

## DOCKETED

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<b>Filer:</b>	Adriana Ayuso
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**STATE OF CALIFORNIA**  
**ENERGY RESOURCES CONSERVATION**  
**AND DEVELOPMENT COMMISSION**

<b>In the Matter of:</b>	)	<b>Docket No. 16-RPS-02</b>
	)	
<b>Appeal by LADWP re</b>	)	<b>RE: LADWP's Initial Response to the</b>
<b>RPS Certification or Eligibility</b>	)	<b>Committee's Scoping Order dated July 27,</b>
	)	<b>2016; Supporting Memorandum of Points</b>
	)	<b>and Authorities</b>
	)	

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**THE LOS ANGELES DEPARTMENT OF WATER AND POWER'S INITIAL**  
**RESPONSE TO THE COMMITTEE'S SCOPING ORDER DATED JULY 27, 2016;**  
**SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**

September 1, 2016

FELIX LEBRON  
Deputy City Attorney  
Los Angeles Dept. of Water and Power  
111 N. Hope Street, Suite 340  
Los Angeles, CA 90012  
Telephone Number: (213) 367-4500  
Email: [Felix.Lebon@ladwp.com](mailto:Felix.Lebon@ladwp.com)

JEAN-CLAUDE BERTET  
Deputy City Attorney  
Los Angeles Dept. of Water and Power  
111 N. Hope Street, Suite 340  
Los Angeles, CA 90012  
Telephone Number: (213) 367-4500  
Email: [Jean-Claude.Bertet@ladwp.com](mailto:Jean-Claude.Bertet@ladwp.com)

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### STATE OF CALIFORNIA

#### ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:	)	Docket No. 16-RPS-02
	)	
Appeal by LADWP re	)	RE: LADWP's Initial Response to the
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	)	2016; Supporting Memorandum of Points
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**THE LOS ANGELES DEPARTMENT OF WATER AND POWER'S INITIAL  
RESPONSE TO THE COMMITTEE'S SCOPING ORDER DATED JULY 27, 2016;  
SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**

Pursuant to the Committee Scoping and Scheduling Orders and Order Granting Motion to Add Consideration of 2007 British Columbia Hydroelectric Generation Contracts dated July 27, 2016, TN# 212485 ("Scoping Order"), LADWP submits the following Initial Response and Supporting Memorandum of Points and Authorities. LADWP's Initial Response is based on the points and authorities addressed below, the Verification of John Dennis (TN# 211752-2), Declaration of Louis C. Ting (TN# 212401), the Supplemental Declaration of Louis Ting dated August 30, 2016, the Second Supplemental Declaration of Louis C. Ting dated August 30, 2016, the Declaration of Sherry Greuter, the Declaration of Sharat Batra, the Declaration of Scott Masuda, the Expert Declaration of Benjamin Schlesinger, the evidence filed thereunder or previously filed in Docket No. 16-RPS-02, and any additional arguments or evidence that LADWP may raise in support of its Reply Response or that the Committee may hear and consider during the hearing on these issues.

## **I. INTRODUCTION**

California's Renewable Portfolio Standard ("RPS") imposes a paramount duty on the California Energy Commission ("Commission" or "CEC") to ensure that the RPS is administered and implemented by the CEC in a manner that is consistent with the statutory provisions and the expressed legislative intent. The City of Los Angeles ("City") through LADWP invested over \$1 billion in support of the RPS as an early and staunch supporter of the State's environmental goals. The CEC's RPS Staff ("Staff") deemed certain renewable energy generated from LADWP's grandfathered renewable resources as ineligible for RPS credit for first compliance period covering the period from January 1, 2011 to December 31, 2013 ("CP1"). Staff's determinations are based on interpretations and administrative practices that are inconsistent with the plain language of the RPS statutes, the expressed legislative intent regarding the grandfathering of publicly owned utilities (POUs') renewable resources into the RPS, and well-established industry customs and practice.

Senate Bill X1-2 ("SBX1-2) and Assembly Bill 2196 ("AB 2196) included provisions to grandfather and seamlessly transition LADWP's RPS program from a voluntary system to a mandatory system administered by the CEC. The plain language of the statutory provisions that grandfather LADWP's renewable resources and legislative history confirm that the Committee must grandfather and count in full LADWP's renewable resources procured under LADWP's voluntary RPS policies adopted pursuant to Senate Bill 1078 ("SB 1078") and Public Utilities Code Section 387. Staff, however, has implemented these grandfathering provisions in a manner that is inconsistent with plain language and expressed legislative intent. Staff's delayed and retroactive rulemaking raises fundamental constitutional questions regarding the retroactive application of laws and the impairment of contracts that LADWP and the City entered into in

good faith and in reliance on the laws in effect at the time and the substantial investment in renewables by LADWP's ratepayers.

In the sections below, LADWP establishes the factual and legal basis supporting its argument that the Committee must grandfather and provide full RPS credit for LADWP's BC hydro and 2009 biomethane procurement.

Section II of this brief addresses the relevant background facts and supporting evidence regarding LADWP's RPS policies, LADWP's BC hydro procurement contracts, and LADWP's 2009 biomethane procurement contracts. These facts establish the evidence supporting the arguments LADWP raises in response to the Scoping Order. Section III of this brief discusses the relevant legal standards for statutory construction under California law. Section IV, in turn, address LADWP's legal arguments in response to the questions raised in the Scoping Order.

## **II. BACKGROUND FACTS**

The following facts are relevant to the dispute and LADWP's responses to the questions raised in the Scoping Order.

### **A. Summary of LADWP's RPS Programs and Policies**

The City and LADWP have been staunch supporters of the RPS and clean-energy programs. The following subsections discussed the history and development of the City's RPS policies for LADWP.

#### **1. The City Established RPS Goals Before the State Enacted SB 1078 in 2002.**

The City and LADWP established RPS and clean-energy targets years before the State enacted SB 1078. For example, in May 1999, LADWP implemented the Green Power for Green

LA Program to promote renewable resource development and procurement through voluntary contributions by its customers. *See* Original Declaration of Louis C. Ting (“Ting Decl.”) at ¶5, Ex. 2. Bates Numbers LA000003. In August 2000, the City and LADWP’s Board adopted an Integrated Resource Plan, which included a local goal of meeting 50 percent of LADWP’s projected load growth through a combination of demand-side management, distributed generation, and renewable resources. *Id.* at ¶332 Ex. 48 Bates Number LA001603. The 2000 IRP also included LADWP’s then-existing RPS goal of developing 30 MWs of renewable energy by 2001, 100 MWs or renewable energy by 2005, and 150 MWs or renewable energy by 2010. *Id.*

**2. Senate Bill 1078 and Senate Bill 1038 Establish California’s RPS.**

SB 1078 became effective on January 1, 2003. SB 1078 had a companion bill – Senate Bill 1038 (“SB 1038”) – that was concurrently enacted and also became effective on January 1, 2003. SB 1078 added Article 16 (commencing with Section 399.11) to Chapter 2.3 or Part 1 of Division 1 of the Public Utilities Code. Section 399.15(b)(1) established the RPS target for California’s investor owned utilities (“IOUs”) to procure 20 percent of retail sales from eligible renewable resources by December 31, 2017. SB 1078 also added PUC Section 399.13, which required that the CEC “certify eligible renewable resources that it determines meet the criteria described in subdivision (a) of Section 399.12.” In addition, the CEC was required to design and implement an accounting system to verify compliance with renewables portfolio standard by retail sellers, to ensure that renewable energy output is counted only once for the purpose of meeting the renewable portfolio standards of this state or any other state, and for verifying retail product claims in this state or any other state.” Section 399.12(b)(4)(C) confirmed that the

defined term “retail seller” expressly excluded “a local publicly owned electrical utility as defined in subdivision (d) of [PUC] Section 9604.”

SB 1038 amended the Public Utilities Code Section 383.5 and the definition of “in-state renewable electricity generation technology” referenced in Section 399.12. As amended by SB 1038, Section 383.5(a) provided: “It is the intent of the Legislature in establishing this program, to increase the amount of renewable electricity generated per year, so that it equals at least 17 percent of the total electricity generated for consumption in California.” Section 383.5(b)(1) defined "In-state renewable electricity generation technology" as a facility that met 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. P.U.C. § 383.5(b)(1)(A)-(B).

For POUs, like LADWP, SB 1078 did not establish mandatory RPS targets. Instead, SB 1078 added Sections 387 to the Public Utilities Code. Section 387(a) provided that “[e]ach governing body of a local publicly owned electric utility [“POU”], 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.”

**3. The City and LADWP Develop Eligibility Criteria for LADWP's Voluntary RPS Program under Section 387.**

In late 2003, the City and took several steps toward developing a new RPS program for LADWP. These steps included the Mayor's creation of a Green Ribbon Commission, and the convening of a Renewable Energy Summit by the City Council's Commerce, Energy and Natural Resources Committee. Declaration of Louis C. Ting in 16-RPS-02 dated July 22, 2016, TN# 212401 ("Ting Decl.") ¶9, Ex. 6.

On June 29, 2004, the Los Angeles City Council (City Council) passed Resolution 03-2064-S1 requesting that LADWP's Board adopt an official RPS Policy. Ting Decl. at ¶4-7, Exs. 1-4. The City and LADWP held several public meetings to discuss the RPS-eligibility criteria for LADWP's RPS program. The City's list of eligible renewable technologies was consistent with the technologies listed in the Public Utilities Code, but the City requested additional information from LADWP regarding the treatment and eligibility of certain hydroelectric facilities owned by LADWP.

On July 13, 2004, the City Council considered a report prepared by LADWP regarding the inclusion of hydroelectric facilities greater than 30 MWs in the City's list of RPS-eligible facilities. *See* Supplemental Declaration of Louis C. Ting ("Supp. Ting Decl.") at ¶ 45, Ex. 329 Bates Number LA001574-LA001587 ( "2004 Hydro Report"). The 2004 Hydro Report address policy considerations regarding whether LADWP should include hydroelectric generating facilities greater than 30 MWs as eligible resources under LADWP's voluntary RPS policy. *Id.* The 2004 Hydro Report discussed LADWP's aqueduct hydro facilities and the Hoover hydroelectric facility. At that time, LADWP's aqueduct facilities included 15 hydroelectric generating units with a maximum capacity of 18 MWs, four hydroelectric generating units with a

maximum capacity of 26 MWs, and three hydroelectric generating units with a maximum capacity of 38 MWs. *Id.* LADWP also owned a total of 491 MWs of hydroelectric output from Hoover. *Id.*

In the 2004 Hydro Report, LADWP recommended that the City include LADWP's aqueduct-hydroelectric facilities as eligible resources under the LADWP's RPS Policy, and recommended that the City exclude Hoover as an eligible resource. *Id.* LADWP estimated that the exclusion of Hoover would require LADWP to procure an additional 2.8% of renewable energy at an estimated aggregate cost of \$157 million. *Id.* The City Council continued the matter to August 10, 2004 to consider additional information regarding the treatment of Hoover.

On August 10, 2004, the City Council considered LADWP's supplemental hydroelectric report regarding Hoover. Supp. Ting Decl. at ¶ 46, Ex. 330 Bates Numbers LA001580-LA001592. ("Supplemental 2004 Hydro Report"). The Supplemental 2004 Hydro Report considered how other POUs classified Hoover under their respective RPS policies. The Supplemental 2004 Hydro Report noted that 80% of the POUs that adopted local RPS program defined all hydro facilities as eligible resources regardless of the size or capacity of the facility. *Id.* The Supplemental 2004 Hydro Report also noted that Hoover was considered an eligible renewable resource by *all* of the other POUs that owned interests in, or received electricity from, Hoover. The Supplemental Hydro Report also discussed the inconsistent standards for hydroelectric facilities among the states that had definitions for the RPS-eligibility of hydro facilities. *See id.* at ¶ 47; Ex. 331 Bates No. LA001595 (noting that 10 out of 21 states had no size limitation for hydro; four states had limits less than 100 MWs, less than 60 MWs, less than 30 MWs, and low head; four states did not recognize hydro as renewable, and three states used criteria other than facility size for hydro eligibility).



On October 15, 2004, the City Council adopted a motion and resolution approving the inclusion of LADWP's aqueduct generating units greater than 30 MWs in size as eligible resources under LADWP's RPS policy. *See* Supp. Ting Decl. at ¶47, Ex. 331 Bates No. LA001593. The City also excluded Hoover as an eligible resource, notwithstanding the cost impact and other POU's treatment of Hoover as an eligible resource. *Id.*

#### **4. LADWP's 2005 RPS Policy.**

On May 23, 2005, LADWP's Board adopted a LADWP RPS Policy that established the goal of increasing the amount of energy that LADWP generates from renewable resources to 20 percent of its retail sales by 2017, with an interim goal of 13 percent by 2010. Ting Decl. ¶ 9, Ex. 06 ("2005 RPS Policy"). On June 29, 2005, the City Council approved the 2005 RPS Policy. The 2005 RPS Policy represented LADWP's "commitment to renewable resource supply as requested by the City Council Resolution 03-2064-S1 and consistent with the provisions of SB 1078 (2002)." *Id.* The 2005 RPS Policy established the goal of increasing the amount of energy LADWP generated from renewable energy resources to 20 percent of its retail sales by 2017, with an interim goal of 13 percent by 2010. *Id.* The 2005 RPS Policy defined the list of "Eligible Resources" as follows:

Electricity produced from the following technologies constitute 'eligible' resources: biomass, biodiesel, digester gas, fuel cells using renewable fuels, geothermal, landfill gas, municipal solid waste only if the energy conversion process does not employ direct combustion of solid fuel; ocean wave, ocean thermal, and tidal current technologies; solar photovoltaic, small hydro 30 MWs or less, and the Los Angeles Aqueduct hydro power plants; solar thermal, wind; and other renewables that may be defined later.

The City's list of eligible-renewable technologies is consistent with the State's then-existing definitions of eligible renewable technologies under the Public Utilities Code, with the exception of the inclusion of the Aqueduct facilities.

The 2005 RPS Policy included a competitive bid process and least-cost, best-fit procurement criteria. The 2005 RPS Policy included the following reporting requirements based on Public Utilities Code Section 387(b): "Reporting Requirements: LADWP will provide an annual report of the following information to its customers as required by SB 1078: (1) expenditure of PBC funds for renewable energy resources development, and (2) the resource misused to serve its retail customers by fuel type." *See id.* The 2005 RPS Policy also included a flexible compliance provision, which allowed LADWP's Board to adjust the RPS Policy as needed due to price expenditure limitations or the unavailability of renewable resources. *Id.*

#### **5. LADWP's 2007 RPS Policy.**

In December 2005, LADWP's Board recommended that LADWP accelerate its RPS goal to achieve a 20-percent RPS by 2010 instead of 2017. A year later, California passed Senate Bill 107 ("SB 107"), which became effective on January 1, 2007. SB 107 accelerated the RPS goals of IOUs to a 20% RPS by 2010. SB 107 also amended Public Utilities Code Section 387(b). As amended, Section 387(b) provided that LADWP would submit a copy of its annual report to the CEC in addition to LADWP's customers. On April 11, 2007, LADWP's Board adopted Resolution No. 007-197 approving an amendment to the 2005 RPS Policy to incorporate these changes, among other things. Ting Decl. ¶ 10, Ex. 7 ("2007 RPS Policy"). The 2007 RPS Policy required that 20 percent of LADWP's energy sales to retail customers be generated from renewable resources by December 31, 2010. *Id.* Section 3 of the 2007 RPS Policy still defined "Eligible Resources" as:

Electricity produced from the following technologies constitute ‘eligible’ resources: biomass, biodiesel, digester gas; fuel cells using renewable fuels; geothermal; landfill gas; municipal solid waste only if the energy conversion process does not employ direct combustion of solid fuel; ocean wave; ocean thermal, and tidal current technologies; solar photovoltaic; small hydro 30 MW or less, and the Los Angeles Aqueduct hydro power plants; solar thermal; wind; and other renewable resources that may be defined later.

Consistent with SB 107, Section 8 of the 2007 RPS Policy provided that “LADWP [would] provide an annual report of the following information to its customers and the California Energy Commission (CEC) as required by SB 1078 and SB 107; (1) expenditure of PBC funds for renewable energy resource development, (2) the resource mix used to serve its retail customers by fuel type, and (3) status in implementing a RPS and progress toward attaining the standard.” *Id.*

Other notable changes in LADWP’s 2007 RPS Policy included a new requirement that LADWP satisfy certain targets for owning renewable resources procured pursuant to the 2007 RPS Policy. Specifically, Section 5 required that LADWP pursue renewable acquisitions that would result in LADWP owning the renewable generating facility, or providing LADWP with a direct or indirect option to purchase the renewable generating facility. *Id.*

## **6. LADWP’s 2008 RPS Policy.**

LADWP’s Board decided to increase LADWP’s RPS goal in 2008. On May 20, 2008, LADWP’s Board adopted Resolution No. 008-247 approving an amendment to the 2007 RPS Policy. Ting Decl. ¶ 11, Ex. 8 (“2008 RPS Policy”). The 2008 RPS Policy included an additional RPS goal requiring that 35 percent of LADWP’s retail sales to customers be generated from eligible renewable resources by December 31, 2020. *Id.* The 2008 RPS Policy set a higher

RPS goal for LADWP in comparison to the IOUs, which, at that time, still had a goal of 20 percent RPS by December 31, 2010. *Id.*

The 2008 RPS Policy also amended the list of “Eligible Resources.” LADWP recommended that the list of eligible resources be updated to include recent updates reflected in the CEC’s Third Edition RPS Eligibility Guidebook released in January 2008 (“Third Edition”). LADWP’s Board Letter dated April 30, 2008, noted that the Third Edition included an expanded list of eligible renewable resources that included “conduit hydroelectric,” “hydroelectric incremental generation from efficiency improvements,” “energy from renewable facilities using multiple fuels,” and “*the use of biogas injected into natural gas pipelines.*” *Id.* LADWP also identified the changes in the Third Edition that permitted the delivery of out-of-state energy as “firmed” or “shaped” electricity. LADWP’s Board Letter stated that “[b]ecause the LADWP desires to own and/or operate its generation facilities and is interested in the physical delivery of renewables, it is not recommending adoption of all CEC provisions.” *Id.*

Section 3 of the 2008 RPS Policy contained LADWP’s amended definition of “Eligible Resources:”

Electricity produced from the following technologies constitute ‘eligible’ resources: biodiesel; biomass; ***conduit hydroelectric*** (hydroelectric facilities such as an existing pipe, ditch, flume, siphon, tunnel, canal, or other manmade conduit that is operated to distribute water for beneficial use); digester gas; fuel cells using renewable fuels; geothermal; ***hydroelectric incremental generation from efficiency improvements***; landfill gas; municipal solid waste; ocean thermal, ocean wave, and tidal current technologies; ***renewable derived biogas*** (meeting the heat content and quality requirements to qualify as pipeline-grade gas) ***injected into a natural gas pipeline for use in a renewable facility***; ***multi-fuel facilities using renewable fuels*** (only the generation resulting from the renewable

fuels will be eligible), small hydro 30 MW or less, and the Los Angeles Aqueduct hydro power plants; solar photovoltaic; solar thermal electric, wind, and other renewables that may be defined later.

Notably, LADWP's eligibility criteria for renewable biogas injected into a natural gas pipeline did not include all requirements listed in the Third Edition for pipeline biogas. In contrast to the Third Edition, the 2008 RPS Policy required only that the renewable biogas meet "the heat content and quality requirements to qualify as pipeline-grade gas" and that the biogas be "injected into a natural gas pipeline for use in a renewable facility." *Id.*

The 2008 RPS Policy included other changes. For example, Section 8 stated, in part, that "for purposes of attaining RPS goals, given that there may be significant fluctuations from year to year in the amount of energy generated, particularly from hydroelectric, wind and solar resources due to weather conditions, LADWP RPS goals may report energy that would have been generated in an average year from individual projects utilizing these technologies." *Id.*

In addition, Section 10 titled "RPS Energy Delivery" was added into the 2008 RPS Policy. Section 10 stated, in part, that "[r]enewable energy may be delivered to LADWP's Power System at a different time than when the renewable facility generated the energy. Further, the energy delivered to LADWP may be generated at a different location than that of the renewable facility. In practical terms, renewable energy may be 'firmed' or 'shaped' within the calendar year." *Id.*

## **7. LADWP's 2011 RPS Policy.**

On April 12, 2011, Governor Brown signed SBX1-2 into law with an effective date of December 10, 2011. LADWP's Board subsequently adopted amendments to the 2008 RPS Policy in anticipation of SBX1-2 becoming effective. SBX1-2 added Section 399.30 to the

Public Utilities Code, which established new RPS requirements applicable to POUs. Section 399.30 required that LADWP's governing board adopt RPS procurement requirements and a program for enforcement on or before January 12, 2012.

On December 6, 2011, LADWP's Board adopted Resolution No. 012-109, which amended LADWP's 2008 RPS policy to comply with the new legislative requirements under SBX1-2, which would become effective on December 10, 2011. Ting Decl. ¶12, Ex. 09 ("2011 RPS Policy"). Section 1 of the 2011 RPS Policy stated that the Board adopted the amendments in accordance with Public Utilities Code Section 399.30(e). *Id.*

Section 3 of the 2011 RPS Policy included LADWP's amended RPS Compliance Targets. For the period of January 1, 2011 to December 31, 2013 (CP1), LADWP was required to "procure sufficient electricity products from eligible renewable energy resources to achieve an average of 20 percent of retail sales during such period." *Id.* LADWP also adjusted its RPS Target for the third compliance period (January 1, 2017 to December 31, 2020) to conform to SBX1-2 by reducing the RPS target from 35% RPS to 33% RPS by December 31, 2020. *Id.*

Section 4 of the 2011 RPS Policy included an amendment to address the standard for determining the criteria for "Eligible Renewable Energy Resources" under the law in effect before SBX1-2 and after SBX1-2's effective date of December 10, 2011. Section 4 stated:

Prior to the enactment of SBX1-2, the LADWP RPS Policy defined the following technologies as 'eligible renewable resources': 'biodiesel; biomass; conduit hydroelectric (hydroelectric facilities such as an existing pipe, ditch, flume, siphon, tunnel, canal, or other manmade conduit that is operated to distribute water for beneficial use); digester gas; fuel cells using renewable fuels; geothermal; hydroelectric incremental generation from efficiency improvements;

landfill gas; municipal solid waste; ocean thermal, ocean wave, and tidal current technologies; renewable derived biogas (meeting the heat content and quality requirements to qualify as pipeline-grade gas) injected into a natural gas pipeline for use in a renewable facility; multi-fuel facilities using renewable fuels (only the generation resulting from the renewable fuels will be eligible), small hydro 30 MW or less, and the Los Angeles Aqueduct hydro power plants; solar photovoltaic; solar thermal electric, wind, and other renewables that may be defined later.’

