to procure pursuant to Public Utilities Code section 365.1(c)(2)(A) *and for resources subject to the [PCIA],* the [IOU] shall report the portion of procurement attributable to the [IOU] as determined by the California Public Utilities Commission pursuant to Public Utilities Code section 365.1(c)(2)(B).[8]

The ISOR describes that the purpose of the addition of PCIA resources to section 1393(e)(1) is to:

> . . . . explain that resources subject to the [PCIA] will be proportionally allocated in the same way as resources procured under the [CAM]. Pursuant to [Public Utilities Code] Section 365.1(c)(2)(A), the CPUC may direct [IOUs] to procure resources for system reliability needs, the costs and benefits of which are shared among retail suppliers within a service territory. The regulations require [IOUs] to report only their portion of these procurements. The amendment in this subdivision extends this reporting requirement to the treatment of resources subject to PCIA, which prevents a utility's customers from experiencing cost

[8] Amendments §1393(e)(1) (emphasis added).

> increases if other customers choose to receive service from another provider.
>
> These requirements are necessary to ensure that an [IOU] accurately accounts for *its share* of specified CAM *and PCIA procurements*.[9]

Subjecting CAM and PCIA resources to identical treatment in the PSD/PCL, however, ignores their fundamental differences.

First, Public Utilities Code section 365.1(c)(2)(B) only applies to CAM resources, requiring the Commission to allocate costs of CAM resources fairly and equitably among all customers, including IOU, community choice aggregator (CCA) and electric service provider (ESP) customers. Section 365.1(c)(2)(B) does not govern the cost allocation mechanism for PCIA, which is a program to ensure customers that depart from IOU service for CCAs or ESPs cover the above-market costs of resources procured by the IOUs for that customer when they were still IOU bundled customers.

Second, the cost and benefit allocations for CAM and PCIA resources are different. Under CAM, contract costs net of California Independent System Operator (CAISO) market revenues in the CAM portfolio are allocated to all IOU, CCA, and ESP customers. Benefits of the resources in CAM, such as Resource Adequacy (RA), are also allocated to load serving entities on behalf of all customers that pay for the resources. In the PCIA program, while departed load customers do pay the IOUs their share of above-market costs for PCIA resources, after such payments the IOUs retain ownership of the entire PCIA fleet including all of the fleet's attributes (i.e., RA, renewables portfolio standard (RPS), and greenhouse gas (GHG)-free) and this fleet remains available to the IOUs to serve their retail load. If any of the attributes are sold by the IOU, including the RPS sold in the Voluntary Allocation and Market Offer (VAMO)

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9 ISOR, at 31 (emphasis added).

as recognized in section 1392(e)(3), those attributes are automatically no longer part of the IOU's PCIA fleet and will no longer be "attributed to" the IOU or available to the IOU to serve retail load. However, this "attribution" as part of the PCIA program is not determined by Public Utilities Code section 365.1(c)(2)(B), but rather other CPUC approved methodologies. Therefore, the reference to the PCIA in subsection (e)(1) in connection with the reporting of the IOUs' "portion of [CAM] procurement" attributable to the IOUs pursuant to Public Utilities Code section 365.1(c)(2)(B) is not only illogical, but is incorrect and should be removed.

III. THE AMENDMENTS SHOULD BE MODIFIED TO POSTPONE CALENDAR YEAR REPORTING OF LOSSES UNTIL AT LEAST 2026 TO PREVENT THEIR IMPROPER AND INEQUITABLE RETROACTIVE APPLICATION

The proposed requirements to incorporate losses and other utility end uses in PSD *calendar year* reporting and the PCL, if adopted, should not be required for 2025 (for the 2024 reporting year). Instead, any such requirements should be deferred to at least 2026 (for the 2025 reporting year) to prevent their improper retroactive application and allow retail sellers adequate opportunity to adapt to the new requirements. California courts follow the long-established legal precedent set by the United States Supreme Court disfavoring retroactive rulemaking. Overall, courts examine whether a statute expressly allows a retroactive impact, and if not, whether harm is caused by retroactive application.[10] Applying the law, the new PSD and PCL reporting requirements should not begin until retail sellers can adequately adapt to such requirements given: (1) the Public Utilities Code does not expressly require such retroactive application, and (2) retroactive application will harm retail sellers by retroactively altering the guideposts for PSD and PCL reporting by attaching new consequences to transactions already complete.

[10] *Landgraf v. USI Products* (1994) 511 U.S. 244, 280.

