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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)	Docket No. 16-RPS-02
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Appeal by LADWP re)	RE: Committee Status Conference
RPS Certification or Eligibility)	July 13, 2016
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THE LOS ANGELES DEPARTMENT OF WATER AND POWER'S STATUS REPORT
FOR JULY 13, 2016 COMMITTEE STATUS CONFERENCE

July 8, 2016

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THE LOS ANGELES DEPARTMENT OF WATER AND POWER’S STATUS REPORT
FOR JULY 13, 2016 COMMITTEE STATUS CONFERENCE

The Los Angeles Department of Water and Power (“LADWP”) submits the following Status Report pursuant to the California Energy Commission Committee’s (“Committee”) Notice of Committee Status Conference dated June 28, 2016 (“CSC Notice”).

STATUS REPORT

The CSC Notice requests a report from LADWP and staff containing information on four items. *See* CSC Notice at 2 (Party Status Reports). LADWP addresses items 1-4 of the CSC Notice in turn below.

I. The Committee and Commission Have the Authority to Consider All Arguments Raised in this Proceeding.

The CSC Notice requests that the parties include “a discussion of whether principles of equity or any laws would prevent or prohibit the Committee and Commission from exercising its broad authority under Public Resources Code sections 25218 and 25218.5 to consider all of the

arguments presented in the Letter of Appeal, including any arguments that might not be within the scope of the [appeal standard in the Eighth Edition RPS Eligibility Guidebook].”

The Commission and Committee have the authority and discretion under the Public Resources Code to consider all of the arguments LADWP raised in its Letter of Appeal or raises in any subsequent RPS-related motions. Public Resources Code Section 25218(e) states “[i]n addition to other powers specified in this division, the commission may do any of the following: Adopt any rule or regulation, *or take any action*, it deems reasonable and necessary to carry out this division.”¹ Section 25218.5, in turn, states “[t]he provisions specifying *any power or duty of the commission shall be liberally construed*, in order to carry out the objectives of this division.” The “division” refers to Division 15 of the Public Resources Code, which includes the Commission’s Renewable Energy Resources Program in Chapter 8.6 (Pub. Res. Code §§ 25740 *et seq.*), and the Commission’s related duties under the California Renewable Energy Resources Act (Pub. Util. Code §§ 399.11 *et seq.*) enacted under Senate Bill X1-2 (“SBX1-2”) and related RPS-legislation.²

The Committee’s presiding member has broad authority to regulate the conduct and scope of the proceedings and hearings. *See* 20 C.C.R. § 1203(c) (the presiding member shall have the power to “[r]egulate the conduct of the proceedings and hearings, including, but not limited to, disposing of procedural requests, ordering the consolidation or severance of any part, or all, of any proceeding or hearing, admitting or excluding evidence, designating the subject matter, scope, time of presentation, and order of appearance of persons making oral comments or testimony, accepting stipulations of law or fact, and continuing the hearings.”); *see also* 20

¹ All emphasis is added unless otherwise indicated.

² The Warren-Alquist Act – which created the Commission – also pronounces a policy and intent for the Commission to develop policies that encourage “the development of renewable energy resources.” *See* Pub. Res. Code § 25000.1(a).

C.C.R. § 1210 (“in an adjudicative proceeding the presiding member may regulate the proceedings, and any parts thereof, in any manner that complies with the Administrative Adjudication Bill of Rights....”).

Public Resources Code section 25747(a) provides an exemption from certain provisions of the Government Code’s Administrative Procedures Act for guidelines adopted by the Commission pursuant to Public Utilities Code Section 399.25. Section 25747(c) states that “awards made pursuant to this chapter are grants, subject to appeal to the commission upon a showing that factors other than those described in the guidelines adopted by the commission were applied in making the awards and payments.” This provision is trumped, however, by the Commission’s *paramount* duty to ensure that California’s Renewable Portfolio Standard (“RPS”) enacted under SBX1-2 and Assembly Bill 2196 (“AB 2196”) is interpreted and implemented by the Commission and staff in a manner that is consistent with the statutory provisions and expressed legislative intent. *See Morris v. Williams*, 67 Cal.2d 733, 748 (1967); *Assoc. for Retarded Citizens v. Dep’t of Dev. Servs.*, 38 Cal.3d 384, 391 (1985); *E.g.*, Gov. Code §§ 11342.1-11342.2.