***All renewable energy resources approved by the Board as part of its renewables portfolio in accordance with applicable law and previous versions of this RPS Policy, including without limitation those on Appendix A, will continue to be eligible renewable energy resources.*** These renewable energy resources will count in full towards LADWP’s RPS targets adopted in section under this updated RPS Policy.

For RPS resources procured ***after the effective date of SBX1-2***, ‘eligible renewable energy resource’ ***means a generation facility that meets the eligibility criteria under the applicable law***, including a ‘Renewable Electrical Generation Facility’ as defined in ***Section 25741(a) of the Public Resources Code*** and ‘Eligible Renewable Energy Resource’ as defined in PUC ***Section 399.12(e) and 399.12.5. Id.*** at § 4.

Appendix A of the 2011 RPS Policy identified the renewable resources procured and approved under LADWP’s voluntary RPS program adopted consistent with Public Utilities Code Section 387 and before SBX1-2’s effective date. *Id.* Appendix A listed, among other renewable

resources, the renewable resources at issue in this administrative proceeding, including the Powerex BC Hydro PPAs and the 2009 Shell and Atmos biomethane procurement contracts. *Id.*

LADWP's Board also included a new Section 7 in the 2011 RPS Policy to address the Portfolio Content Categories. Public Utilities Code Section 399.30(c)(3) stated that "a local publicly owned electric utility shall adopt procurement requirements consistent with Section 399.16." Section 399.16(d)(1), in turn, provides that "any contract or ownership agreement originally executed prior to June 1, 2010, shall count in full toward the procurement requirements" where the "renewable energy resource was eligible under the rules in place as of the date when the contract was executed." Section 7 of the 2011 RPS Policy adopted procurement requirements consistent with Sections 399.30(c)(3) and 399.16(d). Specifically, Section 7 provided, in relevant part, that:

As required by SBX1-2, eligible renewable energy resources, procured on or after June 1, 201, will be in accordance with PUC Sections 399.16(b) and (c). Section 399.16(b) defines eligible renewable energy resources in three distinct portfolio content categories, commonly known as 'buckets.' LADWP will ensure that the procurement of its eligible renewable energy resources on or after June 1, 2010, will meet the specific percentage requirements set out in Section 399.16(c) for each compliance period....Subject to the provisions of PUC Section 399.16(d), renewable electricity products procured prior to June 1, 2010, are exempt from these portfolio content categories and will continue to count in full toward LADWP's RPS compliance targets. *Id.*

Section 9 of the 2011 RPS Policy adopted optional compliance measures consistent with Section 399.30(d). These option compliance measures included the Board's adoption of conditions for delaying timely compliance with the RPS targets under Section 399.30(d)(2) and consistent with Section 399.15(b); the Board's adoption of cost limitations for procurement



expenditures consistent with Sections 399.30(d)(3) and Sections 399.15(c)-(d); and excess procurement rules consistent with Section 399.30(d)(1) and Section 399.13. *Id.*

Finally, the 2011 RPS Policy also amended LADWP's Reporting and Notice Requirements under Section 10 to conform to the new requirements under Sections 399.30(e)-(g) and Section 399.30(l). *Id.*

**8. The CEC Adopted the Prescribed RPS Regulations for POUs in August 2013 over Two Years After the Statutory Prescribed Deadline of July 1, 2011.**

SBX1-2 added Section 399.30(m) to the Public Utilities Code. Section 399.30(m) stated that:

*On or before July 1, 2011, the Energy Commission shall adopt regulations specifying procedures for enforcement of this article.* The regulations shall include a public process under which the Energy Commission may issue a notice of violation and correction against a local publicly owned electric utility for failure to comply with this article, and for referral of violations to the State Air Resources Board for penalties pursuant to subdivision (o).

The CEC adopted the prescribed regulations *over two years* after the statutory deadline. The CEC's "Enforcement Procedures for the Renewable Portfolio Standard for Local Publicly Owned Electric Utilities for the California Renewable Energy Resources Act" ("RPS Enforcement Regulations for POUs") were approved by the California Office of Administrative Law in August 2013 and the regulations became effective on *October 1, 2013*. 20 C.C.R §§ 3200-3208, 1240.

**9. LADWP's 2013 RPS Policy.**

On December 3, 2013, LADWP's Board adopted Resolution No. 014-119, which amended the 2011 RPS Policy to incorporate changes made by the CEC's RPS Enforcement Regulations for POUs. Ting Decl. ¶13, Ex. 10 ("2013 RPS Policy"). Section 3 of the 2013 RPS Policy included references to the Section 3204 of Title 20 of the California Code of Regulations for LADWP's RPS procurement targets. *Id.* Section 8 of the 2013 RPS Policy was amended to address the portfolio content category and portfolio balance requirements address in 20 C.C.R. Section 3203.

The 2013 RPS Policy also included substantive revisions regarding the optional compliance measures. Section 9 of the 2013 RPS Policy made conforming changes to address Excess Procurement (Section 9.1), Delay in Timely Compliance (Section 9.2), Portfolio Balance Requirement Reductions (Section 9.3), Change in Law or Regulations (Section 9.4), and Cost Limitations (Section 9.5). *Id.* In addition, LADWP's Board included a new Section 13 to include LADWP's Board Enforcement Process (Section 13.1) for LADWP's failure to meet its RPS requirements, LADWP's Reporting Requirements (Section 13.2) for providing progress reports to the CEC as required under 20 C.C.R. section 3207; and LADWP's Notice Requirements (Section 13.3) for providing notice of changes in LADWP's RPS Policy as required under 20 C.C.R. Section 3205. *Id.*

**B. LADWP's B.C. Hydro Power Purchase Agreements with Powerex.**

The following subsections discuss LADWP's BC Hydro contracts, including the approval process, the relevant terms of the contract, the RECS generated, and the CEC's BC Hydro Report.

**1. LADWP's Approval Process for the Powerex BC-Hydro PPAs.**

On June 30, 2004, LADWP initiated a competitive-bid process seeking contracts for the long-term purchase of energy from renewable energy resources. Ting Decl. ¶¶ 14-15, Exs. 11 (LADWP Board Letter dated Mar. 23, 2007); Ex 12 (LADWP Board Resolution No. 007-166). On September 18, 2004, LADWP received proposals from firms having the capability to provide the requested renewable energy, including proposals from Powerex Corp. (“Powerex”). *Id.* As a result of the competitive-bid process, LADWP selected Powerex based on the competitive-bid criteria. Ting Decl. ¶ 14, Ex. 11. LADWP and Powerex negotiated two power purchase agreements for the purchase of renewable energy from small hydroelectric generating facilities with a nameplate ratings of 30 MWs or less located in the British Columbia, Alberta, Washington or Oregon control areas (“Powerex BC-Hydro PPAs”). *Id.* Ting Decl. ¶¶ 21-22, Exs. 18-19 (Powerex BC-Hydro PPAs - Agreement Nos. BP 05-020-A and BP 05-020-B).

On May 5, 2006, the Office of the City Administrative Officer issued a report and recommendation regarding LADWP’s proposed Powerex BC-Hydro PPAs. Ting Decl. ¶ 17, Ex. 14 (“CAO Report”). The CAO Report recommended that LADWP and the City Council approve the proposed Powerex BC-Hydro PPAs. *Id.* In support of its recommendation, the CAO noted the City’s 2005 RPS Policy required LADWP to procure 20 percent of the City’s energy from renewable resources. *Id.* The CAO report also acknowledged that the 2005 RPS Policy defined small hydroelectric generating facilities less than 30 MWs as eligible renewable resources. *Id.*

LADWP submitted its Board Letter seeking approval of the Powerex BC-Hydro PPAs on March 2, 2007. Ting Decl. ¶ 14, Ex. 11. LADWP’s Board Letter identified the express purpose for entering the Power BC-Hydro PPAs:

As part of its Renewable Portfolio Standard (RPS), the LADWP has a goal to supply 20% of its retail energy from renewable energy sources by 2010. The Agreement is the result of a competitive bid Request for Proposal (RFP) process, and is an important component of the LADWP's commitment to meeting the goals of its RPS. ***The Agreement will allow the LADWP to purchase renewable energy from RPS qualified hydroelectric facilities for the purpose of supplying renewable electricity to the ratepayers of Los Angeles. The purchase of 438,000 MWh of renewable energy per year will enable the LADWP to meet 1.9% of its RPS goal.*** The renewable energy will be delivered to the LADWP at the Nevada Oregon Border where the LADWP's and Bonneville Power Administration's electric systems meet on the pacific DC intertie, and therefore, no additional transmission infrastructure or transportation is required. *Id.*

The Board Letter explained that LADWP initiated a competitive-bid process on June 30, 2004 and received responsive proposals on September 18, 2004. *Id.* LADWP selected Powerex's proposal based on "a detailed evaluation and due diligence review of [Powerex's] ability to delivery, and a comparison of costs and benefits offered." *Id.* LADWP's estimated cost of the renewable energy under the Power BC-Hydro PPAs was "\$151,876,500 and [was] not to exceed \$186,204,000...based on the price cap of \$89.50/MWh." *Id.*

On March 6, 2007, LADWP's Board adopted Resolution No. 007-166, which approved the Powerex BC-Hydro PPAs. Ting Decl. ¶ 15, Ex. 12 (Resolution No. 007-166); *id.* ¶¶ 21-22, Exs. 18-19. The Resolution stated that the Powerex BC-Hydro PPAs were the result of the competitive-bid process initiated on June 30, 2004, and the responsive proposals received on September 18, 2004. Ting Decl. ¶ 15, Ex. 12. The Resolution acknowledged that the Powerex BC-Hydro PPAs would provide renewable energy to LADWP from small hydroelectric generating facilities. *Id.*

The City Council’s Energy and Environment Committee (“E&E Committee”) issued a report regarding the proposed Powerex BC-Hydro PPAs. Ting Decl. ¶18, Ex 15 (E&E Committee Report). The E&E Committee Report recommended that the full City Council approve the Powerex BC-Hydro PPAs for “expenditures not to exceed \$186,204,000 based on a price cap of \$89.50 per [MWh].” *Id.* In support of its recommendation, the E&E Committee Report stated:

The Board reports that, in accord with the Council approved Renewable Portfolio Standard (RPS), it has set the goal of supplying 20% of the DWP’s retail energy from renewable energy sources by 2010. ***The proposed Agreements, will allow the DWP to meet 1.9% of the RPS goal,*** were the result of a Request for Proposal, a competitive bid process, that the DWP initiated on June 30, 2004, in order to acquire renewable energy resources. *Id.*

The E&E Committee Report included a “Fiscal Impact Statement.” *Id.* The E&E Committee reported that “the total expenditures may total \$186,204,000 for the four years, nine months duration of the Agreement[s]. ***The funds will be used to purchase renewable energy as part of DWP’s Renewable Portfolio Standard. This will benefit the ratepayers of Los Angeles by supplying them with green energy.***” *Id.*

On March 23, 2007, the City Council approved the Powerex BC-Hydro PPAs. Ting Decl. ¶ 19, Ex. 16 (City Council Action dated Mar. 23, 2007). The City Council’s Action approving Powerex BC-Hydro PPAs expressly adopted the recommendations contained in the E&E Committee Report. *Id.*; *see also id.* at ¶ 18-19, Ex. 15. The City executed Ordinance No. 178533 on March 23, 2007. Ting Decl. ¶ 20, Ex. 17 (Ordinance No. 178533). Ordinance No. 178533 approved the execution of the Powerex BC-Hydro PPAs by the City acting by and through LADWP. *Id.*

## **2. Summary of Relevant Provisions in the Powerex BC-Hydro PPAs.**

The Powerex BC Hydro PPA's Recitals expressly acknowledge LADWP's 2005 RPS Policy and that LADWP entered into the agreement to purchase renewable energy attributed to small hydroelectric generation. Ting Decl. ¶¶ 21-22, Exs. 18-19 at Recitals. The term of Powerex BC-Hydro PPAs started in April 2007 and expired in December 2011 for a total term of four years and nine months. *Id.* at § 3.1 (Effective Date and Term). LADWP agreed to purchase and receive 25 MWh of Energy each hour (the "Contract Capacity") during the Term at the Point of Delivery. *Id.* at §§ 4.1 (Sale and Purchase Obligations); § 5.1 (Price for Delivered Energy). The "Point of Delivery" was the Nevada-Oregon Border (NOB), at the point where LADWP's and Bonneville Power Authority's electric system meet on LADWP's Pacific Intertie DC Transmission Line. *Id.* §1.1 (definitions of Point of Delivery and NOB). The Point of Delivery (NOB) was located within the Western Electricity Coordinating Council ("WECC"). *Id.*

The Powerex BC-Hydro PPAs required Powerex to provide Renewable Energy from hydroelectric generating facilities less than 30 MWs. *Id.* at § 1.1 (definition of "Facilities"). Powerex represented that the Delivered Energy in any hour would be Renewable Energy as defined under the Powerex BC-Hydro PPAs. *Id.* §4.8 (Guaranteed Percentage of Renewable Energy). If the Delivered Energy in any hour was not Renewable Energy, LADWP had the right to return an equivalent amount of energy to Powerex, which Powerex would purchase at the energy price for Returned Energy. *Id.* § 4.7 (Delivery of Non-Renewable Energy).

LADWP received one of Renewable Energy Credit ("REC") for each MWh of Delivered Renewable Energy purchased by LADWP under the Powerex BC-Hydro PPAs. *Id.* § 5.3 (Renewable Energy Credits). LADWP received all rights and title to the RECs, and Powerex

represented that it would not “use, sell or otherwise transfer” LADWP’s RECs to any third parties. *Id.* Powerex confirmed the total quantities of Renewable Energy delivered in each hour of every month in Powerex’s monthly billing invoices to LADWP. *Id.* § 5.4 (Quantity of Energy Delivered). Powerex’s monthly billing invoices to LADWP were “deemed to be an attestation by Powerex as to the quantity of Renewable Energy delivered.” *Id.*; *see also id.* § 8.1 (Billing and Payment).

**3. LADWP’s Supporting Evidence Regarding the RECs Claimed for 2011.**

LADWP submits the following additional evidence in support of its BC-Hydro REC claims for CP1:

- Powerex Monthly Invoices, Agreement No. BP-020-A (January 2011 to December 2011). Declaration of Sharat Batra in 16-RPS-02 (“Batra Decl.”) at ¶ 4-16, Exs. 291-302.
- Powerex Monthly Invoices, Agreement No. BP-020-B (January 2011 to December 2011). Batra Decl. at ¶¶ 17-29, Exs. 303-314.
- Powerex Monthly Attestation Letters regarding Renewable Energy Credits for Agreement Nos. BP-020-A and BP-020-B (January 2011 to December 2011). Batra Decl. at ¶¶ 30-42, Exs. 315-326.
- Powerex Letters Designating Facilities under Agreement Nos. BP-020-A and BP-020-B dated November 29, 2010. Supp. Ting Decl. at ¶ 44, Ex. 328.
- LADWP Confirmation of Payment to Powerex for 2011 Monthly Invoices for Agreement Nos. BP-020-A and BP-020-B. Declaration of Sherry Grueter in 16-RPS-02 (“Grueter Decl.”) at ¶ 8, Ex. 327.

The Powerex Monthly Invoices (Agreement Nos. BP-020-A and BP-020-B) confirm the total amount of delivered energy measured in MWh received by LADWP for each month in 2011 for the Powerex BC-Hydro PPAs. Batra Decl. at ¶¶ 4-29, Exs. 291-314. LADWP paid a total of \$46,722,920.44 for the renewable energy purchased and received under the Powerex BC-Hydro PPAs. Grueter Decl. at ¶ 8, Ex. 327. The Powerex REC Attestation Letters confirm the total amount of renewable energy delivered each hour for each day of the specified month, and the total number of RECs measured on a per/MWh basis that LADWP purchased each month in 2011 under Agreements No. BP-020-A and BP-020-B. Batra Decl. at ¶¶ 30-42, Exs. 315-326. The Powerex Monthly Attestations reflect a total of 437,379 RECs procured under the Powerex BC-Hydro PPAs for 2011, and a total of 410,981 RECS for the period of January 1, 2011 to December 9, 2011. Batra Decl. ¶¶ 30-42, Exs. 315-326; *Id.* at ¶ 42.

**4. The CEC Published Its BC Hydro Report Over Two and Half Years After the Statutorily Prescribed Deadline under Public Resources Code Section 25641.5.**

SBX1-2 added a new Section 25641.5 to the Public Resources Code. Section 25641.5 required the CEC to study and provide a report to the Legislature by **June 30, 2011**, that analyzed British Columbia hydroelectric generating facilities and whether those facilities should be included as renewable electrical generating facilities. SBX1-2 did not deem BC hydro generating facilities ineligible for the RPS when the legislation became effective. The CEC staff did not meet the Legislature's prescribed June 30, 2011 deadline for completing the BC Hydro Report.

- On February 24, 2012, the CEC first conducted a staff “workshop to discuss a study to analyze British Columbia Run-of-River Hydroelectric projects and consider whether these



projects are, or should be, eligible renewable electrical generation facilities for California’s [RPS].” *See* Ting Decl. ¶ 24, Ex. 21.

- On March 22, 2013, the CEC conducted a staff “workshop to discuss the draft study to analyze British Columbia Run-of River Hydroelectric projects and whether these projects are, or should be, eligible renewable electrical generation facilities for California’s [RPS].” *See* Ting Decl. ¶ 25, Ex. 22. The draft report did not determine whether BC hydro facilities are or should be RPS eligible.
- On January 15, 2014 – *after the close of CP1* – the CEC adopted the report *Analyzing British Columbia Run-Of-River Facilities for the California Renewables Portfolio Standard Commission Final Report* (“CEC BC Hydro Report”). *See* Ting Decl. ¶ 27, Ex. 24. The BC Hydro Report noted that BC run-of-river facilities should not be eligible for the RPS.

The Commission did not adopt the CEC BC Hydro Report until after the close of CP1 on January 15, 2014. *See* Ting Decl. ¶ 27, Ex. 24.

### **C. LADWP’s 2009 Shell and Atmos Biomethane Agreements.**

The 2009 Shell and Atmos biomethane agreements are based on North American Energy Standards Board (“NAESB”) base contracts for the purchase and sale of natural gas. As discussed below, the City established standards for natural gas contracts that governed LADWP’s NAESB contracts, including the form of contracts LADWP used for the 2009 Shell and Atmos agreements.

#### **1. City Standards for Natural Gas Contracts and Financial Transactions Applicable under Los Angeles Administrative Code Section 10.5.3.**

On August 13, 2002, the City approved Ordinance No. 174755, which amended the Los Angeles Administrative Code to add Section 10.5.3. *Supp. Ting Decl. ¶ 54, Ex. 338* (Ordinance

No. 174755). Ordinance No. 174755 delegated authority to LADWP's Board under Section 10.5.3 to enter into certain contracts and financial transactions for natural gas. *Id.* LADWP's Board was required to establish a natural gas risk management policy and form an executive risk policy committee. *Id.* at § 10.5.3(1)(g). Section 10.5.3 delegated authority to enter into contracts for the purchase of natural gas with a maximum term of five years and a maximum price of \$7.50 per million British Thermal Units ("MMBtu"). *Id.* § 10.5.3(1)(c); (1)(i).

On January 21, 2003, LADWP adopted Resolution No. 033-166, which approved LADWP's Retail Natural Gas Risk Management Policy and established LADWP's Energy Services Executive Risk Policy Committee. Supp. Ting Decl. ¶9 , Ex. 384 Bates Nos. LA002826-LA002839 (Resolution No. 033-166). The Natural Gas Risk Management Policy established a program to mitigate LADWP's exposure to unexpected spikes in the price of natural gas used in the production of electricity to serve retail customers. *Id.*

On June 3, 2003, LADWP's Board adopted Resolution No. 003-285, which approved LADWP's use of a form NAESB Agreement for the purchase of natural gas. Supp. Ting Decl. ¶ 40, Ex. 64 (LADWP Board Letter dated Jun. 3, 2003); Ex. 66 (Resolution No. 003-285). The Board's Resolution approved the use of a form of NAESB Base Contract for the Sale and Purchase of Natural Gas. Supp. Ting Decl. ¶41, Ex. 65 (Board Approved NAESB Contract) Contract for Sale and Purchase of Natural Gas). The Board confirmed that the approved NAESB Base Contract satisfied the requirements under Los Angeles Administrative Code Section 10.5.3 and LADWP's Natural Gas Risk Management Policy. *Id.* ¶ 42, Ex. 66 (Resolution No. 003-285). The Board also delegated authority to LADWP's General Manager to use the form NAESB Contract for natural gas purchases for a term not to exceed five years. *Id.*

On January 24, 2006, LADWP's Board adopted Resolution No. 006-122, which approved recommended amendments to Los Angeles Administrative Code Section 10.5.3 to extend the maximum term of natural gas contracts from five years to ten years and to increase the maximum purchase of natural gas prices from \$7.50/MMBtu to \$10/MMBtu. Supp. Ting Decl. ¶¶ 52, Ex. 336 (LADWP Board Letter dated Jan. 24, 2006); Ex. 337 (Resolution No. 006-122).

On March 16, 2006, the City Council took Action approving an amendment to Section 10.5.3 of the Los Angeles Administrative Code to change the maximum contract term to ten years and the maximum purchase price to \$10/MMBtu. Supp. Ting Decl. ¶¶ 50-52, Ex 334 (CAO Report re Amendment to Section 10.5.3); Ex. 335 Bates NO. LA001615 (E&E Committee Report re Amendment to Section 10.5.3); Ex. 335 Bates No. LA001614) (City Council Action Approving Amendment to Section 10.5.3). On March 13, 2006, the City approved Ordinance No. 177405, which amended Los Angeles Administrative Code Section 10.5.3. Supp. Ting Decl. ¶ 55, Ex. 339 (Ordinance No. 177405).