A. The Amendments Currently Require Retail Sellers to Begin Calendar Year Reporting of Losses in 2025 for the 2024 Calendar Year

Retail sellers, including CCAs, must annually disclose the fuel mix and GHG intensity of the sources of electricity to serve retail load in the previous *calendar year* through both disclosures to the Commission (section 398.5) and to the public and customers through the PCL (section 398.4).[11] SB 1158 adds Public Utilities Code section 398.6 requiring retail sellers to disclose, on an *hourly* basis, the fuel mix and GHG emissions of sources of electricity to serve "*loss-adjusted load"* during the previous calendar year."[12] Such *hourly* disclosures are required to begin January 1, 2028.[13] "Loss-adjusted load" is defined as "the total amount of electricity [required] to provide for retail sales after electrical losses in transmission and distribution."[14] Notably, Sections 398.4 and 398.5, and the current regulations governing *calendar year* reporting through the PSD and PCL, do not expressly require the reporting on losses with retail sales.[15]

The Commission's proposed Amendments incorporate the SB 1158 requirements regarding *hourly* retail sales and *loss-adjusted load*.[16] The Amendments also go one step further, however, and require retail sellers to disclose losses associated with retail sales in the *calendar year* disclosures on the grounds of improving accuracy and maintaining consistency with the

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[11] The Commission established PSD regulations for both the disclosures to the Commission and the PCL, requiring information on the PCL to be "consistent with the information reported to the [Commission] on the annual report for each electricity portfolio." 20 CCR § 1391.1.

[12] Public Utilities Code § 398.6(b)(1) (emphasis added).

[13] *Id.* § 398.6(b); Amendments § 1393.

[14] *Id.* § 398.6(a)(4).

[15] *See* ISOR, at 50 (recognizing the PSD and PCL do not currently incorporate "generation needed to cover energy losses . . . . ").

[16] The regulations also expand the definition of "loss-adjusted load" to include not only transmission and distribution losses, but also "self-consumption and other electricity uses [to] serv[e] retail consumers." Amendments § 1391. Discussions herein of "losses" include both transmission/distribution losses and other uses identified in the Amendments.

new hourly disclosures.[17] The Amendments require retail suppliers to include on the PCL a column for fuel mix and GHG emissions for retail sales in each electricity portfolio, and a separate column for "total power content" which will include all electricity used to serve the retail seller's *loss-adjusted load.*[18] Therefore, individual *portfolio* reporting will only include retail sales, while the *total power content* column will incorporate retail sales *plus* losses and other end uses. The Commission notes in the ISOR that these additional requirements will ensure consistency among the hourly and calendar year reporting, and transparency and accuracy for consumers:

> The inclusion of the Total Power Content category on the PCL provides consumers a more accurate reflection of their retail supplier's overall climate impact by displaying the power sources and GHG emissions intensity associated with annual loss-adjusted load, rather than just retail sales. Calculating the state average GHG emissions intensity based on all retail suppliers' annual loss-adjusted load will also better align with the total system electric generation power mix shown on the PCL. These changes together will improve the PCL as a consumer information tool by aligning retail suppliers' data with the statewide figures shown for comparison and providing consumers with increased transparency about the electricity sources and associated GHG emissions required to provide electric services.[19]

As set forth more fully below, if the Commission adopts the reporting on losses (and other end uses) associated with retail sales on both the *calendar year* reports and PCL, it should postpone until at least 2026 such reporting to prevent the improper and inequitable retroactive application of the new requirements. In all events, retail sellers should have a full year of procurement after the Amendments are adopted to adapt to the new requirements.

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[17] *See* Amendments § 1393(a)-(b) (requiring retail sellers to include "annual retail sales" and "loss-adjusted load" in the calendar year reporting due June 1 of each year, and in the hourly reporting beginning January 1, 2028).

[18] *Id.* § 1393.1(c).

[19] ISOR, at 6.

B. Express or Implicit Retroactivity of Regulations is Disfavored Under Well-Established Legal Principles

California courts have long followed the legal presumption articulated by the United States Supreme Court that statutes and regulations operate prospectively, and that "[r]etroactivity is not favored in the law."[20] Absent express legislative approval, "newly promulgated agency rules should apply only prospectively because of their affinity to legislation."[21] In *Landgraf v. USI Products,* the Court created a two-part test that is now widely applied in federal and California courts to determine whether a statute or regulation has an improper retroactive effect.[22] First, a court determines if the agency was provided legislative authorization through statute to impose retroactive rules.[23] If the answer is yes, the inquiry comes to an end, and the retroactive application of the rule is applied.[24] If, however, the legislature's or agency's intent is not clear, the analysis proceeds to the second step to determine whether the rule has an impermissibly retroactive effect.[25] The California Supreme Court has repeatedly stated that a retroactive or retrospective law "'is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.'"[26] Such retroactive effect can be proven if the action will (1) "impair rights a party possessed when [it] acted," (2)

