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

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

REPLY OF CALIFORNIA ENERGY COMMISSION STAFF TO 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

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I. INTRODUCTION

California Energy Commission Staff (Staff) respectfully submit this Reply in response to Los Angeles Department of Water and Power's (LADWP) Initial Response to the Committee's Scoping Order Dated July 27, 2016; Supporting Memorandum of Points and Authorities (LADWP Response or LADWP's Response, TN 213475).

II. DEVELOPMENT OF THE RPS PROGRAM

A. The RPS program was deliberately developed into a largely uniform statewide program that has conditionally incorporated certain additional resources, but has not adopted a wholesale grandfathering of all POU section 387 policy resources as argued by LADWP.

1. The original RPS program created by SB 1078 contained requirements directed mostly toward retail sellers and gave POUs discretion to develop and implement their own RPS policies.

The Renewables Portfolio Standard (RPS) program was established in 2002 as a result of SB 1078 (Stats. 2002, ch. 516), which required retail sellers of electricity (retail sellers)[1] to procure a minimum percentage of electricity from eligible renewable energy resources, meet annual targets and prepare procurement plans to be reviewed and approved by the California Public Utilities Commission (CPUC) (former Pub. Util. Code §§ 399.14 and 399.15). Under SB 1078 the Energy Commission was required to certify eligible renewable energy resources meeting certain criteria under the RPS program and design and implement an accounting system to verify compliance by retail sellers (former Pub. Util. Code § 399.13).

SB 1078 ALSO required each governing body of a local publicly owned utility (POU) to "be responsible for implementing and enforcing a renewables portfolio standard that recognizes the intent of the Legislature to encourage renewable resources...." (former Pub. Util. Code § 387).

[1] By statute, the definition of "retailer sellers" includes electrical corporations, community choice aggregators, and electric service providers, but excludes local publicly owned electric utilities (Pub. Util. Code, § 399.12, subd. (j)).

SB 1078 did not require POUs to procure renewable resources under their section 387 policies from Energy Commission certified resources. However, the Energy Commission encouraged POUs to do so.[2]

2. By design, SBX1-2 moved the RPS program towards a more uniform statewide RPS program with the same or similar requirements applicable to both retail sellers and POUs.

SB X1-2 adjusted the RPS goal of 20 percent by 2010 to an average of 20 percent for the years 2011 through 2013, increased the long term RPS goal to 33 percent by the end of 2020, and expanded these requirements to apply to POUs as well as retail sellers (Pub. Util. Code §§ 399.15(b), 399.30(b), and 399.30(c)). SB X1-2 also gave the Energy Commission new oversight responsibilities with respect to POUs, resulting in the adoption of enforcement regulations for RPS procurement requirements of POUs (Pub. Util. Code § 399.30, subd. (o), formerly Pub. Util. Code § 399.30, subd. (n)).

Prior to SB X1-2, POUs had discretion to establish and enforce their own RPS policies. Unlike retail sellers, which were required to meet their RPS procurement requirements with electricity procured from eligible renewable energy resources certified by the Energy Commission, a POU could establish its own eligibility requirements for renewable resources to meet the POU's RPS procurement policies. Similarly, POUs were not subject to the minimum annual procurement requirements, procurement plan requirements, reporting requirements, or enforcement requirements applicable to retail sellers. Nor were POUs subject to the penalties applicable to retail sellers for noncompliance. POUs had broad discretion to implement and enforce their own self-established RPS policies. As a result, the RPS policies for POUs could vary from POU to POU and differ from the requirements applicable to retail sellers.

After SB X1-2, POUs became subject to the same or similar RPS requirements as retail sellers.

SB X1-2 requires the governing board of a POU to take actions in order for the POUs to comply with same or similar requirements applicable to retail sellers. Governing boards of POUs are required to implement procurement targets that require the utility to procure a minimum

[2] TN 213249, Renewables Portfolio Standard Eligibility Guidebook, Third Edition, page 30.

quantity of eligible renewable energy resources for the same compliance periods applicable to retail sellers (Pub. Util. Code § 399.30(b); for retail sellers see Pub. Util. Code § 399.15(b)(1)). The governing board of a POU has to ensure that quantities of eligible renewable energy resources procured for the first compliance period from January 1, 2011, to December 31, 2013, are equal to an average of 20 percent of the POU's retail sales, the same percentage required of retail sellers (Pub. Util. Code § 399.30, subd. (c)(1); for retail sellers see Pub. Util. Code § 399.15(b)(2)(B)). The governing board of a POU has to ensure that the quantities of eligible renewable energy resources procured for all other compliance periods reflect reasonable progress in each of the intervening years sufficient to ensure that the procurement of eligible renewable energy resources achieves 25 percent of the POU's retail sales by December 31, 2016, and 33 percent of the POU's retail sales by December 31, 2020, the same procurement requirements applicable to retail sellers (Pub. Util. Code § 399.30(c)(2); for retail sellers see Pub. Util. Code § 399.15(b)(2)(B)). Under SBX1-2 the governing board of a POU had to require that the POU procure not less than 33 percent of retail sales from eligible renewable energy resources in all subsequent years, the same as retail sellers (former Pub. Util. Code § 399.30(c)(2); for retail sellers see Pub. Util. Code § 399.15(b)(2)(B)). The POU also has to adopt procurement requirements consistent with the procurement requirements for retail sellers under Public Utilities Code section 399.16 (Pub. Util. Code § 399.30(c)(3)). Public Utilities Code § 399.30(d) allowed a POU to adopt excess procurement, delay of timely compliance, and cost limitation measures consistent with those same measures applicable to retail sellers (Pub. Util. Code § 399.30(d), which references Pub. Util. Code §§ 399.13, 399.15(b), and 399.15(c), applicable to retail sellers).

