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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of: Appeal by LADWP re RPS Certification or Eligibility	Docket No.: 16-RPS-02

RESPONSE OF CALIFORNIA ENERGY COMMISSION STAFF TO QUESTIONS IN THE COMMITTEE'S ORDER OF JULY 27, 2016

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September 1, 2016

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I. INTRODUCTION

California Energy Commission Staff (Staff) respectfully submits this response (Response) to the questions posed in the Committee order of July 27, 2016 – *Committee Scoping and Scheduling Orders and Order Granting Motion to Add Consideration of 2007 British Columbia Hydroelectric Generation Contracts* – related to the Los Angeles Department of Water and Power's (LADWP) appeal from the denial of Renewables Portfolio Standard (RPS) certification.[1]

This Response is submitted in accordance with the Committee Order and is organized to address each question in the order listed in the Committee Order. For convenience, each of the Committee's questions is repeated in underlined font prior to Staff's response.

Staff has responded to the Committee's questions in a comprehensive manner, providing background information as necessary to address the points raised in each question. In this regard, the Response furthers the Committee's admonition for the parties to describe all their legal arguments and supporting positions in their filings to this proceeding.[2] Additionally, Staff has provided a summary of its response to each question in bold just before the comprehensive response.

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[1] The order of the LADWP Appeal Committee is referred to herein as the "Committee Order" and is docketed in the subject proceeding as TN 212485.

[2] See Transcript of July 13, 2016 Committee Status Conference, p. 23, TN 212481.

II. RESPONSE TO QUESTION 1

Public Resources Code section 25741(a)(1) sets forth as one of the criteria for a facility to be considered a "renewable electrical generation facility": "The facility *uses* biomass, solar thermal, …" (Emphasis added.)

a. CEC Staff asserts that "the only way an electricity generation facility could actually use biogas transported through the natural gas transportation pipeline system is if the biogas was delivered (or had the potential to be delivered) into California for use at the facility."[3] Staff specifically found that the contracts proffered by LADWP are insufficient to demonstrate "use." Why is staff's definition of "use" correct or incorrect? What is the legal basis for either staff's definition or a different definition of the term "use"? Provide any information found in the legislative history, regulation, guidance from the CPUC, ARB, or CEC, applicable RPS Eligibility Guidebook, or industry custom and practice as to the definition of the term "use." Specifically, identify any express language found in the RPS Eligibility Guidebook, Third Edition, interpreting "use".

As discussed below the use requirement originated from Senate Bill 1078[4] (SB 1078), the legislation which created the RPS program. SB 1078 described the scope of what constituted an "eligible renewable energy resource," which included the criteria that the renewable fuel be "used" at the facility and charged CEC with certification of eligible renewable energy resources, among other implementation duties under the newly created RPS program. Using its authority to implement the legislation CEC initiated a public proceeding, which specifically addressed eligibility of renewable energy resources and resulted in a decision to determine eligibility of renewable energy resources by renewable fuel or source used rather than by the specific technology used. Thus, the original RPS Eligibility Guidebook included the requirement that a renewable fuel had to be used at the facility for it to be certified as eligible. The Second Edition of the RPS Eligibility Guidebook included eligibility criteria to certify biogas for use in hybrid-facilities, which later became its own stand-alone renewable eligible resource in the RPS Eligibility Guidebook Fourth Edition. Under its guidebooks CEC expected biogas to be delivered to California since eligibility was premised on fuel use under the Public Resources Code and the only way an electricity generation facility could use biogas was if it was delivered or the potential to be delivered into California for use at the nominated facility.

[3] TN 212214, footnote 14.
[4] SB 1078 (Stats. 2002, ch. 516).

Development of "Use" Provisions and CEC Implementation

To understand the "use" provisions in the RPS statute it is helpful to review the development of these provisions and how they were implemented by the CEC.

The "use" provisions in the RPS statute have existed since the RPS program was first established in 2002 under SB 1078. SB 1078 established new RPS-related responsibilities for the CPUC and the CEC. Among other things, SB 1078 required the CPUC to implement annual RPS procurement targets for electrical corporations beginning January 1, 2003 that required each electrical corporation to increase its total procurement of eligible renewable energy resources by at least an additional 1 percent of retail sales per year so that 20 percent of the electrical corporation's retail sales were procured from "eligible renewable energy resources" by December 31, 2017.[5] SB 1078 charged the CEC with certifying "eligible renewable energy resources" and designing and implementing an accounting system to verify compliance with the RPS by electrical corporations and other retail sellers.[6] [7]

Regarding certification,[8] SB 1078 directed the CEC to certify "eligible renewable energy resources" as specified in Public Utilities Code section 399.13, which provided in pertinent part as follows:

> 399.13. The Energy Commission shall do all of the following:
> (a) **Certify eligible renewable energy resources that it determines meet the criteria described in subdivision (a) of Section 399.12.**
> (b) **Design and implement an accounting system to verify compliance** with the renewables portfolio standard by retail sellers, **to ensure that renewable energy output is counted only once** for the purpose of meeting the renewables portfolio standard of this state or any other state, and for **verifying retail product claims** in this state or any other state. In establishing the guidelines governing this system, the Energy Commission shall collect data from electricity market participants that it deems necessary to verify compliance of retail sellers, in accordance with the requirements of this article and the

[5] Former Public Utilities Code section 399.15 (b)(1), as enacted by Senate Bill 1078.
[6] The term "retail seller" means an entity engaged in the retail sale of electricity to end-use customers located within the state, including an electrical corporation, as defined in Public Utilities Code section 218, a community choice aggregators, and an electric service provider, as defined in Public Utilities Code section 218.3, but does not include a local publicly owned electric utility (POU). Refer to former Public Utilities Code section 399.12(b), as enacted by SB 1078. The term "retail seller" is currently defined in Public Utilities Code section 399.12(j).
[7] Former Public Utilities Code section 399.13 (a) and (b), as enacted by Senate Bill 1078.
[8] As used in the Response, "certification" generally refers to the process whereby the CEC determines that an electrical generation facility is eligible for California's RPS program. The electricity generation from an electrical generation facility that has been certified by the CEC for the RPS (i.e. is RPS-certified) may be procured to satisfy a procurement requirement under the state's RPS program.

California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). In seeking data from electrical corporations, the Energy Commission shall request data from the commission. The commission shall collect data from electrical corporations and remit the data to the Energy Commission within 90 days of the request.
[. . .]
(Former Pub. Util. Code, §399.13, as enacted by Senate Bill 1078. Emphasis added.)

Public Utilities Code section 399.12 (a) provided:

399.12. For purposes of this article, the following terms have the following meanings:
(a) (1) **''Eligible renewable energy resource'' means** an electric generating facility that is one of the following:
(1) **The facility meets the definition of ''in-state renewable electricity generation technology'' in Section 383.5**.
[. . .]
(Former Pub. Util. Code, §399.12, subd. (a), as enacted by Senate Bill 1078. Emphasis added)

And Public Utilities Code section 383.5 provided in pertinent part as follows:

383.5. (a) [. . .]
(b) As used in this section, the following terms have the following meaning:
(1) ''In-state renewable electricity generation technology'' means a facility that meets all of the following criteria:
(A) **The facility uses** biomass, solar thermal, photovoltaic, wind, geothermal, fuel cells using renewable fuels, small hydroelectric generation of 30 megawatts or less, digester gas, municipal solid waste conversion, landfill gas, ocean wave, ocean thermal, or tidal current, and any additions or enhancements to the facility using that technology.
(B) The facility is located in the state or near the border of the state with the first point of connection to the Western Electricity Coordinating Council (WECC) transmission system located within this state.
(C) [. . .]
(Former Pub. Util. Code, §383.5, as enacted by Senate Bill 1038.[9] Emphasis added)

To implement the RPS under SB 1078, the CEC issued Order No. 03-0305-04 on March 5, 2003 authorizing the CEC's then Renewables Committee to work with the CPUC to implement the RPS program.[10] The CEC's Renewable Committee then issued an order on March 13, 2003 to initiate a proceeding to address issues identified by CEC and CPUC staff in a

[9] SB 1038 (Stats. 2002, ch. 515) was enacted as a companion bill to SB 1078 in the same legislative session.
[10] CEC Order No. 03-0305-04, TN 213285.

Workplan.[11] The order established administrative procedures for participating in the proceeding and included a copy of the Workplan, along with a proposed schedule of work products and decisions. As a result of this effort, the CEC prepared and adopted two reports that included decisions addressing RPS implementation issues. These reports are entitled the *Renewables Portfolio Standard: Decision on Phase 1 Implementation Issues* (Phase 1 Decision)[12] and *Renewables Portfolio Standard: Decision on Phase 2 Implementation Issues* (Phase 2 Decision).[13]

The Phase 1 Decision addressed "eligible renewable energy resources" for purposes of the RPS as well as the eligibility of out-of-state power, and determined that the renewable fuel or source used to generate electricity, as opposed to the specific electric generation technology, should guide determinations of RPS eligibility.[14] In defining what is renewable, the Phase 1 Decision stated the following:

> "Several provisions in SB 1078 combine to describe the scope of eligible renewable energy resources under the law. These provisions are set forth in PUC sections 399.11(b) and (c), which describe the legislative intent and purpose, and PUC section 399.12(a)(1), which defines an "eligible renewable energy resource" as a facility meeting the definition of an "in-state renewable electricity generation technology" in PUC section 383.5.
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> PUC section 399.11(b) and (c) provide as follows:
>
> b) Increasing California's reliance on renewable energy resources may promote stable electricity prices, protect public health, improve environmental quality, stimulate sustainable economic development, create new employment opportunities, and reduce reliance on imported fuels.
> c) The development of renewable energy resources may ameliorate air quality problems throughout the state and improve public health by reducing the burning of fossil fuels and the associated environmental impacts."
>
> PUC section 383.5(b)(1) defines an "in-state renewable electricity generation technology" as follows:
>
> (A) The facility uses biomass, solar thermal, photovoltaic, wind, geothermal, fuel cells using renewable fuels, small hydroelectric generation of 30 megawatts or less, digester gas, municipal solid waste conversion, landfill gas, ocean wave, ocean thermal, or tidal current, and any additions or enhancements to the facility using that technology."

[11] Committee Order on RPS Proceeding and CPUC Collaborative Guidelines, TN 213286.
[12] Renewables Portfolio Standard: Decision on Phase I Implementation Issues, June 2003, publication no. 500-03-023F, TN 213294.
[13] Renewables Portfolio Standard: Decision on Phase 2 Implementation Issues, October 2003, publication no. 500-03-049F, TN 213295.
[14] Phase 1 Decision, p. 6.

> These provisions of the law describe the perceived benefits of using these renewable resources to improve the state's environmental quality and reduce its reliance on fossil fuels. The provisions also focus on the renewable resource or fuel, as opposed to the specific technology, that is used to generate electricity. Given this focus in the law, the Energy Commission believes that it is appropriate to define eligible renewable energy resources by renewable resource or fuel rather than by specific technology."
> (*Phase I Decision*, TN 213294, pp. 7-8.)

The Phase 1 Decision made clear that to be an "eligible renewable energy resource" an electrical generation facility must use a renewable resource or fuel to generate electricity. This requirement was later included as part of the certification requirements in the first RPS Eligibility Guidebook (Guidebook) adopted by the CEC in April, 2004. That Guidebook provided as follows:

> "The Energy Commission has determined that it is appropriate to define eligible renewable energy resources by renewable resource or fuel rather than by the specific technology used. For certain eligible renewable energy resources, however, the law contains specific requirements and the Energy Commission must consider both the resource or fuel and the technology to determine RPS eligibility."
>
> To qualify as eligible for California's RPS, a generation facility must use one or more of the following renewable resources or fuels . . : Biomass, . . Fuel cells using renewable fuels, Digester gas, . . Landfill gas, . . "
> (*Renewables Portfolio Standard Eligibility Guidebook*, May 2004, publication no. 500-04-002F, TN 213299.)

"Use" of Biogas

Biogas and biomethane[15] are not one of renewable resources or fuels listed in the definition of an "in-state renewable electricity generation technology" in former Public Utilities Code section 383.5 (b)(1). The RPS eligibility of biogas as a separate category of eligible renewable energy resources was first addressed in the CEC's RPS Eligibility Guidebook, Second Edition (Second Edition Guidebook), which was adopted by the CEC on March 14, 2007.[16] Its inclusion in that edition of the guidebook was the result of an inquiry in 2006 seeking

[15] Biomethane, also referred to pipeline biomethane, is biogas, such as landfill gas, digester gas, or gas derived from biomass, that is upgraded or otherwise conditioned so that the gas may be transported offsite to a power plant through the natural gas transportation pipeline system. See CEC's Overall Program Guidebook for the Renewable Energy Program, Third Edition, January 2011, pub. no. CEC-300-2010-008-CMF, p. 26, TN 213291.

[16] CEC *Renewables Portfolio Standard Eligibility Guidebook, Second Edition*, publication no. CEC-300-2007-006-CMF, TN 213290.

clarification regarding the eligibility of digester gas produced at an in-state dairy operation. Instead of utilizing the digester gas to generate electricity onsite (which would be considered an eligible digester gas facility for purposes of RPS eligibility), there was interest in using the natural gas pipeline system to transport the digester gas to a designated power plant for use in generating electricity.[17]

The law at that time did not specifically identify biogas or biomethane as an eligible renewable energy resource for purposes of the RPS, but did identify "biomass," "digester gas," and "landfill gas" as eligible renewable energy resources. These terms, however, were not defined in the law. Since biogas was produced from biomass or digester gas, the CEC determined that it could be considered an eligible renewable energy resource and established eligibility criteria for biogas injected into a natural gas transportation pipeline system and delivered into California for use in an RPS-certified hybrid facility. These eligibility criteria were specified in the Second Edition Guidebook, and are as follows:

> Biogas Injected into a Natural Gas Pipeline
>
> RPS-eligible biogas (gas derived from RPS-eligible biomass or digester gas) injected into a natural gas transportation pipeline system and delivered into California for use in an RPS-certified hybrid facility may result in the generation of RPS-eligible electricity. The biogas must meet strict heat content and quality requirements within a narrow band of tolerance to qualify as pipeline-grade gas. Quantifying RPS-eligible energy production requires accurate metering of the volume of biogas injected into the transportation pipeline system and the measured heat content of the injected gas. Although blending the biogas into the transportation pipeline system mixes the biogas with other pipeline gas, natural gas regulations require gas entering the system to be "nominated" for use at a specific power plant or to a pipeline system owned by a publicly owned utility or other load-serving entity (LSE). Consequently, the amount and energy content of the biogas or other RPS-eligible gas produced can be measured and either nominated for use at a specific power plant or nominated to a pipeline system owned by an LSE. If the biogas is nominated to a pipeline system, the owner of the system must designate the facility in which the biogas will be used."
>
> The operator of a facility to which biogas is nominated (or designated) must certify its facility as RPS-eligible, recognizing that the facility will use a blend of RPS-eligible and ineligible fuel. The amount of RPS-eligible electricity produced shall be calculated by multiplying the generation of the facility (MWh) by the ratio of the biogas used and the total gas (biogas and natural gas) used by the facility. The electricity generated and gas

[17] CEC *Notice to Consider Suspension of the RPS Guidelines Related to Biomethane*, dated March 16, 2012, TN 213290.

use must be measured over an equal period (such as MWh produced per month and gas used per month).

Any production or acquisition of gas that is directly supplied to the gas transportation pipeline system and used to produce electricity may generate RPS-eligible electricity as follows:

1. The gas must be produced from an RPS-eligible resource, such as biomass or digester gas.

2. 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. The energy content produced and supplied to the transportation pipeline system must be measured and reported annually, disaggregated by month. Reporting shall be in units of energy (e.g. MMBtu) based on metering of gas volume and adjustment for measured heat content per volume. In addition, the total amount of gas used at the RPS-eligible facility must be reported in the same units measured over the same period and the electricity production must be reported in MWh.

4. The gas must be used at a facility that has been certified as RPS-eligible. As part of the application for certification, the applicant must attest that the RPS-eligible gas will be nominated to that facility or nominated to the LSE-owned pipeline serving the designated facility.

5. In its annual verification report, the Energy Commission will calculate the RPS-eligible energy produced using the same methodology discussed above."

When applying for RPS and SEP pre-certification, certification, or renewal, the application must include the following: (1) an attestation from the hybrid facility operator of its intent to procure biogas fuel that meets RPS eligibility criteria, and (2) an attestation from the fuel supplier that the fuel meets eligibility requirements. (*Renewables Portfolio Standard Eligibility Guidebook, Second Edition*, pp. 22-23, TN 213298.)

These same eligibility criteria for biogas were repeated without substantive change and almost verbatim in the CEC's RPS Eligibility Guidebook, Third Edition (Third Edition Guidebook), which was adopted on December 19, 2007.[18]

[18] *Renewables Portfolio Standard Eligibility Guidebook, Third Edition*, December 2007, publication no. CEC-300-2007-006-ED3-CMF, pp 20-21, TN 213249. Instead of referring to an "RPS-certified hybrid facility" in the opening paragraph as was done in the Second Edition Guidebook, the Third Edition Guidebook refers to an "RPS-certified multi-fuel facility." Also, the Third Edition Guidebook specifies that the "energy content produced and supplied to the transportation pipeline system must be measured on

The eligibility criteria for biogas were clarified with the CEC's adoption of the RPS Eligibility Guidebook, Fourth Edition (Fourth Edition Guidebook). Specifically, biogas was identified as a stand-alone renewable eligible resource separate from the multi-fuel requirements section of the guidebook. In addition, the eligibility criteria were clarified to 1) identify acceptable methods of transporting the biogas, 2) to include transportation to an RPS-eligible electric generating facility that is located outside of California (but within the WECC); and 3) identify the documentation required to demonstrate the biogas delivery requirements are satisfied.[19] The CEC considers the biogas delivery requirements in the Third Edition Guidebook and Fourth Edition Guidebook to be largely the same, with some additions to the Fourth Edition Guidebook that were intended to clarify the requirements in the Third Edition Guidebook.[20]

The CEC expected biogas to be delivered to California when it first adopted rules for the RPS eligibility of biogas in the Second Edition Guidebook in March 2007. The delivery requirements were deemed necessary, since the RPS eligibility of biogas was premised on the fuel "use" provisions of then-existing Public Resources Code section 25741(b)(1), and the only way an electricity generation facility could actually use biogas transported through the natural gas transportation pipeline system was if the biogas was delivered (or had the potential to be delivered) into California for use at the nominated facility. Hence, there must be a physical contract path from the injection point on the natural gas pipeline system to the extraction point in California.

b. Does "use" require a specific contractual arrangement? If so, please describe that arrangement. Specifically, provide express language found in the RPS Eligibility Guidebook, Third Edition, requiring a specific type of contract.

As discussed below the Third Edition Guidebook contains a use requirement for eligibility, which Staff interpreted to require a contractual arrangement between the buyer

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a monthly basis and reported annually, illustrated by month," whereas the Second Edition Guidebook specifies the "energy content produced and supplied to the transportation pipeline system must be measured and reported annually, disaggregated by month."

[19] CEC *Notice of Staff Workshop on Proposed Changes to the Renewables Portfolio Standard Eligibility Guidebook and the Overall Program Guidebook for the Renewable Energy Program*, August 16, 2010, Attachment A, p.1, TN 213320.

[20] This is explained in the CEC's *RPS Eligibility Guidebook, Seventh Edition*, April 2013, publication no. CEC-300-2013-005-ED7-CMF-REV, p. 12, n.16 TN 213251, which states: "The eligibility requirements for the third and four editions of the RPS Eligibility Guidebook are largely the same with some additions to the fourth edition guidebook that were introduced largely as clarifications to the third edition guidebook." The *RPS Eligibility Guidebook, Seventh Edition*, TN 213251.

and seller for the transport of the biogas from the point of injection to the delivery point in California. There are several ways natural gas can be purchased and transported in the natural gas system, including through firm or interruptible service, exchange, backhaul, and displacement. According to Staff's understanding of standard industry definitions, only firm or interruptible service delivers renewable fuel and is not considered "paper transport." Therefore, CEC staff has required biogas be delivered to California through firm or interruptible service, which entails entering into contracts for the delivery of biogas. Although the use requirement appears in both the Third Edition Guidebook and Fourth Edition Guidebook, express language specifying that delivery contracts would be needed did not appear until the biomethane delivery requirements were clarified in the Fourth Edition Guidebook.

As noted in the response to Question 1.a, above, the delivery requirements for biogas were deemed necessary because the RPS eligibility of biogas was premised on the fuel "use" provisions of then-existing Public Resources Code section 25741(b)(1). The only way an electrical generation facility could use biogas transported through the natural gas transportation pipeline system was if the biogas was delivered (or had the potential to be delivered) into California for use at the nominated facility. Hence, the requirement for a physical contract path from the injection point on the natural gas pipeline system to the extraction point in California.

There are various ways natural gas can be purchased and transported through the natural gas transportation system. For example, gas may be delivered through firm or interruptible service, exchange, backhaul, or displacement. The following are industry standard definitions for these terms:

From the Interstate Natural Gas Association of America (INGAA)[21]:

- "Displacement – (a) In pipeline transportations, the substitution of a source of natural gas at one point for another source of natural gas at another point. Through displacement, natural gas can be transported by backhaul or exchange.

[21] From INGAA Website, TN 213465. The Interstate Natural Gas Association of America (INGAA) is a trade organization that advocates regulatory and legislative positions of importance to the natural gas pipeline industry in North America, has 25 members, representing the vast majority of the interstate natural gas transmission pipeline companies in the U.S. and comparable companies in Canada. INGAA's members operate approximately 200,000 miles of pipelines, and serve as an indispensable link between natural gas producers and consumers.

(b) In natural gas marketing, the substitution of natural gas from one supplier of a customer with natural gas from another competing supplier."

- "Exchange – Transportation of natural gas by displacement over two pipeline, each of which takes and retains possession of gas contractually allocated to the other."
- "Backhaul – a "paper transport" of natural gas by displacement against the flow on a single pipeline, so that the natural gas is redelivered upstream of its point of receipt. See also DISPLACEMENT. "
- "Firm Service – Service offered to customers under schedules or contracts that anticipate no interruptions, regardless of class of service, except for force majeure."
- "Firm Gas – Gas sold on a continuous basis for a defined contract term (e.g., one year)."
- "Interruptible Gas – Gas sold to customers with a provision that permits curtailment or cessation of service at the discretion of the supplier under certain circumstances, as specified in the service contract."

From Spectra Energy[22]:

- "Displacement – 1. In pipeline transportation, the substitution of a source of natural gas at one point for another source of natural gas at another point. Through displacement, natural gas can be transported by backhaul or exchange. 2. In natural gas marketing, the substitution of natural gas from one supplier of a customer with natural gas from another competing supplier."
- "Exchange – Transportation of natural gas by displacement over two pipelines, each of which takes and retains possession of gas contractually allocated to the other."

[22] From the Spectra Energy Website, TN 213466. Spectra Energy has operations in the United States and Canada which include approximately 21,000 miles of natural gas and crude oil pipelines; approximately 300 billion cubic feet (Bcf) of natural gas storage; 4.8 million barrels of crude oil storage; as well as natural gas gathering, processing, and local distribution operations. Spectra Energy is also a partner of Spectra Energy Partners, one of the largest pipeline master limited partnerships in the United States. Spectra Energy also has also has ownership in DCP Midstream, the largest producer of natural gas liquids and the largest natural gas processor in the United States.