**2. LADWP Internal Memorandum Regarding Renewable Biogas dated July 27, 2009.**

As discussed above in Section II.A(6), LADWP's Board adopted the 2008 RPS Policy on May 20, 2008. The 2008 RPS amended the definition of "eligible resources" to include "renewable derived biogas (meeting the heat content and quality requirements to qualify as pipeline-grade gas) injected into a natural gas pipeline for use in a renewable facility; multi-fuel facilities using renewable fuels (only the generation resulting from the renewable fuels will be eligible)." Ting Decl. ¶ 11, Ex. 8.

On July 27, 2009, LADWP issued an Intradepartmental Correspondence regarding the “Use of Biogas in Multi-Fuel Facilities – Renewable Energy Eligibility.” Supp. Ting Decl. ¶ 56, Ex. 343 (LADWP Biogas Memo dated July 27, 2009). LADWP’s Biogas Memo established a “methodology for calculating the amount of eligible Renewable Portfolio Standard (RPS) energy resulting from the use of RPS-eligible biogas in [LADWP’s] gas-fired generating units.” *Id.* The Biogas Memo discussed the CEC’s inclusion of renewable biogas in the Third Edition Guidebook *Id.* Appendix A of the Biogas Memo attached for reference the CEC’s biogas requirement included in the Third Edition Guidebook (pages 20-21). *Id.* The Third Edition Guidebook contained one standard regarding the delivery of the pipeline biomethane: “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.” *Id.*; *see also* Ex. 383 (CEC Third Edition RPS Eligibility Guidebook). Appendix B of the Biogas Memo attached a sample NAESB Transaction Confirmation for the purchase of renewable biogas. *Id.*

**3. LADWP’s 2009 Shell NAESB Base Contract and Transaction Confirmations for the Purchase of Renewable Biomethane.**

On February 1, 2008, LADWP and Shell entered into a NAESB Base Contract for Sale and Purchase of Natural Gas, LADWP Agreement No. 96-125-510 (the “2009 Shell Agreement”). Supp. Ting Decl. ¶ 3, Ex. 27. The Shell NAESB Contract was based on the form NAESB Agreement approved by LADWP’s Board on June 3, 2003. Supp. Ting Decl. ¶¶ 40-42, Exs. 64-66; *id.*; Second Supplemental Declaration of Louis C. Ting (“Second Supp. Ting Decl.”) ¶ 10, Ex. 385 (LADWP Delegation of Authority for Natural Gas Transactions dated Mar. 31, 2008). On July 27, 2009, LADWP and Shell entered into a Transaction Confirmation under this

Base Contract for the purchase of renewable biogas, specifically pipeline-quality landfill gas. Supp. Ting Decl. ¶ 3, Ex. 27. On August 25, 2009, LADWP and Shell entered into the First Amendment to the Transaction Confirmation dated July 27, 2009. *Id.* On March 31, 2010, LADWP and Shell entered into the Second Amendment to the Transaction Confirmation dated July 27, 2009. *Id.* The First and Second Amendments added additional landfill facilities to the contract. *See id.* The Shell Base Contract, Transaction Confirmation, First Amendment, and Second Amendment are collectively referred to herein as the “Shell Agreement.” Supp. Ting Decl. ¶ 3, Ex. 27.

The Shell Agreement had a term starting on August 1, 2009 and ending on June 30, 2014. *Id.* LADWP paid a fixed contract price of “\$9.80 per MMBtu for the quantity documented as Renewable Biomethane (‘RB’) as metered and delivered from the designated Landfill(s) (see Attachment A) on a monthly basis.” *Id.* LADWP paid a contract price of “\$5.80 per MMBtu for the quantity of delivered Standard Baseload gas on a monthly basis that is excess of the documented metered and delivered RB from the designated Landfill(s). *Id.*

The Shell Agreement provided that “Seller shall sell to Buyer, and Buyer shall purchase from Seller 3,500 MMBtu per Day for August 1, 2009 through August 31, 2009 and 8,200 MMBtu per Day for September 1, 2009 through June 30, 2014 (‘Contract Quantity’) consisting of both RB and Standard Baseload gas as set forth in the Special Conditions.” *Id.* The “Special Conditions” defined “Renewable Biomethane” or “RB” as “gas produced from the Project that consists of Landfill Gas as that term is defined in the California Energy Commission’s (CEC) Renewable Energy Program Overall Program Guidebook (January 2008)...” and acknowledged that “RB, as defined herein, is a qualifying resource under *Buyer’s [LADWP] Renewable*

***Portfolio Standard ('RPS') program in effect as of the execution date of this Transaction Confirmation...." Id.***

The Shell Agreement further provided that “Seller further agrees that ***all deliveries of RB received by Seller under said contracts with the designated landfills shall be delivered to Buyer under this Transaction Confirmation up to the Contract Quantity.***” The Delivery Point for the receipt of the Renewable Biogas was the natural gas terminal located at Opal, Wyoming. *Id.* As discussed below, Kern River Gas Transmission Company owned and operated the interstate natural gas pipeline system where the Opal terminal point was located. *See* Supp. Ting Decl. ¶ 5-22, Exs. 29-46.

The Shell Agreement included a section titled “Seller’s Support of Buyer’s RPS Program” that provided:

Seller will provide an attestation identifying the specific landfill source, the stating the RB source is Landfill Gas, that the RB is injected into a pipeline at the landfill and is measured in BTU’s. The parties understand that this RB will be delivered to Buyer through an exchange rather than 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 the environmental attributes for delivery to Buyer at the specified Delivery Point as RB. Seller shall provide any additional documentation or information related to the supply of RB, to the Buyer, as reasonably required to support Buyer’s ongoing reporting compliance with Buyer’s RPS program. Supp. Ting Decl. ¶ 3, Ex. 27.

On September 4, 2009, LADWP submitted its August 2009 RPS Update to the Board for discussion during the Board’s regularly scheduling meeting on September 15, 2009. Supp. Ting

Decl. ¶ 43, Ex. 67 (LADWP August 2009 RPS Update). LADWP's August 2009 RPS Update identified the renewable landfill gas procured under the Shell Agreement on LADWP's RPS Master Projects List presented to the Board on September 15, 2009. *Id.*

**4. LADWP's 2009 Atmos Shell NAESB Base Contract and Transaction Confirmations for the Purchase of Renewable Biomethane.**

On July 30, 2009, LADWP and Atmos Energy entered into LADWP entered into a NAESB Base Contract for Sale and Purchase of Natural Gas, LADWP Agreement No. 96-125-516. Supp. Ting Decl. ¶ 4, Ex. 28. The Atmos NAESB Contract was based on the form NAESB Agreement approved by LADWP's Board on June 3, 2003. Supp. Ting Decl. ¶¶ 40-42, Exs. 64-66; *id.*, Second Supp. Ting Decl. at ¶ 10, Ex. 385. On August 20, 2009, LADWP and Atmos entered into a Transaction Confirmation under this Base Contract for the purchase of renewable biogas, specifically pipeline-quality landfill gas. *Id.* On August 21, 2009, LADWP and Atmos entered in a second Transaction Confirmation for the purchase of renewable biogas from additional landfill facilities. *Id.* The Atmos Base Contract and Transaction Confirmations (Ex. 28) are collectively referred to herein as the "Atmos Agreement." Supp. Ting Decl. ¶4, Ex. 28.

The Atmos Agreement had a term starting on September 1, 2009 and ending on July 31, 2014. *Id.* LADWP paid a fixed contract price of "\$9.80 per MMBtu" for the renewable landfill gas. *Id.* The Atmos Agreement provided that "Seller shall sell to Buyer, and Buyer shall purchase from Seller, up to [a total of 5,600] MMBtus per Day ('Contract Quantity') for the Delivery Period, consisting of both the Environmental Attributes and Standard Base Load gas as set forth in the Special Conditions." *Id.*

The "Special Conditions" defined "Standard Base Load" as "gas produced from the Project that consists of Landfill Gas as that term is defined in the California Energy

Commission's (CEC) Renewable Energy Program Overall Program Guidebook (January 2008)..." and acknowledged that "Landfill Gas, as defined herein, is a qualifying resource under *Buyer's [LADWP] Renewable Portfolio Standard ('RPS') program in effect as of the execution date of this Transaction Confirmation....*" *Id.*

The Atmos Agreement further provided that "Seller further agrees that *all deliveries of Landfill Gas received by Seller under said contracts with the designated landfills shall be delivered to Buyer under this Transaction Confirmation up to the Contract Quantity hereof.*"

*Id.* The Delivery Point for the receipt of the Landfill Gas was the Kern River Transmission natural gas terminal located at Opal, Wyoming. *Id.*

The Atmos Agreement included a section titled "Seller's Support of Buyer's RPS Program" that provided:

Seller will provide an attestation identifying the specific landfill source, the stating the supply source is Landfill Gas and that the Landfill Gas in is injected into a pipeline at the landfill and is measured in BTU's. The parties understand that this Landfill Gas will be delivered to Buyer through an exchange rather than 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 the environmental attributes for delivery to Buyer at the specified Delivery Point as Standard Base Load. Seller shall provide any additional documentation or information related to the supply of Standard Base Load, to the Buyer, as reasonably required to support Buyer's ongoing reporting compliance with Buyer's RPS program." *Id.*

On September 4, 2009, LADWP submitted its 2009 August RPS Update to the Board for discussion during the Board's regularly scheduling meeting on September 15, 2009. Supp. Ting



Decl. ¶43, Ex. 67. LADWP's August 2009 RPS Update identified the renewable landfill gas procured under the Atmos Agreement on LADWP's RPS Master Projects List presented to the Board on September 15, 2009. *Id.*

**5. LADWP's Firm Transportation Agreements with Kern River Gas Transmission Company.**

LADWP used its Firm Transportation Service Agreement with Kern River Gas Transmission Company ("KRT") to transport the renewable biogas purchased under the Shell and Atmos Agreements from the receipt point at Opal to SoCal Gas' delivery points in Southern California. Supp. Ting Decl. ¶¶ 17, Ex. 41 (Restatement of KRT Firm Transportation Agreement No. 1006); Ex. 46 (Restatement of KRT Firm Transportation Agreement No. 1706).

LADWP's Restatement of KRT Firm Transportation Agreement No. 1006 is a restatement of LADWP's original firm transportation agreement entered into on April 2, 1990. Supp. Ting Decl. ¶¶ 13-17, Exs 37-41. LADWP's Restatement of KRT Firm Transportation Agreement No. 1706 is a restatement of LADWP's expanded firm transportation service agreement executed on May 21, 2001. Supp. Ting Decl. ¶¶ 18-22, Exs. 42-46. On March 5, 2013, LADWP's Board adopted Resolution No. 013-188, which approved the Restatement of KRT Firm Transportation Agreement No. 1006. Supp. Ting Decl. ¶ 14, Ex. 38 (Resolution No. 013-188). On March 5, 2013, LADWP's Board also adopted Resolution No. 013-193, which approved the Restatement of KRT Firm Transportation Agreement No. 1706. Supp. Ting Decl. ¶ 19, Ex. 43 (Resolution No. 013-193). On April 17, 2013, the City Council approved the Restatement of KRT Firm Transportation Agreements Nos. 1006 and 1706. Ting Decl. ¶¶ 16, 21, Ex. 40 (City Council approval of Agreement No. 1006); Ex. 45 (City Council approval Agreement No. 1706). LADWP has also submitted evidence of its KRT Firm Transportation

Agreements before the execution of the 2013 Restatements. *See* Supp. Ting Decl. ¶¶ 5-12, Exs. 29-36.

LADWP's KRT Firm Transportation Agreement Nos. 1006 and 1706 provided firm transportation delivery service for the renewable biogas received at Opal Wyoming under the Shell and Atmos Agreements and delivered to SoCal Gas' delivery points at Kramer Junction and Wheeler Ridge in Southern California during the entire contract term of both agreements. LADWP submits the following evidence establishing the receipt of the renewable biogas procured under the Shell and Atmos Agreement at Opal and transportation and delivery of the renewable biogas to SoCal Gas's receipt points at Kramer Junction and Wheeler Ridge:

- KRT Monthly Invoices for the period of January 2011 to December 2013.  
Declaration of Scott Masuda in 16-RPS-02 ("Masuda Decl.") at ¶¶ 151-186, Exs. 215-250.
- LADWP Confirmation of Payment to KRT for Monthly Invoices from January 2011 to December 2013. Grueter Decl. at ¶ 6, Ex. 289.
- KRT Attestation for Gas Delivery under LADWP's Firm Transportation Service Agreements. 16-RPS-02 TN# 211752-7; Verification of John Dennis, TN# 211752-2.

The gas delivered from Opal to SoCal Gas's receipt points at Kramer Junction and Wheeler Ridge were delivered, in turn, to LADWP's in-basin generating facilities pursuant to LADWP's Master Services Agreement for Gas Transmission Services with SoCal Gas, which are addressed below.

**6. LADWP's Master Services Agreement for Gas Transportation Services with SoCal Gas Co.**

On April 20, 2004, LADWP's Board adopted Resolution No. 004-260, approving LADWP's Master Services Agreement ("MSA") No. 47349-4 with SoCal Gas for intrastate gas transportation services authorized by California Public Utilities Commission. Supp. Ting Decl. ¶24, Ex. 48 (Resolution No. 004-260). On June 16, 2004, the City Council approved SoCal Gas MSA No. 47439-4. Supp. Ting Decl. ¶26, Ex. 50 (City Council Action approving SoCal Gas MSA No. 47439-4. March 30, 2004, LADWP and SoCal Gas entered into a

SoCal Gas MSA No. 47439-4 had a term commencing on July 1, 2004 and ending on July 1, 2006. Supp. Ting Decl. ¶ 27, Ex. 51 (SoCal Gas MSA No. 47349-4). Schedule A of MSA No. 47439-4 provided the terms for the transportation of gas on SoCal Gas's intrastate pipeline system to LADWP's four in-basin generating facilities, including the Scattergood Generating Station, Haynes Generating Station, Valley Generating Station, and Harbor Generating Station. *Id.*

On June 20, 2006, LADWP's Board adopted Resolution No. 006-232, approving SoCal MSA No. 47498-6 extending the term of the SoCal Gas MSA for an additional two-year term followed by unlimited month-to-month interruptible service thereafter. Supp. Ting Decl. ¶ 29, Ex. 53 (Resolution No. 006-232). On August 1, 2006, the City Council approved SoCal Gas MSA No. 47498-6. Supp. Ting Decl. ¶¶ 30-32, Exs. 54-56. SoCal Gas MSA No. 47498-6 provided the terms for the transportation of gas on SoCal Gas's intrastate pipeline system to LADWP's four in-basin generating facilities, including the Scattergood Generating Station, Haynes Generating Station, Valley Generating Station, and Harbor Generating Station. Supp. Ting Decl. ¶ 33, Ex. 57 (SoCal Gas MSA No. 47498-6).

On May 20, 2008, LADWP's Board adopted Resolution No. 008-242, approving the extension and amendment of SoCal Gas MSA No. 47498-6 to provide LADWP with additional

firm transportation and gas-storage services. Supp. Ting Decl. ¶ 35; Ex. 59 (Resolution No. 008-242). On July 22, 2008, the City Council approved the extension and amendment of SoCal Gas MSA No. 47498-6. Supp. Ting Decl. ¶ 37, Ex. 61 (City Council Action Approving Extension and Amendment of SoCal Gas MSA No. 47498-6). On July 17, 2008, the City approved Ordinance No. 180044 delegating authority to LADWP's Board to extend and amend SoCal Gas MSA No. 47498-6 without further approval of the City Council. Supp. Ting Decl. ¶ 38; Ex. 62 (Ordinance No. 180044). The terms of LADWP's Storage Service Agreement was attached to as Schedule 1 to SoCal Gas MSA No. 47498-6. Supp. Ting. Decl. ¶ 39; Ex. 63.

SoCal Gas MSA No. 47498-6 governed the transportation and delivery of gas received at Kramer Junction and Wheeler Ridge during the term of the Shell and Atmos Agreements. LADWP submits the following evidence establishing the delivery of gas on SoCal Gas's interstate transportation system to LADWP's in-basin generating facilities, including the Scattergood Generating Station, Haynes Generating Station, Valley Generating Station, and Harbor Generating Station from January 1, 2011 to December 31, 2013:

- SoCal Gas Monthly Invoices for the period of January 2011 to December 2013.  
Masuda Decl. at ¶¶ 187-222, Exs. 251-286.
- LADWP Confirmation of Payment to SoCal Gas for Monthly Invoices from January 2011 to December 2013. Grueter Decl. at ¶ 7, Ex. 290.

**7. LADWP's Additional Evidence in Support of LADWP's 2009 Biomethane REC Claims under the Shell and Atmos Agreements.**

LADWP submits the following additional evidence in support of its REC claims for the use of renewable biogas procured under the Shell and Atmos Agreements and used at LADWP's in-basin generating facilities.

LADWP submitted attestations from Shell and Atmos, including using the CEC's 55 Attestation form, confirming that LADWP received the exclusive ownership of the green attributes or RECs generated from LADWP's procurement and use of the biomethane for each landfill under the Shell and Atmos Agreements. Masuda Decl. ¶ 4, 5 Exs. 68, 69 The attestations confirm that the green attributes and RECs procured by LADWP were not transferred, sold, conveyed, or otherwise disposed of by Shell or Atmos. *Id.* Atmos provide additional attestations to LADWP required under the Atmos Agreement, which LADWP has also submitted. Masuda Decl. ¶ 5, Ex. 69 (Atmos Attestations).

LADWP submitted metered data measuring the amount of landfill gas injected from each landfill into the interstate pipeline each month under both the Shell Agreement and Atmos Agreement. Masuda Decl. ¶¶ 80-151, Exs. 143-214. LADWP submitted the monthly Shell invoices for each month for the period of January 1, 2011 to December 31, 2013 for the biomethane purchased and received under the Shell Agreement. Masuda Decl. ¶¶ 8-43, Exs. 70-106 LADWP submitted the monthly Atmos invoices for each month for the period of January 1, 2011 to December 31, 2013 the biomethane purchased and received under the Atmos Agreement. Masuda Decl. ¶¶ 44-79, Exs. 107-142.

LADWP submitted Confirmations of Payment of the Shell Monthly Invoices from January 2011 to December 2013. Grueter Decl. at ¶ 4, Ex. 287. LADWP paid Shell a total of \$87,748,947.05 for the biomethane purchase under the Shell Agreement for use during CP1. the *Id.* LADWP also submitted Confirmation of Payment of the Atmos Monthly Invoices from January 2011 to December 2013. Grueter Decl. at ¶ 5, Ex. 288. LADWP paid Atmos a total of \$45,737,168.40 for the biomethane purchased under the Atmos Agreement for use during CP1.

*Id.* Thus, LADWP paid a total of over **\$133 million** for the renewable biomethane purchased and used during CP1.

LADWP has also submitted evidence confirming the use of the Shell and Atmos biomethane at LADWP's Scattergood, Valley, and Haynes Generating Stations. LADWP submitted evidence filed under seal pursuant to LADWP's Application for Confidentiality dated August 31, 2016 providing LADWP's fuel use, heat rates, and generation data for LADWP's Scattergood, Valley and Haynes combined-cycle generating units. Second Supp. Ting Decl. ¶ 4-6, Exs. 348-350; *id.* ¶ 7 Ex. 355. LADWP generated a total of **1,226,490 RECs** during CP1 from the biomethane procured the Shell Agreement and Atmos Agreement for use at LADWP's Scattergood, Valley, and Haynes Generating Stations. *Id.*

Finally, LADWP's submitted two unrebutted expert reports from Benjamin Schlesinger, Ph.D. a gas-pipeline expert. Expert Declaration of Benjamin Schlesinger, Ph.D., in 16-RPS-02 ("Schlesinger Decl.") at ¶¶ 3-5, Ex.344 (Schlesinger Expert C.V.); Ex. 345 (Schlesinger Expert Report dated March 26, 2014); Ex. 346 (Supplemental Schlesinger Expert Report dated January 21, 2016).

### **III. LEGAL STANDARD FOR STATUTORY CONSTRUCTION**

The "first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law." *Dyna Med, Inc. v. Fair Employment & Housing Comm'n*, 43 Cal.3d 1379, 1387 (1987). California law has long found that the words of a statute "provide the most reliable indication of legislative intent." *CPF Agency Corp. v. R&S Towing Servs.*, 132 Cal. App. 4th 1014, 1027 (2005). The Committee must give "the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in the pursuance of the legislative purpose." *Dyna Med, Inc.*, 43 Cal.3d at 1387. "When the statutory

text is ambiguous, or it otherwise fails to resolve the question of its intended meaning, courts look to the statute’s legislative history and the historical circumstances behind its enactment.” *Klein v. U.S.*, 50 Cal.4th 68, 77 (2010). “Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.” *Id.*; *Dyna Med, Inc.*, 43 Cal.3d at 1387. A “construction rendering some words surplusage is to be avoided” and a statute “should be construed whenever possible so as to preserve its constitutionality.” *Dyna Med, Inc.*, 43 Cal.3d at 1387. “A court may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed.” *Cornette v. Dep’t of Transp.*, 26 Cal.4th 63, 73-74 (2001).

#### **IV. ARGUMENT**

The Committee requested input on specific questions identified in the Scoping Order. LADWP provides substantive responses to those questions below, but not in the order identified in the Scoping Order.

Section A analyzes the statutory provisions and legislative history of SB 1078, SBX1-2, and AB 2196. LADWP establishes that Public Utilities Code Sections 399.12(e)(1)(C), 399.16(d)(1), and 399.12.6(a) grandfather and count in full LADWP’s grandfathered resources. LADWP also identifies the rules in place at the time the Powerex BC-Hydro PPAs and Shell and Atmos Agreements were executed based on the City’s and LADWP’s procurement and eligibility rules. In addition, LADWP establishes that the City and LADWP’s Board approved the Powerex BC-Hydro PPAs and the Shell and Atmos Contracts pursuant to LADWP’s RPS Policies and the City’s procurement rules in effect on the date the contracts were executed. Section A also establishes that LADWP had no statutory obligation to certify Powerex’s BC

hydro facilities to receive full RPS credit in CP1. Section A addresses Questions 2, 3, 4, and 5 of the Scoping Order.