SBX1-2 also added POUs to various provisions of the RPS statute that previously only applied to retail sellers. Former Public Utilities Code section 399.13(b), which directed the Energy Commission to "[d]esign and implement an accounting system to verify compliance with the renewables portfolio standard by retail sellers…." and collect data "necessary to verify compliance of retail sellers" (Emphasis added) became Pub. Util. Code §399.25(b) under SBX1-2 and was amended to direct the Energy Commission to "[d]esign and implement and accounting system to verify compliance with the renewables portfolio standard by retail sellers **and** local publicly owned electric utilities" and collect data "necessary to verify compliance of retail sellers **and** local publicly owned electric utilities…." (Emphasis added.)

There are many potential benefits to having uniform statewide RPS program requirements. Consistent requirements can help provide market certainty for stakeholders participating in the California RPS and renewable energy market. If a POU and retail seller purchase the same electricity product from an eligible renewable energy resource, it would not make sense to characterize the product differently depending on which utility, POU or retail seller, purchases the electricity product. Likewise, it would not make sense to characterize the electricity product differently depending on which of two POUs purchased the electricity product as would be the case under LADWP's interpretation of the statute (see Section II.A.3 below). Consistency in the application of the rules among POUs and between POUs and retail sellers may also ease the contracting processes for utilities, developers of eligible renewable energy resources, and other market participants, thereby accelerating the development of new eligible renewable energy resources, which in turn helps promote the underlying goals of the RPS.

LADWP's Response raises the Energy Commission's timeline concerning adoption of the POU regulations,[3] while leaving out critical information from the timeline and failing to present the significance of the timeline to LADWP's appeal. While it is true that SBX1-2 stated that the Energy Commission shall adopt regulations specifying enforcement procedures on or before July 1, 2011, the bill was introduced only on February 1, 2011, was not signed into law until April 12, 2011, and took effect on December 10, 2011, which was over five months after the stated deadline. Therefore, it was legally impossible for the Energy Commission to meet the deadline since the Energy Commission did not have authority to adopt the regulations until after the law took effect. As discussed in Staff's Response,[4] unless exempted by law, in order to adopt regulations state agencies must follow the multi-step process outlined in the Administrative Procedure Act (APA). When proposed regulations involve complex proposals the APA requires agencies to undertake public discussion before the start of formal rulemaking, which was necessary in this case considering the complexity of SBX1-2. After considerable pre-rulemaking discussions the Energy Commssion initiated the formal rulemaking process which included the minimum 45-day comment period, plus two additional 15-day comment periods as required under the APA. It was only after these processes were completed that the regulations and supporting rulemaking package could go to the Office of Administrative Law (OAL) for review

[3] LADWP Response, page 15
[4] TN 213474, Staff Response, starting on page 89.

and approval. Under the APA, OAL has 30 working days for its review and only then can the regulations take effect. All of the above steps had to be followed before the POU regulations took effect.

3. Consistent with a uniform statewide RPS program, SBX1-2 and AB 2196 allowed the incorporation of <u>specific</u> resources under <u>specific</u> conditions, not a wholesale grandfathering of resources as argued by LADWP.

a. SBX1-2 added provisions to the statute in order to allow the incorporation of <u>specific</u> resources under <u>specific</u> conditions, including Public Utilities Code section 399.12(e)(1)(C), not a wholesale grandfathering of all POU resources as argued by LADWP; subsequent amendments to the law also allowed the incorporation of specific resources under specific conditions.

SBX1-2 added provisions to the RPS program in order to allow the incorporation of specific resources under specific conditions. These were not wholesale grandfathering provisions.

SBX1-2 added what now appears in the statute as Public Utilities Code section 399.12(e)(1)(D), which allows a small hydroelectric generation unit with a nameplate capacity not exceeding 40 megawatts that is operated as part of a water supply or conveyance system to be considered an eligible energy resource if the retail seller or POU procured the electricity from the facility as of December 31, 2005. In order for this grandfathering provision to apply, three specific conditions must be met concerning: the nameplate capacity, the operating system, and the energy procurement dates. There was no wholesale grandfathering.