- "Backhaul – A "paper transport" of natural gas by displacement against the flow on a single pipeline, so that the natural gas is redelivered upstream of its point of receipt. See also DISPLACEMENT."
- "Firm Service - Service offered to customers under schedules or contracts that anticipate no interruptions, regardless of class of service, except for force majeure."
- "Firm Gas – Gas sold on a continuous basis for a defined contract term (e.g., one year)."
- "Interruptible Gas – Gas sold to customers with a provision that permits curtailment or cessation of service at the discretion of the supplier under certain circumstances, as specified in the service contract."

Staff's understanding of industry practice for exchange, displacement, and backhaul as reflected in the above definitions does not include the delivery of the natural gas as part of the contract. These types of purchases are "paper-transport" and do not deliver the biomethane, and thus do not meet the use requirements as interpreted and applied by Staff. Firm or interruptible service or delivery of biomethane includes the necessary delivery requirements to deliver biomethane from the source to the electrical generating facility. Biomethane delivered through a firm or interruptible contract allows for the physical delivery of the biomethane and satisfies the delivery requirement.

If biogas is being transported through the natural gas transportation pipeline system, it was determined that it can only be "used" by the nominated electricity generation facility in California if the biogas is delivered or has the potential to be delivered into California. This requires that the buyer and seller of the biogas arrange for the transport of the biogas along a physical contract path from the point of injection through each pipeline segment in the system to the delivery point in California. As explained above, with gas exchanges, backhaul, and displacement, the buyer and seller of the biogas do not arrange for the transport of the biogas along a physical contract path from the point of injection to the delivery point in California.

The Third Edition Guidebook established the following requirements for biogas injected into a natural gas transportation pipeline system:

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"Biogas Injected into a Natural Gas Pipeline

RPS-eligible biogas (gas derived from RPS-eligible fuel biomass or digester gas) injected into a natural gas transportation pipeline system and delivered into California for use in an RPS-certified multi-fuel facility may result in the generation of RPS-eligible electricity. The biogas must meet strict heat content and quality requirements within a narrow band of tolerance to qualify as pipeline-grade gas."

Quantifying RPS-eligible energy production requires accurate metering of the volume of biogas injected into the transportation pipeline system and the measured heat content of the injected gas. Although blending the biogas into the transportation pipeline system mixes the biogas with other pipeline gas, natural gas regulations require gas entering the system to be "nominated" for use at a specific power plant or to a pipeline system owned by a publicly owned utility or other load-serving entity (LSE). Consequently, the amount and energy content of the biogas or other RPS-eligible gas produced can be measured and either nominated for use at a specific power plant or nominated to a pipeline system owned by an LSE. If the biogas is nominated to a pipeline system, the owner of the system must designate the facility in which the biogas will be used."

The operator of a facility to which biogas is nominated (or designated) must certify its facility as RPS-eligible, recognizing that the facility will use a blend of RPS-eligible and ineligible fuel."

The amount of RPS-eligible electricity produced shall be calculated by multiplying the generation of the facility (MWh) by the ratio of the biogas used and the total gas (biogas and natural gas) used by the facility. The electricity generated and gas used must be measured over an equal period (such as MWh produced per month and gas used per month)."

Any production or acquisition of gas that is directly supplied to the gas transportation pipeline system and used to produce electricity may generate RPS-eligible electricity as follows:

1. The gas must be produced from an RPS-eligible resource, such as biomass or digester gas.

2. 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. The energy content produced and supplied to the transportation pipeline system must be measured on a monthly basis and reported annually, illustrated by month. Reporting shall be in units of energy (for example, MMBtu) based on metering of gas volume and adjustment for measured heat content per volume of each gas. In addition, the total amount of gas used at the RPS-eligible facility must be reported in

the same units measured over the same period, and the electricity production must be reported in MWh.

4. The gas must be used at a facility that has been certified as RPS-eligible. As part of the application for certification, the applicant must attest that the RPS-eligible gas will be nominated to that facility or nominated to the LSE-owned pipeline serving the designated facility.

5. In its annual RPS Procurement Verification report, the Energy Commission will calculate the RPS-eligible energy produced using the same methodology discussed above."

When applying for RPS pre-certification, certification, or renewal, the application must include the following: 1) an attestation from the multi-fuel facility operator of its intent to procure biogas fuel that meets RPS eligibility criteria, and 2) an attestation from the fuel supplier that the fuel meets eligibility requirements."

In addition to the certification or pre-certification application, applicants for biogas facilities must complete a supplemental application form."
(*Renewables Portfolio Standard Eligibility Guidebook, Third Edition*, December 2007, publication no. CEC-300-2007-006-ED3-CMF, pp. 20-21, TN 213249.)

The Third Edition Guidebook does not include express language requiring a specific type of contract for the delivery of biogas through the natural gas transportation pipeline system. However, the Third Edition Guidebook does specify that biogas injected into a natural gas transportation pipeline must be "delivered into California for use in an RPS-certified multi-fuel facility" to result in the facility's generation being considered as RPS-eligible electricity. Staff understood this requirement as imposing an obligation on the buyer and seller of the biogas to arrange for the transport of the biogas along a physical contract path from the point of injection through each pipeline segment in the system to the delivery point in California. Consequently, Staff applied the biogas delivery requirements in this manner to each of the four facilities that were RPS-certified under the Third Edition Guidebook to use biogas injected into a natural gas pipeline as described in the response to Question 1.c below.

c. Under the rules in place at the time of contract execution, did the 2009 Shell and Atmos contracts satisfy the "use" requirement? If not, why not?

As discussed below LADWP's 2009 Shell and Atmos contracts would not have satisfied the use requirement from the Third Edition Guidebook as it was interpreted and applied by Staff. While LADWP's 2009 Shell and Atmos contracts had associated delivery

contracts for part of the physical contract path, LADWP has not provided delivery contracts for the entire path from point of injection to point of delivery in California. Unlike PG&E, SMUD, or Calpine's facilities, which were certified by the CEC under the same provisions, LADWP did not apply to the CEC for RPS certification of its facilities contemporaneously with the execution of its 2009 Shell and Atmos contracts, which wasn't a requirement at the time. Therefore, LADWP may not have known the CEC's requirements for certifying facilities based on the use of biomethane, or how those requirements were being interpreted and applied by Staff.

LADWP's 2009 contract with Shell is dated July 27, 2009 and was effective August 1, 2009.[23] LADWP's 2009 contract with Atmos is dated August 20, 2009 and was effective September 1, 2009.[24] The rules in place when these contracts were executed in 2009 were the rules specified in the Third Edition Guidebook. The Third Edition Guidebook was adopted by the CEC on December 19, 2007, and remained in effect until the Fourth Edition Guidebook, was adopted by the CEC on December 15, 2010.

Biomethane procured under LADWP's 2009 contracts with Shell and Atmos did not satisfy the "use" requirement as that requirement was interpreted and applied to the certification of the PG&E, SMUD, and Calpine facilities by Staff, because the biomethane procured under those contracts was not delivered through either firm or interruptible transportation, and the parties were not obligated to arrange for the transport of the biomethane along a physical contract path from the point of injection through each pipeline segment in the transportation pipeline system to the delivery point in California.

Application of the Biogas Criteria to Other Applicants

The CEC's position regarding the delivery requirements for biogas transported through the natural gas transportation pipeline system has not changed since its first adopted rules for the RPS eligibility of biogas in 2007. The CEC received applications for the precertification and certification of seven electrical generation facilities to use biogas, and were subsequently

[23] Refer to the Transaction Confirmation between LADWP and Shell Energy North America, L.P., effective August 1, 2009, dated July 27, 2009, TN 213343.
[24] Refer to Transaction Confirmation between LADWP and Atmos Energy Marketing, effective September 1, 2009, dated August 20, 2009, TN 213342.

certified, under the Third Edition Guidebook. If the facilities were precertified, the eligibility date may be before the certification date.[25] These facilities were as follows:

1) Gateway Generating Station, RPS ID 60758F, certified on March 23, 2009 with an eligibility date of January 20, 2009, owned by Pacific Gas and Electric Company (PG&E);
2) Cosumnes Power Plant, RPS ID 60760F, certified on June 9, 2009, with an eligibility date of February 24, 2009, owned by Sacramento Municipal Utility District Financing Authority (SMUD);
3) Los Medanos Energy Center, RPS ID 61048F, certified on April 13, 2011, with an eligibility date of March 18, 2010, owned by Los Medanos Energy Center, LLC (Calpine);
4) Pastoria Energy Facility, RPS ID 61064F, certified on April 13, 2011, with an eligibility date of April 20, 2010, owned by Pastoria Energy Facility, LLC (Calpine);
5) Wildflower – Indigo 1 Unit, RPS ID 61099A, certified on December 22, 2010, with an eligibility date of June 22, 2010, owned by Shell Energy North America (Shell);
6) Wildflower – Indigo 2 Unit, RPS ID 61100A, certified on December 22, 2010, with an eligibility date of June 22, 2010, owned by Shell Energy North America (Shell); and
7) Wildflower – Indigo 3 Unit, RPS ID 61101A, certified on December 22, 2010, with an eligibility date of June 22, 2010, owned by Shell Energy North America (Shell).

Staff determined that these seven facilities satisfied the biomethane delivery requirements in the Third Edition Guidebook based on the information submitted by the applicants for certification. This information included supplemental letters from each of the applicants and/or biomethane attestants indicating that they satisfied the biomethane delivery requirements.[26] During the verification process initiated in 2012 for the 2008 through 2010 verification report, the Energy Commission relied on biomethane procurement contracts, invoices, and meter data to demonstrate biomethane delivery.[27]

[25] The certification date is the date in which the CEC issued the certificate and letter. The eligibility date is the date in which the facility is eligible to participate in the RPS.
[26] Refer to Supporting Letters from PG&E, Shell, and Others, TN 213394.
[27] Refer to Renewables Portfolio Standard 2008-2010 Procurement Verification, CEC-300-2013-010-CMF, November 2013 TN 213467.

PG&E, SMUD and Calpine, the applicants for the first four facilities, were able to demonstrate a physical contract path from the biomethane injection points on the natural gas pipeline system to the delivery point in California. Shell informed Staff that it did not end up using biomethane at the three Wildflower- Indigo facilities and withdrew the applications for certification of those facilities.[28]

PG&E procures common carrier pipeline biomethane for its Gateway Generating Station through a contract with Microgy, Inc., which was executed in February of 2007 and supplies biomethane from the Huckabay Ridge biogas facility located in Stephenville, Texas.[29] Regarding delivery of the biomethane from the Huckabay Ridge biogas facility, this contract provides in pertinent part as follows:

> "Throughout the Delivery Term, Seller shall sell and deliver and Buyer shall buy and accept delivery of all Gas produced by Seller at the Site(s)…"
> "Gas Environmental Attributes" means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the use of Gas…"
> "Delivery Point. The Delivery Point for Gas shall be the point of interconnection between the facilities of a Site and the natural gas transmission system owned and operated by PG&E (the "PG&E System") as identified in Exhibit A. Seller shall be responsible for and retain ownership of the Gas up to the Delivery Point; Buyer shall assume responsibility for and ownership of the Gas at the Delivery Point."[30]
>
> Additionally, since the contract signed was for "gas" and not specifically "biogas" which was yet to be defined, the following amendment to include the definition of "biogas" included in the *RPS Eligibility Guidebook, Second Edition* effective March 2007 was added:
> "(m) Seller Representation and Warranty: On the Effective Date and the date of entering into this Agreement, Seller represents and warrants to buyer that the Gas sold to Buyer pursuant to this Agreement is RPS-eligible "biogas", as such term is used by the California Energy Commission *Renewables Portfolio Standard Eligibility Guidebook*, issued March 2007."[31]

[28] Due to the biomethane suspension in 2012, Shell was unable to make any action on the facilities until it was lifted. After the biomethane suspension was lifted on April 30, 2013, applicants were required to submit a CEC-RPS-2196 Form within 90 days of the adoption of the guidebook, or be suspended. Shell did not submit the CEC-RPS-2196 Form and was thus suspended until they submitted a withdrawal letter on April 24, 2014. This withdrawal was made because they were not using biomethane at the facilities.
[29] Refer to the Agreement for the Sale and Purchase of Gas between PG&E and Microgy, Inc. executed February 2007, TN 213345.
[30] Refer to the Agreement for the Sale and Purchase of Gas between PG&E and Microgy, Inc. executed February 2007, TN 213345.
[31] Refer to July 9, 2007 letter included as part of the Agreement for the Sale and Purchase of Gas between PG&E and Microgy, Inc. executed February 2007, TN 213345.

SMUD procures biomethane for its Cosumnes Power Plant through a contract with Shell Energy North America (US), L.P., which was executed on April 2, 2009 and supplies biomethane from the McCommas Bluff Landfill project located in Texas. Regarding delivery of the biomethane, this contract provides in pertinent part as follows:

> "Seller agrees to deliver all of the RNG [Renewable Natural Gas] up to the MDV [Maximum Daily Volume] subject to the following:
> a. […]
> b. […]
> c. The successful flow of scheduled RNG on the Atmos pipeline system on a Priority Service basis from the Project to the EPNG Sweetie Peck Interconnect point and on EPNG firm transport from Sweetie Peck to Delivery Point. Seller warrants that transportation has been or will be obtained and will be maintained to support the flow of gas as represented in the MDV schedule above."[32]

Calpine procures biomethane for its Los Medranos Energy Center and Pastoria Energy Facility through a contract with EIF KC Landfill Gas, LLC, which was executed on December 22, 2010 and supplies biomethane from the EIF KC Landfill Gas project located in Johnson County, Kansas. Regarding delivery of the biomethane, this contract provides in pertinent part as follows:

> "WHEREAS, Buyer desires to purchase from Seller, and Seller desires to sell to Buyer, Biogas generated by a landfill gas-to-energy facility located in Johnson County, Kansas, which is an eligible renewable energy resource under California Public Utilities Code Section 399, as it may be amended, restated or supplemented from time to time, by the California Energy Commission (the "Eligible Resource") for spot delivery in accordance with the terms set forth below;
> 1.1 "Biogas" shall mean pipeline quality natural gas that is produced from Landfill Gas and contains all the Green Attributes associated with the use of a pipeline quality Landfill Gas derived fuel for the generation of electric power.
> 1.6 "Landfill Gas" shall mean renewable landfill gas as defined by the CEC in the Second Edition of the Overall Program Guidebook for the RPS as of the date of execution of this Transaction Confirmation.
> 2.2 Transportation. Seller shall have the sole responsibility for transporting the Biogas to the Delivery Point. Buyer shall have the sole responsibility for transporting the Biogas from the Delivery Point.
> 2.5 Supporting Documentation. Following delivery of the Biogas to Buyer, Seller or its designee shall provide Buyer with any documentation required by the CEC to evidence the transportation of the Biogas from the Eligible Resource to the Delivery Point, including any affidavits or attestations set forth in the CEC RPS Eligibility Guidebook, as

[32] SMUD Shell Transaction Confirmation dated March 30, 2009 p. 3, TN 213364.

the same may be amended or supplemented as of the Delivery Deadline, including the information required by Form CEC-RPS-1A:S1.[33]

Application of the Biogas Criteria to LADWP's 2009 Shell and Atmos Contracts

LADWP's 2009 Shell and Atmos contracts would not have satisfied the biomethane delivery requirements in the Third Edition Guidebook as those requirements were interpreted and applied by Staff in the certification of the PG&E, SMUD, and Calpine facilities. LADWP's 2009 Shell contract states:

> The parties understand that this RB [renewable biomethane] will be delivered to Buyer through an exchange rather than through direct long-haul transportation. Specifically, the environmental attributes will be unbundled from the gas at or near the landfill source, and the resulting gas without environmental attributes will be sold by Seller in the local market. The gas will be replaced with an equal volume of gas and re-bundled with environmental attributes for delivery to Buyer at the specified Delivery Point as RB. (Transaction Confirmation between LADWP and Shell Energy North America, L.P., effective August 1, 2009, dated July 27, 2009, p.2, TN 213343)

LADWP's 2009 Atmos contract states:

> The parties understand that this Landfill Gas will be delivered to Buyer through an exchange rather than through direct long-haul transportation. Specifically, that Environmental Attributes will be unbundled from the gas near the landfill source, and the resulting gas without Environmental Attributes will be sold by Seller in the local market. The gas will be replaced with an equal quantity of gas and re-bundled with Environmental Attributes for delivery to Buyer at the specified Delivery Point as Standard Base Load."
> (Transaction Confirmation between LADWP and Atmos Energy Marketing, effective September 1, 2009, dated August 20, 2009, p. 3, TN 213342.)

Biomethane procured under LADWP's 2009 Shell contracts came from landfills located in 1) Cincinnati, Ohio, 2) Fort Smith, Arkansas, 3) Tyler, Texas, and 4) Welsh, Louisiana.[34] Biomethane procured under LADWP's 2009 Atmos contract came from a landfill located in Houston, Texas.[35]

[33] Biogas Purchase Agreement between Calpine Energy Services, L.P. and EIF KC Landfill Gas, LLC dated December 22, 2010, TN 213360.
[34] Refer to the Transaction Confirmation between LADWP and Shell Energy North America, L.P., effective August 1, 2009, dated July 27, 2009, Attachment A, TN 213364.
[35] Refer to Transaction Confirmation between LADWP and Atmos Energy Marketing, effective September 1, 2009, dated August 20, 2009, TN 213342.

Biomethane under LADWP's 2009 Shell and Atmos contracts was not delivered through either firm or interruptible transportation, nor was the seller obligated for the flow of scheduled biomethane from the biomethane sources to the delivery point through a physical contract path, as was the case for the biomethane procured by PG&E, SMUD and Calpine for their respective facilities, as noted above. As discussed in the response to Question 2(a) below, LADWP provided delivery contracts for part of the physical contract path, but could not provide delivery contracts for the entire path from point of injection to delivery point in California.

Unlike PG&E, SMUD, or Calpine, LADWP did not apply to the CEC for RPS certification of its facilities contemporaneously with the execution of its 2009 Shell and Atmos contracts. Nor was LADWP required to apply to CEC for RPS certification of its facilities in 2009, since at that time the law did not require POUs to certify their facilities through the CEC.[36] Consequently, LADWP may not have been informed of the CEC's requirements for certifying facilities based on the use of biomethane, or how these requirements were being interpreted and applied by Staff.

III. RESPONSE TO QUESTION 2

Discuss whether each of the three identified grandfathering provisions—Public Utilities Code sections 399.12(e)(1)(C), 399.12.6(a), 399.16(d)—apply to the 2009 Shell and Atmos contracts.

Public Utilities Code sections 399.12(e)(1)(C), 399.12.6(a), and 399.16(d) can be applied to LADWP's Shell and Atmos contracts.

a. Cite to supporting documents for each required element of the provisions. For example, did the LADWP board "approve" the facilities under section 399.12(e)(1)(C)?

As discussed below Public Utilities Code sections 399.12(e)(1)(C), 399.12.6(a), and 399.16(d) each contain several required elements in order to "grandfather" biomethane thereunder. All three sections include a requirement that the electricity procurement be from an eligible renewable energy resource, which requires the satisfaction of the use

[36] While POUs were not required to meet their RPS procurement requirements with electricity generation from facilities certified by the CEC, the CEC certified facilities for the RPS if the facilities served a POU. The CEC also encouraged POUs to meet their RPS procurement requirements with generation from facilities certified for the RPS by the CEC. Refer to *Renewables Portfolio Standard Eligibility Guidebook, Third Edition*, pp. 28, TN 213249.

requirement. LADWP's 2009 Shell and Atmos contracts failed to meet the use requirement, as it was interpreted and applied by Staff.

The elements and analysis under each of sections 399.12(e)(1)(C), 399.12.6(a), and 399.16(d) of the Public Utilities Code are addressed individually below.

Public Utilities Code section 399.12(e)(1)(C):

Elements of Public Utilities Code section 399.12(e)(1)(C)

Public Utilities Code section 399.12 (e)(1)(C) provides in pertinent part as follows:

> (e) **"Eligible renewable energy resource" means an electrical generating facility that meets the definition of a "renewable electrical generation facility" in Section 25741 of the Public Resources Code**, subject to the following:
> (1) [...]
> (C) A facility approved by the governing board of a local publicly owned electric utility prior to June 1, 2010, for procurement to satisfy renewable energy procurement obligations adopted pursuant to 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**."
> (Pub. Util. Code, §399.12, subd. (e)(1)(A). Emphasis added.)

Public Resources Code section 25741(a)(1) defines a "renewable electrical generation facility" as follows:

> (a) "Renewable electrical generation facility" means a facility that meets all of the following criteria:
> (1) The facility uses biomass, solar thermal, photovoltaic, wind, geothermal, fuel cells using renewable fuels, small hydroelectric generation of 30 megawatts or less, digester gas, municipal solid waste conversion, landfill gas, ocean wave, ocean thermal, or tidal current, and any additions or enhancements to the facility using that technology.
> A) The facility is located in the state or near the border of the state with the first point of connection to the transmission network of a balancing authority area primarily located within the state. For purposes of this subparagraph, "balancing authority area" has the same meaning as defined in Section 399.12 of the Public Utilities Code.
> (B) The facility has its first point of interconnection to the transmission network outside the state, within the Western Electricity Coordinating Council (WECC) service area, and satisfies all of the following requirements:
> (i) It commences initial commercial operation after January 1, 2005.
> (ii) It will not cause or contribute to any violation of a California environmental quality standard or requirement.

(iii) It participates in the accounting system to verify compliance with the renewables portfolio standard once established by the commission pursuant to subdivision (b) of Section 399.25 of the Public Utilities Code.
(C) The facility meets the requirements of clauses (ii) and (iii) in subparagraph (B), but does not meet the requirements of clause (i) of subparagraph (B) because it commenced initial operation prior to January 1, 2005, if the facility satisfies either of the following requirements:
(i) The electricity is from incremental generation resulting from expansion or repowering of the facility.
(ii) Electricity generated by the facility was procured by a retail seller or local publicly owned electric utility as of January 1, 2010.
(3) If the facility is outside the United States, it is developed and operated in a manner that is as protective of the environment as a similar facility located in the state.
(Pub. Res. Code, §25741, subd. (a), as amended by SBX1-2.)[37]

Under the provisions of Public Utilities Code section 399.12(e)(1)(C), the CEC may certify an electrical generating facility for the RPS only if a POU approved the procurement of electricity from the facility prior to June 1, 2010 to satisfy renewable energy procurement obligations adopted by the POU pursuant to former Public Utilities Code section 387, and the facility meets the definition of a "renewable electrical generation facility" by using one of the resources specified in Public Resources Code section 25741(a)(1). Hence, the two basic element under section 399.12 (e)(1)(C) that must be satisfied are:

1. The governing board of a POU must have approved the procurement of electricity from the electrical generation facility prior to June 1, 2010 to satisfy renewable energy procurement obligations adopted by the POU pursuant to former Public Utilities Code section 387; and
2. The electrical generating facility must meet the definition of a "renewable electrical generation facility" in Public Resource Code section 25741.

For a facility to qualify based on the "use" of landfill gas, the facility must use landfill gas as specified by the CEC in the applicable RPS Eligibility Guidebook. And for landfill gas delivered as biomethane via the natural gas transportation pipeline system, the RPS Eligibility Guidebook required the biomethane to be delivered into California as discussed in the response to Question 1.a.

[37] AB 2196 amended Public Resources Code section 25741, by adding subdivision (a)(4), which provides: "(4) If eligibility of the facility is based on the use of landfill gas, digester gas, or another renewable fuel delivered to the facility through a common carrier pipeline, the transaction for the procurement of that fuel, including the source of the fuel and delivery method, satisfies the requirements of Section 399.12.6 of the Public Utilities Code and is verified pursuant to the accounting system established by the commission pursuant to 399.25 of the Public Utilities Code, or a comparable system, as determined by the commission."