Section B analyzes the natural-gas transportation standards under federal and state law. Section B establishes that Staff's interpretation of "use" is inconsistent with federal and state law and is contradicted by the CEC's prior, public statements. Section B also establishes that the Shell and Atmos contracts satisfied the requirements under the Third Edition Guidebook, even though the Third Edition Guidebook standards did not provide the applicable eligibility rules in place when LADWP executed the Shell and Atmos Agreements in 2009. Section B addresses Question 1 in the Scoping Order. and explains why Staff's interpretation of "use" is incorrect as matter of law. Section B addresses Question 1. Section C addresses Question 6. the following questions in the Scoping Order:

Section C discusses LADWP's reporting of RECs using the CEC's Interim Tracking System for CP1 and establishes that the Committee can count the RECs generated under the Powerex BC-Hydro PPAs and Shell and Atmos Agreements reported in the ITS. Section C addresses Question 6 of the Scoping Order.

Section D addresses the undue prejudice to LADWP resulting from Staff's delayed and retroactive rulemaking during CP1. Section D raises the equitable considerations that Committee should consider when assessing whether LADWP satisfied its RPS obligations for CP1 and the prejudice that the City, LADWP, and LADWP's ratepayers would suffer as a result of Staff's conduct and the failure to grandfather the renewable resources that LADWP entered into in good faith under its voluntary RPS program.



**A. LADWP's Resources Are Grandfathered Resources that Count in Full under SBX1-2 and AB 2196.**

The plain language and legislative history of the SBX1-2 and AB 2196 confirm that LADWP's Powerex BC-Hydro PPAs and the Shell and Atmos Agreements are grandfathered resources that count in full for RPS credit for CP1. The following sections analyze the plain language of the statute, discuss the legislative history, and establish that the Powerex BC-Hydro PPAs and the Shell and Atmos Agreements were approved under LADWP's voluntary RPS Policy in effect before SBX1-2 became effective.

**1. LADWP Had No Statutory Obligation to Certify Its Renewable Resources with the CEC under SB 1078 and PUC Section 378**

SB 1078 became effective on January 1, 2003. SB 1078 had a companion bill – Senate Bill 1038 (“SB 1038”) – that was concurrently enacted and also became effective on January 1, 2003. SB 1078 added Article 16 (commencing with Section 399.11) to Chapter 2.3 or Part 1 of Division 1 of the Public Utilities Code. Section 399.15(b)(1) established the RPS target for California's investor owned utilities (“IOUs”) to procure 20 percent of retail sales from eligible renewable resources by December 31, 2017. Pub. Util. Code § 399.15(b)(1) [SB 1078 2002].

SB 1078 also added Section 399.12 to the Public Utilities Code. Section 399.12(a)(1) defined an “eligible renewable energy resource” as “an electric generating facility” that met the “definition of ‘instate renewable electricity generation technology’ in Section 383.5.” Pub. Util. Code § 399.12(a)(1) [SB 1078 2002].

SB 1038 amended Public Utilities Code Section 383.5. Pub. Util. Code § 383.5 [SB 1038 2002]. As amended, Section 383.5(b)(1) defined "In-state renewable electricity generation technology" as

a facility that meets 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.

*See* Pub. Util. Code § 383.5(b)(1)(A)-(B) [SB 1038 2002].

SB 1078 added Sections 387 to the Public Utilities Code. Section 387(a) provided that “[e]ach governing body of a [POU], 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.” Pub. Util. Code § 387(a) [SB 1078 2002]. Section 387(b), in turn, required that each POU provide annual reports to its customers regarding the “[e]xpenditures of public goods funds ... for renewable energy resource development” and the “resource mix used to serve its customers by fuel type.” Pub. Util. Code § 387(b)(1)-(2) [SB 1078 2002].

SB 1078 also added Section 399.13 to the Public Utilities Code. Section 399.13(a) provided that the CEC shall “(a) [c]ertify eligible renewable energy resources that it determines meet the criteria described in subdivision (a) of Section 399.12.” Pub. Util Code § 399.13(a) [SB 1078 2002]. Section 399.13(b) provided that the CEC shall “(b) design and implement an accounting system to verify compliance with renewables portfolio standard by *retail sellers*, to ensure that renewable energy output is counted only once for the purpose of meeting the

renewable portfolio standards of this state or any other state, and for verifying retail product claims in this state or any other state.” *Id.* § 399.13(b). This provision intentionally omits POUs.

The CEC’s certification and accounting-verification standards under Section 399.13 for “retail sellers” did not apply to POUs. Pub. Util. Code § 399.12(b)(4)(C) [SB 1078 2002]. SB 1078’s definition of “retail seller” expressly excluded POUs, like LADWP. Pub. Util Code § 399.12(b)(4)(C) [SB 1078 2002] (definition of “retail seller” excludes “a local publicly owned electrical utility as defined in subdivision (d) of Section 9604.”).

Under well-established principles of statutory construction, “when one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning.” *Cornette v. Dep’t of Transp.*, 26 Cal.4th 63, 73 (2001); *see also CPF Agency Corp.*, 132 Cal. App. 4th at 1028 (under the maxim *expressio unius est exclusio alterius*, if “a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others.”). “[This] rule of statutory construction *is applicable unless a contrary legislative intent is expressed in the statute or elsewhere.*” *CPF Agency Corp.*, 132 Cal. App. 4th at 1028; *see also Rotolo v. San Jose Sports & Entm’t, LLC*, 151 Cal. App. 4th 307, 324 (2007) (“If the Legislature wished to impose additional duties” or “wished to add additional notice requirements, it plainly knew how to do so and would have done so expressly and directly.”).

Moreover, the CEC past admissions confirm that POUs’ governing boards established the resource eligibility rules before SBX1-2 became effective.

In December 2008, the CEC issued a report regarding *The Progress of California’s Publicly Owned Utilities in Implementing Renewables Portfolio Standard*. Ting Decl. ¶ 23, Ex. 20. The CEC expressly admitted that “[a]lthough some POUs certify their renewable facilities as

RPS-eligible under Energy Commission guidelines, *POUs are not required to certify their facilities with the Energy Commission and, in most case, do not.*” Ting Decl. ¶ 23, Ex. 20 at 6. Moreover, unlike Staff’s current position, in December 2008, the CEC plainly admitted that the “[s]tate law provide[d] the governing board of *each POU with the authority to determine the resource eligibility rules under its RPS program.*” *Id.* at 10.

The plain language and express exclusions in Public Utilities Code Sections 399.12, 399.13, and 387 confirm that POUs had no statutory obligations to certify POUs’ renewable resources under the CEC’s certification standards or otherwise report RECs using the CEC’s accounting and tracking system. *CPF Agency Corp.*, 132 Cal. App. 4th at 1028; *Rotolo*, 151 Cal. App. 4th at 324. SB 1078 vested the City and LADWP’s Board with the discretion and authority to establish the eligibility criteria for renewable resources and the rule in place for entering into renewable-procurement contracts. These legal standards were in effect until December 10, 2011, when SBX1-2 became effective.

2. **SBX1-2 Added PUC Sections 399.12(e)(1)(C) and 399.16(d)(1) to Grandfather and Transition POUs’ Renewable Resources Into the RPS.**

SBX1-2 became effective on December 10, 2011. SBX1-2 added Section 399.30 to the Public Utilities Code and established new mandatory RPS requirements for POUs. SBX1-2 included several provision intended to seamlessly transition LADWP from its locally-controlled RPS programs to a mandatory RPS program administered by the CEC. The Legislature accomplished this goal by including statutory provisions grandfathering POUs’ renewable resources adopted under the former Section 387.

First, the Legislature amended the definition of “eligible renewable resource” contained in Section 399.12(e)(1) to include a provision mandating that the CEC certify the facilities or

agreements approved by the POUs' governing board under Section 387. An "Eligible renewable energy resource" was defined as "an electrical generating facility that meets the definition of a 'renewable electrical generating facility' in *Section 25741 of the Public Resources Code*, ***subject to the following***:

(C) A facility approved by the governing board of a local publicly owned electric utility prior to June 1, 2010, for procurement to satisfy the renewable energy procurement obligations adopted pursuant to the former Section 387, shall be certified as an eligible renewable energy resource by the Energy Commission pursuant to this article, if the facility is a 'renewable electrical generation facility' as defined in *Section 25741 of the Public Resources Code*.

Pub. Util. Code § 399.12(e)(1)(C).

Second, the Legislature required POUs to "adopt procurement requirements consistent with Section 399.16." Pub. Util. Code § 399.30(c)(3). SBX1-2 amended Section 399.16. As amended, Section 399.16(d)(1) provides that "any contract or ownership agreement originally executed prior to June 1, 2010, ***shall count in full toward the procurement requirements*** established pursuant to this article, if all of the following conditions are met: (1) [t]he ***renewable energy resource was eligible under the rules in place as of the date when the contract was executed.***" Pub. Util. Code § 399.16(d)(1).

Sections 399.12(e)(1)(C) and 399.16(d)(1), read together, establish the key statutory provisions designed to grandfather POUs' renewable resources into the new RPS standards enacted under SBX1-2. As the California Supreme Court explained: "The ***purpose of a grandfather clause*** is to give those engaged in a business being brought under regulation the right to continue their existing business ***without*** being subjected to certification requirements that would be applicable if the business were then being started for the first time." *Golden Gate*

*Scenic Steamship Lines, Inc. v. Pub. Util. Comm’n*, 57 Cal.2d 373, 379 (1962); *Rich v. State Bd. of Equalization*, 235 Cal. App. 2d 591, 605 (1965) (same); *see also Dyna Med, Inc.*, 43 Cal.3d at 1389 (“Courts should generally assume that the Legislature knew what it was saying and meant what it said.”).

Staff’s interpretation does exactly the opposite; Staff imposes **new** certification requirements that **admittedly** did not apply to POUs under Section 387. *See* Section IV(A)(1), *supra*, *see also* Ting Decl. ¶ 23, Ex. 20 at 6.

a. Staff’s Interpretation of Section 399.12(e)(1)(C) Renders Numerous Statutory Provisions Superfluous.

Staff contends that Section 399.12(e)(1)(C) requires the CEC to certify POU’s grandfathered resources **only** if the resource meets then-applicable definition contained in Public Resources Code Section 25741(a).

Moreover, SBX1-2 also amended Section 399.25 to subject POUs to the CEC’s certification, accounting, and tracking standards. Pub. Util. Code § 399.25(b) (the CEC shall “[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 the electricity generated by an eligible renewable energy resource is counted only once for the purpose of meeting the renewable portfolio standard of this state or any other state, to certify renewable energy credits produced by eligible renewable resources, and to verify retail product claims in this state or any other state.”). Section 399.25(a) required that the CEC “[c]ertify eligible renewable energy resources that it determines meets the criteria described in subdivision (e) of Section 399.12.” Pub. Util. Code § 399.25(a).

Staff's interpretation of Section 399.12(e)(1)(C) renders the grandfather provision meaningless and superfluous if, as Staff contends, the only facilities that could be grandfathered were the ones that met the CEC's *then* existing standards under Public Resources Code Section 25741. Section 399.25 *already* imposed a statutory obligation on the CEC to certify eligible renewable resources that met the requirements of Section 399.12, which, in turn, defines renewable resources in reference to Public Resources Code section 25741. Thus, if the Legislature intended that the CEC's then-existing certification standards would govern the eligibility for all renewable resources – including POUs' grandfathered contracts procured under Section 387 – then there would be no need for the Legislature to include an express exception to the definition of eligible renewable resources for POUs' grandfathered resources in Section 399.12(e)(1)(C). See *Tuolumne Jobs & Small Bus. Alliance v. Supr. Ct.*, 59 Cal.4th 1029, 1039 (2014) (“It is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage.”); *City of Alhambra v. County of Los Angeles*, 55 Cal.4th 707, 724 (2012) (courts “avoid statutory constructions that render particular provisions superfluous or unnecessary”). Staff ignores the Legislature's mandate to certify grandfathered resources by applying the *same* certification criteria regardless of whether or not a POU procured the resource before June 1, 2010 pursuant to Section 387.

Moreover, Staff gives no meaning to the phrase “subject to the following” in Section 399.12(e)(1)(C), which clearly denotes an exception to the general standard defining an eligible renewable resource in reference to Public Resources Code Section 25741(a). The only reasonable construction that gives meaning to Section 399.12(e)(1)(C) is that SBX1-2 required that the CEC certify a POUs' new renewable procurement going forward under the then-existing

standards, while Section 399.12(e)(1)(C) mandated that the CEC certify POU's resources adopted under Section 387 as "eligible renewable resources" based on the POU's eligibility criteria.

Staff contends that its interpretation is supported by the exceptions listed in Section 399.30(g)-(k). Specifically, the Legislature would not have added exceptions in Section 399.30 if Section 399.12(e)(1)(C) grandfathered *all* POU resources adopted under Section 387. However, not all POU's adopted a voluntary RPS program under Section 387, a fact that the CEC reported to the Legislature before SBX1-2 was passed. *See* Exhibit 390 (Senate Energy, Utilities and Communications Committee, Bill Analysis, SBX1-2, February 15, 2011) ("The POU's are required to annually report to the CEC the progress made in establishing and meeting RPS goals and the resource mix used to serve customers. Compliance data through 2009 *and reported by the CEC in November 2010* show that the *POU's RPS deliveries range from zero* to 61 %.").

Moreover, for those POU's that did adopt a voluntary RPS program under Section 387, the exceptions in Section 399.30 were negotiated for POU's that relied upon large hydroelectric facilities – a fact well known by Staff. Ting Decl. ¶ 23, Ex. 20 at 10 (discussing POU's varying treatment of the RPS-eligibility of large hydroelectric facilities, which the CEC did not consider to be RPS-eligible). As discussed in Section II.A(3), the City and LADWP conducted public meetings in 2004 to discuss the eligibility of hydroelectric facilities. *See* Supp. Ting Decl. at ¶ 45-47, Ex. 329-331 As discussed in LADWP's reports to the City Council, LADWP acknowledged that other POU's included hydroelectric facilities, regardless of size, in their voluntary RPS programs. *See* Supp. Ting Decl. at ¶ 45-47, Ex. 329-331. Moreover, LADWP's reports also acknowledged that Hoover was considered an eligible renewable resource by *all* of the other POU's that owned interests in, or received electricity from, Hoover. Supp. Ting Decl. at



¶ 46, Ex. 330 Bates No. LA001592. The City and LADWP, however, made a policy determination not to include large hydroelectric facilities, including Hoover, in the City’s 2005 RPS Policy, despite the cost impact to the City. *See* Supp. Ting Decl. at ¶ 47, Ex. 331 (City Council Resolution dated October 15, 2004 excluding Hoover as an eligible resource under the 2005 RPS Policy).

b. Staff’s Interpretation of Section 399.16(d)(1) Applies Retroactive Rulemaking to POUs’ Grandfathered Resources and Impairs LADWP’s Contractual Rights.

Staff also contends that the reference in Section 399.16(d)(1) to the “rules in place as of the date when the contract was executed” refers to the CEC’s rules under the CEC’s RPS Eligibility Guidebook. In practice, however, Staff does not even apply the rules in effect when the contract was executed. Rather, Staff applies the RPS Eligibility Guidebook rules in effect based on the *date the CEC receives the RPS-certification application*. Staff’s practice of applying the rules in place on the date the CEC receives the RPS-certification application explicitly violates the plain meaning of Section 399.16 and results in the *retroactive* application of SBX1-2.

California law is clear, however, that a “legislative enactment is presumed to operate prospectively and not retroactively unless a different intention is clearly expressed or implied from the legislative history of the context of the enactment.” *City of Monte Sereno v. Padgett*, 149 Cal. App. 4th 1530, 1538 (2007). Despite the Legislature’s clearly expressed intent that POUs’ RPS-resources procured under Section 387 be grandfathered and count in full, the Staff’s implementation of SBX1-2 retroactively applied the CEC’s eligibility criteria to LADWP’s grandfathered resources.

The California Supreme Court has described a retroactive law as “one that affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.” *Evangelatos v. Supr. Ct.*, 44 Cal.3d 1188, 1206 (1988); *City of Monte Sereno*, 149 Cal. App. 4th at 1538. “Phrased another way, a statute that operates to increase a party’s liability for past conduct is retroactive.” *Id*; *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994) (“Every statute which takes away or **impairs vested rights** acquired under existing laws, or **creates a new obligation**, imposes a new duty, or attaches a new disability in respect to transactions considered already past, **must be deemed retrospective.**”).

Staff’s **retroactive** application of its certification standards also raises fundamental due process and constitutional concerns because SBX1-2 imposes a mandatory requirement for which LADWP faces potential penalties for noncompliance. “The *Ex Post Facto Clause* flatly prohibits retroactive application of penal legislation” and “not only ensures that individuals have fair warning about the effect of criminal statutes, but also restricts governmental power by restraining arbitrary and potentially vindictive legislation.” SBX1-2 became effective nearly one year into CP1 and stated plainly that “a violation of these provisions would impose a state-mandated local program by expanding the definition of a crime.” Here, the Staff’s retroactive application of its certification standards will result in the exclusion of RECs from LADWP’s grandfathered resources, which – if not remedied by the Committee in this proceeding – could result in the **unconstitutional** assessment of penalties against LADWP for noncompliance and the impairment of its contractual rights. *See Landgraf*, 511 U.S. at 266.

As discussed below, AB 2196 and Section 399.12.6 reject Staff’s interpretation of Section 399.16(d)(1).

3. **AB 2196 Added Section 399.12.6(a) to Grandfather All Biomethane Contracts Executed Before March 12, 2012 Based on the Rules in Place as of the Date of Contract Execution**

California passed AB 2196 in September 2012. AB 2196 added Section 399.12.6 to the Public Utilities Code. Section 399.12.6(a)(1) states:

Any procurement of biomethane delivered through a common carrier pipeline under a contract executed by a retail seller or [POU] and reported to the Energy Commission prior to March 29, 2012, and otherwise *eligible under the rules in place as of the date of contract execution* shall count toward the procurement requirements established in this article, under the rules in place at the time the contract was executed, including the Fourth Edition of the Energy Commission's Renewable Portfolio Standard Eligibility Guidebook, provided that those rules shall apply only to 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)(1). AB 2196 expressly grandfathered pipeline biomethane procured under contracts executed before March 29, 2012 under the rules in place as of the date when the contract was executed. The Legislature's emphasis on "the rules in place as of the date of contract execution" is important because the legislative history confirms that the Legislature knew that the CEC was applying rules based on the date the CEC received RPS-certification applications. Ex. 369 (Senate Energy, Utilities and Communications Committee Legislative Analysis AB 2196 (Jun. 25, 2012)) at 3 ("The CEC did not and does not consider the execution of contracts in their certification process and the suspension did not consider contract execution either."). Accordingly, Section 399.12.16(a) reflects the Legislature's rejection of the CEC's interpretation of the phrase the "rules in place as of the date when the contract was executed" as used in Section 399.16(d)(1). *Hassan v. Mercy American River Hosp.*, 31 Cal.4th 709, 716

(2003) (“[W]ords should be given the same meaning throughout a code unless the Legislature has indicated otherwise.”).

The Committee should assume the “Legislature knew what it was saying and meant what it said” when it the Legislature confirmed – for a second time – that grandfathered contracts would be eligible for RPS credit based on the eligibility rules in effect as of the date of contract execution. *Dyna Med*, 43 Cal.3d at 1389.

The CEC admitted that AB 2196 required Staff to abrogate its practice of applying the rules in effect on the date the CEC received an application for certification. The CEC’s *Concept Paper for the Implementation of Assembly Bill 2196 for the Renewables Portfolio Standard* stated:

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.

*See* 16-RPS-02 TN# 213287 (CEC Concept Paper for the Implementation of AB 2196 CEC-300-2013-001) at 3. Despite this admission, Staff refused to apply the rules in place when LADWP executed the Shell and Atmos Agreements because Staff contends that the reference to the Fourth Edition Guidebook in Section 399.12.6(a) means that the rules of the Fourth Edition Guidebook are the sole source of eligibility rules for determining eligibility, making the word “including” meaningless.

The CEC adopted the Fourth Edition Guidebook in December 2011 making it *legally impossible* to provide the eligibility-rules for the contracts executed in 2009. *County of Humboldt v. McKee*, 165 Cal. App. 4th 1476, 1498 (2008) (courts should avoid an interpretation “which would result in absurdity.”) Moreover, the term “including” is “a phrase of enlargement.” *Dyna Med*, 43 Cal.3d at 1389. The Legislature could have expressly stated that the eligibility rules for grandfathered biomethane contracts was based solely on the Fourth Edition Guidebook, but instead chose to emphasize the eligibility rules in place on the date the contract was executed. *Rotolo v. San Jose Sports & Entm’t, LLC*, 151 Cal. App. 4th 307, 324 (2007) (“If the Legislature wished to impose additional duties” or “wished to add additional notice requirements, it plainly knew how to do so and would have done so expressly and directly.”); *Dyna Med*, 43 Cal.3d at 1389 (“An administrative agency cannot by its own regulations create a remedy which the Legislature has withheld.”); *Morris v. Williams*, 67 Cal.2d 733, 748 (1967) (“Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligations to strike down such regulations.”); Gov’t Code Section 11342.600 (a “regulation” is defined as “every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.”); Gov’t Code § 11342.1 (“Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.”).

As discussed below, the legislative history of SBX1-2 and AB 2196 confirm that the Legislature intended to grandfather POUs’ resources under Section 399.12(e)(1)(C), 399.16(d)(1), and 399.12.6(a).