SBX1-2 added what now appears in the statute as Public Utilities Code section 399.30(g), which provides that "a public utility district that receives all of its electricity pursuant to a preference right adopted and authorized by the United States Congress pursuant to section 4 of the Trinity River Division Act of August 12, 1955" to be in compliance with the renewable procurement requirements of this article. In order for this grandfathering provision to apply, two specific conditions must be met concerning: the entity receiving the electricity and the law providing for the rights to the electricity. There was no wholesale grandfathering.

SBX1-2 also added what now appears in the statute as Public Utilities Code section 399.30(h), which provides that "for a local publicly owned electric utility that was in existence on or before January 1, 2009, that provides retail electric service to 15,000 or fewer customer accounts in California, and is interconnected to a balancing authority located outside this state but within the WECC, an eligible renewable energy resource includes a facility that is located outside California that is connected to the WECC transmission system, if all of the following conditions are met: (1) The electricity generated by the facility is procured by the local publicly owned electric utility, is delivered to the balancing authority area in which the local publicly owned electric utility is located, and is not used to fulfill renewable energy procurement requirements of other states. (2) The local publicly owned electric utility participates in, and complies with, the accounting system administered by the Energy Commission pursuant to this article. (3) The Energy Commission verifies that the electricity generated by the facility is eligible to meet the renewables portfolio standard procurement requirements." Therefore, in order for this grandfathering provision to apply, several specific conditions must be met concerning: the existence date of the POU, the maximum number of customers the POU serves, the POU's connection situation with a balancing authority, resource delivery, the accounting system, and verification. There was no wholesale grandfathering.

SBX1-2 also added what now appears in the statute as Public Utilities Code section 399.30(i), which provides that "for a local publicly owned electric utility that is a joint powers authority of districts established pursuant to state law on or before January 1, 2005, that furnish electric services other than to residential customers, and is formed pursuant to the Irrigation District Law (Division 11 (commencing with Section 20500) of the Water Code), the percentage of total kilowatt hours sold to the district's retail end-use customers, upon which the renewables portfolio standard procurement requirements in subdivision (b) are calculated, shall be based on the authority's average retail sales over the previous seven years. If the authority has not furnished electric service for seven years, then the calculation shall be based on average retail sales over the number of completed years during which the authority has provided electric service." In order for this grandfathering provision to apply, four specific conditions must be met concerning: the POU establishment date, the type of POU entity, the customer makeup, and the law the POU is formed pursuant to. There was no wholesale grandfathering.

Similarly, SBX1-2 added Public Utilities Code section 399.12(e)(1)(C), which states that a "facility approved by the governing board of a local publicly owned electric utility prior to June 1, 2010, for procurement to satisfy renewable energy procurement obligations adopted pursuant to former Section 387, shall be certified as an eligible renewable energy resource by the Energy Commission pursuant to this article, if the facility is a 'renewable electrical generation facility' as defined in Section 25741 of the Public Resources Code." (Emphasis added). In order for this grandfathering provision to apply specific conditions must be met concerning: the date of facility approval, the entity approving the facility, and the meeting the definition of "renewable electrical generation facility" under the statute. Again, there was no wholesale grandfathering.

The Legislature's subsequent amendments to the RPS statute provide further support that wholesale grandfathering was not intended, as LADWP argues. For example, under Senate Bill 591 (Stats. 2013, ch. 520) the Legislature amended Public Utilities Code section 399.30 to add a new subdivision (k) to establish a limited RPS procurement exemption for a POU that receives greater than 50 percent of its annual retail sales from its own large hydroelectric generation facility that is not an eligible renewable energy resource. And most recently, the Legislature enacted SB 350 (Stats. 2016, ch. 547), which among other things, amended Public Utilities Code section 399.30 to add a new subdivision (l) to establish a limited RPS procurement exemption for POUs that procure more than 50 percent of their retail sales needs in any given year of a RPS compliance period from large hydroelectric facilities that are not eligible renewable energy resources. If a POU's pre-June 1, 2010 resources were grandfathered under Public Utilities Code section 399.12(e)(1)(C), as LADWP argues, these additional RPS exemption would not be needed.

b. LADWP's interpretation of Public Utilities Code section 399.12(e)(1)(C) is not consistent with express statutory language.

In a case cited by LADWP in its Response,[5] *City of Alhambra v. County of Los Angeles*, 55 Cal. 4th 707, 719 (2012), the California Supreme Court acknowledged that courts "first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent" and "[i]f the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls." See also *Mercer v. Department of Motor Vehicles*,

[5] LADWP Response, page 45.

52 Cal 3d 753, 750-751 (1991), ("The first step in our analysis, however, is to focus on the words used by the Legislature in order to determine their traditional and plain meaning"; superseded by unrelated statute).