SBX1-2 created new and mandatory RPS requirements on local publicly owned electric utilities (“POUs”). SBX1-2 imposed new duties on the Commission to facilitate and administer POUs’ transition from locally-controlled RPS programs to mandatory-state RPS programs. LADWP’s Letter of Appeal raises important questions of first impression regarding staff’s interpretation and implementation of SBX1-2 and AB 2196. The Commission will address the substantive merits of these questions for the *first time* in this proceeding. The Commission, therefore, can and should consider all arguments and evidence to ensure that the Commission’s

interpretation and implementation of the California's RPS is consistent with the enabling legislation. *See id.*

Finally, principles of equity and due process warrant the Committee's and Commission's full consideration of the merits in this proceeding. California Senate Bill 1078 ("SB 1078") established the RPS standard effective as of January 1, 2003. SB 1078 added, among other provisions, Sections 387 to the Public Utilities Code. Section 387(a) provided that "[e]ach governing body of a local publicly owned electric utility, as defined in Section 9604, shall be responsible for implementing and enforcing a renewables portfolio standard that recognizes the intent of the legislature to encourage renewable resources, while taking into consideration the effect of the standard on rates, reliability, and financial resources and the goal of environmental improvement." The City of Los Angeles ("City") adopted a voluntary RPS program consistent with Public Utilities Code Section 387, which vested LADWP's Board of Water and Power Commissioners ("LADWP's Board") with discretion over the procurement and selection of eligible renewable resources. The City and LADWP invested over \$1 billion in its RPS program in reliance on the then-existing laws, and deserve a full and fair opportunity to address – and have the Committee and Commission consider – all of the arguments raised in this proceeding.

II. Description of Disputed Issues Raised in this Proceeding.

The CSC Notice asks the parties to describe the specific areas of dispute between LADWP and staff, including the particular regulations, statutes, and applicable RPS Guidebook provisions. In addition, the CSC Notice requests that the parties identify the areas of dispute for which expert testimony will or may be offered, including the purpose of such testimony.

There are two threshold areas of dispute that – once resolved – will determine the scope and extent of any hearing. *First*, there is a dispute regarding staff's interpretation and

implementation of the statutory provisions and legal standards applicable to LADWP's grandfathered resources under SBX1-2 and AB 2196. *Second*, there is a dispute regarding the appropriate set of rules that should apply for purposes of determining whether LADWP's grandfathered resources constitute eligible renewable resources for purposes of the RPS mandates under SBX1-2 and AB 2196.

The Committee's resolution of these threshold legal questions regarding statutory interpretation and the applicable eligibility-rules will allow the parties to address the remaining disputed issues, if any, regarding whether LADWP has established the RPS-eligibility requirements. For the RPS-eligibility of LADWP's 2009 biomethane procurement, the primary dispute has largely focused on whether LADWP satisfied the transportation requirements for delivery of the biomethane via the U.S. interstate-gas pipeline system into the WECC region for use in LADWP's in-basin generating stations.

A. The Legal Standard Applicable to LADWP's Grandfathered Resources under SBX1-2 and AB 2196.

1. Statutory Interpretation of SBX1-2

There is a dispute regarding the governing legal standard applicable to LADWP's grandfathered resources, including specifically the standard for the biomethane procured under contracts executed in 2009.

- SBX1-2 added Section 399.30 to the Public Utilities Code, which established new RPS requirements applicable to POUs. Section 399.30 required that LADWP's governing board adopt RPS procurement requirements and a program for enforcement.
- Public Utilities Code Section 399.30(c)(3) provides that "a local publicly owned electric utility shall adopt procurement requirements consistent with Section 399.16."