LADWP's 2009 Shell and Atmos Contracts Do Not Meet the Elements of section 399.12(e)(1)(C) of the Public Utilities Code

Element 1: POU Approval of Procurement from the Electrical Generating Facilities

Staff cannot speak to whether LADWP approved the procurement of electricity from the Scattergood, Harbor, Valley, and Haynes facilities (resulting from biomethane under the 2009 Shell and Atmos contracts) prior to June 1, 2010 to satisfy renewable energy procurement obligations adopted by LADWP pursuant to former Public Utilities Code section 387. LADWP's Renewables Portfolio Standard Policy, as amended April 2008, appears to have been adopted pursuant to section 387. This policy provides that electricity produced from "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 renewable facility" constitutes an "eligible" resource for purposes of LADWP's policy.[38] However, LADWP's policy does not further define what it means to be "renewable derived biogas injected into a natural gas pipeline for use in renewable facility," and does not refer to electricity procurement from the Scattergood, Harbor, Valley, or Haynes facilities. Staff has no basis for determining whether the biogas procured under the 2009 Shell and Atmos contracts satisfied the requirements in LADWP's Renewables Portfolio Standard Policy, as amended in April 2008, or whether the electricity generation resulting from the Scattergood, Harbor, Valley, and Haynes facilities satisfied procurement requirements under LADWP's policy.

Element 2: Meeting Definition of "Renewable Electrical Generation Facility"

A facility must meet the definition of a "renewable electrical generation facility" under Public Resources Code section 25741(a), which provides that the facility "uses biomass, . . digester gas, . . landfill gas . . ." (Pub. Resources Code, §25741, subd. (a)(1)) As discussed above, for a facility to qualify based on the "use" of landfill gas, the facility must use landfill gas as specified by the CEC in the applicable RPS Eligibility Guidebook, because the law charges the CEC with responsibility for determining whether a particular renewable resource satisfies the definition of a "renewable electrical generation facility" in section 25741. For landfill gas delivered as biomethane via the natural gas transportation pipeline system, the RPS Eligibility

[38] LADWP Renewables Portfolio Standard Policy, as amended April 2008, p. 2 (LA Bate 000045), included as part LADWP Board Approval, TN 212409.

Guidebook required the biomethane to be delivered into California as discussed in the response to Question 1.a.

Biomethane procured under LADWP's 2009 contracts with Shell and Atmos did not satisfy the "use" requirement, because the biomethane procured under these contracts was not delivered through either firm or interruptible transportation, and the parties were not obligated to arrange for the transport of the biomethane along a physical contract path from the point of injection through each pipeline segment in the transportation pipeline system to the delivery point in California. This is explained in the response to Question 1.c.

In its appeal, LADWP argues that it did have contracts for the firm or interruptible delivery of biomethane procured under the 2009 Shell and Atmos contracts.[39] These contracts are with the Kern River Gas Transmission Company (KRT). However, the KRT contracts only provide firm transportation delivery service for natural gas through the transportation pipeline system from Opal, Wyoming, to California.[40] The KRT contracts do not provide firm transportation delivery service for natural gas from the points of injection at the landfills in Ohio, Arkansas, Texas and Louisiana to Opal, Wyoming and therefore parts of the delivery pathway are missing.[41] As noted in the response to Question 1.c, biomethane procured under LADWP's 2009 Shell contract came from landfills located in 1) Cincinnati, Ohio, 2) Fort Smith, Arkansas, 3) Tyler, Texas, and 4) Welsh, Louisiana, and biomethane procured under LADWP's 2009 Atmos contract came from a landfill located in Houston, Texas.

The provisions of Public Resources Code section 25741(a)(2) and (3) are not relevant for purposes of the 2009 Shell and Atmos contracts, because these provisions establish requirements for electrical generation facilities that are located out-of-state or outside the country. LADWP is claiming that the biomethane under the 2009 Shell and Atmos contracts is being used at its Scattergood, Harbor, Valley, and Haynes facilities, which are located in state in the Los Angeles region.

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[39] LADWP Appeal, dated January 21, 2016, TN 211752-1, pp. 13-14.
[40] LADWP Appeal, TN 211752-1, p. 13.
[41] Refer to LADWP's contracts with KRT, TN 211752-5 and TN 211752-6. Exhibit "A" in both contracts identify "Opal-WFS" as a point of receipt where KRT accepts the gas for transport. "Opal-WFS" is Opal, Wyoming as indicated on the upper right corner of the Map with Wyoming received by Staff from LADWP at in-person meeting on February 23, 2016, TN 213388.

Public Utilities Code section 399.12.6(a)

Elements of Public Utilities Code section 399.12.6(a)

Statutory Language

Public Utilities Code section 399.12.6(a) provides in pertinent part as follows:

> (a)(1) Any procurement of biomethane delivered through a common carrier pipeline under a contract executed by a retail seller or local publicly owned electric utility 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 Renewables Portfolio Standard Eligibility Guidebook, provided that those rules shall apply only to sources that are producing biomethane and injecting it into a common carrier pipeline on or before April 1, 2014.
> (Pub. Util. Code, §399.12.6(a))

Section 399.12.6(a) was enacted under AB 2196, which established special RPS eligibility requirements for the certification of facilities that use biomethane and for the categorization of biomethane-based electricity products as "count in full" or PCC procurement.

In order for biomethane procurement delivered through a common carrier pipeline "under a contract executed by a retail seller or local publicly owned electric utility and reported to the Energy Commission prior to March 29, 2012" to "count towards the procurement requirements established" in the RPS program under Public Utilities Code §399.12.6(a)(1), the biomethane procurement must be "otherwise eligible under the rules in place as of the date of contract execution" and the how it is accounted for shall be "under the rules in place at the time the contract was executed, including the Fourth Edition of the Energy Commission's Renewables Portfolio Standard Eligibility Guidebook".

Background of the Statutory Language

To better understand these requirements it is helpful to review the origin of AB 2196, including the CEC's suspension of its RPS-eligibility rules for biomethane as well as the CEC's implementation of AB 2196.

Suspension of Biomethane Guidelines

AB 2196 was enacted in 2012 following the CEC's suspension of its RPS-eligibility rules for biomethane. On March 28, 2012, the CEC suspended its rules for certifying facilities for the RPS based on the use of biomethane. At the time, the CEC's rules for certifying facilities were specified in the RPS Eligibility Guidebook, Fourth Edition. Like the Second and Third Editions of the RPS Eligibility Guidebook, the Fourth Edition identified biomethane as an eligible renewable energy resource and allowed electrical generation facilities that use biomethane to generate electricity to be certified as eligible for the RPS. The suspension was implemented to provide the CEC additional time to evaluate the RPS eligibility of biomethane as a result of SBX1-2. Although SBX1-2 did not change the law with respect to the RPS eligibility of biomass, digester gas, or landfill gas (the renewable fuels from which biomethane is produced), or specify how these renewable fuels should be used by, or delivered to, a facility for generating electricity, SBX1-2 did establish a preference for electricity generation that provides more environmental benefits to the state by displacing in-state fossil fuel consumption, reducing air pollution within the state, and helping the state meet its climate change goals by reducing emissions of greenhouse gases (GHG) associated with electrical generation. (Refer to discussion above regarding Public Utilities Code section 399.16(d).)

It was unclear to the CEC whether, or to what extent, the Fourth Edition guidebook advanced these environmental goals with respect to biomethane. For example, the Fourth Edition guidebook did not require that the use of biomethane displace fossil fuel consumption or reduce air pollution, did not require a showing that the use of biomethane results in GHG reductions, and did not establish rigorous requirements to verify that the claimed quantity of biomethane was actually used by the designated electrical generating facility or that the necessary biomethane attributes were transferred to the facility operator for purposes of the RPS and not double counted for other purposes. Therefore, the CEC suspended its RPS eligibility guidelines related to biomethane to evaluate these issues and ensure the intended benefits of SBX1-2 were realized.[42] The state Legislature was also concerned with these same issues and separately expressed a desire to clarify the RPS-eligibility of biomethane. In this regard, legislative leaders

[42] Refer to the CEC *Notice to Consider Suspension of the of the RPS Eligibility Guideline Related to Biomethane*, dated March 16, 2012, TN 213290, and CEC Resolution No. 12-0328-3, as corrected, TN 213292.

specifically asked that the CEC place a moratorium on the RPS eligibility of biomethane to provide the Legislature an opportunity to act and clarify eligibility.[43]

AB 2196 resulted from the Legislature's desire to clarify the RPS-eligibility of biomethane. AB 2196 established various requirements in Public Resources Code section 25741 and Public Utilities Code section 399.12.6. It defined "biomethane" as landfill gas or digester gas, consistent with Public Resources Code Section 25741. (Pub. Res. Code, §25741, subd (a)(4).) It grandfathered the procurement of electricity from generating facilities using biomethane delivered through a common carrier pipeline under the rules in place at the time the biomethane procurement contract was executed, including the RPS Eligibility Guidebook, Fourth Edition, subject to the additional requirements specified in AB 2196. (Pub. Util. Code, §399.12.6, subd. (a)(1).) These additional requirements include the following:

- The biomethane was procured under a contract executed by a retail seller or POU and reported to the Energy Commission before March 29, 2012; and
- The biomethane is procured from sources that are producing and injecting the biomethane into a common carrier pipeline on or before April 1, 2014. (Pub. Util. Code, §399.12.6, subd. (a)(1).)

AB 2196 also established RPS-eligibility requirements for any quantities of biomethane associated with biomethane procurement contracts executed on or after March 29, 2012, or for amendments made after March 29, 2012, to existing contracts. (Pub. Util. Code, §399.12.6, subd. (b).) These RPS-eligibility requirements apply to biomethane used by an onsite generating facility, biomethane used by an offsite generating facility and delivered through a dedicated pipeline, and biomethane used by an offsite generating facility and delivered through a common carrier pipeline. (Pub. Util. Code, §399.12.6, subd. (b)(1)-(3)) With respect to the latter, AB 2196 imposes the following more rigorous requirements:

- The biomethane is injected into a common carrier pipeline that flows within California or toward the generating facility. (Pub. Util. Code, §399.12.6, subd. (b)(3)(A).)
- The biomethane source did not inject biomethane into a common carrier pipeline before March 29, 2012, or the source began injecting sufficient incremental quantities

[43] Refer to the February 22, 2012 letter included as Attachment A to the CEC *Notice to Consider Suspension of the of the RPS Eligibility Guideline Related to Biomethane*, TN 213290.

of biomethane after March 29, 2012, to satisfy the biomethane procurement contract requirements. (Pub. Util. Code, §399.12.6, subd. (b)(3)(B).)

- The seller or purchaser of biomethane demonstrates that capture and injection of biomethane into a common carrier pipeline directly results in at least one of the following:
  - Reduces or avoids criteria air pollutant emissions in California.
  - Reduces or avoids pollutants that adversely affect California waters.
  - Alleviates local nuisance associated with odor emissions within California. (Pub. Util. Code, §399.12.6, subd. (b)(3)(C).)
- The retail seller or POU procurement of generation from facilities using biomethane under contracts initially executed on or after March 29, 2012, or for quantities of biomethane associated with contract amendments executed after March 29, 2012, shall be assigned to the appropriate portfolio content category based on criteria in Public Utilities Code Section 399.16. (Pub. Util. Code, §399.12.6, subd. (c).)

Implementation of AB 2196

The CEC implemented AB 2196 as part of the revisions to the RPS Eligibility Guidebook. These revisions were informed by a Staff concept paper - *Concept Paper for the Implementation of Assembly Bill 2196 for the Renewables Portfolio Standard* – that was prepared to analyze the various requirements of AB 2196 and solicit public comments on Staff's analysis and recommended interpretation of these requirements.[44] Based on the recommendations in the Staff Concept Paper, public comments, as well as direction from the CEC's lead commissioner for renewables, proposed guidebook revisions were prepared by Staff and considered by the CEC. These guidebook revisions were adopted by the CEC on April 30, 2013 and are reflected in the RPS Eligibility Guidebook, Seventh Edition.

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[44] Refer to the Concept Paper for the Implementation of Assembly Bill 2196 for the Renewables Portfolio Standard, dated January 2013, pub. no. CEC-300-2013-001, TN 213287. Also refer to the *Revised Notice Regarding Staff Concept Paper for Implementation of Assembly Bill 2196 Pertaining to the Renewables Portfolio Standard Program*, dated February 1, 2013, TN 213293.

LADWP's 2009 Shell and Atmos Contracts Do Not Meet the Elements of Public Utilities Code section 399.12.6(a)

According to the 2009 Shell and Atmos contracts, the biomethane procured thereunder is produced from landfill gas, so it meets the definition "biomethane" in Public Resources Code Section 25741 as required under section 399.12.6(a)(1). Additionally, the biomethane was procured under contract executed by LADWP in 2009 and reported to the CEC as part of an application for RPS certification submitted in July 2011,[45] and therefore before the March 29, 2012 deadline specified in Public Utilities Code section 399.12.6(a)(1). Also, the biomethane procured under the 2009 Shell and Atmos contracts may come from landfills that were producing the gas and injecting it into a common carrier pipeline on or before April 1, 2014, thereby satisfying the requirements of Public Utilities Code section 399.12.6(a)(1).

LADWP must also satisfy the "rules in place" requirements of Public Utilities Code section 399.12.6(a)(1) in order for LADWP to count the procurement of electricity generation based on biomethane supplied under the 2009 Shell and Atmos contracts to satisfy its RPS procurement requirements. Public Utilities Code section 399.12.6(a)(1) provides as follows:

> 399.12.6. (a) (1) Any procurement of biomethane delivered through a common carrier pipeline under a contract executed by a retail seller or local publicly owned electric utility 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 Renewables Portfolio Standard Eligibility Guidebook**, provided that those rules shall apply only to sources that are producing biomethane and injecting it into a common carrier pipeline on or before April 1, 2014.
> (Pub. Util. Code, §399.12.6, subd. (a)(1). Emphasis added.)

Section 399.12.6(a)(1) refers to the "rules in place" in two separate clauses. The first clause addresses requirements for the procurement of the biomethane for purposes of certifying an electrical generating facility for the RPS, while the second clause addresses requirements for classifying the procurement of biomethane-based electricity generation as either "count in full" or PCC procurement. The first clause was analyzed in Section 3 of the *Concept Paper for the*

[45] Refer to the staff memo included as part of Executive Director's December 22, 2015 response to LADWP's Petition for Reconsideration, p. 4 of staff memo, TN 213288.

Implementation of Assembly Bill 2196 for the Renewables Portfolio Standard. Section 3 of the Concept Paper includes the following discussion.

> 3. Meaning of *"**under a contract executed by a retail seller or local 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…"***
> (Public Utilities Code Section 399.12.6 (a)(1))
>
> **Staff Proposal:**
> An electrical generation facility using biomethane under a contract executed by a retail seller or local publicly owned electric utility (POU) before March 29, 2012, is eligible for the RPS if the biomethane source and quantity under a contract was reported to the Energy Commission in a complete application for RPS precertification or RPS certification that was received by the Energy Commission before March 29, 2012, and the facility meets all other application eligibility requirements under the *RPS Eligibility Guidebook* that was in place at the time of contract execution, including but not limited to the Fourth Edition of the *RPS Eligibility Guidebook.*
>
> **Rationale:**
> Staff believes that the Legislature intended to allow eligibility of facilities using biomethane for the RPS under executed contracts with identified sources and quantities that were already RPS certified, precertified, or had pending applications for RPS certification with the Energy Commission prior to the Energy Commission's biomethane suspension on March 28, 2012. Staff assumes that if this information was reported to the Energy Commission by March 28, 2012, the contract for biomethane was executed before March 28, 2012. Generation from facilities using biomethane from sources that were not reported to the Energy Commission in an application for RPS certification or precertification before March 29, 2012, would not be eligible and would not count toward a retail seller or POU's RPS procurement requirements unless the facility met the requirements of Public Utilities Code Section 399.12.6 (b).
>
> The Energy Commission's practice has been to determine a facility's RPS eligibility based on the *RPS Eligibility Guidebook* rules in place at the time an application for certification is received by the Energy Commission. However, by referencing the "rules in place as of the date of contract execution," AB 2196 modifies the Energy Commission's existing practice and requires the Energy Commission to determine a facility's RPS eligibility based on the *RPS Eligibility Guidebook* rules in place when the biomethane contract was executed. For the facilities that applied for certification immediately prior to the Energy Commission's March 28, 2012, biomethane suspension, the applicable *RPS Eligibility Guidebook* will be the fourth edition if the biomethane contract was executed on or after December 15, 2010 (the adoption date of the fourth edition) and before March 29, 2012. For facilities that applied for certification before December 15, 2010, and after December 19, 2007 (the adoption date of the third edition), the applicable *RPS Eligibility Guidebook* is the third edition.
> (*Concept Paper for the Implementation of Assembly Bill 2196 for the Renewables Portfolio Standard*, p. 3, TN 213287.)

The first "rules in place" clause in Public Utilities Code section 399.12.6(a)(1) refers to the CEC's rules, not the rules of a POU as LADWP has argued in the past (see response to Question 3). The Legislature was well aware that the CEC had adopted eligibility rules for certifying electrical generation facilities for the RPS, and that these rules were specified in the RPS Eligibility Guidebook. It is for this reason that the Legislature specifically referenced the CEC's Fourth Edition Guidebook, in Public Utilities Code section 399.12.6(a)(1). Had the Legislature intended the "rules in place" to refer to a POU's rules, it would have further qualified this provision, rather than specifically identifying the "Fourth Edition of the Energy Commission's Renewables Portfolio Standard Eligibility Guidebook."

Arguably, the language of Public Utilities Code section 399.12.6(a)(1) can be read to impose the requirements of the Fourth Edition Guidebook, on all existing biomethane procurement contracts, irrespective of the execution date of the contracts. However, the better interpretation of the language is that it requires application of the RPS Eligibility Guidebook in place at the time the biomethane procurement contract was executed.

Construing "including the Fourth Edition" language as imposing the requirements of the Fourth Edition Guidebook on all existing biomethane procurement contracts, irrespective of contract execution date, would render meaningless the "contract execution" language in Public Utilities Code section 399.12.6(a)(1). The language of section 399.12.6(a)(1) should not be construed in a way that renders parts of the statute surplusage. By contrast, if the "including the Fourth Edition" language is construed as requiring the application of one of several possible Editions of the RPS Eligibility Guidebook (the others being the Second Edition Guidebook and Third Edition Guidebook), then the "execution date" language in the statute is not rendered meaningless. Moreover, had the Legislature wanted to subject all existing biomethane contracts to the requirements of the Fourth Edition Guidebook, it could have stated this plainly in the language of Public Utilities Code section 399.12.6(a)(1), but it did not.

Furthermore, at the time the Legislature was considering AB 2196, the Legislature was aware that the CEC had adopted RPS Eligibility Guidebooks starting with the Second Edition Guidebook that allowed electrical generation facilities using biomethane to qualify for RPS

certification.[46] Recognizing that there could have been existing biomethane contracts executed as early as the Second Edition Guidebook, the Legislature may well have intended to allow these existing biomethane procurement contracts to qualify for the RPS under the RPS Eligibility Guidebook in effect at the time the contracts were executed.

The second "rules in place" clause in Public Utilities Code section 399.12.6(a)(1) was analyzed in Section 4 of the *Concept Paper for the Implementation of Assembly Bill 2196 for the Renewables Portfolio Standard.* Section 4 of the Concept Paper includes the following discussion.

> 4. Meaning of ***"Any procurement of biomethane …shall count toward the procurement requirements established in this article, under the rules in place at the time the contract was executed …"***
> (Public Utilities Code Section 399.12.6 (a)(1))
>
> **Staff Proposal:**
> The "procurement requirements established in this article" refers to the RPS procurement requirements established for retail sellers and POUs in Article 16 (commencing with section 399.11) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code, as enacted by Senate Bill X 1-2 (Stats. 2011, 1st Ex. Sess., ch.1). Procurement of generation from an electrical generation facility meeting #3(a)[sic] above will count toward the RPS procurement requirements of Article 16 under the rules in place when the contract was executed, which draws a distinction for renewable energy resource procurement contracts executed before June 1, 2010, and contracts executed on or after this date.
>
> **Rationale:**
> SBX1-2 generally requires retail sellers and POUs to satisfy the procurement requirements of Article 16 by procuring electricity products that 1) meet the Portfolio Content Categories specified in Public Utilities Code Section 399.16 (b) and were procured under contracts executed on or after June 1, 2010 (generally referred to "PCC procurement"), or 2) were procured under contracts executed before June 1, 2010, and satisfy the conditions of Public Utilities Code Section 399.16 (d) (generally referred to as "count in full procurement"). Hence, SBX1-2 draws a distinction between procurement contracts executed before June 1, 2010, and procurement contracts executed on or after this date. The date of execution of a biomethane contract should dictate whether the procurement of biomethane-based electricity generation from a facility qualifies as either PCC procurement or count in full procurement. If the biomethane contract was executed on or after June 1, 2010, the procurement of biomethane-based electricity generation

[46] The biomethane requirements under Second Edition Guidebook was discussed in the CEC's *Notice to Consider Suspension of the of the RPS Eligibility Guideline Related to Biomethane*, dated March 16, 2012, TN 213290. This notice included as Attachment A the February 22, 2012 letter from legislative leaders specifically requesting that the CEC place a moratorium on the RPS eligibility of biomethane to provide the Legislature an opportunity to act and clarify eligibility.

should qualify as PCC procurement, provided all other requirements are satisfied, because the generation of biomethane-based electricity may begin no sooner than the commencement date of the biomethane contract itself. If the biomethane contract was executed before June 1, 2010, and the contract provided for deliveries of biomethane to the facility for generation before June 1, 2010, then the procurement of the biomethane-based electricity generation may qualify, if at all, only as count-in-full procurement, provided all other requirements are satisfied.[47]

For example, if a POU executed a biomethane contract on January 1, 2012, to supply biomethane to the POU's electrical generation facility starting on this same date, the electrical generation resulting from the designated use of the biomethane, if utilized by the POU to satisfy its RPS procurement requirements, may qualify as PCC procurement provided all other requirements were satisfied. This is so because the biomethane contract was executed after June 1, 2010.

By contrast, if a POU executed a biomethane contract on March 1, 2010, to supply biomethane to the POU's electrical generation facility starting on this same date, the electrical generation resulting from the designated use of the biomethane, if utilized by the POU to satisfy its RPS procurement requirements, may qualify, if at all, only as count-in-full procurement, provided all other requirements were satisfied. (*Concept Paper for the Implementation of Assembly Bill 2196 for the Renewables Portfolio Standard*, pp. 4-5, TN 213287.)

If the biomethane procured by LADWP under its 2009 Shell and Atmos contracts is ultimately determined to have satisfied the biomethane delivery requirements specified in the Third Edition Guidebook, thereby allowing the Scattergood, Harbor, Valley and Haynes facilities to qualify for the RPS based on the use of such biomethane, then LADWP's procurement of electricity generation from these facilities should qualify as "count in full" procurement for the RPS.

Public Utilities Code section 399.16(d)

Elements of Public Utilities Code section 399.16(d)

Public Utilities Code section 399.16(d) states:

"(d) Any contract or ownership agreement originally executed prior to June 1, 2010, shall count in full toward the procurement requirements established pursuant to this article, if all of the following conditions are met:

[47] Footnote omitted.

(1) **The renewable energy resource was eligible under the rules in place as of the date when the contract was executed**.

(2) For an electrical corporation, the contract has been approved by the commission, even if that approval occurs after June 1, 2010.