In addition, every part of a statute must be given meaning. In another case cited by LADWP in its Response,[6] *Dyna Med, Inc. v. Fair Employment and Housing Commission*, 43 Cal. 1379, 1386-1387 (1987), the California Supreme Court acknowledged that the "first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." The United States Supreme Court also recognized in *TRW Inc. v. Andrews* that it is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (*TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).) The United States Supreme Court in *TRW Inc. v. Andrews* cites to *Duncan v. Walker*, which states "It is our duty to give effect, if possible, to every clause and word of a statute" and that it was "reluctan[t] to treat statutory terms as surplusage in any setting…." (*Duncan v. Walker*, 533 U.S. 167, 174 (2001); internal quotation marks omitted). Again, as asserted by LADWP itself in its Response,[7] "[i]t 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" and "statutory constructions that render particular provisions superfluous or unnecessary" should be avoided. Also, as asserted by LADWP in its Response,[8] "[t]he Committee should assume the 'Legislature knew what it was saying and meant what it said.'"

Here the plain meaning of the words in Public Utilities Code section 399.12(e)(1)(C) necessitates the inclusion of the requirement that a resource meet the definition of a renewable

[6] LADWP Response, pages 36-37, 43, and 50.
[7] LADWP Response, page 45.
[8] LADWP Response, page 50; please note that the case cited by LADWP in its Response on page 50 does not support this proposition, but Staff have no objection to this assertion as stated

electrical generation facility as defined in section 25741 of the Public Resources Code in order for it to be grandfathered. Under this reading no words or provisions under Public Utilities Code section 399.12(e)(1)(C) are rendered surplusage and every word included by the Legislature when it passed SBX1-2 is given effect. Additionally, the context of SBX1-2, with the creation of a more uniform statewide program governing retail sellers and POUs, is given effect as well.

The Energy Commission's interpretation of Public Utilities Code section 399.12(e)(1)(C) is consistent with the above statutory construction maxims. Under the Energy Commission's interpretation of Public Utilities Code section 399.12(e)(1)(C), in order to grandfather a POU's renewable resource, all three of the conditions expressed in the statute must be met: (1) the facility was approved by the governing board of a local publicly owned electric utility; (2) the facility was approved prior to June 1, 2010; and (3) the facility meets the definition of a "renewable electrical generation facility" as defined in Public Resources Code section 25741. LADWP's interpretation would require the Energy Commission, in certifying LADWP's facilities at issue, to stop reading Public Utilities Code section 399.12(e)(1)(C) after the first two conditions are met and ignore the third condition entirely, which would result in an interpretation that ignores express provisions in the statute.

Furthermore, using LADWP's interpretation of Public Utilities Code section 399.12(e)(1)(C) would render even more provisions of the statute superfluous. If Public Utilities Code section 399.12(e)(1)(C) were intended to grandfather all POU resources adopted under their section 387 policies before June 1, 2010, then many of the provisions from the provisions (discussed above), Public Utilities Code sections 399.12(e)(1)(D), 399.30(g), 399.30(h), and 399.30(i), would also be rendered superfluous since they would be grandfathering many if not all of the same resources that would have already been grandfathered under Public Utilities Code section 399.12(e)(1)(C).

Here the plain meaning of Public Utilities Code section 399.12(e)(1)(C) states that the Energy Commission shall certify "if the facility is a 'renewable electrical generation facility' as defined in Section 25741 of the Public Resources Code." There is no ambiguity in the statutory language. The legislature even provided a citation for the definition the resource is required to meet. The words in Public Utilities Code section 399.12(e)(1)(C) should be given their plain meaning and every word should be given legal effect consistent with Staff's interpretation of this provision; it should not be interpreted in such a way as to render an entire portion of the statutory provision superfluous as argued by LADWP.

Lastly, it should be noted that LADWP's reliance on select legislative committee analyses for SBX1-2 is misplaced. In LADWP's Response, it cites to statements in the legislative committee analyses for SBX1-2 from the Senate Energy, Utilities, and Communications Committee, the Senate Appropriations Committee, and the Senate Rules Committee to support its position that SBX1-2 was intended to grandfather all POU resources procured prior to June 1, 2010 pursuant to a POU's Section 387 program.[9] However, the statements in the legislative committee analyses do not support LADWP's position. These statements do not speak to a POU's Section 387 policy or indicate that resources procured under such policy would be grandfathered on a wholesale basis. Instead, these statements merely recognize that SBX1-2 would excuse the pre-June 1, 2010 contracts of IOUs, ESPs, and POUs from the more rigorous "bucket" requirements.

c. AB 2196 added Public Utilities Code section 399.12.6, allowing the incorporation of specific resources under specific conditions, not a wholesale grandfathering of resources as argued by LADWP.

The Legislative Counsel's Digest for AB 2196 states that AB 2196 "would impose certain requirements with respect to the eligibility of biomethane under the RPS program" and that it "would specify that certain biomethane procurement contracts executed by a retail seller or local publicly owned electric utility prior to March 29, 2012, would count in full towards the RPS program's procurement requirements under the rules applicable to eligible renewable energy resources contracts at the time the procurement contracts were executed if specific conditions are met."[10] (Emphasis added.)