- PUC Section 399.16(d)(1) provides that “any contract or ownership agreement originally executed prior to June 1, 2010, shall count in full toward the procurement requirements” where the “renewable energy resource was eligible under the rules in place as of the date when the contract was executed.”
- SBX1-2 amended the definition of “eligible renewable resource.” As amended, Public Utilities Code section 399.12(e)(1)(C) states “Eligible renewable energy resource” means an electrical generating facility that meets the definition of a ‘renewable electrical generating facility’ in *Section 25741 of the Public Resources Code*, subject to the following: ... (C) A facility approved by the governing board of a local publicly owned electric utility prior to June 1, 2010, for procurement to satisfy the renewable energy procurement obligations adopted pursuant to the former Section 387, shall be certified as an eligible renewable energy resource by the Energy Commission pursuant to this article, if the facility is a ‘renewable electrical generation facility’ as defined in *Section 25741 of the Public Resources Code*.
- Staff contends that Section 399.12(e)(1)(C) requires the CEC to certify POU’s grandfathered resources only if the resource meets the amended definitions in Public Resources Code Section 25741(a) and the facility satisfies the requirements of the RPS Eligibility Guidebook in effect as of the date the CEC processed or received the application for RPS certification.
- Staff contends that the count-in-full resources under Public Utilities Code Section 399.16(d) are limited to the renewable energy resources that were eligible under the CEC’s RPS Eligibility Guidebook in effect on the date that the CEC processed or received the application for RPS certification.

- Public Utilities Code Section 399.25(a) provides that the CEC shall “certify eligible renewable energy resources that it determines meet the criteria described in subdivision (e) of Section 399.12.” SBX1-2 amended Section 399.25 to add POUs to the scope of the section.
- LADWP contends that the CEC was required to certify POUs’ *new* renewable resources procured *after* SBX1-2’s effective date under the rules in place as of the date of the contract execution, including the then-existing edition of the RPS Eligibility Guidebook.
- LADWP contends that, in contrast to Public Utilities Code Section 399.25(a), Section 399.12(e)(1)(C) mandated that the CEC certify as eligible renewable resources the LADWP’s renewable resources adopted under voluntary RPS programs consistent with Public Utilities Code Section 387 for all contracts or ownership agreements executed prior to June 1, 2010.
- LADWP contends that the staff’s interpretation of Section 399.12(e)(1)(C) renders the grandfather provision meaningless and superfluous if, as staff contends, the only facilities that could be grandfathered were the ones that met the CEC’s then existing standards under Public Resources Code Section 25741 and the RPS Guidebook standards in effect on the date the CEC processed or received the application for RPS certification.
- SB 1078 (2002) added Sections 387 to the Public Utilities Code, which provided that “[e]ach governing body of a local publicly owned electric utility, as defined in Section 9604, shall be responsible for implementing and enforcing a renewables portfolio standard that recognizes the intent of the legislature to encourage renewable resources, while taking into consideration the effect of the standard on rates, reliability, and financial resources and the goal of environmental improvement.”

- SB 1078 also added Section 399.13 to the Public Utilities Code, which provided that CEC would “certify eligible renewable energy resources that it determines meet the criteria described in subdivision (a) of Section 399.12” and “design and implement an accounting system to verify compliance with the renewable portfolio standard by retail sellers....” The CEC’s certification standards did not govern the eligibility of renewable resources under POUs’ RPS programs adopted under Section 378.
- LADWP contends that the CEC’s application of the RPS Guidebook standards in effect at the time the CEC processed or received the application for RPS certification – and not the rules in place on the date was contract was executed – constitutes a retroactive application of SBX1-2.
- LADWP contends that staff’s retroactive application of its RPS Guidebook certification standards raises fundamental due process and constitutional concerns relating to contractual impairment and *Ex Post Facto* clauses because SBX1-2 imposes a mandatory requirement for which LADWP faces potential penalties for noncompliance.
- The relevant regulations impacted by these disputes, include 20 C.C.R. sections 3201, 3202, and 3204 of the Commission’s Enforcement Procedures for the RPS for POUs.

2. Statutory Interpretation of AB 2196

AB 2196 added Section 399.12.6 to the Public Utilities Code.