(3) Any contract amendments or modifications occurring after June 1, 2010, do not increase the nameplate capacity or expected quantities of annual generation, or substitute a different renewable energy resource. The duration of the contract may be extended if the original contract specified a procurement commitment of 15 or more years."
(Pub. Util. Code, §399.16(a). Emphasis added.)

The state's RPS program under SBX1-2 establishes a preference for the procurement of electricity products[48] that provides more environmental benefits to the state by, among other things, displacing in-state fossil fuel consumption, reducing air pollution within the state, and helping the state meet its climate change goals by reducing emissions of GHGs associated with electrical generation. (Pub. Util. Code, §399.11, subd. (b).) SBX1-2 does this by categorizing the procurement of electricity products from eligible renewable energy resources into portfolio content categories (PCCs, commonly referred to as "buckets") and establishing minimum and maximum percentages for the amount of these electricity products that may be procured by a retail seller or POU in a given compliance period for the RPS. Public Utilities Code section 399.16(b) specifies the criteria for the PCC buckets and section 399.16(c) specifies the minimum and maximum percentages for these PCC buckets that may be procured for a given compliance period. The minimum and maximum procurement percentages of section 399.16(c) are referred as the Portfolio Balance Requirement (PBR).

Additionally, Public Utilities Code section 399.16(d) establishes a procurement category for electricity products that were procured pursuant to contracts or ownership agreements[49]

[48] "Electricity products" mean either i) electricity bundled with the associated REC generated by an eligible renewable energy resource or ii) an unbundled REC associated with the generation of electricity from an eligible renewable energy resource. Refer to definitions of "electricity product" and "renewable energy credits" in the 20 CCR section 3201 (j) and (v), respectively. Prior to the enactment of SBX1-2, the state's RPS program requred retail sellers to procure bundled electricity to satisfy their RPS procurement requirements. Under the law as amended by SBX1-2, retail sellers and POUs may now also procure unbundled RECs to meet a portion of their RPS procurement requirements.

[49] A retail seller or POU may procure electricity products by entering into a contract with a third party for the procurement of those electricity products, typically referred to as a power purchase agreement, or a retail seller or POU may own the electrical generation facility themselves and procure the electricity

executed prior to June 1, 2010. The procurement of electricity products that satisfy section 399.16(d) are not subject to the PBR and are referred to "count in full," because this procurement is counted in full toward satisfying a retail seller's or POU's procurement requirements for the RPS without regard to the PBR.

Section 399.16(d) applies to POUs by virtue of Public Utilities Code section 399.30(c)(3), which provides "[a] local publicly owned electric utility shall adopt procurement requirements consistent with Section 399.16." (Pub. Util. Code, §399.30, subd. (c)(3), as enacted by SBX1-2.) When the CEC adopted regulations in 2013 specifying enforcement procedures for the RPS programrm for POUs pursuant to Public Utilities Code section 399.30(n),[50] it determined that the language from section 399.16(d)(1) – "[t]he renewable energy resource was eligible under the rules in place as of the date when the contract was executed" – referred to the rules of the CPUC and CEC. The CEC's rationale for this interpretation is explained in Attachment A to the Final Statement of Reasons for the regulations, which provides in pertinent part as follows:

> "Public Utilities Code section 399.16 is part of the statutory requirements that specifically apply to retail sellers, not POUs. It therefore follows that the "rules in place" should be interpreted to mean the rules adopted by the CPUC and the Energy Commission applicable to retail sellers. These rules include the Energy Commission's RPS eligibility requirements, as specified in the *RPS Eligibility Guidebook*, in place at the time the contract or ownership agreement was executed, because these were the rules that applied to retail sellers prior to the enactment of SBX1-2. This interpretation is consistent with the CPUC's interpretation of Public Utilities Code section 399.16 (d) for retail sellers. Public Utilities Code section 399.16 (d) does not apply directly to POUs. Public Utilities Code section 399.16 is cross referenced in Public Utilities Code section 399.30 (c)(3), which directs POUs to adopt procurement requirements "consistent with Section 399.16." If Public Utilities Code section 399.16 (d) is interpreted to apply to POUs at all, it must apply the same way it applies to retail sellers and subject to the same "rules in place." Applying the Energy Commission's RPS eligibility requirements to procurement retired to meet a POU's compliance obligations for January 1, 2011, or later does not retroactively apply RPS rules to POUs, as SCPPA contends. Rather, the regulations appropriately apply rules to POUs consistent with the rules established for retail sellers, as specified by statute. In addition, the Energy Commission does not believe that the legislative committee hearing transcripts for SB X1-2 supports the parties' position. While the legislative history of SBX1-2 specifically refers to "grandfathered"

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products generated by the facility by virtue of facility ownership. Electricity products procured under the latter are considered to have been procured through "ownership agreements."

[50] Subdivision (n) of Public Utilities Code section 399.30 was subsequently renumbered as a result of amendments under AB 2227 (Stats. 2012, ch. 606), SB 591 (Stats. 2013, ch. 520), and SB 350 (Stats. 2015, ch. 547). It provisions are now included subdivision (o) of Public Utilities Code section 399.30. The CEC's regulations adopted pursuant to this authority are commonly referred to as the "POU RPS regulations."

contracts, as SCPPA indicates in its comments, the language of the statute itself does not evince a desire by the Legislature to "grandfather" all contracts entered into by POUs prior to June 1, 2010. Had the Legislature intended to grandfather all such contracts it could have explicitly stated so in SBX1-2. Instead, SBX1-2 establishes grandfathering provisions for only certain contracts and ownership agreements, subject to requirements of Public Utilities Code section 399.16 (d).

The Legislature clearly did not intend to grandfather "all contracts," as that would include contracts and ownership agreements for all non-renewable resources as well. The reference to "existing renewable energy contracts" in the legislative history cited by SCPPA should properly be interpreted to mean contracts and ownership agreements with "eligible renewable energy resources" as defined in statute and the *RPS Eligibility Guidebook*. Otherwise, POUs would be allowed to claim (toward their RPS procurement requirements under SBX1-2) procurement that was not considered renewable at the time of the contract or ownership agreements. An example of this is procurement from large hydroelectric generation facilities greater than 30 megawatts (MW) in capacity. Prior to SBX1-2, the RPS statute for retail sellers allowed only procurement from small hydroelectric generation facilities 30 MW or less in capacity to qualify for the RPS.[51] POUs were not subject to this size limitation for hydroelectric generation facilities under former Public Utilities Code section 387, which merely required that POUs implement and enforce a RPS program "that recognizes the intent of the Legislature to encourage renewable resources."[52] Public Utilities Code section 387 gave POUs discretion to establish their own RPS rules, which allowed POUs to use procurement from large hydroelectric facilities to meet their own self-established RPS programs. And POUs such as LADWP (a member of SCPPA) utilized procurement from its existing hydroelectric generation units[53] less than 40 MWs in capacity to meet its RPS requirements under Public Utilities Code section 387.

The law has now been revised under SBX1-2 to allow hydroelectric generation units of 40 MW or less in capacity to qualify for the RPS under certain circumstances. This exception to the 30 MW limitation[54] for small hydroelectric generation facilities is set forth in Public Utilities Code section 399.12 (e)(1)(A). Had the Legislature intended to "grandfather" all contracts and ownership agreements entered into by POUs prior June 1, 2010, as SCPPA and LADWP insist, there would have been no need to create an express exemption for hydroelectric units 40 MW or smaller in size. These 40 MW units would have qualified for the RPS under SBX1-2 by virtue of their existing contracts or

[51] This requirements was set forth in then-existing Public Utilities Code section 399.12 (c) and Public Resources Code section 25741 (b)(1). Although not pertinent to this discussion, the law also allowed generation associated with certain efficiency improvements to hydroelectric facilities greater than 30 MW to qualify for the RPS under Public Utilities Code section 399.12.5.

[52] Former Public Utilities Code section 387 (a). Section 387 was repealed by SBX1-2.

[53] A hydroelectric generation facility is often comprised of multiple hydroelectric generation units. For example, a 60 MW hydroelectric generation facility may be comprised to three separate 20 MW generating units.

[54] The 30 MW limitation for small hydroelectric facilities remain in law under Public Utilities Code section 399.12 (e)(1)(A) and Public Resources Code section 25741 (a)(1).

> ownership agreements under a POU's pre-June 1, 2010 RPS program. The fact that the Legislature created an express exemption for these 40 MW hydroelectric units indicates the Legislature did not intend to "grandfather" POU contracts and ownership agreements for such units."
> (*Final Statement of Reasons, Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities*, July 2013, pub. no. CEC-300-2013-004-F, Attachment A, pp. A-15 – A-17, TN 213289.)

The CEC's explanation in the Final Statement of Reason was in response to public comments on the regulations LADWP and the Southern California Public Power Authority (SCPPA) regarding the "rules in place" language in the statute.

The Final Statement of Reason was reviewed and considered by the Office of Administrative Law in approving the CEC's regulations establishing enforcement procedures for the RPS for POUs.[55] These regulations are set forth in the California Code of Regulations, Title 20, sections 1240 and 3200 – 3208.

LADWP's 2009 Shell and Atmos Contracts Do Not Meet the Elements of Public Utilities Code section 399.16(d)

Electricity generation that results from biomethane procured under the 2009 Shell and Atmos contracts may qualify as "count in full" procurement to satisfy LADWP's RPS procurement requirements if the generating facility satisfies the CEC's eligibility requirements specified in the RPS Eligibility Guidebook in place at the time the contract or ownership agreement was executed. LADWP's claimed use of biomethane under the 2009 Shell and Atmos contracts for the Scattergood, Harbor, Valley and Haynes facilities arguably commenced in August and September of 2009 when these contracts were executed. It was at that point in time that the facilities could be characterized as "eligible renewable energy resources" for the RPS based on the use of biomethane under the 2009 Shell and Atmos contracts. The applicable "rules in place" at that time for purposes of determining RPS eligibility of the LADWP's facilities were the rules specified in the CEC's Third Edition Guidebook. The Third Edition Guidebook was in effect from the date of adoption on December 19, 2007, until replaced by the CEC's adoption of the Fourth Edition Guidebook on December 15, 2010.

[55] Refer to the Office of Administrative Law approval notice and memo, dated August 28, 2013, TN 213297.

LADWP's procurement of electricity products from the claimed use of biomethane under the 2009 Shell and Atmos contracts at the Scattergood, Harbor, Valley and Haynes facilities may qualify for the RPS only if the facilities satisfy the RPS eligibility requirements specified in the Third Edition Guidebook. If so, the procurement of electricity may only qualify as "count in full" procurement since it occurred prior to June 1, 2010.

b. Explain what "report" means as used in section 399.12.6(a)(1).

"Report" as used in 399.12.6(a)(1) refers to reporting to CEC in connection with applications for certification. LADWP satisfied this reporting requirement when it applied for certification of the subject biomethane facilities.

The meaning of "report" is addressed in the *Concept Paper for the Implementation of Assembly Bill 2196 for the Renewables Portfolio Standard.* As discussed in Section 3 of the Concept Paper, Staff believes "report" refers to the biomethane source and quantity under a contract that was reported to the CEC as part of a complete application for RPS precertification or RPS certification that was received by the CEC before it suspended its biomethane eligibility guidelines on March 28, 2012. Staff believes that the Legislature intended to allow eligibility of facilities using biomethane for the RPS under executed contracts with identified sources and quantities that were already RPS certified, precertified, or had pending applications for RPS certification with the CEC prior to the March 29, 2012. Staff presumes that if this information was reported to the CEC prior to March 29, 2012, the contract for biomethane procurement was executed before March 29, 2012. Generation from facilities using biomethane from sources that were not reported to the CEC in an application for RPS certification or precertification before March 29, 2012, would not be eligible and would not count toward a retail seller or POU's RPS procurement requirements unless the facility met the additional requirements of Public Utilities Code Section 399.12.6(b). (Refer to discussion above and to the *Concept Paper for the Implementation of Assembly Bill 2196 for the Renewables Portfolio Standard,* p. 3, TN 213287.)

c. Explain what "under the rules in place at the time the contract was executed" means both times the phrase is used in section 399.12.6(a)(1).

The first reference to "under the rules in place at the time the contract was executed" in section 399.12.6(a)(1) refers to CEC's requirements for the procurement of

biomethane for purposes of *certifying* an electrical generating facility. The second reference to "under the rules in place at the time the contract was executed" section 399.12.6(a)(1) refers to the requirements for *classifying* the procurement of biomethane-based electricity generation. An explanation of this difference is included in the response to Question 2.a. under the discussion of 399.12.6(a).

d. Explain how the three grandfathering provisions can be harmonized.

The three sections, enacted under different legislation, address different aspects of the RPS and as applied by Staff do not conflict and are in harmony.

The provisions of Public Utilities Code sections 399.12(e)(1)(C), 399.12.6(a), and 399.16(d) were enacted under different legislation. Public Utilities Code sections 399.12(e)(1)(C) and 399.16(d) were enacted under Senate Bill X1-2 (Stats. 2011, 1st ex. Sess., ch. 1) and Public Utilities Code section 399.12.6(a) was enacted under Assembly Bill 2196 (Stats. 2012, Ch. 605).

As discussed above in response to Question 2.a, the provisions of Public Utilities Code sections 399.12(e)(1)(C), 399.12.6(a), and 399.16(d) address different aspects of the RPS. These provisions are not in conflict as construed and interpreted by Staff and the CEC.

If the "rules in place" provisions of Public Utilities Code sections 399.12.6(a) or 399.16(d) are construed to mean a POU's rules, rather than the CEC's rules for certifying electrical generation facilities for the RPS, as LADWP has argued, then there would conflicts in how the law is interpreted and applied. There would be one set rules for certifying facilities for the RPS for retail sellers (the rules of the CEC) and a different set of rules for certifying facilities for the RPS for POUs. In fact, since there were 44 separate POUs when SBX1-2 was enacted, there could be 44 different sets of rules for the POUs; one set rules of each POU that established an RPS program under former Public Utilities Code section 387.

Having different sets of rules for retail sellers and POUs, and different sets of rules among the various POUs is not consistent with the statutory scheme established by Legislature under SBX1-2. SBX1-2 contemplates a single, statewide RPS program that subjects POUs to the same RPS certification requirements applicable to retail sellers. This is evinced by the provisions of Public Utilities Code section 399.25(a), which charges the CEC with certifying eligible

renewable energy resources for the RPS for both retail sellers and POUs. This is also evinced by the repeal of Public Utilities Code section 387.

A single set of rules will result in a more uniform implementation and application of the RPS program. It makes no sense to certify a facility differently for the RPS depending on which utility, retail seller or POU, purchases electricity generation from the facility. Likewise, it makes no sense to certify a facility differently depending on which of two POUs purchase electricity generation from the facility. Consistency in the application of the certification rules among POUs and between POUs and retail sellers may ease the contracting processes for utilities, developers of eligible renewable energy resources, and other market participants, thereby accelerating the development of new eligible renewable energy resources, which in turn helps promote the underlying goals of the RPS.

IV. RESPONSE TO QUESTION 3

Provide a list, together with the text, of all of the eligibility and procurement rules in place on the date(s) the 2009 Shell and Atmos contracts and the BC Hydro contracts were executed.

The rules in place applicable to the 2009 Shell and Atmos contracts are those from the Third Edition Guidebook, including requirements concerning biogas injected into a natural gas pipeline, applications for RPS certification, tracking, verifying, and reporting.

The rules in place applicable to the BC Hydro contracts are those from the Second Edition Guidebook including requirements concerning certification of small hydroelectric generation facilities, new or repowered small hydroelectric generation facilities that commence operations on or after January 1, 2006, including those within and outside of California, applications for RPS certification, tracking, verifying, and reporting.

At the time the 2009 Shell and Atmos contracts and the BC Hydro contracts were executed, POUs also had voluntary renewable resource programs under former Public Utilities Code section 387. However SBX1-2 repealed former Public Utilities Code section 387 and sought to created a uniform statewide program. The 44 sets of POU rules are not the rules in place under the statewide RPS program as argued by LADWP.

As discussed in the response to Question 1.c, the Third Edition Guidebook was in effect when the 2009 Shell and Atmos contracts were executed. The Third Edition Guidebook was adopted by the CEC on December 19, 2007, and remained in effect until the Fourth Edition

Guidebook, was adopted by the CEC on December 15, 2010. Therefore, the eligibility rules in the Third Edition Guidebook would apply to the RPS certification of LADWP's Scattergood, Harbor, Valley and Haynes facilities based on use biomethane procured under the 2009 Shell and Atmos contracts. This assumes that LADWP chose to apply to the CEC for RPS certification of the Scattergood, Harbor, Valley and Haynes facilities in 2009 when LADWP executed its biomethane contracts with Shell and Atmos in 2009.

In 2009, POUs were not required to meet their RPS procurement requirements with electricity generation from facilities certified by the CEC. However, the CEC encouraged POUs to meet their RPS procurement requirements with generation from facilities certified for the RPS by the CEC, and it did certified facilities for the RPS if the facilities served a POU.[56] For example, the CEC certified SMUD's Cosumnes Power Plant facility for the RPS in June 2009 based on the use biomethane procured by SMUD in 2009.

As discussed in the response to Question 1.b, the Third Edition Guidebook specifies the following requirements for certifying facilities based on the use of biogas injected into a natural gas transportation pipeline system.

Biogas Injected into a Natural Gas Pipeline

> RPS-eligible biogas (gas derived from RPS-eligible fuel biomass or digester gas) injected into a natural gas transportation pipeline system and delivered into California for use in an RPS-certified multi-fuel facility may result in the generation of RPS-eligible electricity. The biogas must meet strict heat content and quality requirements within a narrow band of tolerance to qualify as pipeline-grade gas.
>
> Quantifying RPS-eligible energy production requires accurate metering of the volume of biogas injected into the transportation pipeline system and the measured heat content of the injected gas. Although blending the biogas into the transportation pipeline system mixes the biogas with other pipeline gas, natural gas regulations require gas entering the system to be "nominated" for use at a specific power plant or to a pipeline system owned by a publicly owned utility or other load-serving entity (LSE). Consequently, the amount and energy content of the biogas or other RPS-eligible gas produced can be measured and either nominated for use at a specific power plant or nominated to a pipeline system owned by an LSE. If the biogas is nominated to a pipeline system, the owner of the system must designate the facility in which the biogas will be used.

[56] Refer to the *Renewables Portfolio Standard Eligibility Guidebook, Third Edition*, December 2007, publication no. CEC-300-2007-006-ED3-CMF, pp. 28, TN 213249.

The operator of a facility to which biogas is nominated (or designated) must certify its facility as RPS-eligible, recognizing that the facility will use a blend of RPS-eligible and ineligible fuel.

The amount of RPS-eligible electricity produced shall be calculated by multiplying the generation of the facility (MWh) by the ratio of the biogas used and the total gas (biogas and natural gas) used by the facility. The electricity generated and gas used must be measured over an equal period (such as MWh produced per month and gas used per month)."

Any production or acquisition of gas that is directly supplied to the gas transportation pipeline system and used to produce electricity may generate RPS-eligible electricity as follows:

1. The gas must be produced from an RPS-eligible resource, such as biomass or digester gas.

2. 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. The energy content produced and supplied to the transportation pipeline system must be measured on a monthly basis and reported annually, illustrated by month. Reporting shall be in units of energy (for example, MMBtu) based on metering of gas volume and adjustment for measured heat content per volume of each gas. In addition, the total amount of gas used at the RPS-eligible facility must be reported in the same units measured over the same period, and the electricity production must be reported in MWh.

4. The gas must be used at a facility that has been certified as RPS-eligible. As part of the application for certification, the applicant must attest that the RPS-eligible gas will be nominated to that facility or nominated to the LSE-owned pipeline serving the designated facility.

5. In its annual RPS Procurement Verification report, the Energy Commission will calculate the RPS-eligible energy produced using the same methodology discussed above.

When applying for RPS pre-certification, certification, or renewal, the application must include the following: 1) an attestation from the multi-fuel facility operator of its intent to procure biogas fuel that meets RPS eligibility criteria, and 2) an attestation from the fuel supplier that the fuel meets eligibility requirements.

In addition to the certification or pre-certification application, applicants for biogas facilities must complete a supplemental application form."

(*Renewables Portfolio Standard Eligibility Guidebook, Third Edition*, pp. 20-21, TN 213249.)

Apart from the biogas-specific requirements listed above, the Third Edition Guidebook includes requirements to apply for RPS certification and requirements for tracking, verifying and reporting to the CEC a facility's electricity generation and its delivery. Requirements to apply for RPS certification are specified in Section III of the Third Edition Guidebook.[57] Requirements for tracking, verifying and reporting a facility's electricity generation and its delivery are specified in Section IV of the Third Edition Guidebook.[58] The Third Edition Guidebook also includes additional requirements for facilities that are located out-of-state, for repowered facilities, and facilities that utilize certain technologies or renewable resources. However, these additional requirements would not apply to the certification of the Scattergood, Harbor, Valley and Haynes facilities, because these facilities are located in-state, were not repowered, and do not utilize those certain technologies or renewable resources.

The Third Edition Guidebook did not specify any RPS procurement requirements for retail sellers or POUs. It specified RPS certification requirements for electrical generation facilities from which a retail seller could procure electricity generation to satisfy the retail seller's RPS procurement requirements. RPS procurement requirements for retail sellers were established by the CPUC.[59] RPS procurement requirements for POUs in 2009 would have been established by the POU itself as part of a POU's RPS program implemented pursuant to former Public Utilities Code section 387. If a POU's RPS program under section 387 required electrical generation facilities to be RPS-certified by the CEC, then those facility would have had to satisfy the requirements specified in the Third Edition Guidebook to become RPS-certified. LADWP's RPS program in place in 2009 does not appear to require electrical generation facilities to be RPS-certification by the CEC.[60]

Starting in 2011 with the enactment of SBX1-2, retail sellers and POUs were both required to procure electricity generation from facilities certified for the RPS by the CEC in order for the retail seller or POU to count the procurement of that generation to satisfy its RPS

[57] Refer *RPS Eligibility Guidebook, Third Edition*, pp. 28-31, TN 213249.
[58] Refer *RPS Eligibility Guidebook, Third Edition*, pp. 45-50, TN 213249.
[59] Refer to discussion on RPS procurement requirements for retail sellers in Section II.A of the *RPS Eligibility Guidebook, Third Edition*, pp. 7-8, TN 213249.
[60] Refer to LADWP's RPS Policy of April 2008, TN 212409.

procurement requirements.[61] If LADWP wants to count electricity generation from its Scattergood, Harbor, Valley and Haynes facilities to satisfy LADWP's RPS procurements requirements under SBX1-2, these facilities must be certified for the RPS by the CEC. As discussed in the response to Question 2, the RPS certification requirements of the Third Edition Guidebook would apply for certifying the Scattergood, Harbor, Valley and Haynes facilities based on the use biomethane procured under the 2009 Shell and Atmos contracts, because these contracts were executed when the Third Edition Guidebook was in effect.

Rules Covering the BC Hydro Contracts

The eligibility rules in the Second Edition Guidebook would apply to the RPS certification of the BC Hydro facilities, since the Second Edition Guidebook was adopted on March 14, 2007 and was in effect in March and October 2007 when LADWP executed its two contracts with Powerex Corp. to procure electricity generation from the BC Hydro facilities.[62] This assumes that LADWP chose to apply to the CEC for RPS certification of the BC Hydro electrical generation facilities in 2007 when LADWP executed its contracts with Powerex Corp.

In 2007, POUs were not required to meet their RPS procurement requirements with electricity generation from facilities certified by the CEC. However, the CEC encouraged POUs to meet their RPS procurement requirements with generation from facilities certified for the RPS by the CEC, and it did certify facilities for the RPS if the facilities served a POU.[63]

The Second Edition Guidebook specifies the following requirements for the RPS certification of small hydroelectric generation facilities with a nameplate capacity of 30 MW or less.