4. **The Legislative History Provides Substantial Evidence of the Legislature’s Intent to Grandfather and Count in Full LADWP’s BC Hydro and Biomethane Procurement under Sections 399.12(e)(1)(C), 399.16(d)(1) and 399.12.16(a)(1).**

Staff’s interpretation and implementation of SBX1-2 and AB 2196 squarely contradicts the legislative intent of the grandfathering provisions. The legislative history confirms that the renewable resources POUs procured under an RPS program adopted pursuant to Section 378 would be grandfathered and count in full for POU’s procurement requirements going forward under the new statutory mandates. Similarly, the Legislature’s enactment of AB 2196 confirmed that LADWP’s Shell and Atmos Agreements would be grandfathered and receive RPS credit based on the eligibility rules in effect when those contracts were executed.

For example, the Senate Energy, Utilities and Communications Committee, included the following statements in the SBX1-2 Bill Analysis dated February 15, 2011 (Exhibit 390).

- “Current law exempts local publicly owned utilities (POUs) from the state RPS program and instead directs these utilities to implement and enforce their own renewable energy purchase programs that recognize the intent of the Legislature to encourage increasing use of renewable resources.”
- ***“This bill grandfathers all contracts consummated by an IOU, ESP or POU prior to June 1, 2010. Going forward, all contracts for an electricity product would be required to meet the requirements of a ‘loading order’ that mandates minimum and maximum quantities of three product categories (or ‘buckets’) which include renewable resources directly connected to a California balancing authority or provided in real time without substitution from another energy source, energy not***

connected or delivered in real time yet still delivering electricity, and unbundled renewable energy credits.”

- “POU Progress” – “The POU’s RPS requirement has been interpreted differently by the CEC and the POU’s. The CEC reports that the POU’s are required to ‘implement a Renewables Portfolio Standard, but are given flexibility in developing utility specific targets, timelines and resource eligibility rules.’”

The Senate Appropriations Committee’s Fiscal Summary Staff Comments dated February 23, 2011 (Exhibit 391), including the following the statements:

- “Existing law also requires publicly owned utilities to adopt their own Renewables Portfolio Standard.”
- ***“The state’s publicly owned utilities (which collectively serve about 25 percent of the state’s electricity market) vary considerably in their procurement of renewable energy.*** The Los Angeles Department of Water Power receives 14 percent from renewable resources, the Sacramento Municipal Utility District receives 21 percent, members of the Northern California Power Authority collectively receive 20 percent, and members of the Southern California Power Authority receive between 2 percent and 20 percent from renewable sources.”
- “This bill increases the state’s Renewable Portfolio Standard requirement to 33 percent of electricity supply by 2020 and broadens the Renewable Portfolio Standard mandate to include publicly owned utilities.”
- ***“Under the bill, all existing renewable energy contracts signed by June 1, 2010 would be ‘grandfathered’ into the program. Going forward, new renewable energy contracts must meet a ‘loading order’ that categorizes renewable resources.”***

The Senate Rules Committee, Bill Analysis, Third Reading of SBX1-2 dated February 23, 2011 (Exhibit 392), including the following statements:

- “Current law *exempts* local publicly owned utilities (POUs) from the state RPS program and instead directs these utilities to implement and enforce their own renewable energy purchase programs that recognize the intent of the Legislature to encourage increasing use of renewable resources.”
- “Current law requires renewable resources to be generated in, or delivered to, the California grid. *This bill grandfathers all contracts consummated by an IOU, ESP, or POU prior to June 1, 2010. Going forward* all contracts for electricity products would be required to meet the requirements of a ‘loading order’ that mandates the minimum and maximum quantities of three product categories (or ‘buckets’) which includes renewable resources directly connected to a California balancing authority or provided in real time without substitution from another energy source, energy not connected or delivered in real time yet still delivering electricity, and unbundled renewable energy credits.”

Moreover, legislative developments *after* the passage of SBX1-2 reflect that the Legislature believed that SBX1-2 – *passed one year earlier* – grandfathered all contracts entered into before June 1, 2010.

The Senate Energy, Utilities and Communications Committee Fiscal Hearing dated June 25, 2012 (Exhibit 369), stated that:

- “Current law permits procurement from contracts for renewable generation executed prior to June 1, 2010 to ‘count in full’ toward a retail seller’s or POU’s



RPS requirements and further exempts those contracts from the three product categories or ‘bucket’ requirements.”

The Senate Floor Analysis of AB 2196, Third Reading, dated August 31, 2012 (Exhibit 394), included a discussion regarding “Grandfathered Contracts” that stated:

- “To finesse the transition from the 20% by 2010 RPS program to the 33% by 2020 program, *SBx1 2 grandfathered all RPS contracts entered into prior to June 1, 2010 and provided that those contracts will ‘count in full’ under the new program requirements.*” See Ex. 394.

Moreover, the legislative history in AB 2196 expressly acknowledged LADWP and the Shell and Atmos Agreements *at issue in this dispute* and confirmed that those contracts would be grandfathered:

The Assembly Legislative Analysis for AB 2196 dated September 1, 2012 (Ex. 370) stated that:

- “Several major electric utilities, *including the Los Angeles Department of Water and Power* and the Sacramento Municipal Utilities District, among others, *have signed contracts with pipeline biomethane suppliers.*”
- “The Senate amendments clarify that electric generation that relies on procurement of biomethane from a contract executed, by a retail seller *or local publicly owned utility* and reported to PUC or Energy Commission, prior to March 29, 2012, *counts in full, as eligible generation for purpose of complying with the RPS.*”

The Senate Energy, Utilities and Communications Committee Legislative Analysis for AB 2196 dated June 25, 2012 (Ex. 369) included the following analysis:

- “[T]he contracts being signed by some California retail sellers and POU’s were with landfills from as far away as Pennsylvania, Ohio, and Tennessee – locales which make it physically impossible to verify delivery of the fuel to California particularly because the flow of those pipelines passes through pipelines flowing in the opposite direction of California.”
- “This bill will override the suspension of pipeline biomethane and the associated generation facilities as eligible renewable resources by the CEC and count as eligible under the RPS program *any* procurement of pipeline biomethane under a contract executed prior to January 1, 2012.”
- “It is important to distinguish this bill from the CEC’s suspension because the CEC determined eligibility based on the certification status of a facility and not on contracts for the fuel supply. Consequently, *this bill will grandfather an unknown number of contracts* that never filed for certification or pre-certification of, the facility with the CEC.”

In the Senate Floor Session for AB 2196 that occurred on August 23, 2012, numerous Senators raised concerns that the then-existing version of the bill would apply new requirements retroactively that would improperly impair the rights under existing biomethane contracts executed by municipal utilities, like LADWP. See <http://www.calchannel.com/video-on-demand/> starting at starting at 3:51:20. The video of the August 23, 2012 Senate Floor Session included the following statements during the discussion on the then-existing version of AB 2196:

- **Senator Ted Lieu:** “[T]he bill does something that we should never, ever do which is go backwards in time and retroactively change the law and standards. People have a right to rely on our laws. People enter into contracts that rely on our laws that are

existing. What the bill does, regardless of what you think the Energy Commission did, they made a decision in March, and I disagree with it, but at least people got notice in March of this year [2012] that hey there some issues with biomethane and how it applies to RPS standards. So, if you want to take March going forward, and apply a new standard, fine. Except this bill goes something in addition to that, it also applies to contracts before March when there was never any Energy Commission decision, where there was no notice to people. They were contracting based on the law as it was then and as it is now. This bill, if it became in effect, would go backwards prior to March of this year and change the law. We cannot do that for any reason.”

- **Senator Carol Liu:** “I must also oppose this bill because it does affect two of my munis and I would agree with those who are opposed to this bill that this bill is retroactive, bad public policy, and devalues contracts, and increases rates to my consumers and I just cannot support this bill.”
- **Senator Tom Harman:** “I agree with both senators Lieu (Liu). We should not be doing this. This is a situation where the municipal utilities in particular, are going to experience hundreds of millions of dollars or additional costs if this bill is passed into law and that will just be passed on as rate increases to the customers. But I thought Senator Ted Lieu really hit the nail on the head, this is frankly illegal. It is, I believe, probably a violation of the Constitutional prohibition against impairing the rights of contracts. These are people or entities that have valid, legal, enforceable contracts and here the legislature is about to pass a bill that’s gonna neutralize those and revoke them. So I encourage a no vote.”

- **Senator Joe Simitian:** “The debate we had in the Energy committee, in the Environmental Quality committee, and in the Appropriations committee, was about two things and two things only. The first thing was, are we going to give people grandfathered credit for contracts prior to the March 2012 date and, in spite of the fact that there is some controversy about whether or not those contracts should be credited, the legislation we have before us gives those contracts full grandfathering credit.”

Finally, in a letter from the California Legislature to CEC Chairmen Weisenmiller dated May 18, 2016 (16-RPS-02 TN# 211968), a delegation of ten California Assembly Members stated, in relevant part, that:

The passage of the California Renewable Energy Resources Act (SB X102) in 2011, for the first time, brought POUs, like LADWP, under state jurisdiction through the CEC. The CEC, after evolving its rulemaking over a number of years, is now considering applying those rules *retroactively* to investments made years ago. If allowed to enforce *retroactive rulemaking* and LADWP’s contracts are not counted in full by the CEC. LADWP ratepayers may face a potential liability of \$130 million.

*Grandfathering provisions in SB X1-2 were intended by the Legislature to seamlessly transition from a voluntary program of renewable energy for POUs to a mandatory program. SBX1-2 also stipulated that the CEC ‘shall’ certify procured renewable energy resources under the rules in place at the time of contract execution. The Legislature provided grandfathering language in SB X1-2 and later in Assembly Bill (AB) 2196, to expressly account for the investments made on behalf of the public by POUS to ensure those investments would be fully counted by the CEC.*

AB 2196 expressly *grandfathered* pipeline biomethane procured under contracts executed before March 29, 2012.

The legislative intent and purpose behind the grandfathering provisions in SBX1-2 and AB 2196 confirm that the Legislature intended to grandfather and count in full the renewable resources that LADWP procured under its voluntary RPS Policy, including the Powerex BC-Hydro PPAs and the Shell and Atmos Agreement. *See Golden Gate Scenic Steamship Lines*, 57 Cal.2d at 379; *Rich*, 235 Cal. App. 2d at 605. Staff's interpretation of Sections 399.12~~6~~(1)(C), 399.16(d)(1) and 399.12.6(a)(1) is inconsistent with the plain language and legislative history, renders numerous statutory provisions superfluous, raises unnecessary constitutional questions, and renders absurd results. Accordingly, Staff's interpretation must be rejected under well-established rules of statutory construction. *Dyna Med, Inc.*, 43 Cal.3d at 1387.

**5. The City and LADWP Approved the Powerex BC-Hydro PPAs under the Governing Procurement and Eligibility Rules in Effect in 2007 under the City's Charter, Administrative Code and the 2005 RPS Policy.**

The following subsections discuss the list of procurement and RPS-eligibility rules applicable to the small-hydroelectric procurement under the Powerex BC-Hydro PPAs, establish that the City and LADWP approved the Powerex BC Hydro PPA's pursuant to the City's standards and under the 2005 RPS Policy for the purpose of procuring renewable energy to meet LADWP voluntary RPS target of 20 percent. In addition, LADWP confirms that under SB 1078 and SBX1-2, LADWP had no statutory obligation to seek certification of the small-hydroelectric generating facilities that provided renewable energy to LADWP under the Powerex BC Hydro PPAs. The Powerex BS-Hydro PPAs are grandfathered contracts under Section 399.16(d)(1) and the RECs generated in 2011 count in full for RPS credit.

- a. The List of Procurement and RPS-Eligibility Requirements under the Los Angeles City Charter, Los Angeles Administrative Code, and the 2005 RPS Policy in Effect on the Date the Powerex BC-Hydro PPAs Were Executed.

The Los Angeles City Charter, Los Angeles Administrative Code, and LADWP's 2005 RPS Policy established the list of procurement and eligibility requirements applicable to the Powerex BC-Hydro PPAs.

- Eligible Renewable Resources (2005 RPS Policy): "Eligible Resources" defined as "Electricity produced from the following technologies constitute 'eligible' resources: biomass, biodiesel, digester gas, fuel cells using renewable fuels, geothermal, landfill gas, municipal solid waste only if the energy conversion process does not employ direct combustion of solid fuel; ocean wave, ocean thermal, and tidal current technologies; solar photovoltaic, *small hydro 30 MWs or less*, and the Los Angeles Aqueduct hydro power plants; solar thermal, wind; and other renewables that may be defined later." Ting Decl. ¶ 9; Ex. 6.
- Competitive-Bid Process: Renewable procurement contracts were subject to the City's Competitive Bid Process and Procedures were codified in Chapter 1, Article 2 (commencing with Section 10.15) of Division 10 of the Los Angeles Administrative Code Los Angeles Administrative Code. (L.A. Admin. Code §§ 10.15 *et seq.*).
- Renewable Resource Acquisition: LADWP's renewable acquisitions were required to "be based on a competitive bid process, and least-cost, best-fit selection criteria." Ting Decl. ¶ 9; Ex. 6.
- Renewable Resource Price Cap – renewable procurement subject to price cap, which included the energy price and the costs of associated interconnection, transmission, and

energy losses to deliver the renewable energy to LADWP's load center. Ting Decl. ¶ 9; Ex. 6.

- Flexible Compliance - "Renewable resource procurements [were] limited to development and acquisition of physical generation assets and energy purchase contracts, and therefore, LADWP [would] not purchase the 'renewable energy credit' from a renewable resource, without purchasing the associated energy." Ting Decl. ¶ 9; Ex. 6.
- City Council Approval for Long-Term Contracts - Los Angeles Administrative Code Section 10.5(a) requires City Council approval for any contract "to make or receive payments of month or other valuable consideration for a period longer than three (3) years, unless such contract shall have been first approved by the Council." Los Angeles Charter Section 373 states "[e]xcept as otherwise provided in the Charter, no board, officer or employee shall make any type of contract, as specified by ordinance, obligating the City or any department to make or receive payments of money or other valuable consideration for a period longer than such period as provided by ordinance, unless such contract shall have been first approved by the Council."
- City Council Approval by Ordinance – City Council approval was required by ordinance under Los Angeles Charter Section 674(a)(2), which provided, in relevant part, "s]ubject to approval by ordinance, the board shall have the power to contract with...any corporation, public or private, located inside or outside of the City or State of California....(2) For the sale, purchase, exchange, or pooling of electric energy or electric generating capacity."

As discussed below, the Powerex BC Hydro PPAs were approved in accordance with the City's procurement and RPS-eligibility rules.

- b. The City and LADWP's Board Approved the Powerex BC Hydro PPAs By Ordinance in Accordance with the City's Procurement Rules and the 2005 RPS Policy.

On June 30, 2004, LADWP initiated a competitive-bid process seeking contracts for the long-term purchase of energy from renewable energy resources. Ting Decl. ¶¶ 14-15, Exs. 11-12. On September 18, 2004, LADWP received proposals from firms having the capability to provide the requested renewable energy, including proposals from Powerex. *Id.* As a result of the competitive-bid process, LADWP selected Powerex based on the competitive-bid criteria. Ting Decl. ¶ 14, Ex. 11. On May 5, 2006, the City's CAO issued a report recommending the approval of the contracts to help LADWP meet its RPS targets and noting that the procurement was from small hydro less than 30 M, an eligible resource under the 2005 RPS Policy. Ting Decl. ¶ 17, Ex. 14. The CAO Report recommended that LADWP and the City Council approve the proposed Powerex BC-Hydro PPAs. *Id.* In support of its recommendation, the CAO noted the City's 2005 RPS Policy required LADWP to procure 20 percent of the City's energy from renewable resources. *Id.* LADWP's Board Letter identified the express purpose for entering the Power BC-Hydro PPAs:

As part of its Renewable Portfolio Standard (RPS), the LADWP has a goal to supply 20% of its retail energy from renewable energy sources by 2010. The Agreement is the result of a competitive bid Request for Proposal (RFP) process, and is an important component of the LADWP's commitment to meeting the goals of its RPS. ***The Agreement will allow the LADWP to purchase renewable energy from RPS qualified hydroelectric facilities for the purpose of supplying renewable electricity to the ratepayers of Los Angeles. The purchase of 438,000 MWh of renewable energy per year will enable the LADWP to meet 1.9% of its RPS goal.*** The renewable energy will be delivered to the LADWP at the Nevada Oregon Border where the LADWP's and Bonneville Power



Administration's electric systems meet on the Pacific DC intertie, and therefore, no additional transmission infrastructure or transportation is required. *Id.*

Ting Decl. ¶ 14, Ex. 11. The Board Letter discussed the competitive-bid process and LADWP's selection of Powerex's proposal based on "a detailed evaluation and due diligence review of [Powerex's] ability to delivery, and a comparison of costs and benefits offered." *Id.*

On March 6, 2007, LADWP's Board adopted Resolution No. 007-166, which approved the Powerex BC-Hydro PPAs. Ting Decl. ¶ 15, Ex. 12. The Resolution acknowledged that the Powerex BC-Hydro PPAs would provide renewable energy to LADWP from small hydroelectric generating facilities. *Id.*

On March 23, 2007, the City Council E&E Committee Report recommended approval of the Powerex BC-Hydro PPAs for the purpose of procuring renewable energy to meet LADWP's RPS target. and included the following statements: Ting Decl. ¶ 18, Ex. 15.

The Board reports that, in accord with the Council approved Renewable Portfolio Standard (RPS), it has set the goal of supplying 20% of the DWP's retail energy from renewable energy sources by 2010. ***The proposed Agreements, will allow the DWP to meet 1.9% of the RPS goal,*** were the result of a Request for Proposal, a competitive bid process, that the DWP initiated on June 30, 2004, in order to acquire renewable energy resources.

"[T]he total expenditures may total \$186,204,000 for the four years, nine months duration of the Agreement[s]. ***The funds will be used to purchase renewable energy as part of DWP's Renewable Portfolio Standard. This will benefit the ratepayers of Los Angeles by supplying them with green energy.***"

On March 23, 2007, the full City Council approved the Powerex BC-Hydro PPAs and adopted the E&E Committee Report. Ting Decl. ¶ 19, Ex. 16. The same day, the City executed

Ordinance No. 178533 approving the execution of the Powerex BC-Hydro PPAs. Ting Decl. ¶ 20, Ex. 17.

LADWP's Powerex BC-Hydro PPAs were approved pursuant to the City's and LADWP's procurement and eligibility rules in effect in 2007. LADWP's Board and City Council approved the Powerex BC-Hydro PPAs. The Powerex BC Hydro PPAs were executed before June 1, 2010 and the City and LADWP's Board approved the contracts for the express purpose of providing renewable energy to meet LADWP's voluntary RPS targets under the 2005 RPS Policy. Accordingly, the Powerex BC-Hydro PPAs constitute grandfathered procurement that counts in full for RPS credit under Public Utilities Code Sections 399.16(d)(1) and 399.12(e)(1)(C). *See supra*, Section IV(A)(1)-(3).

c. California Law Prohibits Staff from Imposing *Retroactive* Certification Standards under SBX1-2 to Exclude LADWP's Grandfathered Powerex BC-Hydro Procurement Generated in 2011.

Section IV(A)(1) established that SB 1078 imposed no statutory obligations on POUs to certify resources with the CEC. Specifically, Public Utilities Code Section 399.13 excluded POUs from the CEC's certification and accounting-verification standards. Pub. Util. Code § 399.12(b)(4)(C) [SB 1078 2002]; Pub. Util. Code § 399.12(b)(4)(C) [SB 1078 2002] (definition of "retail seller" excludes POUs). The CEC's admissions before the passage of SBX1-2 confirm the same. Ting Decl. ¶ 23, Ex. 20 at 6. California's well-established principles of statutory construction confirm "when one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning." *Cornette*, 26 Cal.4th at 73; *CPF Agency Corp.*, 132 Cal. App. 4th at 1028 ("[This] rule of statutory construction *is applicable unless a contrary legislative intent is expressed in the statute or elsewhere.*"); *Rotolo*, 151 Cal. App. 4th at 324 ("If the Legislature

wished to impose additional duties” or “wished to add additional notice requirements, it plainly knew how to do so and would have done so expressly and directly.”).

California law clearly prohibits Staff from **retroactively** applying the CEC’s RPS-eligibility criteria to LADWP’s grandfathered resource for the purpose of deeming the BC Hydro RECs ineligible for RPS credit. *City of Monte Sereno*, 149 Cal. App. 4th at 1538 (a “legislative enactment is presumed to operate **prospectively** and **not retroactively** unless a different intention is clearly expressed or implied from the legislative history of the context of the enactment.”). Staff’s attempt to retroactively apply eligibility criteria to Powerex’s BC small hydro generating facilities would be particularly egregious here because the CEC issued its BC Hydro Report **two and half years** after the statutorily prescribed deadline under Public Resources Code Section 25641.5 and **after** the close of CP1. Moreover, Section 25741.5 requested a report from the CEC, but did not deem BC hydro facilities ineligible for RPS credit on SBX1-2’s effective date. LADWP clearly established the RPS-eligibility of the small hydro procurement based on the rules in place in June 2004 when LADWP issued its RFP for competitive-bid proposals, and in 2007 when LADWP executed the Powerex BC-Hydro PPAs.

The plain language, legislative history, and recent correspondence from the California Legislature confirm that LADWP’s BC hydro procurement should be grandfathered and count in full. Moreover, the Committee must reject Staff’s interpretation because retroactive application of the CEC’s certification standards raises unnecessary constitutional questions regarding retroactive rulemaking and the Ex Post Facto clause. *Dyna Med, Inc.*, 43 Cal.3d at 1387; *Evangelatos*, 44 Cal.3d at 1206; *City of Monte Sereno*, 149 Cal. App. 4th at 1538; *Landraf*, 511 U.S. at 269.

**6. The City and LADWP Approved the Shell Agreement and Atmos Agreement under the Governing Procurement and Eligibility Rules in Effect in 2009 under the City's Charter, Administrative Code, and the 2008 RPS Policy.**

As discussed below, the Shell Agreement and Atmos Agreement were approved under the City's and LADWP's procurement and eligibility rules in effect in 2009 and, therefore, these contracts are grandfathered under SBX1-2 and AB 2196.

- a. The List of Procurement and RPS-Eligibility Requirements under the Los Angeles City Charter, Los Angeles Administrative Code, LADWP's Natural Gas Risk Management Policy and the 2008 RPS Policy in Effect in 2009 when LADWP Executed the Shell Agreement and Atmos Agreement.