- Public Utilities Code Section 399.12.6(a)(1) states “any procurement of biomethane delivered through a common carrier pipeline under a contract executed by a retail seller or [POU] and reported to the Energy Commission prior to March 29, 2012, and otherwise eligible under the rules in place as of the date of contract execution shall count toward the procurement requirements established in this article, under the rules in place at the time

the contract was executed, including the Fourth Edition of the Energy Commission’s Renewable Portfolio Standard Eligibility Guidebook, provided that those rules shall apply only to resources that are producing biomethane and injecting it into a common carrier pipeline on or before April 1, 2014.”

- LADWP contends that AB 2196 grandfathered the procurement of pipeline biomethane for any contract executed before March 29, 2012, reported to the CEC, and eligible under the rules in place on the date the contract was executed.
- LADWP contends that the emphasis on the eligibility “under the rules in place at the time the contract was executed” is a legislative mandate that supersedes staff’s practice of applying the requirements of the RPS Eligibility Guidebook in effect on the date when the staff processed or received the application for RPS certification.
- Staff contends that the reference to the Fourth Edition RPS Eligibility Guidebook in AB 2196 means that the Fourth Edition is the only set of rules that can apply for determining whether biomethane procurement is grandfathered and counts in full for the RPS.
- LADWP contends that the Fourth Edition RPS Eligibility Guidebook became effective in January 2011, which makes it legally impossible to constitute the rules in place as of the date LADWP’s biomethane procurement contracts were executed in 2009.

B. The Applicable Rules that Determine the Eligibility Criteria for LADWP’s 2009 Biomethane Procurement.

There is a dispute regarding the applicable “rules in place” that determine the RPS-eligibility criteria applicable to LADWP’s 2009 biomethane procurement. LADWP contends that the applicable rules in place are based on LADWP’s 2008 RPS Policy. The only alternative rules in place back in 2009 would be under the then-effective Third Edition RPS Eligibility

Guidebook. Staff contends that the Fourth and Seventh Edition RPS Eligibility Guidebooks apply because of the dates the CEC processed or received the application for RPS certification.

C. The RPS Eligibility of LADWP's 2009 Biomethane Procurement based on the Applicable Standards.

There is a dispute regarding whether LADWP established the applicable requirements for the 2009 biomethane procurement, specifically any requirements regarding the delivery and transportation of the biomethane gas on the U.S. interstate-gas pipeline into the WECC region. The Committee, however, must first decide which set of rules govern the eligibility determination. At that point, the Committee may determine whether LADWP established any applicable delivery and transportation requirements based on the fact and expert evidence submitted to the Committee. LADWP has identified the potential standards below.

1. LADWP's 2008 RPS Policy - Section 3 -Eligible Resources

- “Eligible Resources” include “[e]lectricity produced from the following technologies... renewable derived biogas (meeting the heat content and quality requirements to qualify as pipeline-grade gas) injected into a natural gas pipeline for use in a renewable facility....”

2. Third Edition RPS Eligibility Guidebook - Section II.B(6) – Biogas Injected Into a Natural Gas Pipeline

- “The gas must be injected into a natural gas pipeline system that is either within the WECC region or interconnected to a natural gas pipeline system in the WECC region that delivers gas into California.”

3. Fourth Edition RPS Eligibility Guidebook - Section II.B(2) – Biogas (including pipeline biomethane)

- “The biomethane must be injected into a natural gas pipeline system that is either within the WECC region or interconnected to a natural gas pipeline system located in the WECC region that delivers gas into California (or delivers to the electric generating facility if the electric generation facility is located outside California) and the gas is delivered as specified below.”
- “The applicant, or authorized party, must enter into contracts for the delivery (firm or interruptible) or storage of the gas with every pipeline or storage facility operator transporting or storing gas from the injection point to California (or to the electric generating facility if located outside of California). Delivery contracts with the pipeline operators may be for delivery with or against the flow of gas in the pipeline.”