> **"a. Small Hydroelectric (not conduit)**
> The RPS eligibility of small hydroelectric facilities depends in part on whether the facility was operational on or after January 1, 2006, and whether energy efficiency improvements were made after January 1, 2003.

[61] Refer to Public Utilities Code section 399.25(a), as amended by SBX1-2, which provides in pertinent part: "The Energy Commission shall . . . (a) Certify eligible renewable energy resources that it determines meet the criteria described in subdivision (e) of Section 399.12."
[62] Refer to LADWP's Power Purchase Agreement with Powerex Corp., DWP No. BP 05-020-A, executed March 28, 2007, TN 212419. Also refer to LADWP's Power Purchase Agreement with Powerex Corp., DWP No. BP 05-020-B, executed October 21, 2007, TN 212420.
[63] Refer to the *Renewables Portfolio Standard Eligibility Guidebook, Second Edition*, March 2007, publication no. CEC-300-2007-006-CMF, p. 30, TN 213298.

RPS Eligibility

- January 1, 2006: Generation from a small hydroelectric facility that commenced commercial operations before January 1, 2006, is eligible for the California RPS if the facility meets all of the following criteria:
  1. The facility is 30 MW or less, with an exception for eligible efficiency improvements as discussed below.
  2. The facility is located in-state or satisfies the out-of-state requirements.
  3. The facility was under contract to, or owned by, a retail seller as of January 1, 2006.

  Eligible Efficiency Improvements: A small hydroelectric facility shall not lose its RPS eligibility if efficiency improvements undertaken after January 1, 2003, cause it to exceed 30 MW and do not require a new or increased appropriation or diversion of water from a watercourse. The entire generating capacity of the facility shall be RPS-eligible.

- Post-January 1, 2006: Generation from a small hydroelectric facility that commences commercial operations or is repowered on or after January 1, 2006, is eligible for the California RPS if the facility meets all of the following criteria:
  1. The facility is 30 MW or less, with an exception for eligible efficiency improvements, as discussed below.
  2. The facility is located in-state or satisfies the out-of-state requirements.
  3. The facility does not require a new or increased appropriation or diversion of water from a watercourse.

  Eligible Efficiency Improvements: A small hydroelectric facility shall not lose its RPS eligibility if efficiency improvements undertaken after the facility commences commercial operations cause it to exceed 30 MW and do not require a new or increased appropriation or diversion of water from a watercourse. The entire generating capacity of the facility shall be RPS-eligible."
  (*Renewables Portfolio Standard Eligibility Guidebook, Second Edition*, pp. 14-15, TN 213298.)

In addition, the Second Edition Guidebook specifies the following requirements for new or repowered small hydroelectric generation facilities that commence operations on or after January 1, 2006.

> "For purposes of new or repowered small hydroelectric and conduit hydroelectric facilities, and efficiency improvements to these facilities, the terms "appropriation" and "diversion" shall be defined as follows:
>
> "Appropriation" shall be defined in a manner consistent with Water Code Section 1201 to mean the right to use a specified quantity of water from any surface streams or other

surface bodies of water or from any subterranean streams flowing through known and definite channels.

"Diversion" shall be defined in a manner consistent with Water Code Section 5100(b) to mean the taking of water by gravity or pumping from a surface stream or subterranean stream flowing through a known and definite channel, or other body of surface water, into a canal, pipeline, or other conduit, and includes impoundment of water in a reservoir.

Hydroelectric Facilities Located within California

A new or repowered small hydroelectric facility or conduit hydroelectric facility located within California is NOT eligible for the RPS or SEPs[64] if it requires any of the following:

1. A new permit from the State Water Resources Control Board (SWRCB) for a new appropriation of water.

2. A new permit or license from the SWRCB for a new diversion of water.
3. An increase in the volume or rate of water diverted if the increase would require a new permit or approval of a time extension petition from the SWRCB.

4. An increase in the volume or rate of water diverted under an existing right, even if such an increase would not require a water right permit or license from the SWRCB.

If a new or repowered small hydroelectric facility or conduit hydroelectric facility can demonstrate that it may operate without a new or increased appropriation or diversion of water, it may be eligible for the RPS and SEPs. For example, a small hydroelectric facility that can operate by simply adding hydroelectric power generation as an authorized purpose of use to its existing SWRCB permit or license may be eligible for the RPS and SEPs if this change in use does not require a new appropriation and does not increase the volume or rate of water diverted beyond that which otherwise would be diverted under that permit or license.

Hydroelectric Facilities Located Outside California

A new or repowered small hydroelectric facility or conduit hydroelectric located outside California is NOT eligible for the RPS or SEPs if it requires any of the following:

1. A new permit or license from any government body for a new appropriation of water.

2. A new permit or license from any government body for a new diversion of water.

3. An increase in the volume or rate of water diverted under an existing right, even if such an increase would not require a new permit or license from any government body.

[64] "SEPs" refer to supplemental energy payments which were available under certain conditions to help cover the above market cost of procuring eligible renewable energy resources. (Refer *Renewables Portfolio Standard Eligibility Guidebook, Second Edition*, p. 1, TN 213298.)

If a new or repowered small hydroelectric facility or conduit hydroelectric facility located outside California can demonstrate that it may operate without a new or increased appropriation or diversion of water, it may be eligible for the RPS and SEPs. For example, a small hydroelectric non-conduit or conduit facility that can operate by simply adding hydroelectric power generation as an authorized purpose of use to its existing government permit or license may be eligible for the RPS and SEPs if this change in use does not require a new appropriation or increased diversion and does not change the volume or rate of water withdrawn or released under that permit or license.

The applicant is responsible for showing that its facility qualifies for the RPS or SEPs. Information required of applicants for small hydroelectric or conduit hydroelectric facilities is discussed in the section on certification."
(*Renewables Portfolio Standard Eligibility Guidebook, Second Edition*, pp. 17-19, TN 213298.)

In addition, the Second Edition Guidebook specifies the following eligibility requirements for electrical generating facilities that are located out-of-state and have their first point of interconnection to the Western Electricity Coordinating Council (WECC) transmission system outside the state.

"**D. Eligibility of Out-of-State Facilities**

This section applies to renewable facilities that are located out-of-state and have their first point of interconnection to the WECC transmission system outside the state, as defined in the *Overall Program Guidebook*. Facilities that have their first point of interconnection to the WECC transmission system within the state are considered to be in-state facilities and are not subject to the requirements of this section for purposes of RPS or SEP eligibility. Out-of-state facilities that are not or will not be interconnected to the WECC transmission system are not eligible for the RPS.

Note that the delivery requirements described here for out-of-state facilities do not apply to electric corporations that serve retail end-use customers outside California and have 60,000 or fewer customer accounts in California under Public Utilities Code Section 399.17. Section 399.17 modifies the definition of an eligible renewable energy resource to include out-of-state facilities for certain electric corporations, such as PacifiCorp and Sierra Pacific Power, which serve customers both in and outside California.

Generation from renewable facilities located out-of-state is potentially eligible for both the RPS and SEPs. To qualify for the RPS or SEPs, generation from an out-of-state facility must meet the RPS eligibility requirements described above and must satisfy all of the following criteria.

//

a) Is located so that it is or will be connected to the WECC transmission system.

b) Commences initial commercial operations on or after January 1, 2005, (except in the case of small hydroelectric and conduit hydroelectric facilities, which must commence initial commercial operations on or after January 1, 2006, and January 1, 2007, respectively, to qualify for SEP eligibility).

c) Demonstrates delivery of its generation to an in-state market hub or in-state location, as specified in the delivery requirements below.

d) Does not cause or contribute to any violation of a California environmental quality standard or requirement.

e) If located outside the United States, it is developed and operated in a manner that is as protective of the environment as a similar facility located in California.

f) Participates in an RPS tracking and verification system approved by the Energy Commission.

g) Satisfies the "Delivery Requirements" set forth below.

If the facility meets all of the above criteria except it commenced commercial operations before January 1, 2005 (criterion "b" above), then it may be RPS-eligible (but not SEP-eligible) if it meets one of the following two criteria:

a) The electricity is from incremental generation resulting from project expansion or repowering of the facility, or

b) The facility is part of a retail seller's existing baseline procurement portfolio as identified by the CPUC.

For retail sellers that serve end-use customers outside California and have 60,000 or fewer customer accounts in California under Public Utilities Code Section 399.17, such as PacifiCorp and Sierra Pacific Power, electricity procured from a facility located out-of-state must, in lieu of the foregoing criteria, meet the following criteria to be eligible for the RPS:

a) The generation must be procured by the retail seller on behalf of its California customers and is not used to fulfill its renewable energy procurement requirements in other states or any other renewable energy retail claim.

b) The facility is connected to the WECC.

c) The facility and retail seller must participate in an RPS tracking and verification system approved by the Energy Commission.

Generation procured by retail sellers under Public Utilities Code Section 399.17 is not eligible for SEPs.

E. Delivery Requirements

For purposes of RPS compliance, electricity is deemed delivered if it is either generated at a location within the state or is scheduled for consumption by California end-use retail customers as specified in Public Resources Code Section 25741, Subdivision (a). Consequently, electricity generated by facilities located in-state or having their first point of interconnection to the WECC transmission system in-state satisfies California RPS delivery requirements.

To count generation from out-of-state facilities for purposes of RPS compliance, the facility must enter a power purchase agreement with the retail seller or procurement entity and electricity must be delivered to an in-state market hub (also referred to as "zone") or in-state point of delivery (also referred to as "node") located within California. The retail seller or procurement entity and Seller may negotiate which party is responsible for securing transmission at any point along the delivery path as long as the energy is delivered into California. The retail seller or procurement entity may document delivery from a control area operator (also referred to as "balancing authority") in the WECC transmission system. The Energy Commission will compare the amount of RPS-eligible energy generated by the RPS-eligible facility per calendar year with the amount of energy delivered into California for the same calendar year and the lesser of the two amounts may be counted as RPS-eligible procurement (for more discussion see "verification of delivery"). The generation from the facility must be under a power purchase agreement with the retail seller or procurement entity. The delivery must be made consistent with North American Electric Reliability Corporation (NERC) rules and documented with a NERC tag as described below.

The following deliverability requirements were developed in consultation with the California ISO. These requirements must be satisfied for an out-of-state facility to qualify for the RPS or SEPs (with the exception noted above for retail sellers subject to Public Utilities Code Section 399.17). The delivery requirements do not apply to facilities located outside of California whose first point of interconnection to the WECC transmission system is located in California.

1. The retail seller, procurement entity, or facility representative must either (a) arrange for an interchange transaction with the California ISO to deliver the facility's energy to a point of delivery in California, or (b) arrange for an interchange transaction with another balancing authority to deliver energy to the point of delivery in California. In accordance with the policies of the NERC, the interchange transaction must be tagged as what is commonly referred to as a "NERC tag," which requires, among other things, that information be provided identifying the Generation Providing Entity, the "Source" or "Point of Receipt," the physical transmission path for delivery showing intermediary "Points of Delivery," the contract or market path, the final Point of

Delivery or load center known as the "sink," and the Load Serving Entity responsible for the consumption of electricity delivered.

2. The Source identified on the NERC tag may be a specific RPS-eligible facility registered as a unique source or may be any balancing authority located in the WECC.

3. The RPS certification number of the facility or facilities (or RPS pre-certification number, in the case of local publicly-owned electric utilities) that is/are engaged in a power purchase agreement with a retail seller or procurement entity (or local publicly-owned electric utility implementing these delivery requirements as part of compliance with its RPS) must be shown on the comment field of the NERC tag.

4. The facility must provide the Energy Commission with its NERC identification (Source point name)[65] if it registers as a unique source, or the Source point name of its balancing authority when it applies for RPS certification.

5. The facility representative, retail seller, or procurement entity (or local publicly-owned electric utility implementing these delivery requirements as part of compliance with its RPS) must request and receive acceptance of a NERC tag between a balancing authority in California and a balancing authority in WECC.

6. The applicable parties (the Generation Providing Entity and Load Service Entities) must agree to make available upon request documentation of the NERC tag to the Energy Commission. On May 1 of each year (or the next business day), the retail seller or procurement entity must submit an annual report documenting compliance with this NERC tag requirement for the previous calendar year to the Energy Commission.

7. The facility must submit verification of its generation to the Energy Commission annually. Please refer to the section on the "Generation Tracking System." The Energy Commission will use these data to verify the actual generation of power that was scheduled for delivery via NERC tags.

8. If a facility has obtained a SEP award, the Energy Commission will verify that SEPs were granted only for generation that satisfies delivery requirements. For more information, please refer to the *New Renewable Facilities Program Guidebook*."

(*Renewables Portfolio Standard Eligibility Guidebook, Second Edition*, pp. 25-28, TN 213298.)

The Second Edition Guidebook also includes requirements to apply for RPS certification and requirements for tracking, verifying and reporting to the CEC a facility's electricity

[65] The NERC identification is the Source point name, an alpha-numeric code the generator uses to identify itself when it registers with the Transmission Services Information Network (TSIN). Registration with TSIN is mandatory for participation in the NERC tagging system.

generation and its delivery. Requirements to apply for RPS certification are specified in Section III of the Second Edition Guidebook.[66] Requirements for tracking, verifying and reporting a facility's electricity generation and its delivery are specified in Section IV of the Second Edition Guidebook.[67]

Regarding the certification process, the Second Edition Guidebook requires applicants for RPS certification to submit supplemental information for certain resources, including small hydroelectric facilities and facilities located outside of California. With respect to small hydroelectric facilities and facilities located outside of California, the Second Edition Guidebook specifies the following.

> **"D. Supplemental Information**
>
> The following supplemental instructions apply to applications for biomass, small hydroelectric (including conduit hydroelectric), and MSW/solid waste conversion facilities. Supplemental instructions are also included for applicants seeking certification or pre-certification of repowered facilities and facilities located outside California. The information described below must be submitted as an attachment to the applicant's completed CEC-RPS-1A or CEC-RPS-1B form, along with the appropriate supplement form.
> **[. . .]**
>
> **2. Supplemental Instructions for Small Hydroelectric and Conduit Hydroelectric Facilities**
>
> An applicant must provide additional information to substantiate its self-certification that a small hydroelectric facility or conduit hydroelectric facility is eligible for the RPS or SEPs if the facility:
>
> - Commenced commercial operations or was repowered on or after January 1, 2006, for small hydro facilities and after January 1, 2007, for conduit hydroelectric facilities.
> - Was added to an existing water conduit.
> - Was subject to efficiency improvements undertaken after January 1, 2003 that caused it to exceed 30 MW.
>
> Supplemental water-use data and documentation described below must be attached to a completed CEC-RPS-1A (for certification) or CEC-RPS-1B (for pre-certification) form. These requirements apply to facilities located within California as well as those located out-of-state. Applicants possessing a permit or license from the State Water Resources

[66] Refer *RPS Eligibility Guidebook, Second Edition*, pp. 29-33, TN 213298.
[67] Refer *RPS Eligibility Guidebook, Second Edition*, pp. 46-50, TN 213298.

Control Board (SWRCB) – or from another governing body, if located out-of-state – must submit a copy of the permit or license as well as the application for the permit or license.

1. Name of the Facility

2. Ownership of the Facility

3. Source Water Description

   The application must identify the source of the water for the small hydro project. The source must be characterized as surface, groundwater, or other (for example, recycled water). For surface water sources, a map at a scale of 1:24,000 must be provided. The map should also identify the location of the diversion point and all other facilities. In addition, a written description of the location of the diversion should be provided (county and nearest city) as well as the name of the body of water at the point of diversion. For groundwater, the location of the well(s) and conveyance facilities shall be identified on a map of 1:24,000 scale. The applicant must also specify how much water is used for each of the identified beneficial uses.

4. Water Rights

   Both in-state and out-of-state applicants must clearly establish their right to divert water by submitting all necessary information as well as all appropriate licenses or permits. Within California, this information must establish the applicant's legal right to appropriate or divert water and identify the permitted volume and rate of water diversions, the place of diversion, and beneficial uses. This may be achieved through submittal of the appropriate SWRCB appropriation permit or license, or the Statement of Water Diversion and Use filed with SWRCB. Out-of-state facilities must provide similar documentation of an existing water right for the water diversion of the project.

5. Hydrologic Data

   The applicant must submit appropriation and/or diversion data for the last five years, or for the period of operation if the project has been operating less than five years. Information contained in any legally required reports may be used to meet this requirement if sufficient information is included in the report. For other projects, the hydrologic data submitted must be accompanied by a description of how the data is collected. Flow data shall be provided at the frequency set forth in the applicable water appropriation permit; for example, if the permit specifies minimum and maximum flows on a monthly basis that is the level of information necessary to be submitted.

6. Other Permits

The applicant must submit all other applicable permits, including those permits and exemptions issued by the Federal Energy Regulatory Commission (FERC).

7. Environmental Documentation

   The applicant must submit copies of any permits, agreements, contracts, or other requirements affecting the operation of the facility, especially those that affect the volume and rate of flows.

8. Capacity

   The applicant must demonstrate how the project will comply with the size limitations under the RPS. For repowering projects, the applicant must describe how capacity will be increased without an increase in the appropriation and/or diversion of water or a change in the volume or rate of flows.

9. Efficiency Improvements

   Applicants seeking certification of hydro facilities that exceed 30 MW due to efficiency improvements are required to provide the following:

   a) Verifiable generation data for the 10 years preceding efficiency improvements (if the facility has not been operating 10 years, then provide data for the years it has been operational).

   b) The actual or expected efficiency improvement and increase in production in MWh resulting from the efficiency improvement and a discussion of the methodology used to estimate increased energy production. If production data are available for years following the efficiency improvement, provide those data.

   c) Evidence that the efficiency improvement from the facility resulted (or will result if the applicant is seeking pre-certification) from a capital expenditure in the project. The capital investment must exclude monies that would have been spent on operation and maintenance in the normal course of doing business. The applicant must provide a brief description of each capital investment made for project efficiency, including a discussion of the nature of the capital investments and how they resulted in efficiency improvements. In substantiating an application, the burden of proof will be on the applicant to submit compelling evidence to demonstrate the effect of the capital investments on improving facility

[. . .]

4. Supplemental Instructions for Out-of-State Facilities

All out-of-state facilities must provide additional information when applying for certification as RPS-eligible. Further reporting requirements apply to facilities that commenced commercial operations before January 1, 2005, as described below.

The supplemental reporting requirements for out-of-state facilities do not apply, however, to a facility that is:

1) Exclusively serving retail sellers subject to Public Utilities Code Section 399.17, or

2) Seeking pre-certification and is not yet on-line.

Representatives of all other out-of-state facilities seeking certification as RPS- or SEP-eligible must submit the following additional information with a completed CEC-RPS-1A form.

1. Impact on California Environmental Quality Standards: The applicant must provide a) a comprehensive list and description of all California environmental quality laws, ordinances, regulations, and standards (collectively referred to as "LORS") that may be directly or indirectly impacted by the facility's development or operation, and b) an assessment as to whether the facility's development or operation will cause or contribute to a violation of any of these LORS in California.

   At a minimum, the LORS described shall address the following environmental areas consistent with Appendix B, Section (g), of the Energy Commission's regulations for power plant certification, Title 20, California Code of Regulations, Sections 1701, et seq:
   - Cultural Resources
   - Land Use
   - Traffic and Transportation
   - Visual Resources
   - Socioeconomics
   - Air Quality
   - Public Health
   - Hazardous Materials Handling
   - Workers' Safety
   - Waste Management
   - Biological Resources
   - Water Resources
   - Agriculture and Soil
   - Paleontologic Resources
   - Geological Hazards and Resources
   - Transmission System Safety and Nuisance

The applicable LORS for a given facility will vary depending on the facility's location, since the LORS across California vary. For example, the air quality standards in Southern California may differ from the air quality standards in Northern California.

If an out-of-state facility commenced commercial operations before January 1, 2005, the applicant may qualify for RPS certification if either: 1) the facility was part of a retail

seller's baseline, or 2) the facility produces incremental generation due to project expansion or repowering. The supplemental information needed for each case is described below.

1. Baseline: If an out-of-state facility commenced commercial operations before January 1, 2005, the applicant must identify the retail seller that procured electricity from the facility, the baseline year, and the amount sold to the retail seller.

2. Incremental generation: The Energy Commission may certify incremental generation from out-of-state facilities as RPS-eligible if it finds that the incremental generation exceeds the project's historical production. The methodology for quantifying incremental generation is described in the "Generation Tracking System" section of this *Guidebook*. The applicant must provide the following information:

- For small hydro facilities, the applicant must provide verifiable generation data for the 10 years preceding project expansion or repowering. If the project has not been operational for 10 years, then provide generation data on all previous years to date. The applicant must also provide the information described in "Supplemental Instructions for Hydropower Facilities."

- For all RPS-eligible technologies except small hydro, the applicant must provide data on annual generation for the 36 months preceding the project expansion or repowering (for example, if the project expansion comes on-line January 1, 2007, then generation data must be provided from January 1, 2004 through 2006). If the project has not been operational for 36 months, then provide generation data for all previous months to date.

- All applicants seeking certification of incremental generation must provide evidence that the incremental generation from the facility resulted (or will result if the applicant is seeking pre-certification) from a capital expenditure in the project. This information is needed to verify that the incremental production is not a result of weather fluctuations or some other recurring or random event. The capital investment must exclude monies that would have been spent on operation and maintenance in the normal course of doing business. The applicant must provide a brief description of each capital investment made for project expansion or repowering, including a discussion of the nature of the capital investments and how they resulted in the incremental generation. In substantiating an application to certify incremental production, the burden of proof will be on the applicant to submit compelling evidence to demonstrate the effect that capital expenditures had on production.

All data submitted are expected to be public. However, the Energy Commission is interested only in data with a direct bearing on the application. For example, although information on capital investments and the resulting production increases is expected to be submitted publicly, the Energy Commission has no interest in any proprietary

underlying economic analyses that may have led to the decision to make such an investment.

2. Out-of-Country Facilities: In addition to the above information, an applicant for a facility located outside the United States must provide all of the following:

    - A comprehensive list and description of all California environmental quality LORS that would apply to the facility if the facility were located within California.

    - An assessment as to whether the facility's development or operation will cause or contribute to a violation of any of these LORS.

    - An explanation as to how the facility's developer and/or operator will meet these LORS in developing or operating the facility, including whether the developer and/or operator will secure and put in place mitigation measures to ensure that these LORS are complied with."

(*Renewables Portfolio Standard Eligibility Guidebook, Second Edition*, pp. 34-41, TN 213298.)

The Rules Are Not the 44 Sets of POU Rules As Argued by LADWP

In its Petition for Reconsideration, which initiated the subject appeal, LADWP argued that the Legislature intended the CEC to certify resources that were used by a local publicly owned electric utility (POU) to satisfy its "voluntary" RPS program pursuant to former Public Utilities Code section 387, and therefore the CEC should certify the subject facilities to use biomethane procured under the 2009 Shell and Atmos contracts, because LADWP's voluntary RPS program permitted this type of biomethane procurement. (LADWP Petition for Reconsideration, dated March 28, 2014, pp. 11-14, TN 213248).

While former Public Utilities Code section 387 did give POUs discretion to develop and implement their own RPS programs, the law does not require the CEC to certify all resources that were included in a POU's RPS program pursuant to section 387.[68] The CEC is required to

[68] Former Public Utilities Code section 387 required POUs to implement and enforce a renewables portfolio standard that recognized 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 improvements." RPS programs implemented by POUs under section 387 are sometimes referred to as "voluntary" programs, even though section 387 did not characterize them as such, because the law did not include requirements or provisions for the enforcement of such programs as it did for the RPS programs of retail sellers of electricity. Public Utilities Code section 387 was repealed in 2011 by Senate Bill X1-2.

certify only those POU resources that meet the provisions of Public Utilities Code section 399.12(e)(1)(C).