AB 2196 added section 399.12.6 to the Public Utilities Code which states that: "Any procurement of biomethane delivered through a common carrier pipeline under a contract executed by a retail seller or local publicly owned electric utility and reported to the Energy Commission prior to March 29, 2012, and otherwise eligible under the rules in place as of the date of contract execution shall count toward the procurement requirements established in this article, under the rules in place at the time the contract was executed, including the Fourth Edition of the Energy Commission's Renewables Portfolio Standard Eligibility Guidebook,

[9] TN 213475, pages 52-54.
[10] Legislative Counsel's Digest AB 2196.

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." (Emphasis added.) In order for this grandfathering provision to apply, five specific conditions must be met concerning: delivery method, contract execution date, date of reporting to the Energy Commission, eligibility under the rules in place when the contract was executed, and counting pursuant to the rules in place at the time the contract was executed.

Staff's interpretation of the "rules in place" is consistent with the RPS program's development into a uniform state program since using statewide rules in place would apply uniform rules to both retail sellers and POUs. However, LADWP's interpretation of this provision would apply as many as 44 sets of "rules in place" (one for each POU policy), thereby accomplishing a wholesale grandfathering of resources contrary to the development of a statewide uniform program with conditional incorporation of certain resources.

Furthermore, as discussed in Staff's Response,[11] had the Legislature intended the "rules in place" to refer to the POU rules, it would have further qualified this provision, rather than specifically identifying the "Fourth Edition of the Energy Commission's Renewables Portfolio Standard Eligibility Guidebook" among the rules in place. Under LADWP's interpretation of Public Utilities Code section 399.12.6, the language, "including the Fourth Edition of the Energy Commission's Renewables Portfolio Standard Eligibility Guidebook," would be reduced to surplusage, which as previously discussed, should be avoided whenever possible when interpreting statutory provisions.

III. MEETING THE REQUIREMENTS UNDER LADWP'S SECTION 387 POLICY IS NOT A SUBSTITUTE FOR MEETING THE REQUIREMENTS UNDER STATE LAW.

In its Response, LADWP includes a lengthy description of the RPS policy it adopted pursuant to former Public Utilities Code section 387.[12] LADWP describes in great detail the efforts that were made to closely align its section 387 policy with the RPS statutory requirements applicable to retail sellers under the law and later to POUs under SBX1-2. It is true, as stated by

[11] Staff Response, page 31.
[12] LADWP Response, starting on page 9

LADWP, that it had authority to create its own RPS policy under former Public Utilities Code section 387.

However, satisfying the requirements under LADWP's section 387 policy, no matter what form it took, is not a substitute for meeting the requirements under state law. Even if the Committee were to undertake a review of LADWP's section 387 policy and LADWP's contracts at issue and make a determination that LADWP's section 387 policy met the general goals of the statewide program and contained similar requirements as the statewide program, and also that LADWP's contracts at issue met its section 387 policy requirements and were eligible under its section 387 policy, this would still be no substitute for meeting the letter of the law. State law outlines resource eligibility requirements and LADWP must satisfy those requirements, plain and simple.

IV. STATUTORY RETROACTIVITY IS NOT ILLEGAL AS ARGUED BY LADWP, AND IF RETROACTIVITY EXISTS UNDER THE RPS PROGRAM IT WAS PROPERLY UNDERTAKEN AND INTENDED BY THE LEGISLATURE WHEN ENACTING SBX1-2 AND AB 2196.

LADWP asserts that Staff is imposing retroactive requirements by virtue of applying the rules in place concerning certification requirements.[13] LADWP discusses retroactivity of a newly enacted law as if it was an illegal practice in all instances. However, this is simply not true. Staff is not "imposing" retroactive requirements; it is implementing statutory requirements, which if retroactive, include permissible and intentional retroactivity. Retroactivity is allowed under the law if it is clearly expressed and SBX1-2 and AB 2196 meet this threshold for any applicable retroactivity under its provisions.

As acknowledged by LADWP in its Response,[14] a newly enacted law is applied prospectively unless a different intention is expressed. The California Supreme Court in *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223, 230 (2006) states that when "a statute's application to a given case is challenged as impermissibly retroactive, we typically begin our analysis by reiterating the presumption that statutes operate prospectively absent a clear

[13] LADWP Response, pages 47 and 64.
[14] LADWP Response, page 47.

indication the voters or the Legislature intended otherwise." The California Supreme Court in *People v. Brown*, 54 Cal.4th 314, 319 (2012), states: "[w]hether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent."

The United States Supreme Court also had this to say about retroactivity of a law in relation to the United States Constitution: "Absent a violation of one of those specific [constitutional] provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." (*Landgraf v. USI Film Products*, 511 U.S. 244, 267-268 (1994).)