4. Seventh Edition RPS Eligibility Guidebook - Section II.C(1)(a) – Delivery Requirements for Existing Biomethane Procurement Contracts

- “A facility using biomethane procured under an existing biomethane procurement contract is required to meet the requirements of the *RPS Eligibility Guidebook* in place at the time the biomethane procurement contract was executed. The applicable guidebooks require that: 1) The biomethane must be injected into a natural gas pipeline system that is either within the WECC region or interconnected to a natural gas pipeline system located in the WECC region that delivers gas into California (or delivers to the electrical generation facility if the electrical generation facility is located outside California) and the gas is delivered as specified below. 2) The applicant, or authorized party, must enter into contracts for the delivery (firm or interruptible) or storage of the gas with every pipeline

or storage facility operator transporting or storing the gas from the injection point to California (or to the electrical generation facility if the electrical generation facility is located outside California). Delivery contracts with the pipeline operators may be for delivery with or against the physical flow of the gas in the pipeline.”

- “It is the responsibility of the applicant to ensure that the delivery of biomethane complies with the requirements in the *RPS Guidebook* that was in place when the application for certification was submitted. An applicant may submit a complete delivery description as part of a certification or precertification application for Energy Commission staff’s preliminary review. If this information is submitted with the application, staff may identify any potential issues with the delivery path, but a final determination on the eligibility of a delivery path will not be made until after the applicant submits the annual reporting requirements as specified in Section II.C.6: Annual Accounting and Reporting Requirements for Biomethane Injected into a Common Carrier Pipeline.”

D. Disputed Issues that May Require Expert Testimony.

There is a dispute regarding whether the transportation of biomethane through U.S. interstate-gas pipelines for delivery into the WECC region via a gas exchange is an acceptable method of transportation and delivery for the RPS. Specifically, LADWP contends that staff’s interpretation of the delivery requirements for biomethane is inconsistent with well-established federal standards for natural gas transportation under the Natural Gas Act and related federal precedent. The record in LADWP’s Letter of Appeal includes two expert reports discussing these expert issues that address a disputed issue regarding whether LADWP has satisfied any applicable delivery requirements. The Committee’s consideration of this expert evidence is necessary to ensure that the Committee’s determination is supported by accurate evidence and

not arbitrary or capricious. LADWP anticipates that expert testimony may be offered on the topics addressed in the expert reports. The expert issues include, among others, the following topics: the production and transportation of landfill gas/biomethane on the U.S. interstate-gas pipeline system; the functioning of the U.S. interstate-gas pipeline both contractually and economically under FERC's open access rules; the methods of transportations of natural gas on the U.S. interstate-gas pipeline system via backhaul, front-haul, and exchanges under the Natural Gas Act and FERC standards; the discussion of whether transportation agreements for firm or interruptible service on U.S. pipelines means the gas molecules of renewable biomethane are actually delivered from the landfills into the WECC region for use in generating facilities.

III. Proposed Scheduling Order.

The CSC Notice requests a "proposed schedule for this proceeding including addition Committee Status Conferences (if believed necessary), hearings, and pre- and/or post-hearing briefing." LADWP proposes that the Committee consider a two-phase approach for this proceeding. Phase I would address the threshold issues regarding the statutory interpretation of SBX1-2 and AB 2196 and the applicable eligibility standards for determining the RPS-eligibility of the resources. Phase II, in turn, would address remaining factual disputes of whether LADWP established the applicable eligibility criteria. The proposed two-phase approach would conserve the Committee's and the parties' resources by avoiding the unnecessary presentation of fact and expert evidence on standards that may not apply or ultimately be in dispute in this proceeding. Following the Phase I ruling, the Committee would schedule a second Committee Status Conference regarding the Phase II schedule for any briefing and hearing on the then-existing disputed issues.

A. Proposed Phase I Schedule.

LADWP proposes the following briefing and hearing schedule for the proposed Phase I issues regarding statutory interpretation of SBX1-2 and AB 2196 and the applicable eligibility rules.³ LADWP is willing to consider extending these proposed deadlines to accommodate the Committee's or staff's scheduling conflicts; however, shorting the proposed briefing schedule would create potential conflicts for LADWP staff working on these matters who will be unavailable because of previously-booked vacations scheduled in July or August 2016.

- LADWP Opening Brief – **August 31, 2016**
- Staff Opposition Brief – **September 21, 2016**
- LADWP Reply Brief – **September 30, 2016**
- Phase I Hearing – **October 12, 2016 at 1:00 p.m.** (Same date as CEC's October Business Meeting)

B. Proposed Phase II Schedule.

LADWP proposes that the Committee schedule a second Committee Status Conference after it issues a decision on the Phase I briefing. The Phase II scheduling order would provide the schedule for the hearing on pending disputes, including deadlines for pre- and post-hearing briefing.