Had the Legislature intended the provisions of Public Utilities Code section 399.12(e)(1)(C) to apply to all procurement approved by a POU prior to June 1, 2010, as LADWP has argued, then portions of the POU-specific exceptions granted under Public Utilities Code sections 399.30(g), (h), (i), (j), (k), and (l) and portions of the RPS eligibility criteria in section 399.12(e)(1)(A), applicable to hydroelectric generations units not exceeding 40 MW that are operated as part of water supply and conveyance system, would not have been necessary because these resources would have been already grandfathered by virtue of Public Utilities Code section 399.12(e)(1)(C).

For example, LADWP's RPS policy, as amended in April 2008, identifies "Los Angeles Aqueduct hydroelectric plants" as an eligible resource under the RPS policy. (Refer to *LADWP Board Approval Letter*, dated April 30, 2008, and attached *City of Los Angeles Department of Water and Power Renewables Portfolio Standard Policy As Amended April 2008*, p. 2, TN 212409.) To the extent these aqueduct hydroelectric plants exceed the 30 MW limit for small hydroelectric facilities under Public Utilities Code section 399.12, as existed prior to SBX1-2, the aqueduct hydroelectric plants would have come within the grandfathering provision of Public Utilities Code section 399.12(e)(1)(C) as LADWP has argued. As such, the RPS eligibility category in Public Utilities Code section 399.12(e)(1)(A) for 40 MW hydroelectric generations units that are operated as part of a water supply and conveyance system would not have been necessary, since these hydroelectric units would have been grandfathered under LADWP's interpretation of Public Utilities Code section 399.12(e)(1)(C). The fact that the Legislature created a new RPS eligibility category for 40 MW hydroelectric units that are operated as part of a water supply and conveyance system clearly shows the Legislature did <u>not</u> intend these hydroelectric units to be grandfathered by virtue of Public Utilities Code section 399.12(e)(1)(C).

LADWP's argument would be more compelling if the language of Public Utilities Code section 399.12(e)(1)(C) did not include the last clause – **if the facility is a "renewable electrical generation facility" as defined in Section 25741 of the Public Resources Code**.

Moreover, it is the CEC's responsibility for determining whether a particular renewable resource satisfies the definition of a "renewable electrical generation facility" in Public Resource Code section 25741(a) for purposes of the RPS program under SBX1-2. SBX1-2 charges the

CEC, not POUs, with this responsibility under Public Utilities Code section 399.25, which provides as follows:

> 399.25. The Energy Commission shall do all of the following:
> (a) **Certify eligible renewable energy resources that it determines meet the criteria described in subdivision (e) of Section 399.12.**
> (b) Design and implement an accounting system to verify compliance with the renewables portfolio standard by retail sellers and local publicly owned electric utilities, to ensure that electricity generated by an eligible renewable energy resource is counted only once for the purpose of meeting the renewables portfolio standard of this state or any other state, to certify renewable energy credits produced by eligible renewable energy resources, and to verify retail product claims in this state or any other state. In establishing the guidelines governing this accounting system, the Energy Commission shall collect data from electricity market participants that it deems necessary to verify compliance of retail sellers and local publicly owned electric utilities, in accordance with the requirements of this article and the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). In seeking data from electrical corporations, the Energy Commission shall request data from the commission. The commission shall collect data from electrical corporations and remit the data to the Energy Commission within 90 days of the request.
> (c) Establish a system for tracking and verifying renewable energy credits that, through the use of independently audited data, verifies the generation of electricity associated with each renewable energy credit and protects against multiple counting of the same renewable energy credit. The Energy Commission shall consult with other western states and with the WECC in the development of this system.
> (d) Certify, for purposes of compliance with the renewables portfolio standard requirements by a retail seller, the eligibility of renewable energy credits associated with eligible renewable energy resources procured by a local publicly owned electric utility, if the Energy Commission determines that all of the conditions of Section 399.31 have been met. (Pub. Util. Code, §399.25, as amended by SBX1-2. Emphasis added.)

Public Utilities Code section 399.25(a) charges the CEC with certifying eligible renewable energy resources for the RPS for both retail sellers and POUs. The CEC adopted criteria for this purpose in its RPS Eligibility Guidebook. Section 399.25 is part of Article 16 (sections 399.11 – 399.32) of Chapter 2.3 of Part 1 or Division 1 of the Public Utilities Code. This article is entitled the "California Renewables Portfolio Standard Program" and establishes the RPS requirements for both retail sellers and POUs.

If each POU had discretion to determine which renewable resources qualify as a "renewable electrical generation facility" for purposes of the RPS under Public Resource Code section 25741(a), there could be 44 different sets of rules for making this determination; one set of rules for each POU in California. SBX1-2 repealed Public Utilities Code section 387 and any

discretion the POUs might have had in this regard, and established a single, statewide RPS program applicable to all retailer sellers and POUs. By charging the CEC with sole responsibility for determining which renewable resources qualify as "renewable electrical generation facility" and for certifying such resources as eligible for the RPS, the Legislature placed retail sellers and POUs on equal footing and subjected them to one set of rules – the CEC's rules - for determining which renewable resources qualify as a "renewable electrical generation facility" for the RPS program. The CEC's rules for this purpose are set forth in the RPS Eligibility Guidebook and address various aspects of a "renewable electrical generation facility," including:

- "use" of a renewable energy resource;
- use of fossil fuels and other non-renewable resources, if any,
- facility size limitations (for example, what constitutes a hydroelectric facility for purposes of the 30 MW limit);
- facility location (for example, what constitutes an in-state versus out-of-state versus out-of-county for purposes of facility locational requirements);
- metering and tracking of facility generation; and
- unbundling and double counting of RECs from facility generation.

Public Utilities Code section 399.25(b), (c), and (d) also charge the CEC with sole responsibility for other elements of the state's RPS program, including the design and implementation of an accounting system to verify compliance with the RPS by retail sellers and POUs, establishing a system for tracking and verifying renewable energy credits (REC)[69] for the RPS program, and certifying, for purposes of compliance with the RPS requirements by a retail seller, the eligibility of RECs associated with eligible renewable energy resources procured by a POU. Like the provisions of Public Utilities Code section 399.25(a), the provisions of

[69] As defined by Public Utilities Code section 399.12(h), a "renewable energy credit" or REC means a certificate of proof associated with the generation of electricity from an eligible renewable energy resource, issued through the accounting system established by the CEC pursuant to Public Utilities Code section 399.25, that one unit of electricity was generated by and delivered by an eligible renewable energy resource. A REC includes all renewable and environmental attributes associated with the production of electricity from an eligible renewable energy resource, except as specified in Public Utilities Code section 399.12(h). The CEC's regulations specifying enforcement procedure for the RPS for POUs, defines a REC in 20 CCR section 3201 (v).

subdivisions (b), (c) and (d) help placed retail sellers and POUs on equal footing and subjected them to one set of rules for purposes of the state's RPS program.

V. RESPONSE TO QUESTION 4

Regarding the BC Hydro contracts, was LADWP required, under the rules in place at the time the contracts were executed, or at any later time, to apply for certification of the contracts? Cite to any information found in the legislative history, regulation, guidance from the CPUC, ARB, or CEC, applicable RPS Eligibility Guidebook, or industry custom and practice and specifically, identify any express language found in the RPS Eligibility Guidebook, Third Edition.

Yes. If LADWP wanted the procurement generation from their BC Hydro contracts to count towards the RPS starting in 2011 it was required to apply for certification. Starting in 2011 with the enactment of SBX1-2, retail sellers and POUs, including LADWP, were required to procure electricity generation from facilities certified for the RPS by the CEC in order for them to count the procurement of that generation to satisfy their RPS procurement requirements. The CEC gave POUs an opportunity to certify facilities from which they wished to count procurement from beginning January 1, 2011.

In 2007, when LADWP executed its BC Hydro contracts with Powerex Corp., POUs were not required to meet their RPS procurement requirements with electricity generation from facilities certified for the RPS by the CEC. At that time, POUs had discretion to implement their own RPS program in accordance with former Public Utilities Code section 387(a), which provided in pertinent part as follows:

> 387. (a) Each 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.
> (Former Pub. Util. Code, §387, subd. (a), as enacted by Senate Bill 1078.)[70]

If a POU's RPS program under section 387 required electrical generation facilities to be RPS-certified by the CEC, then those facility would have to be certified by CEC under the CEC's rules in place at that time. LADWP's RPS program in place in 2007 does not appear to

[70] Former Public Utilities Code section 387 was repealed by SBX1-2 in 2011.

require electrical generation facilities to be RPS-certified by the CEC.[71] Therefore, LADWP was not required to have the BC Hydro facilities RPS certified by the CEC in order for LADWP to count the electricity generation procured under the BC Hydro contracts for LADWP's section 387 RPS program.

However, as discussed in the response to Question 3, starting in 2011 with the enactment of SBX1-2, retail sellers and POUs were both required to procure electricity generation from facilities certified for the RPS by the CEC in order for the retail seller or POU to count the procurement of that generation to satisfy its RPS procurement requirements.[72] If LADWP wants to count electricity generation procured under the BC Hydro contracts towards satisfaction of its RPS procurement requirements under SBX1-2, then the BC Hydro facilities must be certified for the RPS by the CEC. As explained in the response to Question 6 below, the CEC gave POUs the opportunity to certify facilities from which they wished to count procurement from beginning January 1, 2011.

VI. RESPONSE TO QUESTION 5

Discuss whether grandfathering provisions—Public Utilities Code sections 399.12(e)(1)(C) and 399.16(d)—apply to the BC Hydro contracts.

Yes. If LADWP wants to count any of the electricity generation from the BC Hydro facilities towards its PRS procurement requirements under SBX1-2 then Public Utilities Code sections 399.12(e)(1)(C) and 399.16(d) would be applied.

a. Cite to supporting documents for each required element of the provisions. For example, did the LADWP board "approve" the facilities under section 399.12(e)(1)(C)?

LADWP has not applied for certification under its BC Hydro contracts as required under 399.12(e)(1)(C) and Staff has not determined that LADWP has satisfied the required elements from Public Utilities Code sections 399.12(e)(1)(C), including Public Resources Code Section 25741. Only if LADWP's BC Hydro facilities were to be certified and their

[71] Refer to LADWP's RPS Policy of May 23, 2005, TN 212407.
[72] Refer to Public Utilities Code section 399.25(a), as amended by SBX1-2, which provides in pertinent part: "The Energy Commission shall . . . (a) Certify eligible renewable energy resources that it determines meet the criteria described in subdivision (e) of Section 399.12."

generation otherwise determined to be eligible, would Public Utilities Code section 399.16(d) apply and allow the generation to be classified as count-in-full.

Public Utilities Code section 399.12(e)(1)(C)

As previously discussed in the response to Question 2(a), section 399.12(e)(1)(C) establishes requirements that must be satisfied for the procurement of renewable energy resources approved by a POU prior to June 1, 2010 to qualify for the POU's new RPS procurement requirements under SB X1-2 starting on January 1, 2011.

Under the provisions of Public Utilities Code section 399.12(e)(1)(C), the CEC may certify a facility for the RPS only if it was approved for procurement by the POU prior to June 1, 2010, for procurement to satisfy renewable energy procurement obligations adopted by the POU pursuant to former section 387, and it meets the definition of a "renewable electrical generation facility" by using one of the resources specified in Public Resources Code section 25741(a)(1).

Staff cannot speak to whether LADWP approved the procurement of electricity from the BC Hydro facilities prior to June 1, 2010 to satisfy renewable energy procurement obligations adopted by LADWP pursuant to former Public Utilities Code section 387. LADWP's Renewables Portfolio Standard Policy, dated May 23, 2005, appears to have been adopted pursuant to section 387. This policy was in effect when LADWP executed its BC Hydro agreements with Powerex Corp. in March 2007.[73] LADWP's policy provides that electricity produced from "small hydro 30 MW or less" constitutes an "eligible" resource for purposes of LADWP's policy.[74] However, LADWP's policy does not further define what it means to be a "small hydro 30 MW or less," and does not refer to electricity procurement from the BC Hydro facilities. Staff has no basis for determining whether the electricity procured under the BC Hydro agreements satisfied the requirements in LADWP's Renewables Portfolio Standard Policy.

Small hydroelectric generation of 30 MW or less is one of the specified "use" resources under section 25741(a)(1). Based on LADWP's *Status Report*[75] and its *Motion to Add and Consolidate Additional RPS-Eligibility Claims,*[76] it is Staff's understanding that the "BC Hydro" electrical generation facilities are small hydroelectric generating facilities with a nameplate

[73] See TN 212419, p. 41, and TN 212420, p. 41.
[74] LADWP Renewables Portfolio Standard Policy, dated May 23, 2005, p. 1 (LA Bate 000020), included as part of LADWP Board Approval, TN 212407.
[75] TN 212206, pp. 15-16.
[76] TN 212400, p. 8.

capacity of 30 MW or less. However, Staff has no independent knowledge of the BC Hydro facilities or independent basis for confirming whether the BC Hydro facilities were in fact hydroelectric generating facilities with a nameplate capacity of 30 MW or less. LADWP's agreements with Powerex Corp. define "Facilities" to include "hydroelectric generating facilities . . . having a nameplate capacity not exceeding 30 MW; plus . . any generating facility or facilities designated by Powerex . . of the type referred to in Part 1 of Appendix A . ." and ". . of a type referred to in Part 2 of Appendix A .." (TN 212419, p.4., and TN 212420, p. 4.) Part 1 of Appendix A of the agreements identifies the following additional resources: "hydroelectric (30 MW or less nameplate capacity), biomass, landfill gas, and wind." Part 2 of Appendix A of the agreements identifies the following additional resources: "biodiesel, digester gas, waste gas, solar thermal, geothermal, photovoltaics, fuel cells with renewable fuels and ocean wave technologies" (TN 212419, Appendix A, and TN 212420, Appendix A.) Under LADWP's agreements with Powerex Corp. it was possible for Powerex Corp. to supply electricity generation from facilities that were <u>not</u> small hydroelectric generating facilities with a nameplate capacity of 30 MW or less.

Additionally, Staff has no independent basis for confirming the location of the BC Hydro facilities. Staff presumes that the BC Hydro facilities are located outside of California and possibly outside the country in British Columbia or Alberta, Canada. LADWP's agreements with Powerex Corp. do not identify the location of the BC Hydro electrical generating facilities. According to LADWP's agreements with Powerex Corp., energy delivered from the BC Hydro facilities shall be "scheduled by Powerex from a Control Area, provided that nothing in this Agreement requires that Delivered Energy be scheduled or tagged from any one or more specific Facilities located in the source Control Area."[77] These agreements define "Control Area" to mean "(i) any NERC certified control area(s), balancing authority area or similar area that operates in whole or in part in any one or more of Washington, Oregon, British Columbia or Alberta, and (ii) any other control area, balancing authority area or similar area that LADWP

[77] Refer to LADWP's Power Purchase Agreement with Powerex Corp., DWP No. BP 05-020-A, Section 4.3, p. 13, TN 212419. Also refer to LADWP's Power Purchase Agreement with Powerex Corp., DWP No. BP 05-020-B, Section 4.3, p. 13, TN 212420.

agrees in writing pursuant to Section 4.8(e) is a "Control Area" for purposes of this Agreement."[78]

Staff does not know whether the BC Hydro facilities are located in Washington or Oregon, and if so, whether they could satisfy the requirements in Public Resources Code section 25741(a)(2) for out-of-state facilities.

Public Resources Code section 25741(a)(2) states that a renewable electrical generation facility must satisfy one of the following requirements: (a) the facility is "located in the state or near the border of the state with the first point of connection to the transmission network of a balancing authority area primarily located within the state"; (b) the facility has "its first point of interconnection to the transmission network outside the state, within the Western Electricity Coordinating Council (WECC) service area," and satisfies all of the following requirements: (i) it "commences initial commercial operation after January 1, 2005"; (ii) it "will not cause or contribute to any violation of a California environmental quality standard or requirement"; and (iii) it "participates in the accounting system to verify compliance with the renewables portfolio standard" established by the Energy Commission; or (c) The facility "will not cause or contribute to any violation of a California environmental quality standard or requirement" and "participates in the accounting system to verify compliance with the renewables portfolio standard" established by the Energy Commission, but did not commence initial commercial operation after January 1, 2005 "because it commenced initial operation prior to January 1, 2005" and the facility satisfies either of the following requirements: (i) its electricity is "from incremental generation resulting from expansion or repowering of the facility"; or (ii) "electricity generated by the facility was procured by a retail seller or local publicly owned electric utility as of January 1, 2010" ((Pub. Resources Code § 25741(a)(2))

If the BC Hydro facilities are located in British Columbia, it is unlikely that these facilities could satisfy the requirements in Public Resources Code section 25741(a)(3) for out-of-country facilities, because the environmental quality standards and requirements of California are more stringent than the environmental quality standards and requirements of British Columbia.

[78] Refer to LADWP's Power Purchase Agreement with Powerex Corp., DWP No. BP 05-020-A, Section 1.1, p. 3, TN 212419. Also refer to LADWP's Power Purchase Agreement with Powerex Corp., DWP No. BP 05-020-B, Section 1.1, p. 3, TN 212420.

Public Resources Code section 25741(a)(3) requires that if the facility is outside the United States, it must be "developed and operated in a manner that is as protective of the environment as a similar facility located in the state [of California]" (Pub. Resources Code § 25741(a)(3)).

An analysis of the environmental laws, ordinances, regulations and standards of California and British Columbia was conducted as part of a CEC report evaluating run-of-river hydroelectric generation – *Analyzing British Columbia Run-of-River Facilities For The California Renewables Portfolio Standard*.[79] This report made the following finding:

> "An additional RPS eligibility requirement on facilities located outside of the United States is that those facilities must be constructed and operated to be as protective of the environment as a similar facility in California. Based on the current RPS eligibility requirements and the regulatory factors described below, staff concludes that B.C. run-of-river hydroelectric facilities up to 30 MW in size are not inherently eligible for the RPS, as there are substantial differences between the levels of environmental protection required in British Columbia and California, including the fact that British Columbia does not have a stand-alone endangered species act. Facilities located in British Columbia would have great difficulty demonstrating that they are as protective of the environment as a similar facility would be if located in California, as current statute requires. The ***Analysis of Regulatory Requirements for Including British Columbia Run-of- River Facilities in the California Portfolio Standard Consultant Report*** documented several subject areas where the environmental protections required in California are more stringent than in British Columbia.[80] Because these limitations make it very unlikely that B.C. run-of-river projects will be able to contribute in any significant way to meeting California's 33 percent RPS target, staff does not find any compelling reason to recommend a modification of the existing eligibility requirements of the Renewables Portfolio Standard statute."
> (*Analyzing British Columbia Run-of-River Facilities For The California Renewables Portfolio Standard*, January 2014, pub. no. CEC-300-2013-011-CMF, p. 2, included as TN 212426.)

Similarly, if the BC Hydro facilities are located in Alberta, Canada, it is unlikely that the facilities could satisfy the requirements in Public Resources Code section 25741(a)(3) for out-of-country facilities.

Consequently, Staff cannot say whether the BC Hydro facilities could satisfy the requirements in Public Resources Code section 25741(a)(2) or (3) for electrical generating facilities located out-of-state or out-of-country.

[79] This report was prepared pursuant to Public Resources Code section 25741.5, as enacted by SBX1-2.
[80] Footnote omitted.

Public Utilities Code section 399.16(d)

As previously discussed in order for electricity generation procurement to qualify as "count in full" to satisfy RPS procurement requirements under Public Utilities Code section 399.16(d), the renewable energy resource must be eligible under the rules in place as of the date when the contract was executed and neither LADWP nor Powerex Corp. applied to the CEC to certify the BC Hydro facilities for the RPS. Since no applications and supporting documentation for these facilities were submitted to the CEC, Staff cannot say whether the BC Hydro facilities could satisfy the requirements to be certified for the RPS and it is unlikely they would because they were located out-of-state and most likely in British Columbia or Alberta, Canada.

VII. RESPONSE TO QUESTION 6

Explain whether and how, under applicable rules and standards, the 2009 Shell and Atmos contracts and BC Hydro contracts are to be counted, or related facilities certified, under the Renewables Portfolio Standard (RPS).

If LADWP's 2009 Shell and Atmos contracts and/or its BC Hydro contracts were to be counted, the applicable rules would be those from the RPS program, Public Utilities Code section 399.11 et seq.

As to the 2009 Shell and Atmos contracts, if the Committee determines that the 2009 Shell and Atmos contracts are eligible, because the biomethane delivery requirements in the Third Edition Guidebook were not clear on their face and did not include express language on the contracting requirements, then CEC would need to amend the certification of that subject facility to include the 2009 Shell and Atmos contracts and thereafter verify procurement. Verification data collected from LADWP would include invoices and meter data. If procurement from LADWP's 2009 Shell and Atmos contracts are verified as eligible, it would be categorized as "count in full" procurement.

As to the BC Hydro contracts, if LADWP wanted to count the procurement of electricity generation under these contracts starting on January 1, 2011 either LADWP or Powerex Corp would have needed to apply for certification on or before the December 31, 2013 deadline. If generation occurred before the adoption of the Fifth Edition Guidebook the Fourth Edition Guidebook eligibly requirements would have applied, including as appropriate, those for small hydroelectric facilities and out of state facilities. If certified

and verified as eligible, the procurement from these facilities would be categorized as "count in full" procurement.

As previously discussed, the state's RPS program as amended by SBX1-2 and set forth in Public Utilities Code section 399.11, et seq., establishes a preference for the procurement of electricity generation that provides more environmental benefits to the state by categorizing the procurement of electricity products from eligible renewable energy resources into PCCs, commonly referred to as "buckets," and establishing minimum and maximum percentages for the amount of these electricity products that may be procured in a given compliance period. Public Utilities Code section 399.16(b) specifies the criteria for the PCC buckets and section 399.16(c) specifies the minimum and maximum percentages for these PCC buckets that may be procured for a given compliance period (referred as the Portfolio Balance Requirement or PBR).

Additionally, Public Utilities Code section 399.16(d) establishes a procurement category for electricity products that were procured pursuant to contracts or ownership agreements[81] executed prior to June 1, 2010. The procurement of electricity products that satisfy section 399.16(d) are not subject to the PBR and are referred to "count in full," because this procurement is counted in full toward satisfying a retail seller's or POU's procurement requirements for the RPS without regard to the PBR.

Classifying Procurement of Biomethane-based Electricity Generation

As discussed in the response to Question 1.a, the biomethane procured under LADWP's 2009 Shell and Atmos contracts do not satisfy the biomethane delivery requirements in the RPS Guidebook, Third Edition, as those requirements were applied by Staff in the certification of the PG&E, SMUD, and Calpine facilities under the Third Edition guidebook. However, if the Committee determines otherwise, because the biomethane delivery requirements in Third Edition guidebook were not clear on their face and did not include express language on the contracting requirements for biomethane delivery, then LADWP's procurement of electricity generation

[81] A retail seller or POU may procure electricity products by entering into a contract with a third party for the procurement of those electricity products, typically referred to as a power purchase agreement, or a retail seller or POU may own the electrical generation facility themselves and procure the electricity products generated by the facility by virtue of facility ownership. Electricity products procured under the latter are considered to have been procured through "ownership agreements."

resulting from biomethane under the 2009 Shell and Atmos contracts may qualify as "count in full" procurement to satisfy LADWP's RPS requirements under SBX1-2.