SBX1-2 was signed into law on April 12, 2011, and went into effect on December 10, 2011, but included provisions that apply retroactively. SBX1-2 repealed Public Utilities Code section 399.15 and replaced it with a new section 399.15 outlining compliance periods for retail sellers under the RPS program (Pub. Util. Code section 399.15(b)(1)). The first compliance period started January 1, 2011, and ended on December 31, 2013 (Pub. Util. Code section 399.15(b)(1)(A)). SBX1-2 did the same when it added Public Utilities Code section 399.30 applicable to POUs. Public Utilities Code section 399.30(b) establishes compliance periods for POUs, with the first compliance period starting on January 1, 2011, and ending on December 31, 2013 (Pub. Util. Code section 399.30(b)(1)). SBX1-2 expressly enacted compliance periods that started before SBX1-2 went into effect, which demonstrates the Legislature's intent that the new RPS law, and its obligations thereunder, commence on January 1, 2011. Therefore the retroactive nature of SBX1-2 should be upheld.

Similarly, AB 2196 was signed into law on September 27, 2012, and went into effect on January 1, 2013, but included provisions that LADWP argue apply retroactively. AB 2196 added section 399.12.6 to the Public Utilities Code, which states in subsection (a)(1): "Any procurement of biomethane delivered through a common carrier pipeline under a contract executed by a retail seller or local publicly owned electric utility and reported to the Energy Commission prior to March 29, 2012, and <u>otherwise eligible under the rules in place as of the date of contract</u>

execution shall count toward the procurement requirements established in this article, under the rules in place at the time the contract was executed, including the Fourth Edition of the Energy Commission's Renewables Portfolio Standard Eligibility Guidebook, provided that those rules shall apply only to sources that are producing biomethane and injecting it into a common carrier pipeline on or before April 1, 2014." (Emphasis added.) If it is argued that this provision is retroactive, then Public Utilities Code section 399.12.6 specifically called for the application of retroactive eligibility requirements concerning biomethane. LADWP's Response cites quotes from Senators who expressed reasons to vote no on AB 2196 (LADWP Response starting on page 56), however the bill passed and went into effect with the above language and therefore must be given effect.

V. STAFF'S STATUTORY INTERPRETATION SHOULD BE UPHELD.

A. State agencies are afforded great deference in promulgating rules pursuant to the statutes they are charged with implementing and enforcing.

The California Supreme Court in *Ralphs Grocery Co. v. Reimel*, 69 Cal.2d 172, 174-175 (1968), in upholding the propriety of administrative regulations promulgated pursuant to a grant of power by the Legislature, found that the rule in question was within the scope of the power delegated by the Legislature to the agency and that the rule reasonably effectuated the statutory purposes. The Court noted that the "construction of a statute by the officials charged with its administration must be given great weight" (*Id*. at 176) and that "the court should not substitute its judgment for that of an administrative agency which acts in a quasi-legislative capacity." (*Id*. at 179.)

In creating the RPS program, the Legislature directed the Energy Commission to certify eligible renewable energy resources and gave the Energy Commission authority to adopt guidelines for purposes of RPS certification, accounting, and verification (Pub. Resources Code § 25747(a)). In an extensive public process, and in consultation with many entities, including stakeholders and the CPUC (also tasked with implementation of various parts of the RPS program), the Energy Commission adopted guidelines concerning certification of eligible renewable energy resources, which include provisions concerning the use requirement found in

the statute. Therefore the Energy Commission's certification requirements should be given deference and upheld.

B. Staff's interpretation of the use requirement does not contradict well established federal or state law as argued by LADWP.

1. Staff's interpretation of the use requirement does not conflict with FERC's regulations as argued by LADWP.

In its Response LADWP includes a discussion of Federal Energy Regulatory Commission's (FERC) regulations, such as those governing rate schedules and types of transportation services a natural-gas pipeline may offer, and claims that these regulations preempt the Energy Commission, because the Energy Commission's requirements conflict with FERC's regulations.[15]

However, Staff's interpretation of the use requirement does not conflict with FERC's regulations and therefore is not preempted as argued by LADWP. Staff's interpretation of use does not regulate, standardize, or control the natural-gas system in any way. It does not require the use of specific pipelines, rates, or tariffs. Staff's interpretation of the use requirement requires entities to use FERC-approved transportation services that deliver or have the potential to deliver gas to California, and these requirements can be met using FERC-approved pipelines, under FERC-approved rates and tariffs, and using FERC-approved transportation services.

LADWP also asserts that FERC defines what constitutes transportation.[16] Staff's interpretation of the use requirement does not conflict with FERC's definition of transportation. FERC allows several forms of transportation service, including firm or interruptible, and Staff's interpretation just requires applicants to use the firm or interruptible transportation method for delivery of biomethane for purposes of California's RPS program.

[15] LADWP Response, starting on page 73.
[16] LADWP Response, page 75.

2. It is possible for an entity to satisfy both FERC's regulations and the use requirement as has been shown by several entities, including LADWP for its 2011 Shell contract.