The Los Angeles City Charter, Los Angeles Administrative Code, and LADWP's 2008 RPS Policy established the governing list of procurement and eligibility requirements applicable to the Shell Agreement and Atmos Agreement. Los Angeles Administrative Code section 10.5.3, and related natural-gas purchase standards. *See* Ting Decl. ¶¶ 11, Ex. 08; Supp. Ting Decl. ¶¶ 50-55, Exs. 334-339.

- Eligible Resource – the 2008 RPS Policy's definition of "Eligible Resource" provided that
  - renewable derived biogas (meeting the heat content and quality requirements to qualify as pipeline-grade gas) injected into a natural gas pipeline for use in a renewable facility;
  - multi-fuel facilities using renewable fuels (only the generation resulting from the renewable fuels will be eligible). *See* Ting Decl. ¶ 11, Ex. 8 at § 3.
- Contract Limitations – Los Angeles Administrative Code Section 10.5.3 – delegated authority to enter into contracts for the purchase of natural gas with a maximum term of ten years and a maximum price of \$10/MMBtu. Supp. Ting Decl. ¶¶ 54-55, Ex. 338 (Ordinance No. 174755); Ex. 339 (Ordinance No. 177405); Second Supp. Ting Decl. at ¶

10, Ex. 385 (LADWP Delegation of Authority for Natural Gas Transaction dated March 31, 2008).

- Board Approved Form of NAESB Contract – The Board delegated authority to LADWP to use the form of NAESB Contract approved on June 3, 2003. Supp. Ting Decl. ¶¶ 41-42, Ex. 65 (Board Approved NAESB Contract); Ex. 66 (Resolution No. 003-285);
- LADWP Natural Gas Risk Management Policy – contracts for the purchase of gas had to comply with LADWP’s Natural Gas Risk Management Policy. Second Supp. Ting Decl. ¶9 , Ex. 384 (Resolution No. 033-166).

As discussed in the following subsection, the Shell Agreement and Atmos Agreement satisfied the eligibility and procurement requirements under LADWP’s 2008 RPS Policy, Los Angeles Administrative Code Section 10.5.3, and LADWP’s Board delegation of authority to enter into specified contracts for the purchase of natural gas using the approved form of NAESB Contract and consistent with the Delegation of Authority Natural Gas Transaction and LADWP’s Natural Gas Risk Management Policy.

b. The Shell Agreement and Atmos Agreement were Executed and Approved In Accordance with the Los Angeles Administrative Code, LADWP’s Natural Gas Risk Management Policy, and LADWP’s 2008 RPS Policy.

As discussed in Section II.C, LADWP entered into the Shell Agreement and Atmos Agreement in July and August 2009 pursuant to LADWP’s 2008 RPS Policy, which included as eligible resources “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” and “multi-fuel facilities using renewable fuels (only the generation resulting from the renewable fuels will be eligible).” *See supra* Section II.C; *see also* Ting Decl. ¶ 11, Ex. 8.

Supp. Ting Decl. ¶ 3, Ex. 27. On July 27, 2009, LADWP and Shell entered into a Shell Agreement, including the NAESB Base Agreement dated February 2, 1008, the Transaction Confirmation, and Transaction Confirmations Amendments for the purchase of renewable biogas, specifically pipeline-quality landfill gas. Supp. Ting Decl. ¶ 3, Ex. 27. The Shell Agreement was based on the form NAESB Agreement approved by LADWP's Board on June 3, 2003. Supp. Ting Decl. ¶¶ 40-42, Exs. 64-66; *id.*; Second Supp. Ting Decl. ¶ 10, Ex. 385.

The Shell Agreement had a term starting on August 1, 2009 and ending on June 30, 2014. *Id.* LADWP paid a fixed contract price of "\$9.80 per MMBtu for the quantity documented as Renewable Biomethane ('RB') as metered and delivered from the designated Landfill(s) (see Attachment A) on a monthly basis." *Id.* The Delivery Point for the receipt of the Renewable Biogas was the natural gas terminal located at Opal, Wyoming, located in the WECC region. *Id.*

The Shell Agreement provided that "Seller shall sell to Buyer, and Buyer shall purchase from Seller 3,500 MMBtu per Day for August 1, 2009 through August 31, 2009 and 8,200 MMBtu per Day for September 1, 2009 through June 30, 2014 ('Contract Quantity') consisting of both RB and Standard Baseload gas as set forth in the Special Conditions." *Id.* The "Special Conditions" defined "Renewable Biomethane" or "RB" as "gas produced from the Project that consists of Landfill Gas as that term is defined in the California Energy Commission's (CEC) Renewable Energy Program Overall Program Guidebook (January 2008)..." and acknowledged that "RB, as defined herein, is a qualifying resource under Buyer's [LADWP] Renewable Portfolio Standard ('RPS') program in effect as of the execution date of this Transaction Confirmation..." *Id.* The Shell Agreement further provided that "Seller further agrees that all deliveries of RB received by Seller under said contracts with the designated landfills shall be delivered to Buyer under this Transaction Confirmation up to the Contract Quantity."

On July 30, 2009, LADWP and Atmos Energy entered into LADWP entered into the Atmos Agreement, including the NAESB Base Contract and Transaction Confirmations. The Atmos Agreement was based on the form NAESB Agreement approved by LADWP's Board on June 3, 2003. Supp. Ting Decl. ¶¶ 4, Exs. 64-66; *id.*, Second Supp. Ting Decl. at ¶ 10, Ex. 385. On August 20, 2009, LADWP and Atmos entered into a Transaction Confirmation under this Base Contract for the purchase of renewable biogas, specifically pipeline-quality landfill gas. *Id.* On August 21, 2009, LADWP and Atmos entered in a second Transaction Confirmation for the purchase of renewable biogas from additional landfill facilities. *Id.*

The Atmos Agreement had a term starting on September 1, 2009 and ending on July 31, 2014. *Id.* LADWP paid a fixed contract price of "\$9.80 per MMBtu" for the renewable landfill gas. *Id.* The Atmos Agreement provided that "Seller shall sell to Buyer, and Buyer shall purchase from Seller, up to [a total of 5,600] MMBtus per Day ('Contract Quantity') for the Delivery Period, consisting of both the Environmental Attributes and Standard Base Load gas as set forth in the Special Conditions." *Id.* The Delivery Point for the receipt of the Landfill Gas was the Kern River Transmission natural gas terminal located at Opal, Wyoming, located in the WECC region. *Id.*

The "Special Conditions" defined "Standard Base Load" as "gas produced from the Project that consists of Landfill Gas as that term is defined in the California Energy Commission's (CEC) Renewable Energy Program Overall Program Guidebook (January 2008)..." and acknowledged that "Landfill Gas, as defined herein, is a qualifying resource under Buyer's [LADWP] Renewable Portfolio Standard ('RPS') program in effect as of the execution date of this Transaction Confirmation...." *Id.* The Atmos Agreement further provided that "Seller further agrees that all deliveries of Landfill Gas received by Seller under said contracts

with the designated landfills shall be delivered to Buyer under this Transaction Confirmation up to the Contract Quantity hereof.” *Id.*

The Shell Agreement and Atmos Agreement conformed to LADWP’s Biogas Memo dated July 27, 2009, which included the “methodology for calculating the amount of eligible Renewable Portfolio Standard (RPS) energy resulting from the use of RPS-eligible biogas in [LADWP’s] gas-fired generating units.” *Id.*

On September 4, 2009, LADWP submitted its 2009 August RPS Update to the Board for discussion during the Board’s regularly scheduling meeting on September 15, 2009. Supp. Ting Decl. ¶ 43, Ex. 67. LADWP’s August 2009 RPS Update identified the renewable landfill gas procured under the Atmos Agreement on LADWP’s RPS Master Projects List presented to the Board on September 15, 2009. *Id.*

On December 6, 2011, LADWP’s Board adopted the 2011 RPS Policy. Ting Decl. ¶12, Ex. 09. Appendix A of the 2011 RPS Policy identified the Shell Agreement and Atmos Agreement as grandfathered renewable resources adopted under LADWP’s 2008 RPS Policy. *Id.*

LADWP’s KRT Firm Transportation Service Agreements No. 1006 and 1706 were used to transport the renewable biogas purchased under the Shell Agreement and Atmos Agreement from the receipt point at Opal to SoCalGas’ delivery points at Wheeler Ridge and Kramer Junction for use at LADWP’s in-basin generating facilities. Supp. Ting Decl. ¶¶ 17,22, Ex. 41; Ex. 46; *See also* Section II(C)(6)-(7), incorporated by reference

- c. SBX1-2 and AB 2196 Both Mandate that the CEC Grandfather the Shell Agreement and Atmos Agreement for Full RPS Credit.

As discussed in Section IV(A)(1)-(3), *supra*, establishing that the Shell Agreement and Atmos Agreement are grandfathered resources that count in full for RPS credit under Section



399.12(e)(1)(C), 399.16(d)(1), and 399.12(6)(a). As discussed therein, LADWP executed the Shell Agreement and Atmos Agreement before June 1, 2010 under LADWP's 2008 RPS Policy and consistent with LADWP's governing procurement and eligibility rules. Accordingly, Public Utilities Code Sections 399.12(e)(1)(C) and 399.16(d)(1) mandate that the CEC certify these grandfathered renewable resources and count in full the RECS generated from the use of the biomethane procured under the Shell and Atmos Agreements.

In addition, Section 399.12.6(a) further mandates that the CEC grandfather the biomethane procurement from the Shell and Atmos Agreements, which were executed before March 29, 2012 and eligible under the City's and LADWP's procurement and eligibility rules. Section 399.12.6(a) refers to grandfathering of biomethane contracts "reported" to the CEC before March 29, 2012. LADWP applied for precertification and certification of LADWP's Scattergood, Valley, Haynes, and Harbor Generating Stations using the biomethane procured under the Shell Agreement and Atmos Agreement as early as July 2011 and submitted numerous subsequent applications to Staff seeking certification of these agreements before the CEC suspended biomethane application on March 28, 2012. The dictionary definition of "report" means "to make known to the proper authorities" or "to give a formal or official account or statement" *See Merriam-Webster Dictionary; see also American Heritage College Dictionary, 4th Ed.* ("report" means to "make or present an often official, formal, or regular account of"). There is no meaningful question that LADWP "reported" the Shell Agreement and Atmos Agreement to Staff before March 29, 2012 through LADWP's RPS-certification and precertification applications and correspondence starting in July 2011 and continuing through March 2012.

In sum, SBX1-2 and AB 2196 grandfathered LADWP's Shell and Atmos Agreements for RPS credit. The plain language, legislative history, and submitted evidence confirm that the Committee must certify and count in full the Shell Agreement and Atmos Agreement as grandfathered resources under Public Utilities Code Sections 399.12(e)(1)(C), 399.16(d)(1), and 399.12.6(a).

**B. Staff's Interpretation of "Use" Provision Contradicts Well Established Federal and State Law.**

This section responds to question 1 a) through c) in the July 27, 2016 Scoping Order. It is critical for the Committee and the full Commission to understand the fundamental concepts of how the interstate pipeline was developed as legislated by the U.S. Congress and policies and regulations developed by the Federal Energy Regulatory Commission ("FERC").

At the outset, Staff's definition of "use" is incorrect as a matter of law. Indeed, Staff's interpretation of "use" is premised on a fundamental misunderstanding of how natural gas is transported through the interstate pipeline system, and directly conflicts with FERC policies and regulations that govern the interstate transportation of natural gas. Interstate natural gas pipelines subject to FERC jurisdiction transport natural gas in accordance with their FERC-approved gas tariffs. 18 C.F.R. § 154.1(b) (2016). It is impossible for FERC regulated pipelines to comply with their tariffs, which have the force and effect of federal law, and meet the Staff's proposed definition of "use."

Staff contends that the "the only way an electric 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 nominated facility." (Exhibit 367, LA002403, LA002406). According to Staff, the only way gas can be actually

delivered to a generating facility, is if the gas is delivered through forwardhaul firm or interruptible transportation service. *Id.* Staff cites no authority for the basis of its understanding of the natural-gas transportation system, but Staff’s interpretation is inconsistent with federal and state natural-gas transportation standards.

1. **FERC has Exclusive Jurisdiction to Regulate Interstate Natural Gas Pipeline Transportation in Conformance with the Natural Gas Act, and its Regulations Have a Preemptive Effect over Any State Regulation that Conflicts with its Authority.**

Section 1(b) of the Natural Gas Act (“NGA”), 15 U.S.C. § 717(b) (2012), “confers upon FERC *exclusive jurisdiction* over the transportation and sale of natural gas in interstate commerce for resale.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1985) (emphasis added); *see also*, *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1416 (10th Cir. 1992). Sections 4 and 5 of the NGA, 15 U.S.C. §§ 717c and 717d, confer upon FERC exclusive authority over an interstate pipeline’s rates and practices. ; *see id*; *See also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (holding that “the authority to decide whether the rates are reasonable is vested by § 4 of the [NGA] solely in the [FERC] and the right to a reasonable rate is the right to the rate which the [FERC] files or fixes.” (internal citations omitted). “FERC exercise[s] authority over the rates and facilities of natural gas companies used in . . . transportation . . . through a variety of powers.” *Schneidewind*, 485 U.S. at 301 (citing as examples NGA Sections 4, 5, and 7, 15 U.S.C. §§ 717c, 717d, and 717f). Among these powers is the enactment of a comprehensive scheme of regulations governing natural gas pipeline transportation. *See e.g.* 18 C.F.R. Parts 154 and 284 (regulating rate schedules, tariffs, and transportation). FERC’s extensive regulations outline, among other items, the types of transportation service a pipeline may offer, how a pipeline may assess rates for the transportation

services provided, and the manner in which such pipelines must offer transportation services. *See e.g., id.* Part 284, subparts A, B, and G; *see also id.* Part 154. FERC also comprehensively regulates the standards for pipeline business operations and communications through incorporation by reference of the NAESB standards. *See id.* § 284.12.

FERC regulations of interstate natural gas pipeline transportation preempt “state and local law to the extent the enforcement of such laws or regulations would conflict with the [FERC]’s exercise of its jurisdiction under the [NGA].” *Iroquois Gas Transmission Sys., L.P.*, 59 FERC ¶ 61,094, at p. 61,360 (1992). The preemptive effect of FERC’s regulatory oversight is rooted in Article VI of the U.S. Constitution. U.S. Const., Art. VI, Clause 2. Federal regulations have the same preemptive effect as federal statutes. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984); *See also Iroquois Gas Transmission Sys., L.P.*, 59 FERC ¶ 61,094, at p. 61,360; *United Distrib. Companies v. FERC*, 88 F.3d 1150, 1155 (D.C. Cir. 1996) (holding that “federal preemptive authority may be exercised not only through federal statutes but also regulations issued by administrative agencies.”). And, a federal regulation can preempt a state statute, regulation, or action under the concepts of field and conflict preemption even if the regulation itself is not explicit. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015). Under field preemption, a state is forbidden “to take action in the *field* that the federal statute preempts.” *Id.* (emphasis in original). Conflict preemption arises “where ‘compliance with both state and federal law is impossible,’ or where ‘the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”’” *Id.* (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989)).

Under both of these preemption concepts, California is prohibited from regulating the interstate transportation of natural gas by pipeline. FERC occupies the field of interstate pipeline

transportation. Its regulations necessarily override any state law that “affect[s] the ability of [FERC] to regulate comprehensively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was the object of the Natural Gas Act.” *Schneidewind*, 485 U.S. at 310 (quoting *N. Natural Gas Co.*, 372 U.S. 84, 91-92 (1963)). Nor is California permitted to enact a regulation that makes it impossible for a FERC regulated pipeline, or a shipper on a FERC regulated pipeline, to comply simultaneously with state and federal requirements. Any such requirements would “stand as an obstacle” to FERC executing “the full purposes and objectives” of the NGA. *See e.g. Oneok*, 135 S.Ct. at 1595.

**2. FERC’s Comprehensive Regulatory Scheme Defines What Constitutes Transportation on the Interstate Pipeline System and How Transportation Services Are to Be Provided.**

Central to how FERC regulates transportation is how FERC defines what constitutes “transportation.” FERC defines transportation to “include[] storage, *exchange*, backhaul, displacement, or other methods of transportation.” 18 C.F.R. § 284.1(a) (emphasis added). This broad definition is purposeful. It ensures that FERC has the “authority to comprehensively administer open access transportation and to promote competition.” *Williams Nat. Gas Co.*, 61 FERC ¶ 61,205, at p. 61,764 (1992) (“*Williams*”) (explaining why backhauls constitute interstate transportation even if the molecules delivered in a backhaul transaction are produced, transported, and consumed entirely within state lines), *aff’d sub nom., Okla. Nat. Gas Co. v. FERC*, 28 F.3d. 1281 (1992). *See* Schlesinger Decl. ¶¶ 1-4 and at ¶ 9 (explaining that “North American gas pipelines function as an interconnected grid, under ‘open access’ rules” operating, “essentially, as a unified grid.”). FERC has found that NGA Section 16 supports its broad “transportation” definition by permitting FERC to prescribe rules and regulations that “define

accounting, *technical and trade* terms used in [the NGA].” *Id.* at 61,763 (quoting 15 U.S.C. § 717(o)).

In *Williams*, FERC explained why natural gas transportation was not limited to “forward hauls where the end user was located in a different state than the producer.” *Id.* at p. 61,764; *see also*, *Natural Gas Pipeline Co. of Am.*, 15 FERC ¶ 61,254, at p. 61,586 (1981). *Williams* rejected an Oklahoma local distribution company’s arguments that actual molecules of gas delivered needed to cross state lines to constitute interstate natural gas service. *Williams*, 61 FERC ¶ 61,205 at p. 61,763 (finding that backhauls constituted interstate service as much as forwardhauls) (citing *Tennessee Gas Pipeline Co. v. FERC*, 809 F.2d 1138 (5th Cir. 1987); *Transwestern Pipeline Co. v. FERC*, 747 F.2d 781, 782-83 (D.C. Cir. 1983)); *see also* *Nat’l Fuel Gas Distribution Corp.*, 93 FERC ¶ 61,276, at p. 61,897 (2000) (explain that “[t]he Commission has long held that delivery of interstate gas by displacement constitutes jurisdictional interstate transportation service.”), *reh’g denied*, 94 FERC ¶ 61,136 (2001). It follows that gas “transportation” does not require delivery of the same molecules of gas that were received at a shipper’s receipt point; the gas can be exchanged with other, thermally equivalent volumes. *See* Schlesinger Decl. ¶¶ 7, 12-13.

Equally central to FERC regulations is how FERC defines the types of transportation services a pipeline must offer. *See* Schlesinger Decl. ¶12. For example, every interstate pipeline must offer firm transportation service. 18 C.F.R. § 284.7(a). “Firm transportation service” is defined as service that “is not subject to a prior claim by another customer or another class of service and receives the same priority as any other class of firm service.” *Id.* at §284.7(a)(3). Firm transportation service can be accomplished through exchange, backhaul, or displacement,

in addition to direct long-haul transportation. The crux of what constitutes firm transportation, therefore, is not the method of transportation, but priority of service.

The regulations also require each FERC-regulated pipeline to file a tariff that sets forth the universe of rates, terms, and conditions under which it offers transportation services, including firm transportation services. *Id.* § 154.1(b). Within the tariff, each pipeline also must publish a *pro forma* agreement for every transportation service offered. Each tariff and any subsequent changes must be approved by FERC. 15 U.S.C. § 717c(c); 18 C.F.R. § 154.1(b). And, an interstate pipeline is prohibited from offering a shipper service in a manner that does not conform with the *pro forma* agreement without first obtaining FERC approval. 18 C.F.R. § 154.1(d).

Once a tariff is in effect, it “carri[ies] the same legal force as federal regulations, and [is] thus considered federal law.” *Great Lakes Gas Transmission LP v. Essar Steel Minn., LLC*, 103 F. Supp.3d 1000, 1018 (D. Minn. 2015) (citing *Central Iowa Power Co-op. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 913 (8th Cir. 2009); *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385,387 (8th Cir. 1992)), *motion to certify appeal denied*, 2015 WL 3915687 (D. Minn. June 25, 2015); *see also Monforte Exploration L.L.C. v. ANR Pipeline Co.*, 2010 WL 143712, \*4 (S.D. Tex. Jan. 7, 2010)) (citing *Carter v. Am. Tel. & Tel. Co.*, 365 F.2d 486, 496 (5th Cir. 1966)). “A tariff has the force of law and is binding on all concerned parties including the [FERC], absent a modification of the tariff.” *Equitable*, 28 FERC ¶ 61,235, at p. 61,444. FERC is the only entity with authority under the NGA to order or approve a tariff modification. 15 U.S.C. §§ 717c(d) and 717d(a). Under the NGA, the right and responsibility to regulate conformance with the tariff rests exclusively with FERC. *Schneidewind*, 485 U.S. at 310. Moreover, under the filed rate doctrine, both state and federal

courts are prohibited from questioning a rate that has been filed with a federal regulator. *See Montana-Dakota Util. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951). Under this regulatory scheme, the KRT tariff and KRT’s FERC-approved transportation service agreements with LADWP govern the delivery of LADWP’s procured biogas into California, not Staff.

3. **Staff’s Definition of “Use” Impinges Upon Interstate Commerce because the Definition Makes it Impossible for a FERC Regulated Pipeline to Meet the Requirements of its FERC Gas Tariff and the Third Edition Guidebook**

Staff rejected the RPS-eligibility of the 2009 Shell and Atmos Agreements because the gas was delivered to LADWP at Opal via a gas exchange, as opposed to via a “physical contract path.” Staff based this determination on its concept of “use.” It determined that:

[t]he 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 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.