This is so, since LADWP's claimed use of biomethane under the 2009 Shell and Atmos contracts for the Scattergood, Harbor, Valley and Haynes facilities arguably commenced in August and September of 2009 when these contracts were executed. It was at that point in time that the facilities could be characterized as "eligible renewable energy resources" for the RPS based on the use of biomethane under the 2009 Shell and Atmos contracts. LADWP's procurement of electricity generation from the claimed use of biomethane under the 2009 Shell and Atmos contracts at the Scattergood, Harbor, Valley and Haynes facilities may only qualify as "count in full" procurement since the procurement occurred prior to June 1, 2010.

The Scattergood, Harbor, Valley and Haynes facilities are currently certified for the RPS by the CEC based on the use of biomethane procured under LADWP's 2011 Shell contract.[82] In order for the CEC to amend the existing certification of these facilities based on the use of biomethane procured under the 2009 Shell and Atmos contracts, LADWP would need to do the following:

To amend certification -- LADWP already submitted an amended certification application on the CEC-RPS-2196 Form in July 2013 to include the 2009 Shell and Atmos contracts, which was denied by the Energy Commission. If the Committee finds the 2009 Shell and Atmos contracts to be eligible, the removal of the denial decision would allow Staff to evaluate and certify the LADWP biomethane facilities using the 7th Edition RPS Eligibility Guidebook, which allows the rules of the 3rd Edition to be applied, for the use of the biomethane until the contract end date of 2014.

The amended certification of the Scattergood, Harbor, Valley and Haynes facilities would be based on the RPS Eligibility Guidebook, Seventh Edition, because this was the Edition that implemented AB 2196, including the provisions in AB 2196 requiring determinations of RPS-eligibility based on the "rules in place" at the time of execution of the biomethane procurement contract.[83] The Seventh Edition guidebook was also the guidebook edition in place when LADWP submitted its applications for amended RPS certification of the Scattergood, Harbor, Valley, and Haynes facilities based the use of biomethane from the 2009 Shell and Atmos

[82] Refer to RPS Certificates for the Scattergood, Harbor, Valley and Haynes Facilities, TN 213404
[83] Refer to the *RPS Eligibility Guidebook, Seventh Edition*, pp. 10-26, TN 213251.

contracts. The Seventh Edition guidebook was adopted on April 30, 2013, and LADWP submitted applications to amend the RPS certification of these facilities on July 19, 2013.[84] The Seventh Edition guidebook requires Staff to evaluate applications for certification under the Edition of the guidebook in place at the time a complete application is received by the CEC.[85]

For verification, the following documentation is required of all RPS participants to verify the eligibility of biomethane electricity procurements:

- Biomethane invoices stating the amount of biomethane injected into the common carrier pipeline in MMBtus on a daily basis for each biomethane source. The daily basis is to determine contract quantities which are specified in daily quantities.
- Biomethane meter data with the quantities of biomethane injected into the common carrier pipeline from each eligible biomethane resource.
- Meter data from each pipeline to demonstrate the biomethane quantities delivered from the biomethane source to the electrical generation facility in MMBtus.
- Meter data at the LADWP facilities to determine the total combined gas used at the facility in MMBtus.

If the Committee determines that the LADWP 2009 Shell and Atmos contracts are eligible because they are not subject to the delivery requirements, then the following data would be required for verification:

- Biomethane invoices stating the amount of biomethane injected into the common carrier pipeline in MMBtus on a daily basis for each biomethane source. The daily basis is to determine contract quantities which are specified in daily quantities.
- Biomethane meter data with the quantities of biomethane injected into the common carrier pipeline from each eligible biomethane resource.
- Meter data at the LADWP facilities to determine the total combined gas used at the facility in MMBtus.

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[84] Refer to LADWP's applications for amended certification of the Scattergood, Harbor, Valley, and Haynes facilities, TN 213405.
[85] Refer to the *RPS Eligibility Guidebook, Seventh Edition*, p. 66, TN 213257.

Classifying Procurement of BC Hydro Electricity Generation

If the BC Hydro facilities satisfy the eligibility requirements in the RPS Guidebook to be certified for the RPS by the CEC, then LADWP may count the procurement of electricity generation from these facilities to satisfy its RPS procurement requirements under SBX1-2. The procurement of electricity generation from the BC Hydro facilities may qualify, if all, only as "count in full" procurement for LADWP, because LADWP's agreements with Powerex Corp were executed in 2007, and hence before June 1, 2010.

If LADWP wanted to count the procurement of electricity generation from the BC Hydro facilities starting on January 1, 2011 to satisfy its RPS procurement requirements under SBX1-2, either LADWP or Powerex Corp would have needed to apply for RPS certification of the facilities on or before December 31, 2013. This is the deadline specified in the RPS Eligibility Guidebook, Seventh Edition, which provides as follows in Section IV.B.3.c:

> "*c. Grace Period Exception for Facilities Serving Local Publicly Owned Electric Utilities*
>
> For generation occurring on or after January 1, 2011, to count toward a POU's RPS procurement obligations from a facility that was not certified by the Energy Commission as RPS eligible at the time of generation, the Energy Commission must receive an application for RPS certification by December 31, 2013, and subsequently certify the facility as RPS-eligible.[86] An applicant must include the facility's assigned WREGIS GU ID number on the application for RPS certification. As noted above, applicants must register facilities with WREGIS to be assigned a WREGIS ID number. If the generation occurred before adoption of the *Renewables Portfolio Standard Eligibility Guidebook, Fifth Edition*, the Energy Commission must determine that the facility met the eligibility requirements of the *Renewables Portfolio Standard Eligibility Guidebook, Fourth Edition*, at the time the generation occurred for the generation to count toward the POU's RPS. Generation meeting these requirements may only be counted toward the RPS procurement obligations of a POU."
> (*RPS Eligibility Guidebook, Seventh Edition*, pp. 78-79, TN 213251.)

As specified in these provisions, if the generation occurred before adoption of the Fifth Edition Guidebook, the CEC must determine that the facility met the eligibility requirements of the Fourth Edition Guidebook, at the time the generation occurred for the generation to count toward the POU's RPS.

[86] A facility must be RPS-certified by the CEC before a POU or retail seller may report procurement of its generation toward the POU's or retail seller's RPS procurement requirements. In earlier editions of this guidebook, a facility under contract with or approved by a POU for its RPS before June 1, 2010, was encouraged to apply for certification by October 1, 2012.

The Fourth Edition Guidebook, specifies the following requirements for the RPS certification of small hydroelectric generation facilities with a nameplate capacity of 30 MW or less.

a. Small Hydroelectric

The RPS eligibility of small hydroelectric facilities depends in part on whether the facility was operational before or after January 1, 2006, and whether energy efficiency improvements were made after January 1, 2008.

- Pre-January 1, 2006 (Existing Facility): Generation from a small hydroelectric facility that commenced commercial operations before January 1, 2006, is eligible for the California RPS if the facility meets all of the following criteria:

    1. The facility is 30 MW or less, with an exception for eligible efficiency improvements made after January 1, 2008, as discussed below.

    2. The facility is located in-state or satisfies the out-of-state requirements.

    3. The facility was under contract to, or owned by, a retail seller or local publicly owned electric utility prior to January 1, 2006.[87]

- Post-January 1, 2006 (New Facility): Generation from a small hydroelectric facility that commences commercial operations or is repowered on or after January 1, 2006, is eligible for the California RPS if the facility meets all of the following criteria:

    1. The facility is 30 MW or less, with an exception for eligible efficiency improvements made after January 1, 2008, as discussed below.

    2. The facility is located in-state or satisfies the out-of-state requirements.

    3. The facility does not "cause an adverse impact on instream beneficial uses or cause a change in the volume or timing of streamflow."[88]

A small hydroelectric facility shall not lose its RPS eligibility if efficiency improvements undertaken after January 1, 2008, cause it to exceed 30 MW and "the efficiency improvements do not result in an adverse impact on instream beneficial uses or cause a change in the volume or timing of streamflow."[89] The entire generating capacity of the facility shall be RPS-eligible.

[. . .]

[87] Assembly Bill 3048 revised the definition of an "eligible renewable energy resource" to include small hydroelectric facilities under contract with or owned by a local publicly owned electric utility.
[88] Public Utilities Code Section 399.12(c)(1)(A).
[89] Public Utilities Code Section 399.12.5(a).

General Requirements for Hydroelectric Facilities Located Outside California

A new or repowered small hydroelectric facility, conduit hydroelectric facility, or incremental generation from eligible efficiency improvements to a hydroelectric facility located outside California may be eligible for the RPS if it can demonstrate that it may operate without adversely impacting the instream beneficial uses or causing a change in the volume or timing of streamflow.[90]49 A facility could have an adverse impact on the instream beneficial uses if it causes an adverse change in the chemical, physical, or biological characteristics of water, including a change in the volume, rate, timing, temperature, turbidity, or dissolved oxygen content of the stream water.

Eligible Efficiency Improvements

Eligible efficiency improvements to hydroelectric facilities are limited to those improvements that make more efficient use of the existing water resource and equipment, rather than increase the storage capacity or head of an existing water reservoir. Efficiency improvements do NOT include regular or routine maintenance activities. Eligible efficiency improvements may include the following measures:

- Rewinding or replacing the existing turbine generator.
- Replacing turbines.
- Computerizing control of turbines and generators to optimize regulation of flows for generation.

The applicant is responsible for showing that its facility qualifies for the RPS. Additional information required of applicants for small hydroelectric, conduit hydroelectric facilities and incremental generation regardless of output is discussed in the section on certification."
(RPS Eligibility Guidebook, Fourth Edition, January 2011, publication no. CEC-300-2010-007-CMF, pp. 23-27, TN 213250.)

In addition, the Fourth Edition Guidebook specifies the following eligibility requirements for electrical generating facilities that are located out-of-state and have their first point of interconnection to the WECC transmission system outside the state.

"**C. Out-of-State Facilities**

This section applies to renewable facilities that are located out-of-state and have their first point of interconnection to the WECC transmission system outside the state, as defined in the *Overall Program Guidebook*. Facilities that are physically located in

[90] A hydroelectric generation facility that is certified as eligible for the RPS as of January 1, 2010, shall not lose its eligibility if the facility causes a change in the volume or timing of streamflow required by license conditions approved pursuant to the Federal Power Act (Chapter 12 (commencing with Section 791a) of Title 16 of the United States Code) on or after January 1, 2010.

California or have their first point of interconnection to the WECC transmission system within the state are considered to be in-state facilities and are not subject to the requirements of this section for RPS eligibility. Similarly, facilities that are physically located outside California but have their first point of interconnection to the WECC transmission system within California are not subject to the requirements of this section; such facilities must submit documentation to verify the location of their first point of interconnection with their application for pre-certification or certification.
Out-of-state facilities that are not or will not be interconnected to the WECC transmission system are not eligible for the RPS.

Procurement by multijurisdictional retail sellers that serve end-use customers outside California and have 60,000 or fewer customer accounts in California pursuant to Public Utilities Code Section 399.17, such as PacifiCorp and Sierra Pacific Power Company, that is counted toward meeting the RPS obligation of the multijurisdictional purchasing utility (and subject to Public Utilities Code Section 399.17) is not subject to the eligibility requirements for out-of-state facilities. In lieu of the above criteria, the energy procured must meet all of the following criteria to be eligible for the RPS:

1. The generation must be procured by the multijurisdictional retail seller subject to Public Utilities Code Section 399.17 on behalf of its California customers and not used to fulfill its renewable energy procurement requirements in other states or for any other renewable energy retail claim.
2. The facility is connected to the WECC transmission system. The facility and multijurisdictional retail seller must participate in WREGIS under the provisions in this guidebook.

Generation from a renewable facility located out-of-state can qualify for the RPS if it meets the RPS eligibility requirements described in this guidebook and satisfies all of the following criteria.

1. Facility is located so that it is or will be connected to the WECC transmission system.
2. Facility commences initial commercial operations after January 1, 2005.
3. Energy is delivered to an in-state market hub or in-state location, as specified in the delivery requirements in the next section.
4. Facility does not cause or contribute to any violation of a California environmental quality standard or requirement within California.
5. If located outside the United States, the facility is developed and operated in a manner that is as protective of the environment as would a similar facility be if it were located in California.
6. Facility, retail seller, and third parties participate in WREGIS.

If the facility meets all of the above criteria for out-of-state facilities except it commenced commercial operations on or before January 1, 2005 (criterion “2” above), then it may be RPS-eligible if it meets one of the following criteria:

1. The electricity is from incremental generation resulting from project expansion or repowering of the facility after January 1, 2005; or
2. The facility was part of the initial baseline procurement portfolio of a retail seller[91] or of a local publicly owned utility.[92]

Note that the delivery requirements described in the next section for out-of-state facilities do not apply to facilities whose generation is procured by multijurisdictional electric corporations that serve retail end-use customers outside California and have 60,000 or fewer customer accounts in California under Public Utilities Code Section 399.17. The application for certification of such a facility must indicate it is applying under this rule and the subsequent certification will indicate the special conditions of the certificate.59 This exception to the delivery requirements only applies to situations wherein these multijurisdictional utilities procure energy to meet their own RPS obligations. In the event that these facilities are located out-of-state and their generation is procured to meet the RPS obligations of another retail seller, the facility would be subject to all out-of-state eligibility requirements, including delivery requirements. In addition to the certification or pre-certification application, applicants for out-of-state facilities must complete a supplemental application form and provide additional required information (see Section III: Additional Required Information)."
(RPS Eligibility Guidebook, Fourth Edition, pp. 35-36, TN 213250.)

In addition the Fourth Edition Guidebook specifies the following requirements for new or repowered small hydroelectric generation facilities that commence operations on or after January 1, 2006.

"**1. Instructions for Additional Required Information for Hydroelectric and Conduit Hydroelectric Facilities**

An applicant must provide additional information to substantiate its application for RPS pre-certification or certification that a small hydroelectric facility, conduit hydroelectric facility, or incremental generation from efficiency improvements to hydroelectric facilities regardless of overall facility size if the facility:

[91] Pursuant to paragraph (2) of subdivision (b) of Section 399.15 of the Public Utilities Code, the CPUC established an initial baseline for each retail seller based on the actual percentage of retail sales procured from eligible renewable energy resources in 2001, and to the extent applicable, adjusted going forward pursuant to Section 399.12 of the Public Utilities Code. (The statutes cited in this footnote are to the law as existed in 2011, when the Fourth Edition Guidebook was adopted by the CEC.)
[92] Pursuant to Section 387 of the Public Utilities Code, each governing body of a local publicly owned electric utility 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 statutes cited in this footnote are to the law as existing in 2011, when the Fourth Edition Guidebook was adopted by the CEC.)

- Commenced commercial operations or was repowered on or after January 1, 2006, for small or conduit hydroelectric facilities.

- Commenced commercial operations before January 1, 2007, for incremental generation from efficiency improvements regardless of facility size.

- Was added to an existing water conduit on or after January 1, 2006, for conduit hydroelectric facilities.

- Was an existing small hydro or conduit hydro facility and made efficiency improvements after January 1, 2008, that caused it to exceed 30 MW.

Additional required water-use data and documentation described below must be attached to a completed CEC-RPS-1A (for certification) or CEC-RPS-1B (for precertification) form. These requirements apply to facilities located within California as well as those located out-of-state. Applicants possessing a permit or license from the State Water Resources Control Board (SWRCB) – or from another governing body, if located in another state – must submit a copy of the permit or license as well as the application for the permit or license.

1. Name of the Facility

2. Ownership of the Facility

3. Source Water Description

The application must identify the source of the water for the hydroelectric project. The source must be characterized as surface, groundwater, or other (for example, recycled water). For surface water sources, a map at a scale of 1:24,000 must be provided. The map should also identify the location of the diversion point and all other facilities. In addition, a written description of the location of the diversion should be provided (county and nearest city) as well as the name of the body of water at the point of diversion. For groundwater, the location of the well(s) and conveyance facilities shall be identified on a map of 1:24,000 scale. The applicant must also specify how much water is used for each of the identified beneficial uses.

4. Water Rights

Both in-state and out-of-state applicants must clearly establish their right to divert water by submitting all necessary information as well as all appropriate licenses or permits. Within California, this information must identify the permitted volume, rate, and timing of water diversions, the place of diversion, and beneficial uses. This may be achieved through submittal of the appropriate SWRCB appropriation permit or license, or the Statement of Water Diversion and Use filed with SWRCB. For diversions not subject to an appropriation permit or license, a copy of any Statement of Water Diversion and Use filed with SWRCB should be provided. Facilities located outside of California must

provide similar documentation of an existing water right for the water diversion of the project.

5. Hydrologic Data

The applicant must submit appropriation and/or diversion data for the last five years or for the period of operation if the project has been operating less than five years. Information contained in any legally required reports may be used to meet this requirement if sufficient information is included in the report. For other projects, the hydrologic data submitted must be accompanied by a description of how the data is collected. Flow data shall be provided at the frequency set forth in the applicable water appropriation permit; for example, if the permit specifies minimum and maximum flows on a monthly basis that is the level of information necessary to be submitted.

6. Other Permits

The applicant must submit all other applicable permits, including those permits and exemptions issued by the Federal Energy Regulatory Commission (FERC).

7. Environmental Documentation

The applicant must submit copies of any permits, agreements, contracts, or other requirements affecting the operation of the facility, especially those that affect the volume, rate, timing, temperature, turbidity, and dissolved oxygen content of the stream water before and after the points of diversion.

8. Capacity

For small and conduit hydroelectric facilities, the applicant must demonstrate how the project will comply with the 30 MW size limitations under the RPS and not cause an adverse impact on instream beneficial uses or a change in the volume or timing of streamflow. For this purpose, a facility may have an adverse impact on the instream beneficial uses if it causes an adverse change in the chemical, physical, or biological characteristics of water.

9. Efficiency Improvements

Applicants seeking certification of small or conduit hydroelectric facilities that exceed 30 MW due to efficiency improvements are required to provide the following:

a. Documentation that shows when the existing small or conduit hydroelectric facility commenced commercial operations.

b. Documentation that describes the efficiency improvements and when they were initiated and completed.

c. Documentation that demonstrates that the efficiency improvements are not the result of routine maintenance.

d. Documentation that demonstrates that the efficiency improvements did not result in an adverse impact on instream beneficial uses or cause a change in the volume or timing of streamflow. For this purpose, an efficiency improvement could have an adverse impact on the instream beneficial uses if it causes an adverse change in the chemical, physical, or biological characteristics of water.

[. . .]

3. Instructions for Additional Required Information for Out-of-State Facilities

All out-of-state facilities must provide additional required information when applying for certification as RPS-eligible. Further requirements apply to facilities that commenced commercial operations before January 1, 2005, as described below. However, the additional reporting requirements for out-of-state facilities do not apply, to a facility that is either:

- Exclusively serving retail sellers subject to Public Utilities Code Section 399.17, or
- Seeking pre-certification and is not yet on-line.

1. Out-of-State Facilities: Representatives of all other out-of-state facilities seeking certification as RPS-eligible must submit the following additional information with a completed CEC-RPS-1A form.

Impact on California Environmental Quality Standards: The law requires a facility located out-of-state to demonstrate that it will not cause or contribute to a violation of a California environmental quality standard or requirement.[93] To meet these criteria, the applicant must provide:

a. A comprehensive list and description of all California environmental quality laws, ordinances, regulations, and standards (collectively referred to as "LORS") that may be directly or indirectly violated by the facility's development or operation, and
b. An assessment as to whether the facility's development or operation will cause or contribute to a violation of any of these LORS in the region of California most likely to be affected by the facility's development or operation.
c. Documentation that substantiates the applicant's assessment as required in b) above. For example, documentation could include environmental studies, permits, and similar materials that demonstrate that the facility's development or operation will not cause or contribute to a violation of a California environmental quality standard or requirement in California.

[93] Public Resources Code Section 25741(b)(2)(B)(iv).

At a minimum, the LORS described shall address the following environmental areas consistent with Appendix B, Section (g), of the Energy Commission's regulations for power plant certification, Title 20, California Code of Regulations, Sections 1701, et seq, to the extent that application of the Environmental Area Thresholds for Out-of-State Facilities set forth in Table 2 shows that the project has the potential to impact resources within California:

- Cultural Resources
- Land Use
- Traffic and Transportation
- Visual Resources
- Socioeconomics
- Air Quality
- Public Health
- Hazardous Materials Handling
- Workers' Safety
- Waste Management
- Biological Resources
- Water Resources
- Agriculture and Soil
- Paleontological Resources
- Geological Hazards and Resources
- Transmission System Safety and Nuisance
- Noise

The assessment of the potential for an out-of-state facility to cause or contribute to any violation of a California environmental quality standard or requirement depends on the environmental resource area and the project's distance from the region in California most likely to be impacted by the facility's development or operation. The likelihood that a facility located outside California will affect California's environmental quality is primarily related to distance. For example, a project located in a state not adjacent to California is unlikely to contribute to a violation of a California Visual Resources LORS. The Out-of-State Supplemental Form, CEC-RPS-1A:S3, requires an applicant to identify the project's distance from California, as well as the location in California most likely to be impacted by the project.

The applicable LORS for a given facility will vary depending on the facility's location, since the LORS across California vary. For example, the air quality standards in Southern California may differ from the air quality standards in Northern California. Accordingly, for demonstrating whether the out-of-state facility will cause or contribute to a violation of any of these LORS in California, the applicant should select the region in California that would most likely be affected by the facility's development or operation.
The Energy Commission will first consider the facility's technology and distance from the California region most likely to be impacted to assess the applicant's LORS documentation. Table 2 describes the thresholds the Energy Commission will apply when evaluating the likelihood of a project to cause or contribute to a violation of a California

LORS, with projects located beyond those thresholds being unlikely to violate a California LORS. As shown in Table 2, some environmental areas have discrete distance limits beyond which the project is unlikely to impact California's environmental quality. Other environmental areas have conditional thresholds for which the potential impact depends on the nature of the facility and its location.

Table 2: Environmental Area Thresholds for Out-of-State Facilities
[Table 2 omitted]

All applicants must submit a written explanation substantiating the claim that the project does not violate California LORS. For projects that are beyond the discrete thresholds, submission of a simple explanation documenting how the project's development and operation do not contribute to a violation of a California LORS is sufficient. For projects that are closer than the discreet threshold for an environmental area, a detailed explanation documenting how the project's development and operation do not contribute to a violation of a California LORS for the environmental area is required. An applicant may submit a simple explanation for each environmental area with a conditional threshold if there is no potential for a violation of a California LORS. If, however, there is potential for such a violation for an area with a conditional threshold, a detailed explanation is required. For example, Traffic and Transportation is an area with a conditional distance of 20 miles. A project located in Wyoming, which is farther than 20 miles from the California border, could provide a simple explanation describing how its development and operation have no impact on California's LORS because its transportation activities do not involve California air travel or its highways. All LORS assessments and explanations should be submitted in a document to accompany the CEC-RPS-1A Form and Out-of-State Supplemental Form, along with documentation that substantiates the applicant's assessment as required above in 1.c.

As noted above, further reporting requirements apply to out-of-state facilities that commenced commercial operations before January 1, 2005. For such facilities, the applicant may qualify for RPS certification if either: 1) the facility was part of a retail seller's baseline, or 2) the facility produces incremental generation due to project expansion or repowering on or after January 1, 2005. The additional required information needed for each case is described below.