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[20] *Bowen v. Georgetown Univ. Hosp.* (1988) 488 U.S. 204, 208; *Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal.4th 828, 841 ("just as federal courts apply the time-honored legal presumption that statutes operate prospectively . . . so too California courts comply with the legal principle" that a statute will not be applied retroactively unless it is very clear that the legislature intended such a retroactive application).

[21] *Bowen,* 488 U.S. at 208; *accord Evangelatos v. Sup. Ct.* (1988) 44 Cal.3d 1188, 1208 (quoting *Aetna Casualty and Surety Co. v. Ind. Accident Comm'n* (1947) 30 Cal.2d 388, 393).

[22] *Landgraf,* 511 U.S. at 280.

[23] *Ibid*.

[24] *Ibid*.

[25] *Ibid.*

[26] *Myers,* 28 Cal.4th at 839-40 (quoting *Aetna,* 20 Cal.2d at 391) (finding the application of a tobacco tort liability statute could not be applied during a ten year period during which an immunity statute was in effect because it would subject the tobacco company for liability for past conduct); *accord Evangelatos,* 44 Cal.3d at 1206 (refusing to retroactively apply a voter approved measure regarding tort liability when such an application would "defeat the reasonable expectations of individuals who had taken irreversible actions in reliance on the preexisting state of the law").

"increase a party's liability for past conduct," or (3) "impose new duties with respect to transactions already completed."[27] Courts may properly consider whether the retrospective application of a statute would affect substantial rights, or substantially alter rules on which the parties have detrimentally relied.[28]

C. Retroactive Application of the Calendar Year Loss Reporting Rule is Not Expressly Required by Statute

Here, the Commission does not have *express* authority under the Public Utilities Code to proscribe retroactive *calendar year* reporting of losses associated with retail sales. Sections 398.4 and 398.5 do not, like section 398.6 governing hourly reporting, incorporate losses expressly or in any definition of "loss-adjusted load." Therefore, the Commission does not have express authority to apply its *calendar year* reporting retroactively.

In fact, the Legislature has expressly set timelines for application of other new PSD requirements, including January 1, 2028, for the new SB 1158 hourly reporting requirements.[29] In addition, Section 398.4's requirement (added by the Legislature in 2016) for the Commission to adopt by January 1, 2018, regulations for disclosure of GHG emissions associated with retail sales expressly required retail suppliers to report, beginning June 1, 2020, such GHG data for retail sales *after* December 31, 2018.[30] Therefore, retail sellers had a full year to adapt to the new

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[27] *Landgraf,* 511 U.S. at 280; *see also Bahr v. Regan* (9th Cir. 2021) 6 F.4th 1059, 1072 (applying the *Landgraf* principles to the analysis of regulatory retroactivity); *see also Aktar v. Anderson* (1997) 58 Cal.App.4th 1116, at 1182 (applying *Landgraf* and finding that a law regarding food stamps did not apply to issuances of such food stamps which occurred prior to the effective date of the enactment because such retroactive application would increase the food stamp recipients' liability for past benefits).

[28] *Evangelatos,* 44 Cal.3d at 1215-17; *see also Solar Energy Industries Assoc. v.* FERC (2023) 80 F.4th 956, 981-82 (finding that a new site rule making it more difficult for energy producers to achieve qualifying facility status does not operate retroactively merely because it "upsets expectations based in prior law" or "is applied in a case arising from conduct antedating the statute's enactment" when the rule only applies to existing facilities seeking recertification when there have been substantial changes to the facility).

[29] Public Utilities Code § 398.6(b).

[30] *Id.* § 398.4(k)(2)(F)(i).

requirements before procurement began in 2019, and over two full years before reporting on the 2019 procurement.

Importantly, the new Section 398.6 does not require *calendar year* reporting of losses, and therefore also does not expressly include a timeline for implementation of such reporting. Therefore, caselaw next requires a case specific analysis of whether the Amendments' new requirements have an impermissibly retroactive effect. As set forth below, application of the requirements for the Amendments in the 2025 reporting will retroactively and negatively impact transactions already complete.