IV. Additional RPS-Eligibility Motions.

The CSC Notice requests that LADWP “describe any additional certification or eligibility appeals, motions, or requests that it currently expects to present to this Committee with estimated

³ LADWP and staff were unable to meet-and-confer on the proposed schedule before the July 8, 2016 filing date because of the conflicting vacation schedules following the Committee's issuance of the CSC Notice on June 28, 2016. LADWP plans to meet-and-confer with the staff regarding scheduling issues before the July 13, 2016 status conference.

filing and review timeframes. LADWP requests that the Committee consider the RPS-eligibility of LADWP's procurement from British Columbia ("BC") small-hydro facilities.

On March 6, 2007, LADWP's Board approved two Power Purchase Agreements with Powerex for the purchase of renewable energy from small hydroelectric generating facilities with nameplate ratings of 30 MWs or less (the "Powerex PPAs"). On March 23, 2007, the Los Angeles City Council approved the Powerex PPAs by ordinance. LADWP procured these resources pursuant to its 2005 RPS Policy then in effect, which identified small hydroelectric facilities of 30 MWs or less as eligible renewable resources. The Powerex PPAs expired on December 31, 2011. LADWP did not own these small-hydro facilities and did not seek RPS certification of the facilities because the contracts expired, and there was no requirement for POU's to certify resources before SBX1-2 became effective.

SBX1-2 added a new Section 25641.5 to the Public Resources Code. Section 25641.5 required the CEC to study and provide a report to the legislature by June 30, 2011, that analyzed BC Hydro facilities and whether those facilities should be included as renewable electrical generating facilities. On January 15, 2014 (after the close of Compliance Period 1), the Commission adopted the report *Analyzing British Columbia Run-Of-River Facilities for the California Renewables Portfolio Standard Commission Final Report* (B.C. Run-of-River Report), which concluded that B.C. hydro facilities should not be eligible for the RPS.

Although SBX1-2 included the legislature's request that the CEC study the eligibility of B.C. hydro facilities, the legislature did not deem B.C. small-hydro facilities ineligible when SBX1-2 became effective. More importantly, there is no dispute that B.C. small hydro was eligible under the rules in place when LADWP executed the Powerex PPAs in 2007. As discussed above, Public Utilities Code Section 387 did not require that LADWP certify its

resources with the CEC. LADWP reported RECs generated from the Powerex PPAs from January 1, 2011 to December 10, 2011 as part of LADWP's conscientious effort to remain in harmony with California rulemaking and in light of the B.C. Run-of-River Report issued after the close of Compliance Period 1.

The RPS-eligibility of LADWP's B.C. small hydro procurement raises the same legal questions regarding the statutory interpretation of SBX1-2 and the applicable legal standards to LADWP's grandfathered resources, including whether staff's interpretation and implementation of SBX1-2 has resulted in an improper retroactive application of certification standards that did not exist for POU's before SBX1-2's effective date. Based on the substantive similarities of the legal questions, the addition of these issues into this proceeding will promote efficiencies and conserve the Committee's and parties' resources in resolving a significant dispute that is ripe for resolution.

On June 17, 2016, LADWP attempted to meet-and-confer with staff regarding the proposed motion regarding the RPS-eligibility of LADWP's B.C. small hydro procurement. However, staff indicated that it would be appropriate to address these issues following the Committee's issuance of scoping memo or notice of committee status conference. To the extent there is no objection to LADWP's request, the Committee has discretion to consider the issue during the July 13, 2016 status conference. *See* 20 C.C.R. § 1211.5. To the extent there are objections to the request, LADWP proposes filing its motion on or before **July 22, 2016**, but recommends that the Committee consider a briefing schedule that allows the Committee to decide this issue before any scheduled due date for LADWP's proposed Phase I opening motion.

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LADWP thanks the Committee for its time and attention to these matters.

Dated: July 8, 2016

Respectfully submitted,

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