Memorandum from CEC Staff to CEC’s Executive Director at 13 (Nov. 30, 2015) (“2015 CEC Staff Memo”) (emphasis added) (this is the memorandum relied on in the Office of the Executive Director’s letter denying LADWP’s Petition) (Exhibit 367, LA002403, LA002406). Staff concluded that procured biogas delivered through an exchange, as opposed to “transported through the natural gas transportation pipeline system” could not “be ‘used’ by the electrical generation facility.” *Id.* (Exhibit 367, LA002409). By way of contrast, Staff suggests that LADWP can comply simultaneously with its regulations and FERC’s when the procured biogas is delivered “through a physical contract path”



whereby the shipper must “reasonably contractually arrange for Firm transportation . . . [or] the type of Interruptible transportation most similar to Firm that is available.” *Id.* (Exhibit 367, LA002408) (referencing the 2011 Shell Agreement).<sup>1</sup> However, Staff’s understanding is “inconsistent with, the regulatory and contractual constructs for gas transportation in the United States.” Schlesinger Decl. ¶15.

The 2015 CEC Staff Memo adds that its “biogas delivery requirements are not intended to impinge upon the operations of interstate commerce.” *Id.* (Exhibit 367, LA002408). What is meant by “biogas delivery requirements” is unclear. Staff refers to methods of transportation that “actually deliver gas,” which presumably translates into molecule mapping and the ability to deliver the actual molecules injected into the pipeline system at the landfill site. In furtherance of this assessment, Staff proclaims:

Gas exchanges and other natural gas transport methods, such as ‘displacements’ or ‘backhauls,’ do not actually deliver gas from the injection site to the extraction site, and are commonly used to avoid transportation costs. As Energy Commission staff understand, displacement is a method of natural gas transportation where gas is injected into the natural gas pipeline and an equivalent amount of gas is extracted downstream; however, the injected gas is not scheduled to be delivered to the extraction point. Backhaul is basically the same as displacement, except that backhaul is used in cases where the gas in the pipeline flows from the extraction point towards the injection point.

*Id.* (Exhibit 367, LA002402). Presumably, because displacement, backhauls, and exchanges, will never deliver the same molecules injected into the gas stream by the shipper, they do not “actually deliver gas.” This definition of transportation conflicts with the definition used by

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<sup>1</sup> The CEC certified LADWP’s in-basin facilities using biomethane based on an agreement with Shell executed in 2011. (Exhibit 367, LA002408).

FERC to regulate interstate natural gas transportation. It is undisputed that the biogas was “transported through the natural gas pipeline system” because an exchange is a valid form of pipeline transportation. *See* 18 C.F.R. § 284.1(a); *Williams*, 61 FERC ¶ 61,205, at p. 61,764; Schlesinger Decl. ¶¶ 12-13.

Under the definitions described above, very few, if any at all, California applicant would be able to participate in the RPS-eligibility program and use the interstate pipeline system to transport procured biogas from non-California sources, even though the Third Edition Guidebook permitted interstate transportation. Contrary to its self-serving findings, Staff’s biogas delivery requirements directly impinge on interstate commerce because they conflict with FERC-approved gas tariffs. This is evident, and most relevant, in the KRT tariff, which governed LADWP’s transportation service between Opal and the California delivery points.

In conjunction with the 2009 Shell and Atmos Agreements, LADWP had FERC approved transportation service contracts with KRT. *Kern River Gas Transmission Co.*, Letter Order Approving Non-Conforming Contract, Docket No. RP13-948-000 (issued June 19, 2013) (approving permissible non-conforming provisions pertaining to flexible receipt and delivery point entitlements, operating and balancing provisions, state law, and flow order downstream of the Muddy Creek compressor station).<sup>2</sup> Under the contract, KRT was obligated “to transport and deliver Thermally Equivalent Quantities to [LADWP] at the [California] Delivery Point(s).” Kern River Transportation Agreement No. 1706 Restated. (Exhibit 46, LA000618).

The concept of thermal equivalency is present throughout the KRT Tariff. *See e.g.*, Kern River Gas Transmission Co., FERC Gas Tariff (“KRT Tariff”), Rate Schedule KRF-1, Section

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<sup>2</sup> The non-conforming provision concerning state law allowed the contract to be construed in accordance with California law, as opposed to Utah law as set forth in Kern River’s *pro forma* firm transportation services agreement.

2.2(c), version 1.0.0 (effective Apr. 24, 2014); (requiring “[t]he delivery of Thermally Equivalent quantities after Transportation . . . by Transporter to Shipper at the Delivery Point(s).”). Thermal equivalency is the requirement to deliver “an equal number of Btu’s.” *Id.*, General Terms & Conditions (“GT&C”), Definitions, § 1.29, version 0.0.0 (effective Aug. 19, 2010).<sup>3</sup> Thus, even though LADWP had a contract with Kern River that provided for forwardhaul firm service premised on a physical receipt and delivery point, Kern River made no guarantee that it would deliver the same molecules of gas injected at Opal. Indeed, it could not under its tariff. The delivery obligation was based solely upon the energy content of the gas. All that mattered and all that was required by law was that LADWP received the same quantity of gas delivered to the pipeline, not the same molecules of gas.

KRT is not unique in its FERC-sanctioned ability to deliver a thermally equivalent quantity of gas as opposed to identifiable and traceable gas molecules. Each of the natural gas pipelines that transport gas between the various landfill injection sites and the Kern River system has a similar FERC approved tariff provision.<sup>4</sup> Under no circumstances can any of these

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<sup>3</sup> The “Thermally Equivalent” definition in Kern River’s currently effective tariff was in effect in 2009, if not earlier. See e.g., Kern River Gas Transmission Co., Letter Order Re: Order No. 587-S Compliance Filing, Docket No. RP05-456 (Aug. 18, 2005).

<sup>4</sup> See e.g., ANR Pipeline Co., FERC Gas Tariff, Third Revised Vol. No. 1, GT&C, Definitions § 6.1, version 4.0.0 (effective Aug. 1, 2016) (defining “Equivalent Quantities” as “a quantity of Gas containing an amount of Dekatherms equal to the amount of Dekatherms received by Transporter for the account of Shipper at the Receipt Point(s)”; Columbia Gas Transmission, LLC FERC Gas Tariff, Fourth Revised Vol. No. 1, Rate Schedule FTS, Section 2(a), version 5.0.0 (effective July 1, 2016) (defining the pipeline’s responsibility as delivering “thermally equivalent scheduled quantities” to the shipper); Enable Gas Transmission, LLC FERC Gas Tariff Ninth Revised Vol. No. 1, GT&C, Quality § 4.5, version 0.0.0 (effective Aug. 16, 2013) (setting forth the pipelines “unqualified right to commingle Gas received for service hereunder with Gas from other sources” such that the pipeline is “under no obligation to deliver for Shipper’s account Gas identical to that received by Transporter.”); Natural Gas Pipeline Co. of Am. LLC, FERC Gas Tariff Eighth Revised Vol. No. 1, Part 6.1, GT&C § 1.7, version 1.0.0

pipelines be required to deliver the same molecules of gas from the injection site to the extraction site. Hence, the RPS Staff's argument that LADWP can comply simultaneously with its regulations and FERC's requirements is not correct. Even under the 2011 Shell contract, which requires "direct long-haul" transportation and a "physical contract path" between the injection and extraction sites, no FERC-regulated pipeline could be obligated to deliver the same molecules of biogas injected at the landfills under any form of transportation. 2015 CEC Staff Memo (Exhibit 367, LA002408) (quoting Section 2 of the Special Provisions of the Transaction Confirmation of the 2011 Shell contract). It would be nearly impossible for a natural gas shipper to use FERC jurisdictional pipeline facilities and comply with Staff's definition of "use" regardless of whether the method of transportation was "direct, long-haul transportation."

Under Staff's reasoning, LADWP would have needed to execute individual transportation contracts with each pipeline between each landfill site and California, and those contracts would have required each pipeline to deliver the precise molecules produced from the landfills so that "use" could be achieved. That is not how interstate transportation is accomplished under FERC approved tariffs.

As the D.C. Circuit has explained, "[s]ince natural gas is fungible, its 'transportation' does not always take the form of the physical carriage of a particular supply of gas from its

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(effective Apr. 1, 2016) (defining "Equivalent Volumes" as "the quantity of gas measured in Dth received by Natural for the account of Shipper at the Receipt Point(s) at any given period of time"); Rockies Express Pipeline LLC FERC Gas Tariff Third Revised Vol. No. 1, GT&C, § 1, version 5.0.0 (effective June 1, 2016) (defining "Equivalent Volumes" and explaining that it is "the intent of the parties that the volumes of Gas delivered hereunder at the Delivery Point after transportation be the thermal equivalent of the volumes of Gas delivered at the Receipt Point for transportation"); and Southern Star Central Gas Pipeline, Inc. FERC Gas Tariff, First Revised Vol. No. 1, FTS Rate Schedule, § 2(b), version 0.0.0 (effective June 1, 2010), providing that Southern Star's obligation is "the delivery of a quantity of natural gas with the thermal equivalent of the quantity received at the Primary Receipt Point(s)").

starting point to its destination.” *Associated Gas Distrib. v. FERC*, 899 F.2d 1250, 1254, n.1 (D.C. Cir. 1990). The court then compares the transportation of natural gas between points to the wiring of money by Western Union, demonstrating the impossibility of the same gas molecules being received and delivered. *Id.* The only way a pipeline and its shippers could comply with both sets of regulations would be through the revision of the FERC-approved tariffs under which each interstate pipeline operates. This is a classic case of conflict preemption. The tariffs carry the force of law. Staff’s interpretation of what constitutes natural gas transportation or delivery carries no weight.

**4. Staff’s Definition of “Use” Must Be Rejected Because It Would Require Natural Gas Pipelines to Engage in Physically Impossible and Legally Irrelevant Molecule Tracing.**

Staff’s definition of “use” would obligate a pipeline to engage in molecule tracing, a concept absent from FERC’s regulations governing natural gas transportation. Natural gas is fungible. *Associated Gas Distrib.*, 899 F.2d at 1254, n.1; *Nat’l Fuel Gas Supply Corp.*, 2 FERC ¶ 63,032, at p. 65,201 (1978) (holding that natural gas is a “fungible commodity”); *see also* Schlesinger Decl. at ¶ 13. Thus, molecule tracing is physically impossible. *See e.g., Nat’l Fuel Gas Distrib. Corp.*, 93 FERC ¶ 61,276, at p. 61,899 (2000) (“*National Fuel*”) (holding that “[t]he conceptual idea of transportation from point to point does not match the physical reality.”); *see also, Williams Natural Gas Co.*, 59 FERC ¶ 61,306 at p. 62,119 (stating verbatim the same principle as *National Fuel*), *reh’g denied and clarification granted*, 61 FERC ¶ 61,205 (1992). Molecule tracing also is legally irrelevant. *See Natural Gas Pipeline Co. of Am.*, 92 FERC ¶ 61,221, at p. 61,740 (2000) (explaining that “it is not possible to trace molecules of gas transported under any specific [pipeline] rate schedule in order to determine their end-use after they enter the [pipeline’s] and the [local distribution company’s] systems and are commingled.”);

*See also* Schlesinger Decl. at ¶¶ 13-14. For this reason, FERC “does not require the tracing of gas molecules.” *Tex. Gas Serv. Co. v. El Paso Natural Gas Co. , L.L.C.*, 143 FERC ¶ 61,200 at P 6 (2013); *El Paso Natural Gas Co.*, Opinion No. 528, 145 FERC ¶ 61,040 at P 249 (2013). Instead, FERC acknowledges that “it is impossible to identify specific molecules of gas transferred to [a given shipper], and it would be fruitless to try.” *Nat’l Fuel Gas Supply Corp.*, 2 FERC ¶ 63,032, at p. 65,202.

The inability and irrelevancy of molecule tracing is premised on the physical reality of the interstate pipeline grid, which includes KRT and every pipeline between the landfill injection sites and California. The grid is integrated and “accommodates numerous receipt and delivery points throughout its network” and gas is “constantly being injected into and withdrawn from different points throughout any given system.” *National Fuel*, 93 FERC ¶ 61,276, at p. 61,899; *see also* Schlesinger Decl. at ¶ 9. Recognizing gas as a fungible commodity, FERC has also stated that a “pipeline’s obligation to the customer is satisfied when the customer either receives at the appropriate delivery point sufficient volumes, from whatever source, to meet the quantity, quality, and heat content called for by the tariff’s terms and conditions.” *Revisions to Uniform System of Accounts, Forms, Statements, and Reporting Requirements for Natural Gas Companies*, 60 Fed. Reg. 3,141, 3,143 (Jan. 13, 1995) (referring to a pipeline’s obligations under accounting regulations). This is an apt description of how the biogas is moved from the landfills to California. The biogas transportation is subject to the interstate pipeline tariffs in between the landfill injection sites and California, which require deliveries of thermally equivalent quantities of gas, not identical molecules.

Staff's definition of "use" is therefore at odds with the entire pipeline regulatory scheme. The molecules of biogas do not and cannot follow a direct pipeline path. The RPS Staff's interpretation of the Third Edition Guidebook, which requires such an outcome, must be rejected.

**5. Staff's Interpretation of "Use" Contradicts State Law.**

In addition to conflicting with federal law, Staff's definition of "use" finds no support in state law. Moreover, the interconnectedness of the grid, which makes molecule tracing impossible, applies equally to pipelines operating in California under the authority of the California Public Utilities Commission ("CPUC"). This may be seen in CPUC Decision D.06-12-031, where the CPUC allowed an "off-system service" for gas trading and exchanges "to open up new markets in northern California to potential gas suppliers based in southern California." 2006 Cal. PUC LEXIS 437, \*2-3. This Decision would not have been possible if gas were not fungible. Thus, Staff's proposed definition of use raises fundamental questions regarding state law that must be rejected by the Committee.

- a. The Aliso Canyon Action Plan clearly demonstrate Staff's fundamental misunderstanding how SoCalGas operates its gas pipeline and storage facilities in the Los Angeles Basin.

The Aliso Canyon Action Plan which was coauthored by four agencies including the CEC clearly demonstrate Staff's fundamental misunderstanding about the nature of gas transportation and delivery on the interconnected U.S. pipeline gas grid and how SoCalGas operates its gas pipeline and storage facilities in the Los Angeles Basin. The Aliso Canyon Action Plan recognizes that SoCalGas, like the interstate pipelines that are regulated by FERC, operates under the concept that gas in the pipeline system is entirely fungible in the pipeline system:

[S]hippers are not required to, and often do not, bring in each day exactly the amount of gas they will use. Noncore customers [such as LADWP] are not required to balance their demand and delivery of gas each day; instead, SoCalGas requires that noncore customers total demand for the month must match up with the gas they deliver in that month within a tolerance band of plus or minus 10 percent. That difference does not have to be made up until the next month. In other words, a shipper can be out of balance by up to 10 percent of its monthly gas use and make up that difference next month at no penalty. These balancing provisions have been in place for a long time and have provided great benefits to all shippers on the SoCalGas system.

“Aliso Canyon Action Plan to Preserve Gas and Electric Reliability for the Los Angeles Basin,” p.12, coauthored by the CEC, LADWP, CAISO, and the CPUC. Ex. 381, LA002637.

For SoCalGas to adequately balance its pipeline system, including scheduling and balancing on a regular basis, SoCalGas determines when and which of its customers deliver gas into the extensive SoCalGas pipeline system for redelivery to a point designated by the customer. Under SoCalGas Rule No. 30, the amount of gas that redelivered is a thermally equivalent to the amount that was delivered into the system: “[SoCalGas] will accept such quantities of gas from the customer or its designee and redeliver to the customer on a reasonably concurrent basis an equivalent quantity, on a therm basis, to the quantity accepted.” Ex. 51, LA000671 to LA000673. Rule 30, addressing “Customer Owned Gas,” specifically states that SoCalGas has no requirement to deliver the “identical” gas purchased. Ex. 51, LA000671 to LA000679.

SoCalGas Rule 30.B.1 further explains that due to operating conditions there may be a difference between the amount of gas a customer delivers into the SoCalGas system and the amount of gas that is delivered to the customer on a given day:

The Utility shall as nearly as practicable each day redeliver to customer and customer shall accept, a like quantity of gas as is delivered by the customer to the Utility on such



day. It is the intention of both the Utility and the customer that the daily deliveries of gas by the customer for transportation hereunder shall approximately equal the quantity of gas which the customer shall receive at the point(s) of delivery. However, it is recognized that due to operating conditions either (1) in the fields of production, (2) in the delivery facilities of third parties, or (3) in the Utility's system, deliveries into and redeliveries from the Utility's system may not balance on a day-to-day basis. Id.

Furthermore, this same Rule 30, identifies the gas quality expected for its distribution pipeline system so that the gas is interchangeable. Ex, 51, LA00688.

The interchangeability of gas delivered into the SoCalGas system for redelivery to a point designated by a customer is also demonstrated by the fact that SoCalGas permits imbalances between deliveries into the SoCalGas system and deliveries to the point of redelivery Schedule G-IMB, provides for this imbalance service:

The Utility System Operator will provide a Monthly Imbalance Service for individual customers, including the Utility Gas Procurement Department, end-use customers, wholesale customers, marketers and aggregators (referred to herein as "customers") when their usage differs from their transportation deliveries to the Utility's system or their targeted sales gas quantities purchased and delivered by the Utility. In case of the Utility Gas Procurement Department, the Daily Forecast Quantity will be used as a proxy for daily usage and the calculation of imbalances.

SoCalGas Schedule G-IMB (sheet 1)(current), (see prior, Ex. 51, LA000671).

Given how SoCalGas operates its gas storage system, gas transportation service does not match the physical flow of gas. The structure of the SoCalGas o pipeline system in requires gas in the pipeline system to be fungible. To serve its some 22 million customers, about half of whom are in the Los Angeles Basin, "SoCalGas owns and operates high-pressure gas pipelines (known as the "backbone transmission system") that can accept as much as 3.875 Billion Cubic

Feet per day (Bcf per day) of natural gas from several pipelines that connect California to gas producing areas . . . often hundreds of miles away, in New Mexico, Texas or the Rocky Mountains.” Ex. 381, LA002632.

The definitions in SoCalGas Rule No. 1 in CPUC-approved tariffs, referred to in the Master Services Agreement specifically refer to the ability to exchange gas: “Natural gas which is produced by a customer and redelivered under a natural gas exchange agreement by Utility to that same customer at a different location.” Ex. 51, LA000659.

The interchangeability of gas delivered into the SoCalGas system is further illustrated by the fact that some of the gas may be delivered to SoCalGas storage fields: “Some of the gas delivered via the backbone transmission system flows directly to customers. The remainder, however, is injected into one of SoCalGas’ underground gas storage fields (Aliso Canyon, Honor Rancho, La Goleta or Playa del Rey) for later use.” Ex. 381, LA002632. The fluctuating demands placed on the SoCalGas pipeline system, especially during the winter and summer, makes gas storage essential to meeting demand. *Id.* From a practical perspective and within the Los Angeles Basin especially, gas storage necessarily requires interstate pipeline gas to be a fungible commodity to support gas reliability in the region. Ex. 381, LA002632-LA002635.

**6. The CEC’s Interpretation is Inconsistent with CARB Regulations.**

Staff’s interpretation of the delivery standards required to verify use of biogas is inconsistent with other State regulatory agencies, including the California Air Resources Board’s (“CARB”) standards for Mandatory Reporting Regulation for Greenhouse Gas Emissions (“MRR”). *See* 17 C.C.R. § 95131(i)(2)(D)(1) (“For biomethane and biogas, the verifier must examine all nomination, invoice , scheduling, allocation, transportation, storage, in-kind fuel purchase and balancing reports from the producer to the reporting entity and have reasonable

assurance that the reporting entity is receiving the identified fuel”). CARB’s Guidance for California’s Mandatory Greenhouse Gas Emissions Reporting discussed CARB’s biomethane standards. (Exhibit 376, LA002532 to LA002541).

Specifically, Section 4.2 of the Biomass-Derived Fuels Reporting and Verification Guidance, states: “Biomethane nominated to a pipeline is identical to fossil-fuel derived natural gas; therefore the actual molecules of biomethane may not be combusted by the operator with a purchase contract.” (Exhibit 376, LA002537) “Pursuant to section 95131(i)(2)(D) of MRR, the operator, or reporting entity,” could employ one of two methods to provide evidence that the operator is ‘receiving the biomethane. (Exhibit 376, LA002537). Section 4.2 explains that the “second method is for the operator, or reporting entity, to provide evidence that the owner or marketer of the biomethane engaged in a ‘swap’ of the biomethane at the source with the natural gas delivered to the operator or reported entity. This would still require evidence that the biomethane was nominated to a pipeline, but would not require evidence that the biomethane physically flowed to the operator’s facility in California.” Id.

In addition, in Section 4.2.2, CARB provides an example in Figure 3 “of an arrangement where biomethane is transferred from a landfill to an operator, or reporting entity, where there is no physical pathway through interconnected pipelines.” (Exhibit 376, LA002538, emphasis added.) Figure 3 is consistent with the use of gas exchanges under the Shell and Atmos Agreements. (see Exhibit 376, LA002539).

**7. The Shell and Atmos Agreements Satisfy the Third Edition’s Biomethane Requirements.**

As established above in Section IV(A), the Shell and Atmos Agreements are grandfathered resources subject to the City’s eligibility requirements for biogas procurement

under the 2008 RPS Policy, LADWP’s Natural Gas Risk Management Policy, and the Los Angeles Administrative Code Section 10.5.3 standards. However, even assuming that the CEC could apply the Third Edition Guidebook standards *retroactively* – which it cannot – the Shell and Atmos Agreements satisfy the express requirements under the Third Edition, which contains *one delivery requirement*: the biogas “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.” Ex. 383 (“Third Edition Guidebook) at LA002744. The Third Edition Guidebook also requires that the gas “meet strict heat content and quality requirements within a narrow band of tolerance to qualify as pipeline-grade gas” and that the gas “be used at a facility that has been certified as RPS-eligible.” *Id. at* LA002743.