D. The Amendments' Requirement to Report Losses in the 2025 Disclosures Retroactively Alters the Guideposts for PSD and PCL Reporting by Attaching New Consequences to Transactions Already Complete

Requiring reporting on calendar year losses in the 2025 PSD and PCL disclosures retroactively alters the guideposts for such disclosures by attaching new consequences to transactions in 2024 that by the time the regulations are adopted, will likely be in the past. As set forth below, changing the legal framework relied on by CCAs entering into transactions in 2024 regarding what will be required in the PSD and PCL reports: (1) impermissibly harms retail sellers relying on the rules applicable for the majority of 2024; (2) denies retail sellers notice and due process to participate in the compilation of the loss factors for 2024 in the Integrated Energy Policy Report (IEPR) Demand Forecast planning process; and (3) denies CCAs the ability to calculate alternative loss factors for 2024 given CCAs are not transmission or distribution owners or operators and do not have access to data to quickly make such calculations. As a result, the Commission must defer the new *calendar year* reporting to prevent its impermissibly retroactive application.

1. Requiring Loss Reporting in the 2025 Disclosures Will Impermissibly Harm Retail Sellers for Relying on Rules Applicable for the Majority of 2024

New rules regarding reporting losses on retail sales for the calendar year should only be applied prospectively to ensure retail sellers are not harmed for relying on rules applicable for the majority of 2024. The PSD and PCL regulations do not require procurement of specific sources of electricity to serve retail customers, but they are the primary source to educate customers on such procurement and likely have impacts on customer choice of retail sellers. Changing the disclosure rules mid-year will harm retail sellers which rely greatly on the disclosure rules in place at the time of procurement. The California Supreme Court in *Evangelatos* has similarly refused such retroactive application when it would "defeat the reasonable expectations of individuals who had taken irreversible actions in reliance on the preexisting state of the law."[31] CCAs have historically been among the cleanest retail sellers, and market their portfolios to demonstrate their clean energy offerings. Having clarity on the loss determination methodology at the time of procurement will ensure retail sellers obtain the correct amount of energy for losses with the same characteristics as the energy for retail sales for reporting on the PSD and PCL.

2. Applying in 2024 the Commission's New Proposal to Utilize Loss Factors from the IEPR Demand Forecast Planning Process Denies Retail Sellers Notice and Due Process in the Establishment of the Loss Factors

In addition to adding the new requirement to include losses in *calendar year* reporting, the Commission has proposed a new methodology for calculating such losses obtained from the IEPR process. The pre-rulemaking proposed regulations assigned a distinct loss factor to in-state resources (four percent) and imported resources (six percent) based on a ten-year average of loss

[31] *Evangelatos,* 44 Cal.3d at 1206.

data.[32] Stakeholders were able to comment in the pre-rulemaking on those load factors, but now the Commission has again changed its approach. The Amendments will now incorporate a "systemwide approach" to capture losses by increasing a retail suppliers' hourly or annual load based on a retail supplier's planning area using data from the IEPR Demand Forecast.[33] The Commission is therefore taking the IEPR loss factor that was previously only calculated for planning purposes and now proposing to make it a required component of PSD and PCL disclosures. If retail sellers had been aware that the IEPR loss data would be used for PSD and PCL reporting, they could have actively participated in the formulation of the loss factors during the IEPR proceeding to make sure these numbers were accurate. The Commission will therefore be retroactively applying the IEPR requirements in a way retail sellers had no notice or due process to influence. In addition, until the Amendments are adopted, retail sellers have no finality as to the rules that will be applied, for 2024 or moving forward. Therefore, at a minimum the Amendments utilizing the new loss factor should not be effective until 2026 (for the 2025 reporting year).

3. CCAs are Not Transmission or Distribution Owners or Operators and Do Not Have Data to Calculate Alternative Loss Factors for the 2025 Reporting

The Amendments do allow for retail sellers to propose an alternative loss factor if it can substantiate the loss factor claim.[34] However, requiring CCAs to formulate an alternative loss factor for 2024 not only changes the framework on which CCAs relied, but would be administratively burdensome and costly. In addition, CCAs are at a disadvantage given CCAs

[32] *See* Docket 21-OIR-01, *Pre-Rulemaking Amendments to the PSD Program,* § 1392(c)(2)(A) (Jan. 31, 2024).

[33] Amendments § 1392(a)(8)(B); *see also* ISOR at 50-51 (describing the change to its "systemwide approach").