LADWP argues in its Response that it is impossible to satisfy FERC's regulations and Staff's interpretation of the use requirement.[17]

As discussed in Staff's Response,[18] other entities have satisfied Staff's interpretation of the use requirement. Staff has not received any information indicating these entities were not able to meet FERC's regulations or that meeting the use requirement prevented them from meeting FERC's regulations.[19]

Additionally, LADWP satisfied the use requirement as interpreted and applied by Staff, and presumably FERC's regulations as well, when it received certification for its Scattergood, Harbor, Valley and Haynes facilities based on biogas procured under a 2011 contract with Shell from the Imperial, Greentree, Turkey Creek, and Live Oak landfills. All of these landfills are located outside of California and have been able to demonstrate biogas delivery to LADWP's facilities in accordance with the Energy Commission's RPS certification requirements as interpreted and applied by Staff.[20] Under LADWP's 2011 contract with Shell, the biogas procured by LADWP is delivered through either firm transportation or through the type of interruptible transportation most similar to firm transportation that is available. This is explained in section 2 of the Special Provisions of the Transaction Confirmation of the 2011 Shell contract, which provides in pertinent parts as follows: "Buyer and Seller acknowledge and agree that . . . Seller is obligated at all times to reasonably contractually arrange for Firm transportation if offered by a transporting entity (and if Firm transportation is not available, for the type of Interruptible transportation most similar to Firm that is available) and the successful flow of scheduled RB [Renewable Biomethane] from the Projects to the Delivery Point through a physical contract path, and such contractual arrangements shall not allow Seller or the transportation entity to case the cessation of transportation of the RB [Renewable Biomethane] to

[17] LADWP Response, starting on page 78.
[18] Staff Response, starting on page 15.
[19] See Declaration of Christina Crume, TN 213755 , paragraph 22.
[20] TN 213747, LADWP Transaction Confirmation with Shell Energy North America (U.S.), LP dated December 20, 2011, pages 2-3.

the Delivery Point solely or in part for financial reasons or at the mere election of Seller or the transportation entity or entities."[21]

3. Staff's interpretation of the use requirement does not amount to "molecule tracing" as argued by LADWP.

In its Response, LADWP argues that Staff's definition of use would require natural-gas pipelines to engage in "molecule tracing."[22]

Staff's interpretation of the use requirement does not amount to "molecule tracing" as argued by LADWP. Staff requires applicants to transport and secure delivery service of biomethane injected into the pipeline using firm or interruptible service as a transportation method that can deliver or have the potential to deliver biomethane to California. This requirement does not require that the exact same molecules be tracked and combusted in the subject facilities.

4. Staff's interpretation of the use requirement does not conflict with state law as argued by LADWP.

LADWP argues that Staff's interpretation of the use requirement conflicts with state law because there is no support for Staff's definition of use in state law.[23] LADWP supports this proposition by stating that the "Aliso Canyon Action Plan clearly demonstrates Staff's fundamental misunderstanding how SoCalGas operates its gas pipeline and storage facilities in the Los Angeles Basin."[24] The Aliso Canyon Action Plan has no relevance to this proceeding. The Aliso Canyon Plan relates to a storage system and not a transportation system.

LADWP also argues in its Response that Staff's interpretation of the use requirement is inconsistent with California Air Resources Board (CARB) regulations.[25] The CARB's regulations cited by LADWP are not relevant to this proceeding as they deal with a CARB

[21] *Id*.
[22] LADWP Response, page 83.
[23] LADWP Response, page 85.
[24] *Id*.
[25] LADWP Response, page 88.

program for reporting greenhouse gas emissions, which focused on the measuring, reporting, and controlling of greenhouse gas emissions. This is a completely different program and has no bearing on the definitions or requirements in the RPS program.

C. LADWP's Claim that Staff Made Inconsistent Statements is Incorrect and Statements were taken out of Context.

In its Response LADWP argues that Staff made inconsistent statements regarding pipeline biomethane,[26] however this statement is incorrect and ignores the context regarding the Energy Commission's treatment of pipeline biomethane.

LADWP brings up statements by Staff in 2011 and 2012 regarding areas in connection with the Energy Commission's evaluation and ultimate suspension of the biomethane rules. These statements include the Energy Commission's explanation regarding the rationale for the initial allowance of biomethane and also the recognition that the law was silent on biomethane delivery requirements. However, this does not presuppose that the Energy Commission did not have authority to establish biomethane delivery requirements since it was authorized by statute to establish guidelines for certifying facilities for the RPS, including facilities that use biomethane delivered through the natural gas pipeline system. These statements were made before the Energy Commission issued its suspension of the biomethane eligibility rules on March 28, 2012, and show that the Energy Commission recognized the shortcomings of its existing biomethane eligibility rules in light of SBX1-2, and sought to address them. This should be something lauded by entities such as LADWP, not taken out of context to allege inconsistency.

VI. LADWP'S RESPONSE DOES NOT ESTABLISH THAT ITS 2009 SHELL AND ATMOS CONTRACTS PROCURE ELIGIBLE RESOURCES UNDER THE RPS PROGRAM.