- Baseline: If an out-of-state facility commenced commercial operations before January 1, 2005, the applicant must identify the retail seller that procured electricity from the facility, the baseline year, and the amount sold to the retail seller.
- Incremental generation: The Energy Commission may certify incremental generation from out-of-state facilities as RPS-eligible if it finds that the incremental generation exceeds the project's historical production. The method for quantifying incremental generation from out-of-state facilities is described below. The applicant must provide the following information:

    - For small hydroelectric or conduit hydroelectric facilities, the applicant must provide verifiable generation data for the 20 years preceding project expansion or

repowering. If the project has not been operational for 20 years, then provide generation data on all previous years to date. The applicant must also provide the information described in "Additional Required Instructions for Small Hydroelectric or Conduit Hydroelectric Facilities."

- For all RPS-eligible technologies except small hydroelectric or conduit hydroelectric, the applicant must provide data on annual generation for the 36 months preceding the project expansion or repowering (for example, if the project expansion comes on-line January 1, 2007, then generation data must be provided from January 1, 2004 through 2006). If the project has not been operational for 36 months, then provide generation data for all previous months to date.
- All applicants seeking certification of incremental generation must provide evidence that the incremental generation from the facility resulted (or will result if the applicant is seeking pre-certification) from a capital expenditure in the project. This information is needed to verify that the incremental production is not a result of weather fluctuations or some other recurring or random event. The capital investment must exclude monies that would have been spent on operation and maintenance in the normal course of doing business. The applicant must provide a brief description of each capital investment made for project expansion or repowering, including a discussion of the nature of the capital investments and how they resulted in the incremental generation. In substantiating an application to certify incremental production, the burden of proof will be on the applicant to submit compelling evidence to demonstrate the effect that capital expenditures had on production.

[. . .]

2. Out-of-Country Facilities: In addition to the above information for out-of-state facilities, an applicant for a facility located outside the United States must provide all of the following:

a) A comprehensive list and description of all California environmental quality LORS that would apply to a similar facility located within California at a site designated by the applicant.
b) An assessment as to whether the facility's development or operation will cause or contribute to a violation of any of these LORS. The applicant may select any region in California to demonstrate whether the facility's development or operation will cause or contribute to a violation of any of the LORS in California.
c) An explanation as to how the facility's developer and/or operator will protect the environment to the same extent as provided by these LORS for a similar facility located in California in developing or operating the facility, including whether the developer and/or operator will secure and put in place mitigation measures to ensure that these LORS are followed.
d) Documentation that substantiates the applicant's assessment as required in b) and c) above. For example, documentation could include environmental studies, permits, and similar materials that demonstrate that the facility's development or operation will not cause or contribute to a violation of a California environmental standard or regulation and will protect the environment to the same extent as provided by these LORS for a similar facility located in California."

(RPS Guidebook, Fourth Edition, pp. 48-59, TN 213250.)

Applying the RPS Eligibility Requirements to the BC Hydro Facilities

Neither LADWP nor Powerex Corp. applied to the CEC to certify the BC Hydro facilities for the RPS. Since no applications and supporting documentation for these facilities were submitted to the CEC, Staff cannot say whether the BC Hydro facilities could satisfy the requirements in Fourth Edition Guidebook, to be certified for the RPS. However, as discussed above in the response to Question 5, Staff believes it is unlikely the BC Hydro facilities could satisfy the requirements in the Fourth Edition Guidebook, because the BC Hydro facilities were located out-of-state and most likely located in British Columbia or Alberta, Canada.

As noted above, the Fourth Edition Guidebook provides that electricity generation from a renewable facility located out-of-state can qualify for the RPS if it meets the RPS eligibility requirements in the Fourth Edition Guidebook and satisfies all of the following criteria.

1. Facility is located so that it is or will be connected to the WECC transmission system.
2. Facility commences initial commercial operations after January 1, 2005.
3. Energy is delivered to an in-state market hub or in-state location, as specified in the delivery requirements in the next section.
4. Facility does not cause or contribute to any violation of a California environmental quality standard or requirement within California.
5. If located outside the United States, the facility is developed and operated in a manner that is as protective of the environment as would a similar facility be if it were located in California.
6. Facility, retail seller, and third parties participate in WREGIS.

If the facility meets all of the above criteria for out-of-state facilities except it commenced commercial operations on or before January 1, 2005 (criterion "2" above), then the Fourth Edition Guidebook provides that it may be RPS-eligible if it meets one of the following criteria:

1. The electricity is from incremental generation resulting from project expansion or repowering of the facility after January 1, 2005; or

2. The facility was part of the initial baseline procurement portfolio of a retail seller[94] or of a local publicly owned utility.

If a facility is located outside of the state, it must be shown that the facility does not cause or contribute to any violation of a California environmental quality standard or requirement within California. If the facility is located outside the United States, it must additionally show that the facility was developed and is operated in a manner that is as protective of the environment as would a similar facility if it were located in California.

In order to meet this burden as noted above, the Fourth Edition Guidebook requires applicants for the out-of-state facilities to provide the following information with their completed application forms certification.

a. A comprehensive list and description of all California environmental quality laws, ordinances, regulations, and standards (collectively referred to as "LORS") that may be directly or indirectly violated by the facility's development or operation, and
b. An assessment as to whether the facility's development or operation will cause or contribute to a violation of any of these LORS in the region of California most likely to be affected by the facility's development or operation.
c. Documentation that substantiates the applicant's assessment as required in b) above. For example, documentation could include environmental studies, permits, and similar materials that demonstrate that the facility's development or operation will not cause or contribute to a violation of a California environmental quality standard or requirement in California.

As noted above, the Fourth Edition Guidebook requires applicants for out-of-country facilities to provide the following additional information with their completed application forms certification.

a. A comprehensive list and description of all California environmental quality laws, ordinances, rules and standards (LORS) that would apply to a similar facility located within California at a site designated by the applicant.
b. An assessment as to whether the facility's development or operation will cause or contribute to a violation of any of these LORS. The applicant may select any region in California to demonstrate whether the facility's development or operation will cause or contribute to a violation of any of the LORS in California.
c. An explanation as to how the facility's developer and/or operator will protect the environment to the same extent as provided by these LORS for a similar facility

[94] Pursuant to paragraph (2) of subdivision (b) of Section 399.15 of the Public Utilities Code, the CPUC established an initial baseline for each retail seller based on the actual percentage of retail sales procured from eligible renewable energy resources in 2001, and to the extent applicable, adjusted going forward pursuant to Section 399.12 of the Public Utilities Code. (The statutes cited in this footnote are to the law as existing in 2011, when the Fourth Edition Guidebook was adopted by the CEC.)

located in California in developing or operating the facility, including whether the developer and/or operator will secure and put in place mitigation measures to ensure that these LORS are followed.

d. Documentation that substantiates the applicant's assessment as required in b) and c) above. For example, documentation could include environmental studies, permits, and similar materials that demonstrate that the facility's development or operation will not cause or contribute to a violation of a California environmental standard or regulation and will protect the environment to the same extent as provided by these LORS for a similar facility located in California.

As discussed in the response to Question 5, Staff does not know whether the BC Hydro facilities are located in Washington or Oregon, and if so, whether they could satisfy the above requirements for out-of-state facilities. If the BC Hydro facilities are located in British Columbia, it is unlikely that these facilities could satisfy the above requirements for out-of-country facilities, because the environmental quality LORS for California are more stringent than the LORS in British Columbia. Similarly, if the BC Hydro facilities are located in Alberta, Canada, it is unlikely that the facilities could satisfy the above requirements for out-of-country facilities.

If the BC Hydro facilities were able to satisfy the requirements in Fourth Edition guidebook and be certified for the RPS, the procurement of electricity products from these facilities would be categorized as "count-in-full" procurement under Public Utilities Code section 399.16(d). This would be so, because LADWP's agreements with Powerex Corp. were executed in 2007, prior to the June 1, 2010 date specified in section 399.16(d).

a. Public Utilities Code section 399.12.6(a) uses the term "count." Public Utilities Code section 399.16(d) uses "count in full." Explain whether there is any difference in the application of these two sections in the "counting" of resources against the RPS requirements.

"Count" refers to the procurement of electricity products towards satisfaction of a retail seller or POU's procurement requirements under the RPS program. "Count-in-full" is a category of counting procurement of electricity products under the RPS program towards a POU or retail seller's procurement requirements under the RPS program. Eligible RECs that are applied toward the procurement target are either classified as "count-in-full" or "portfolio content category."

As explained in the response to Question 2, the state's RPS program under SBX1-2 establishes a preference for the procurement of electricity products[95] that provides more environmental benefits to the state by, among other things, displacing in-state fossil fuel consumption, reducing air pollution within the state, and helping the state meet its climate change goals by reducing emissions of GHGs associated with electrical generation. (Pub. Util. Code, §399.11, subd. (b).) SBX1-2 does this by categorizing the procurement of electricity products from eligible renewable energy resources into portfolio content categories (PCCs, commonly referred to as "buckets") and establishing minimum and maximum percentages for the amount of these electricity products that may be procured by retail sellers and POUs in a given compliance period for the RPS. Public Utilities Code section 399.16(b) specifies the criteria for the PCC buckets and section 399.16(c) specifies the minimum and maximum percentages for these PCC buckets that may be procured for a given compliance period. The minimum and maximum procurement percentages of section 399.16(c) are referred as the Portfolio Balance Requirement (PBR).

Additionally, Public Utilities Code section 399.16(d) establishes a procurement category for electricity products that were procured pursuant to contracts or ownership agreements[96] executed prior to June 1, 2010. The procurement of electricity products that satisfy section 399.16(d) are not subject to the PBR and are referred to "count in full," because this procurement is counted in full toward satisfying a retail seller or POU's procurement requirements for the RPS without regard to the PBR.

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[95] "Electricity products" mean either i) electricity bundled with the associated REC generated by an eligible renewable energy resource or ii) an unbundled REC associated with the generation of electricity from an eligible renewable energy resource. Refer to definitions of "electricity product" and "renewable energy credits" in the 20 CCR section 3201 (j) and (v), respectively. Prior to enactment of SBX1-2, the state's RPS program requred retail sellers to procure bundled electricity to satisfy their RPS procurement requirements. Under the law as amended by SBX1-2, retail sellers and POUs may now also procure unbundled RECs to meet a portion of their RPS procurement requirements.

[96] A retail seller or POU may procure electricity products by entering into a contract with a third party for the procurement of those electricity products, typically referred to as a power purchase agreement, or a retail seller or POU may own the electrical generation facility themselves and procure the electricity products generated by the facility by virtue of facility ownership. Electricity products procured under the latter are considered to have been procured through "ownership agreements."

Categorizing the Procurement of Biomethane-based Electricity Products

Electricity generation that results from biomethane procured under the 2009 Shell and Atmos contracts may qualify as "count in full" procurement to satisfy LADWP's RPS procurement requirements if the generating facility satisfies the CEC's eligibility requirements specified in the RPS Eligibility Guidebook in place at the time the contract or ownership agreement was executed. LADWP's claimed use of biomethane under the 2009 Shell and Atmos contracts for the Scattergood, Harbor, Valley and Haynes facilities arguably commenced in August and September of 2009 when these contracts were executed. It was at that point in time that the facilities could be characterized as "eligible renewable energy resources" for the RPS based on the use of biomethane under the 2009 Shell and Atmos contracts. Under Public Utilities Code section 399.12.6(a), the applicable "rules in place" at that time for purposes of determining RPS eligibility of the LADWP's Scattergood, Harbor, Valley and Haynes facilities were the rules specified in the CEC's RPS Eligibility Guidebook, Third Edition.

LADWP's procurement of electricity products from the claimed use of biomethane under the 2009 Shell and Atmos contracts at the Scattergood, Harbor, Valley and Haynes facilities may qualify for the RPS only if the facilities satisfy the RPS eligibility requirements specified in the Third Edition guidebook. If so, the procurement of electricity may only qualify as "count in full" procurement since it occurred prior to June 1, 2010.

Categorizing the Procurement of Electricity Products from BC Hydro Facilities

The "rules in place" provisions of Public Utilities Code section 399.12.6(a) apply only to biomethane-based electricity procurement, and do not apply to procurement of electricity products from other renewable energy resources, such as small hydroelectric generation of 30 MW or less.[97] Consequently, if the BC Hydro facilities were able to satisfy the requirements in Fourth Edition guidebook and be certified for the RPS, the procurement of electricity products from these facilities would be categorized as "count-in-full" procurement under Public Utilities

[97] This is clear from a plain reading of Public Utilities Code section 399.12.6, which refers to biomethane exclusively in its various provisions; for example, to "procurement of biomethane" in subdivision (a), "quantities of biomethane" in subdivision (b), "electricity products generated using biomethane" in subdivision (c), "sellers and buyers of biomethane" in subdivision (d), "quantities of biomethane" in subdivision (e), and "party to a biomethane procurement contract" in subdivision (f), and defines "biomethane" in subdivision (g).

Code section 399.16(d). This is so, since LADWP's agreements with Powerex Corp. were executed in 2007, prior to the June 1, 2010 date specified in section 399.16(d).

In its *Motion to Add and Consolidate Additional RPS-Eligibility Claims,* LADWP argues that the "rules in place" provision of Public Utilities Code section 399.16(d)(1) should be construed to mean LADWP's rules in place when it entered into the BC Hydro agreements with Powerex Corp.[98] As explained in the response to Question 2, in the CEC's rulemaking proceeding for the POU RPS regulations it determined that the best construction of section 399.16(d)(1) was to interpret the "rules in place" provision as referring to the CEC's rules. The CEC's construction of section 399.16(d)(1) was discussed its Final Statement of Reasons for the POU RPS regulations, which was considered by the Office of Administrative Law in approving the regulations.

Moreover, construing the "rules in place" provision of Public Utilities Code section 399.16(d)(1) as LADWP argues would conflict with a plain reading of Public Utilities Code section 399.12(e)(1)(C), since it could result in procurement from the BC Hydro facilities qualifying as "count-in-full" procurement under section 399.16(d)(1) even though the BC Hydro facilities do not qualify as eligible renewable energy resources for RPS under section 399.12(e)(1)(C). As discussed in the response to Question 2, the BC Hydro facilities do not qualify as eligible renewable energy resources for the RPS under section 399.12(e)(1)(C), because the facilities do not meet the definition of a "renewable electrical generation facility" under Public Resources Code section 25741.

In its *Motion to Add and Consolidate Additional RPS-Eligibility Claims,* LADWP also suggests that the CEC's delays in reporting on British Columbia run-of-river hydroelectric generation facilities should be considered in determining the RPS-eligibility of these facilities.[99] As noted above, the CEC's report on British Columbia run-of-river hydroelectric generation facilities was prepared pursuant to Public Resource Code section 25741.5, which provided as follows:

> 25741.5. (a) By June 30, 2011, after providing public notice and an opportunity for public comment, including holding at least one public workshop, and following consultation with interested governmental entities, the commission shall study and provide a report to the Legislature that analyzes run-of-river hydroelectric generating facilities in British Columbia, including whether these facilities are, or should be, included as renewable

[98] TN 212400, pp. 9-10.
[99] TN 212400, pp. 9-10.

electrical generation facilities pursuant to Section 25741 or eligible renewable energy resources pursuant to Article 16 (commencing with Section 399.11) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code.
(b) By completing the study and making recommendations, the commission shall consider the effect that inclusion would have upon all of the following:
(1) Emissions of carbon dioxide and other greenhouse gases.
(2) Emissions of air pollutants.
(3) Water quality, recreation, and fisheries.
(4) Any other environmental impact caused by run-of-river hydroelectric generating facilities.
(c) The report submitted pursuant to this section shall be submitted in compliance with Section 9795 of the Government Code
(d) Pursuant to Section 10231.5 of the Government Code, this section is repealed on January 1, 2015.
(Pub. Resources Code, §25741.5, as enacted by SBX1-2.)

In its Motion, LADWP states that "[t]he CEC did not meet the prescribed June 30, 2011 deadline" in Public Resources Code section 25741.5 for conducting study and preparing the report.[100] While this is true, it should be noted that SBX1-2 was not signed into law until April 2011 and did not become effective until December 10, 2011, making it virtually impossible for the reporting deadline of June 30, 2011 to be satisfied.

As discussed above, the CEC's report found that British Columbia run-of-river hydroelectric facilities up to 30 MW in size are not inherently eligible for the RPS, as there are substantial differences between the levels of environmental protection required in British Columbia and California, including the fact that British Columbia does not have a stand-alone endangered species act. Facilities located in British Columbia would have great difficulty demonstrating that they are as protective of the environment as a similar facility would be if located in California, as current statute requires. The CEC report included an ***Analysis of Regulatory Requirements for Including British Columbia Run-of-River Facilities in the California Portfolio Standard Consultant Report,*** which documented several subject areas where the environmental protections required in California are more stringent than in British Columbia. Because these limitations make it very unlikely that British Columbia run-of-river projects will be able to contribute in any significant way to meeting California's RPS target, CEC staff did not find any compelling reason to recommend a modification of the existing eligibility requirements of the RPS statute.

[100] TN 212400, pp. 10-11.

LADWP's Motion argues that SBX1-2 "did not deem BC hydro facilities ineligible when SBX1-2 took effect."[101] However, SBX1-2 did make the BC hydro facilities ineligible for the RPS. As discussed above, the BC Hydro facilities do not qualify as eligible renewable energy resources for the RPS under section 399.12(e)(1)(C), which was added by SBX1-2, because the BC Hydro facilities do not meet the definition of a "renewable electrical generation facility" under Public Resources Code section 25741.

VIII. RESPONSE TO QUESTION 7

If either party desires to present additional argument that is not directly responsive to the above Committee Questions, they may do so.

If the Committee determines that the CEC interpreted the RPS statute incorrectly in adopting the RPS eligibility guidelines or the POU RPS regulations, then the CEC should be directed to initiate new proceeding(s) to revise the eligibility guidebook and/or the POU RPS regulations as appropriate.

RPS Eligibility Guidelines

The RPS Program guidelines have been developed pursuant to a public process as mandated by statute and can only be changed through the mandated process, not through this Appeal by LADWP re RPS Certification or Eligibility proceeding. Therefore, if revisions to the RPS Eligibility Guidebook are necessary, Staff should be directed to initiate a separate proceeding in accordance with section 25747(a) to propose guidebook revisions.

Public Resources Code section 25747(a) requires the CEC to adopt guidelines for purposes of RPS certification, accounting and verification under Public Utilities Code section 399.25 pursuant to a public process that contemplates public participation and an opportunity to comment. Section 25747(a) provides as follows:

> 25747. (a) The commission **shall adopt guidelines** governing the funding programs authorized under this chapter, **at a publicly noticed meeting offering all interested parties an opportunity to comment**. Substantive changes to the guidelines shall not be adopted without at least 10 days' written notice to the public. The public notice of meetings required by this subdivision shall not be less than 30 days. Notwithstanding any other law, any guidelines adopted pursuant to this chapter or Section 399.25 of the Public Utilities Code, shall be exempt from the requirements of Chapter 3.5 (commencing with

[101] TN 212400, p. 11.

> Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The Legislature declares that the changes made to this subdivision by the act amending this section during the 2002 portion of the 2001–02 Regular Session are declaratory of, and not a change in existing law.
> (Pub. Resources Code, §25747, subdivision (a))

Section 25747(a) requires the guidelines to be adopted at "a publicly noticed meeting offering all interested parties an opportunity to comment" with at least 30 days written notice for such meetings. Additionally, any substantive changes to the guidelines shall not be adopted without at least 10 days' written notice to the public. The CEC's guidelines are set forth in its adopted RPS Eligibility Guidebook. The CEC has complied with these statutory requirements for public meetings, notice, and opportunity to comment for every edition of its RPS Eligibility Guidebook.

For example, when revisions to the RPS Eligibility Guidebook, Fourth Edition, were being proposed to implements AB 2196, Staff used the following public process to develop, consider and adopt the guidebook revisions: In August of 2010 Staff released a draft fourth edition guidebook, conducted a public workshop on the draft guidebook, and solicited public comments for consideration. In November of 2010 a revised draft CEC Committee guidebook was released with a solicitation for additional public comment. Upon consideration of further public comment the CEC Committee guidebook was revised and adopted by at a CEC Business Meeting in December of 2010.

If the Committee determines that the RPS Eligibility Guidebook needs to be revised, the matter should be remanded back to the CEC so Staff may commence a separate proceeding to revise the RPS Eligibility Guidebook in accordance with the public process found outlined above.

POU Regulations

The POU RPS regulations have been developed pursuant to a public process in accordance with the Administrative Procedures Act and can only be changed through the same process, not through this Appeal by LADWP re RPS Certification or Eligibility proceeding. Therefore, if amendments to the CEC's POU RPS regulations are necessary, Staff should be directed to initiate a separate rulemaking proceeding to propose the amendments, rather than

address the amendments as part of a POU-specific appeal proceeding, such as the subject proceeding for the LADWP Appeal.

The Administrative Procedure Act (APA, Gov. Code, §1340 et seq.) establishes statewide administrative rulemaking procedures and standards (Gov. Code, §11346) and prohibits state agencies from issuing regulations unless they have been adopted pursuant to the APA (Gov. Code §11340.5) or have otherwise been expressly exempted by statute (Gov. Code, §11346(a)).

Compliance with the APA requires a multi-step process. When proposed regulations involve complex proposals or a large number of proposals the APA requires agencies to initiate public discussion prior to the start of the formal rulemaking process (Gov. Code, §11346.45(a)). The formal rulemaking process starts with publishing of notice of proposed rulemaking, initial statement of reasons, and the text of the proposed regulations (Gov. Code, §11346.5). This is followed by a minimum 45 day public comment period (Gov. Code, §11346.4), which is followed by the agency's consideration and possible changes to the proposed regulations, which could involve an additional 15 day comment period (Gov. Code, §11346.8(c)). Thereafter a final statement of reasons, including a summary and responses to comments, is prepared by the agency before adopting the regulations, which are then forwarded with the rest of the rulemaking package to the Office of Administrative Law (OAL) for review (Gov. Code, §11346.9). OAL reviews the regulations pursuant to the standards set forth in Government Code section 11349.1 and can return the regulations to the issuing agency or approve or disapprove the regulations within 30 days (Gov. Code, §11349.3).

The CEC has complied with the APA in each rulemaking for the adoption of the POU RPS regulations.[102] For example, when original POU RPS regulations were adopted in 2013, Staff used the following public process to develop, consider and adopt the regulations:

Staff initiated pre-rulemaking activities in June of 2011 with a staff workshop where public comments were solicited and considered by Staff. Thereafter POU focus groups were held in both northern and southern California where public comments again were solicited and considered by Staff. In February of 2012 Staff released an initial draft of the regulations and conducted a workshop where public comment was solicited and considered by Staff, followed by

[102] These regulations are set forth in the California Code of Regulations, title 20, sections 1240 and 3200 – 3208.

the release of a second draft in July of 2012, also followed by a Staff workshop and the solicitation and consideration of more public comments.

The formal rulemaking process was initiated by Staff in March of 2013 with the publishing of the proposed draft regulations, an Initial Statement of Reasons, and the other documents required under the APA. During the required 45-day comment period, staff conducted a workshop on the regulatory language. After consideration of comments Staff released revised regulations and solicited further public comment for consideration. Thereafter more revisions were made to the regulations and further public comment was solicited and considered by Staff. On June 12, 2013 the revised regulations were adopted by the Energy Commission at a Business Meeting.

The final regulations package was submitted to OAL on July 18, 2013, was approved by OAL the following month, and became effective October 1, 2013.

If the Committee determines that any part of the POU RPS regulations need to be amended the matter should be remanded back to the CEC, so Staff may initiate a new rulemaking proceeding under the APA, following the public process outlined above.

Dated this 1st day of September 2016

Respectfully submitted,

CALIFORNIA ENERGY COMMISSION

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