[34] *See* Amendments § 1392(a)(8)(C).

are not transmission or distribution owners or operators (like the IOUs and publicly-owned utilities (POUs)) and do not have the data to quickly calculate such alternative loss factors. Any argument that CCAs can sidestep the retroactive effect of applying the new loss factors to 2024 transactions by calculating alternative loss factors fails to recognize the impairment of CCA rights and new duties imposed on transactions already complete.[35]

For example, with respect to transmission, almost all energy delivered to CCAs is delivered over the CAISO transmission grid which does not assign losses to individual retail sellers. Instead, losses are calculated on an hourly basis and the costs (but not the associated megawatt-hours (MWhs)) are recovered through the CAISO's various uplift and reconciliation processes. Therefore, a CCA only knows that it received 100 MWh from the CAISO, and not that the CAISO instead needed to procure 103 MWh to cover losses and rolled the incremental cost of this 3 MWh loss into the price paid by the CCA for the 100 MWh it received. As the CAISO calculates these losses hourly, and as each CCA has different load profiles, calculating a "loss-adjusted load" for each CCA will be both administratively burdensome and costly.

In addition, it is the distribution utility, and not the CCA, that is responsible for operating the distribution system. CCAs have no detailed access to this data. Therefore, CCAs will need time to work with their IOU distribution utility to access the necessary data, develop the appropriate methodology, determine the appropriate loss factor and document this factor for the Commission. CCAs should not be disadvantaged relative to other retail sellers (e.g., IOUs and POUs) that operate the distribution system and already have the data and methodologies to calculate their appropriate loss factor. The significant change to the loss factor calculation in the

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35 *See Landgraf,* 511 U.S. at 280; *see also Aktar,* 58 Cal.App.4th at 1180 (citing *Landgraf's* rule that impermissible retroactive effect occurs when the new law impairs rights a party possessed when it acted, or imposed new duties with respect to transactions already complete).

Amendments further supports deferring the new *calendar year* reporting to 2026 to avoid the harmful retroactive effect of the Amendments as currently written.

IV. THE POWER CONTENT LABEL'S DESCRIPTION OF "UNSPECIFIED POWER" SHOULD ACKNOWLEDGE RESOURCES MAY BE INCLUDED OTHER THAN FOSSIL FUEL RESOURCES

The description of "unspecified power" on the PCL must be accurate and acknowledge that such unspecified power is primarily from fossil fuels but also includes other resources to ensure consumers are not misled. The Commission issued a "Sample Power Content Label" in its presentation at the June 11, 2024, workshop that includes a parenthetical after the term "Unspecified Power" of "(primarily fossil fuels)."[36] The Commission also stated in the ISOR that it will keep its "primarily fossil fuels" language without any other description because unspecified power is "overwhelmingly . . . derived from in-state or imported fossil fuel generation."[37]

Prior to the issuance of proposed pre-rulemaking regulations in January 2024, CalCCA had several informal discussions with CEC staff to ensure the "may include other resources" language would be included on the PCL template in conjunction with the description of unspecified power as "primarily fossil fuels." CEC staff assured CalCCA that the language "may include other resources" would be included, which it was in the mock-up of the PCL accompanying the January 31, 2024, pre-rulemaking amendments.[38] The Commission stated at the time that:

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[36] Docket 21-OIR-01, *Presentation on Updates to the Power Source Disclosure Regulations,* at 15 (June 10, 2024).

[37] ISOR, at 56-57 (denying the request of parties to incorporate language stating that unspecified power may come from other sources).

[38] *See* Docket 21-OIR-01, *Summary of Changes and FAQs,* Fig. 1, at 9 (Jan. 31, 2024).

> To better contextualize unspecified power for consumers and reflect CARB's methodology of calculating annual marginal emissions, staff proposes to reclassify unspecified power as "unspecified power (primarily fossil fuels)," categorize unspecified power with other fossil fuels, *and include a footnote on the power content label explaining that "unspecified power is primarily fossil fuel generation but may include other resources," as shown in Figure 1.*[39]

The Commission, however, has now dropped the footnote in the Amendments and only include the "primarily fossil fuels" description.[40] To ensure accuracy on the PCL in compliance with Public Utilities Code section 398.1, the Commission should add back the descriptor regarding unspecified power to ensure consumers understand that such power comes from both fossil fuels *and other resources*. In the alternative, if the Commission does not want to add a description that unspecified power also comes from other resources, the Commission should remove the "primarily fossil fuels" description from the PCL entirely to ensure consumers are not misled as to the entire content of unspecified power.

V. CONCLUSION

CalCCA looks forward to further collaboration on this topic.

Respectfully submitted,

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July 3, 2024

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39 *Id.,* at 4.
40 *See id.,* Fig. 1, at 9.