LADWP's Response states that LADWP's 2009 Shell and Atmos contracts were approved under LADWP's administrative code and its section 387 policy.[27] However, as previously discussed, all POU-approved section 387 policy resources were not grandfathered under the

[26] LADWP Response, starting on page 93.
[27] LADWP Response, starting on page 23

uniform statewide RPS program. As Staff discussed in its Response, under Public Utilities Code section 399.12(e)(1)(C), approval by the governing board of a POU prior to June 1, 2010, is just one element that must be met in order to receive RPS certification by the Energy Commission. It must also meet the definition of a "renewable electrical generation facility" as defined under section 25741 of the Public Resources Code.

Under AB 2196, the Third Edition Guidebook applies to LADWP's 2009 Shell and Atmos contracts. LADWP states that the Third Edition Guidebook 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.'".[28] However, as Staff discussed in its Response, the Third Edition Guidebook contains several requirements, not just a singular delivery requirement.[29] Also as discussed in Staff's Response, the Third Edition Guidebook included the use requirement, but did not include express language detailing specific contract delivery requirements.[30] If the Committee determines that the biomethane delivery requirements in the Third Edition Guidebook were not clear on their face and did not include express language on the contracting requirements for biomethane delivery, and that LADWP did not have the benefit of knowing how these requirements were being applied by Staff, then it is possible for the Committee to decide that LADWP should not be held to the biomethane contract delivery requirements under the Third Edition Guidebook as they were interpreted and applied by Staff, while still maintaining deference to the use requirement from the statute and Energy Commission rules.

VII. LADWP'S RESPONSE DOES NOT ESTABLISH THAT ITS BC HYDRO CONTRACTS PROCURE ELIGIBLE RESOURCES UNDER THE RPS PROGRAM.

LADWP's Response states that LADWP's BC Hydro contracts were approved under LADWP's section 387 policy.[31] However, as previously discussed, all POU-approved section 387 policy resources were not grandfathered. As Staff discussed in its Response, under Public

[28] LADWP Response, page 90.
[29] Staff Response, starting on page 12.
[30] Staff Response, starting on page 67.
[31] LADWP Response, starting on page 16.

Utilities Code section 399.12(e)(1)(C), approval by the governing board of a POU prior to June 1, 2010, is just one element that must be met in order to receive RPS certification by the Energy Commission. It must also meet the definition of a "renewable electrical generation facility" as defined under section 25741 of the Public Resources Code. As discussed in Staff's Response, LADWP never applied for certification of its BC Hydro facilities by the original or extended deadline to do so, so it is not known whether it would have met the statutory definition of "renewable electrical generation facility" under the RPS statute.[32]

LADWP's Response raises the Energy Commission's timeline concerning its report to the legislature analyzing run-of-river hydroelectric generating facilities in British Columbia,[33] while leaving out critical information from the timeline and failing to present the significance of the report's timing to LADWP's appeal.

SBX1-2 added section 25741.5 to the Public Resources Code stating that: "by June 30, 2011, after providing public notice and an opportunity for public comment, including holding at least one public workshop, and following consultation with interested governmental entities, the [energy] commission shall study and provide a report to the Legislature that analyzes run-of-river hydroelectric generating facilities in British Columbia, including whether these facilities are, or should be, included as renewable electrical generation facilities pursuant to Section 25741 or eligible renewable energy resources pursuant to Article 16 (commencing with Section 399.11) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code."

The bill was only introduced on February 1, 2011, was not signed into law until April 12, 2011, and took effect on December 10, 2011, over five months after the report was due. Therefore, it was impossible for the Energy Commission to meet the deadline.

Additionally, the report did not affect the law in any way. The report provided recommendations to the Legislature that resulted in no revisions to the law. LADWP's Response states that BC hydro facilities were not deemed ineligible for RPS credit upon the effectiveness of SBX1-2,[34] however this is not accurate. BC hydro was not eligible before or after the report was provided to the Legislature.

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[32] Staff Response, starting on page 61.
[33] LADWP Response, pages 22 and 65.
[34] LADWP Reponse, page 65.

VIII. CONCLUSION

As discussed in this Reply, the California RPS program, established in 2002, has developed into a largely uniform statewide program. In developing the RPS program, the Legislature purposefully placed Publicly Owned Utilities (POUs) and retail sellers on equal footing with regards to its requirements, and has only conditionally brought in certain additional eligible resources into the program. LADWP argues that all resources it certified under its section 387 policy are grandfathered under the RPS program, however meeting the certification requirements under LADWP's section 387 policy alone is not sufficient to meet all certification requirements under state law. LADWP also argues that Staff is imposing retroactive requirements under the RPS program. However, if retroactivity exists under the RPS program, it was properly intended and undertaken by the Legislature and therefore Staff is simply implementing those statutory requirements. As a state agency charged with implementing and enforcing the RPS program, Staff's interpretation of the RPS program's statutory requirements, including the use requirement, should be upheld. Lastly, as discussed in this Reply, LADWP's Response failed to establish that it met RPS program eligibility requirements under its 2009 Shell and Atmos contracts and its BC Hydro contracts.

Dated this 21st day of September 2016

Respectfully submitted,
CALIFORNIA ENERGY COMMISSION
/S/ Mona Badie

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