The Third Edition Guidebook requires two attestations from the applicant: “(1) an attestation from the multi-fuel facility operator of its intent to procure biogas that meets the RPS eligibility criteria, and (2) an attestation from the fuel supplier that the fuel meets eligibility requirements.” *Id. at* LA002744). These certification and attestation forms included in Appendix A do not require delivery of gas through a physical contract path and, unlike the Fourth Edition Guidebook, *do not mention much less expressly require any evidence of delivery contracts for firm or interruptible transportation service.*

The Third Edition Guidebook’s certification forms CEC-RPS-1A/B require the applicant to complete the supplemental biogas forms if biogas is injected into a pipeline or is landfill gas, and do not refer to evidence of a physical contract path. Ex. 383 at LA002788 to LA002792, LA002801 to LA002805. The supplemental biogas forms in CEC-RPS-1A/B:S1, in turn, identify the delivery criteria, which only requires that “*the gas must be used at a point within the WECC region into a pipeline that delivers gas into California.*” Ex, 383 at LA002793 to LA002795,

LA002806 to LA002808). LADWP's evidence confirms – without a doubt – that the Shell and Atmos Agreements satisfy the *sole* delivery standard under the Third Edition Guidebook.

- a. LADWP's Evidence Establishes the Biogas Procurement under the Shell and Atmos Agreement was Purchase, Received, Delivered and Used at LADWP's RPS-Certified In-Basin Generating Facilities.

The Shell and Atmos Agreements meet the requirements of the Third Edition Guidebook's plain language. The contracts allowed LADWP to procure biogas from specific landfill sources outside of California to meet its RPS obligations. Supp. Ting Decl. at ¶¶ 3-4, 40-42 Exs. 27-28, 64-66. That gas was injected into the interstate pipeline system at specific landfills where the gas was sourced, and measured by its energy content in Btus at the time of injection. Masuda Decl. at ¶¶ 4-224, Exs. 68-286. An equal volume, as measured in Btus, was then delivered to LADWP through a gas exchange at Opal, Wyoming. *Id.* At Opal, the gas was injected into KRT's interstate natural gas pipeline system, which is located within the WECC region. *Id.*; *see also* Schlesinger Decl. ¶12. During the relevant service period, LADWP had firm transportation agreements with KRT to deliver that gas from Opal to SoCalGas California delivery points at Kramer Junction and Wheeler Ridge.<sup>5</sup> Supp. Ting Decl. at ¶¶ 5-39, Exs. 29-63.

LADWP provided the Staff with nomination scheduling paths showing how the pipelines at the injection point were interconnected with KRT. These paths demonstrated how the interstate natural gas pipeline system was interconnected between the landfill sources and the Kern River pipeline. Thus, biogas procured on LADWP's behalf was "injected into a natural gas pipeline system that is . . . interconnected to a natural gas pipeline system in the WECC region

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<sup>5</sup> The biomethane gas procured under the Shell and Atmos Agreements were delivered to LADWP under the KRT Firm Transportation Service Agreements Nos. 1006 and 1706. Supp. Ting Decl. at ¶¶ 17, 22, Ex. 41 at LA000602 to LA000605; Ex. 46 at LA000618 to LA000621.

that delivers gas into California” meeting the Third Edition Guidebook standard. (Exhibit 383, LA002744).

The Third Edition Guidebook does not contain a single reference to delivery of gas through a physical contract path. Staff’s insistence that gas procured via a gas exchange is not RPS-eligible because it does not result in the actual delivery of gas is not present in the text. It also conflicts with physical and legal realities. A gas exchange is a valid form of natural gas transportation under both the tariff and the interstate natural gas regulations, which results in actual gas delivered under the KRT tariff and FERC regulations. Neither the CEC nor LADWP could require KRT or any other interstate pipeline to deliver the molecules of biogas that originated at the landfill sites.

b. The Expert Schlesinger Report and Supplemental Report Contain Unrebutted Expert Opinions Refuting Staff’s Unsupported and Legally Untenable Interpretations of Use.

Benjamin Schlesinger, Ph.D., a nationally-recognized gas and pipeline expert, prepared a report supporting LADWP’s Petition for Reconsideration. *See* Schlesinger Decl. ¶¶1-4, (Exhibit 345, LA001679 to LA001708). The Schlesinger Report explained how the U.S. gas pipeline system works in interstate commerce. Schlesinger Decl. ¶6. Mr. Schlesinger has provided additional information to the CEC in support of LADWP’s letter of appeal (“Supplemental Schlesinger Report”), which is incorporated herein as further supporting evidence. Schlesinger Decl. ¶¶ 5, 7, Ex. 346 at LA001679 to LA001708. Staff stated that it “has no reason to dispute the conclusion that biogas procured under the 2009 Shell and Atmos contracts is injected into natural gas pipelines that are interconnected to the U.S. gas transmission pipeline network, and that gas flowing through the transmission pipeline network can be delivered into California.” Ex. 367 at LA002407.

The 2016 Schlesinger Letter further adds that:

Shippers of gas on U.S. pipelines are required to enter into transportation agreements (contracts) under the provisions of the pipeline’s FERC Gas Tariff. Contracts with gas pipelines – be they for firm service, interruptible service, backhaul services, etc. – obligate the pipeline to deliver gas physically from the point of receipt to the point of delivery.

See Schlesinger Decl. ¶ 5, Ex. 346 at LA001710. Schlesinger’s expert opinions are *undisputed* by Staff. Moreover, Schlesinger’s expert opinions are *unrebutted* and the *only* expert evidence properly before the Committee on these issue.

**8. Staff’s Interpretation of “Use” In this Proceeding Is Inconsistent with the Staff’s Prior Public Statements Contained in CEC’s Notices or Made by Staff During the CEC’s Workshops.**

As discussed below, the CEC’s prior *public* statements squarely contradict Staff’s statements to the Committee that the Public Resources Code Section 25741 requires evidence of certain delivery agreements to confirm the use of biomethane at generating facilities.

**c. CEC August 16, 2011 Notice of Staff Workshop re Pipeline Biomethane.**

The CEC’s August 16, 2011 Notice of Staff Workshop re Pipeline Biomethane regarding Pipeline Biomethane included the statements in direct contrast to the memorandum relied on in the Office of the Executive Director’s letter denying LADWP’s Petition :

<b>Staff Statement on August 16, 2011</b>	<b>2015 Staff Memo</b>
“SBX1-2 defines a ‘renewable electrical generating facility’ as a facility that uses, among other technologies and fuels, biomass, digester gas, and landfill gas, and any additions or enhancements to the facility using that technology. These provisions have not changed since the law established the RPS with passage of Senate Bill 1078 in 2002. The law does not define the terms ‘biomass,’ ‘digester gas,’ or ‘landfill has,’ and <u>is likewise silent as to whether</u>	“The Energy Commission established delivery requirements for biogas transported through the natural gas transportation pipeline system in order to satisfy the fuel ‘ <u>use</u> ’ provisions of then Public Resources Code section 25741(b)(1).” (Emphasis added).  (Exhibit 367, LA002403).

<p><u>these fuels must be used on the site of the fuel's production to generate electricity for purposes of the RPS. Nor does the law specify how these fuels, if produced offsite, should be delivered to a power plant for purposes of generating electricity."</u></p> <p>(Exhibit 356, LA001736)</p>	<p>This is a new interpretation.</p>
<p>"The Energy Commission <u>currently allows backhaul and forward haul transportation agreements</u> that are either firm or interruptible to be considered eligible delivery methods . . ."</p> <p>(Exhibit 356, LA001740)</p>	<p>"This necessarily <u>excludes</u> gas exchanges and other natural gas transport methods such as 'displacements' or '<u>backhauls</u>.'"</p> <p>(Exhibit 367, LA002406).</p>

The 4th Edition RPS Guidebook was already published, and in the August 16, 2011 Notice of Staff Workshop regarding pipeline biomethane, the Staff stated that "since the law established the RPS with passage of Senate Bill 1078 in 2002, . . . [it did not ] specify how [biomethane], if produced offsite, should be delivered to a power plant for purposes of generating electricity." The Staff went on to say that with the Fourth Edition RPS Guidebook included "delivery requirements for delivering biogas... for use in an RPS eligible electric generating facility," and it specifically asked whether it should retain the "current requirements" allowing backhaul and forward haul transportation agreements

d. CEC March 16, 2012 Notice to Consider Suspension of the RPS Eligibility Guidelines Related to Biomethane.

The CEC's March 16, 2016 Notice to Consider Suspension of the RPS Eligibility Guidelines Related to Biomethane, the CEC also made numerous statements that contradict Staff's current position in this proceeding. For example:

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CEC Statement on March 16, 2012	2015 CEC Staff Memo
<p>“The law at that time, as well as now, did not specifically identify ‘biogas’ as an eligible renewable energy resources for purposes of the RPS, but did identify ‘biomass,’ ‘digester gas’ and ‘landfill gas’ as eligible renewable resources. These terms, however, were not defined in the law. <u>Nor did the law specify whether these fuels needed to be used on the site of the fuel’s production to generate electricity for the purposes of the RPS. Likewise, the law did not specify how these fuels, if produced offsite, should be delivered</u> to a power plant for purposes of generating electricity.</p> <p>(Exhibit 386, LA002842).</p>	<p>“The Energy Commission established delivery requirements for biogas transported through the natural gas transportation pipeline system in order to satisfy the fuel <u>“use”</u> provisions of then Public Resources Code section 25741(b)(1).”</p> <p>(Exhibit 367, LA002403).</p>
<p>“The current RPS Guidebook . . . does not establish rigorous requirements to verify that the claimed quantity of biomethane was actually used by the designated power plant.”</p> <p>(Exhibit 386, LA002843).</p> <p>Biomethane that is injected into a natural gas pipeline system for delivery to a designated power plant in accordance with the RPS Guidebook may not . . . be physically delivered to the purchasing power plan” because biomethane is “commingled” with natural gas in the pipeline and “the gas within the pipeline does not consistently flow in one direction.”</p> <p>Id.</p>	<p>“As the Energy Commission Staff understand, firm transportation service guarantees gas delivery without interruption (except in extraordinary circumstance) at the customer’s primary firm delivery point. Interruptible transportation service refers to transportation service offered to customers under schedules or contracts on an as-available basis.”</p> <p>(Exhibit 367, LA002402).</p>

Staff’s understanding as stated in the CEC’s March 16, 2012 Notice coincided with the gas pipeline system when the Shell and Atmos Contracts were executed in 2008. The CEC’s statements also correspond with the description of the natural gas pipeline system described in the Schlesinger Expert Report. *See* Schlesinger Decl. ¶¶1-6, 8-11 (Exhibit 345, LA001692 to

LA1692). Thus, Staff's current position in this proceeding is inconsistent with the CEC's prior public statements and interpretation of the CEC's Guidebook standards.

e. CEC September 21, 2012 Workshop re 2008-2010 RPS Procurement Verification and Proposed SBX1-2 RPS Verification.

LADWP attended the CEC's September 21, 2012 Workshop regarding the 2008-2010 RPS Procurement Verification and Proposed SBX1-2 RPS Verification. The transcript from this proceeding includes statements by LADWP expressing concern regarding the time required for the CEC to complete the verification process for IOUs. Ex. 357 (CEC Sept. 21, 2012 Workshop Transcript) at LA001772. LADWP identified that when it procured biomethane in 2009 it "had an eye . . . what the CEC was doing under Guidebook 3," and then expressed concern over the potential prejudice to LADWP. *Id.* at LA001772 to LA001773). In response, CEC Staff counsel responded as follows:

[T]his presentation and these requirements are really focusing on the retail seller requirements, and so as part of the retail sellers, in order for them to claim this procurement based on biomethane use, the facility designated for use of the biomethane needed to be certified by the Energy Commission. Again, these were retail sellers. Back in 2010 LADWP was under no obligation, obviously, to follow the Energy Commission's rules. It had its own rules it adopted pursuant to Public Utility Code Section 387. You know, going forward, starting in 2011, under Senate Bill X 1-2, the Energy Commission will need to address the situation of verifying procurement by POUs. And at that point we'll need to address L.A.'s, you know, contracts pre-June 2010 contracts. Ex. 357 at LA001777.

Staff admits that LADWP had no obligation to certify its resources under the CEC's standards back in 2010 and before SBX1-2. Nonetheless, Staff insists in this proceeding that the CEC's RPS Guidebook standards establish the rules in place in 2009 for determining the eligibility of LADWP's 2009 biomethane procurement under the Shell and Atmos Contracts.

**C. LADWP's Reported Its CP1 REC Claims in the CEC's Interim Tracking System (ITS) for Generation Procured under the Powerex BC-Hydro PPAs and from the Use of Biomethane Procured under the Shell and Atmos Agreements.**

LADWP reported the RECS procured under the Powerex BC-Hydro PPA and the Shell and Atmos Agreements through the CEC's ITS system. ITS and WREGIS are accounting and tracking systems that use an accounting construct where one megawatt hour (MWh) of renewable generation results in the creation of one REC. These accounting and tracking systems are designed primarily to ensure that a Load Serving Entity (LSE), like LADWP, does not double count RECs or use the same REC to meet the RPS obligations of different states. LADWP reported accurate data in the CEC's ITS. The CEC can verify the ITS data in the same manner that CEC verified ITS data for the past 10 years. The RECs reported in ITS confirm that LADWP met its RPS procurement obligations for CP1. This dispute is one of form over substance and is particularly troubling based on the CEC's implementation of the RPS program over POUs after SBX1-2 became effective.

By way of background, the CEC worked on the development of WREGIS for approximately six years. In December 2008, the CEC and CPUC issued a Joint Agency Staff Report: Tracking System Operational Determination. Ex. 363 Bates Nos. LA002155-LA002196 (CEC Joint Agency Report: Tracking System Operational Determination). The report notes that the transition and use of WREGIS would be mandatory for the IOUs and other retail sellers for

establishing RPS compliance. As discussed above, Section 387 of the Public Utilities Code did not require that POUs report their procurement data through ITS, much less require that POUs register with and exclusively use WREGIS. *See* Ex. 362 (CEC Consultant Report: Publicly-Owned Electric Utilities and the California Renewables Portfolio Standard: A Summary of Data Collection Activities, CEC-300-2005-023 (Nov. 2005)) at 23-24 (acknowledging the POUs were not required to verify or report RPS procurement in WREGIS or the CEC's Interim Tracking System).

On December 10, 2011, after SBX1-2 became effective, the CEC permitted POUs to use the CEC's ITS to track renewable generation data. LADWP tracked its renewable procurement data in the CEC's ITS. The WREGIS Operating Rules contains registration guidelines. WREGIS Operating Rule 5.2 allows Qualified Reporting Entities (QREs) to establish a WREGIS account. Rule 5.3, in turn, contains the rules for registering a generation unit with WREGIS. Rule 5.3.2, however, requires the RPS program administrators for each state to confirm whether a generating facility is certified and eligible for the state's RPS program. The CEC is the RPS program administrator for California. Rule 5.3.2 state that "[e]ach Program Administrator is responsible for determining whether a particular Generating Unit qualifies for its program and providing that information to the WREGIS Administrator." LADWP's inability to complete its WREGIS registration for its generating facilities was, therefore, hindered by the CEC's failure to, or delay in, certifying LADWP's renewable resources.

As discussed above, Staff was required to, but did not, certify all of LADWP's grandfathered resources for use in the RPS. In addition, even when the CEC did certify a facility, the certification process typically lasted well over a year, and LADWP received certification results from the CEC in 2014, after the close of CP1.

The CEC issued its Seventh Edition RPS Eligibility Guidebook in April 2013, which applied a retroactive requirement that stated “for POUs, procurement data must be tracked and reported to the Energy Commission using WREGIS beginning October 2012.” 16-RPS-02, TN #213251 (Seventh Edition Guidebook). This *retroactive* requirement raised concerns with POUs, particularly in light of the CEC’s violation of the statutory mandate to certify all grandfather facilities, and the CEC’s delayed certification process, both of which impacted POUs ability to complete the WREGIS registration of generating facilities.

On July 29, 2013, the CEC held a workshop to discuss the RPS Implementation for POUs (which was over two years after the CEC’s July 1, 2011 deadline for the adoption of RPS regulations for POUs). Ex. 365. The transcript from this workshop confirmed the concerns and questions about the use of WREGIS and the compliance reporting for CP1. *Id.* The transcript also shows that even the CEC did not know how POUs would retroactively transition to WREGIS by October 2012 when the CEC knew it would not finish certification application until the close of CP1. *Id.* As expected, the CEC’s retroactive guidelines created compliance reporting problems, which resulted in a second round of retroactive rules to permit POUs to use the ITS through December 31, 2013, the end of CP1. Nonetheless the WREGIS Operating Rules and the CEC’s violation of the legislative certification mandates in SBX1-2 precluded POUs, like LADWP, from reporting all of its renewable procurement in WREGIS. Therefore, LADWP reported this data through the CEC’s ITS.

The CEC can verify LADWP’s procurement data in the same manner it has done for over 10 years. The CEC can compare LADWP’s GEN-form data against LADWP’s yearly Power Source Disclosure submission. LADWP’s Power Source Disclosure is independently audited before being released. The CEC received LADWP’s 2011, 2012, and 2013 Power Disclosure

Audit reports. Moreover, LADWP owns and operates the facilities in question and uses all energy to serve LADWP's load. LADWP's procurement is used exclusively to serve load in LADWP's service territory. LADWP's RECs are used for California's RPS. Therefore, LADWP claims do not and would not support or be used for another state's renewable program

LADWP submitted evidence establishing its REC claims from the Powerex BC-Hydro PPAs. *See* Batra Decl. ¶¶5-41, Exs. 291-326 Bates Nos. LA001508-LA001567. LADWP also submitted evidence establishing its RECs claims for generating using the biomethane procured under the Shell and Atmos Agreements. *See* Masuda Decl. ¶¶8-151, Exs. 71-214 Bates Nos. LA00817-LA001278. Moreover, LADWP and Staff have established a methodology for verifying the REC claims from LADWP's 2011 Shell Biomethane Agreement, *which the CEC did certify as an eligible renewable resource*, based on well-established industry standards for use of economic dispatch. Batra Decl. ¶¶43, 44, Ex. 378, LA002560, (see also U.S. Environmental Protection Agency Final Report: Economic Impact Analysis of the Stationary Combustion Turbines NSPS (Feb. 2006)) at 2-3 (discussing the significant efficiency gains in using a combined-cycle turbine compared to a simple-cycle turbine.); 42 U.S.C. § 16432(b) ("Economic dispatch" means "the operation of generation facilities to produce energy at the lowest cost to reliably serve consumers, recognizing any operational limits of generation and transmission facilities."); Ex. 378 Bates Nos. LA002547-LA002616 (DOE Congressional Report: The Value of Economic Dispatch: A Report to Congress Pursuant to Section 1234 of the Energy Policy Act of 2005 (Nov. 7, 2005)) at 14-15 (identifying the physical, environmental and regulatory considerations that affect the economic dispatch process, including variable cost of generating, a unit's heat rate and operating cost; variable environmental compliance costs.).

Staff's methodology for verifying the RECs from the 2011 Shell Biomethane Contract can be applied in the same manner and using the same types of data for Staff to verify the REC claims for the 2009 Shell and Atmos Agreements. Moreover, the Powerex BC-Hydro PPAs and the Shell and Atmos Agreements were all executed before June 1, 2010 and, therefore, all RECs procured from these grandfathered resources count in full as "Bucket 0" RECs. Accordingly, the Committee can issue an order deeming the Powerex BC-Hydro PPAs and the Shell and Atmos Contracts as grandfathered resources and award the associated RECs LADWP reported in the CEC's ITS based on the supporting evidence submitted hereunder.

**D. Staff's Retroactive Rulemaking Has Caused Undue Prejudice to LADWP.**

Staff's delayed and retroactive rulemaking and failure to implement SBX1-2 and AB 2196 in accordance with the legislative mandates under SBX1-2 and AB 2196 has caused severe prejudice to LADWP. Among other things, the CEC issued the RPS Regulations for POUs over two years after the statutorily prescribed deadline, Staff issued the CEC's BC Hydro Report two and half years after the statutorily prescribed deadline, and Staff implemented a *retroactive* requirement for POUs to report all RECs in WREGIS toward the end of CP1. Staff denied LADWP's RPS-certification application for the Shell and Atmos Agreements on February 28, 2014, *after* the close of CP1. Staff denied LADWP's RPS-certification application for efficiency upgrades to LADWP's Castaic Power Plant (another grandfathered resource) on January 15, 2014, *after* the close of CP1 – making it impossible for LADWP to remediate.

Staff's delayed and retroactive rulemaking and issuance of RPS-eligibility determinations after the close of CP1 has caused undue prejudice to LADWP. LADWP invested over \$1 billion in its RPS program in reliance on the then existing legal standards, but now faces potential penalty exposure for noncompliance in CP1. In addition, LADWP has no way to cure any

alleged shortfall because POUs cannot retroactively procure RECs for CP1. The U.S. Supreme Court has identified the prejudice and unfairness that results from delayed and retroactive rulemaking.

Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. For this reason, "the retroactive aspects of economic legislation must meet the test of due process"--a legitimate legislative purpose furthered by rational means.

*General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). Staff's conduct, all after the close of CP1, is a prime example the Supreme Court's wisdom, and speaks volumes as to why grandfathering is so critical to SBX1-2 and AB2 2196, and why the Committee must count in full the RECs procured from LADWP's grandfathered resources. Accordingly, LADWP requests that the Committee also consider and weigh the the equities and undue prejudice that would result to LADWP from excluding the RECs that LADWP procured in good faith under grandfathered contracts that are now expired. Moreover, the Committee must consider and accord appropriate deference to the decisions made by the LADWP's Board, the City Council, and the Mayor before SBX1-2 became effective. Finally, the Committee must also consider the adverse impact to LADWP's ratepayers resulting from excluded the RECs from the substantial investments made by the City and LADWP in its RPS program.

## **V. CONCLUSION**

LADWP thanks the Committee for its time and attention to these matters. For the foregoing reasons, LADWP respectfully requests that the Committee issue an order consistent with the Legislature's statutory mandate and LADWP's supporting evidence. LADWP's



renewable procurement under the Powerex BC-Hydro PPAs and Shell and Atmos Agreements should be grandfathered and count in full for CP1.

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Respectfully submitted,

/s/ Felix Lebron

FELIX LEBRON

Deputy City Attorney

Los Angeles Dept. of Water and Power

111 N. Hope Street, Suite 340

Los Angeles, CA 90012

Telephone Number: (213) 367-4500

Email: [Felix.Lebon@ladwp.com](mailto:Felix.Lebon@ladwp.com)