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

In the Matter of:

Appeal by LADWP re  
RPS Certification or Eligibility

Docket No.: 16-RPS-02

**RESPONSE OF CALIFORNIA ENERGY COMMISSION STAFF  
TO LADWP'S MOTION TO EXCLUDE DOCUMENTS AND  
SUPPLEMENTAL DECLARATIONS SUBMITTED BY STAFF**

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**I. INTRODUCTION**

California Energy Commission Staff (Staff) respectfully submits this response (Response) to the Los Angeles Department of Water and Power's (LADWP) *Motion to Exclude Documents and Supplemental Declarations Submitted by CEC Staff* (Motion) in the subject proceeding related to LADWP's appeal of Renewables Portfolio Standard (RPS) certifications and eligibility (Appeal). The Motion was filed with the Commission and served electronically on Staff on October 31, 2016.<sup>1</sup> The Motion states that it was filed in accordance with the California Code of Regulations (CCR), title 20, section 1212.

This Response is filed pursuant to CCR, title 20, section 1211.5 and the Committee's *General Orders Regarding Electronic Document Formats, Electronic Filings and Service of Documents and Other Matters* dated August 5, 2016,<sup>2</sup> which provides that motions shall be filed and responded to according to the schedule established by the presiding member, and in the absence of such a schedule, responses to motions shall be filed within 14 days of the service of the motions.

Staff strongly opposes the Motion and LADWP's efforts to use it to exclude relevant information and documents pertinent to the Committee's consideration of the subject appeal. The Motion relies on LADWP's incorrect interpretation of the Committee's direction and statements concerning requirements for the proceeding. In Staff's view, the Motion is an attempt by LADWP to exclude documents and information pertinent for a thorough and objective

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<sup>1</sup> TN 214304.

<sup>2</sup> TN 212640.

consideration of the Appeal, because documents and information do not support LADWP's position. Staff has not attempted to block any documentation or information proffered by LADWP to date, even though Staff considers many of the documents and information to be irrelevant to the issues that Staff considers critical to the subject Appeal. Staff recognizes, however, that the Committee has not determined the full scope of the legal issues in this Appeal, so objecting to LADWP's submitted documents and information is premature at this point.

Once the Committee has determined the full scope of the issues in the Appeal, and the parties have had an opportunity to proffer additional evidence as necessary, including any documents or information obtained through the parties' requests for discovery, the parties should be permitted to move for the exclusion of any evidence. At that time, the Committee may choose to entertain motions or alternatively choose to allow any proffered evidence to be admitted conditionally based on the proponent party providing additional support for the evidence during the evidentiary phase of the proceeding or any hearings.

The Committee's decision regarding LADWP's Appeal should be based on all relevant documents and information, whether submitted by LADWP or Staff.

## **II. LADWP'S MOTION RELIES ON INCORRECT STATEMENTS CONCERNING COMMITTEE REQUIREMENTS.**

### **A. The Committee Has Outlined the Proceeding Requirements Which Should Be Upheld Until the Parties are Instructed Otherwise By the Committee.**

#### **1. The Committee has ordered a two-phased approach for this proceeding.**

In its Status Report for the July 13, 2016 Committee Status Conference, LADWP proposed a two-phased approach for the Appeal proceedings as follows:

Phase I would address the threshold issues regarding the statutory interpretation of SBX1-2 and AB 2196 and the applicable eligibility standards for determining the RPS-eligibility of the resources. Phase II, in turn, would address remaining factual disputes of whether LADWP established the applicable eligibility criteria. The proposed two-phase approach would conserve the Committee's and the parties' resources by avoiding the unnecessary presentation of fact and expert evidence on standards that may not apply or ultimately be in dispute in this proceeding. Following the Phase I ruling, the Committee would schedule a second Committee Status Conference regarding the Phase II schedule for any briefing and hearing on the then-existing disputed issues.<sup>3</sup>

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<sup>3</sup> The Los Angeles Department of Water and Power Status Report for July 13, 2016 Committee Status Conference, TN 212206, page 13.

During the July 13, 2016 Committee Status Conference, Staff agreed to the two-phased approach<sup>4</sup> proposed by LADWP and the Committee decided to adopt it (with a minor date adjustment).<sup>5</sup> In its subsequent *Committee Scoping and Scheduling Orders and Order Granting Motion to Add Consideration of 2007 British Columbia Hydroelectric Generation Contracts* (Scoping and Scheduling Orders), the Committee stated in its order to adopt the two-phased approach as follows:

The Committee reviewed the parties' status reports for the July 13 Committee Status Conference. In those reports and the related discussions during the Status Conference, the parties recommend a two-phase approach to resolving the appeals. First, the Committee would decide the legal issues presented—which laws apply and what they require. Second, the Committee would apply those identified laws and standards to the facts of the appeals. Upon further review, for purposes of efficiency, we believe that it is appropriate at this time to ask for the identification of various facts which would be required to satisfy specified legal provisions (see questions 2.a. and 5.a., below). Following receipt of the parties' responses, we will determine whether evidentiary hearings or additional information are required prior to our determination of the legal issues. . . . Therefore, in order to determine the scope of hearings and whether hearings are necessary to resolve the appeals, the Committee directs the parties to file responses to the following Committee Questions. Initial responses shall be filed no later than 5:00 p.m. on Thursday, September 1, 2016. Replies to the initial responses, if any, shall be filed no later than 5:00 p.m. on Wednesday, September 21, 2016.<sup>6</sup>

Based on this two-phased approach, it is Staff's understanding that the legal and applicable eligibility issues would first be decided by the Committee before the facts in dispute would be heard and decided on by the Committee. To date, the parties have responded to questions posed by the Committee in the Scoping and Scheduling Order to help narrow the pertinent issues in the Appeal and identify facts that may be relevant. Depending on the Committee's determination of the issues, other facts may be relevant and necessary to resolve the issues. Contrary to LADWP's suggestions, the Scoping and Scheduling Orders did not ask the parties to "brief" the issues. When the Committee has determined the legal and applicable eligibility issues and decided whether and to what extent hearings are necessary, only then should the evidence be finally submitted by the parties for review and evaluation by the

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<sup>4</sup> Transcript of July 13, 2016 Committee Status Conference, TN212481, page 11.

<sup>5</sup> Transcript of July 13, 2016 Committee Status Conference, TN212481, page 39.

<sup>6</sup> Committee Scoping and Scheduling Orders and Order Granting Motion to Add Consideration of 2007 British Columbia Hydroelectric Generation Contracts, TN 212485, page 2.

Committee, including documents, expert testimony, and other forms of evidence. Indeed, the schedule provided by the Committee in its Scoping and Scheduling Orders issued on July 27, 2016, has the Committee status conferences, which have yet to be completed, followed by “TBD” dates for prehearing conference statements, including witness and exhibit lists, prehearing conferences, and then evidentiary hearings.<sup>7</sup> Therefore, in Staff’s view, it is premature for LADWP to make a motion to exclude any documents, declarations, or other information docketed by Staff in this proceeding.

This is consistent with the stated purpose of the status conferences in the Committee’s Scoping and Scheduling Orders, which state that the status conferences will allow the Committee “to assess the parties’ progress and readiness to proceed to hearings, frame the issues to be addressed during the hearings, refine the schedule for review and decision of the appeal, and address any then-pending motions, petitions, and other requests that are ready for consideration.”<sup>8</sup>

**B. LADWP’s Motion Conflicts with the Committee-Ordered Proceeding Requirements as Well as Its Own Status Report Filed on July 8, 2016.**

1. LADWP’s Motion conflicts with the Committee-ordered proceeding requirements.

LADWP’s Motion states that the parties were required to submit briefings on September 1, 2016, with reply briefings due on September 21, 2016, and that the parties were to submit the documents they were relying on to support their briefings at the time they filed their briefs.<sup>9</sup> In its Motion, LADWP assumes that since “there was no discussion of submitting additional documents and no additional legal arguments after the briefing deadline of September 21, 2016,” there should be a prohibition on the docketing of any further documents after September 21, 2016. It also assumes that the responses and replies filed by the parties in response to the Committee’s scoping questions would constitute all submissions, responses to questions, and briefings for these proceedings.

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<sup>7</sup> Committee Scoping and Scheduling Orders and Order Granting Motion to Add Consideration of 2007 British Columbia Hydroelectric Generation Contracts, TN 212485, page 6.

<sup>8</sup> Committee Scoping and Scheduling Orders and Order Granting Motion to Add Consideration of 2007 British Columbia Hydroelectric Generation Contracts, TN 212485, pages 1-2.

<sup>9</sup> Los Angeles Department of Water and Power’s Notice of Motion and Motion to Exclude Documents and Supplemental Declarations Submitted by CEC Staff, TN 214304, page 3.



LADWP's Motion does not accurately characterize the proceeding requirements as established by the Committee at this time. The Committee's Scoping and Scheduling Orders stated that "in order to determine the scope of hearings and whether hearings are necessary to resolve the appeals, the Committee directs the parties to file responses to the following Committee Questions...."<sup>10</sup> The Committee asked the parties to respond to seven questions to help narrow the pertinent issues in the Appeal, identify facts that may be relevant, and determine whether and to what extent evidentiary hearings would be necessary. The Scoping and Scheduling Orders recognized that the Committee may require additional information, stating that after receipt of the parties' responses, the Committee will determine whether "evidentiary hearing or additional information are required prior to our determination of the legal issues."<sup>11</sup> Similarly, the Committee's order of September 6, 2016, as memorialized in the September 7, 2016 memorandum of Hearing Officer Paul Kramer, further recognized the potential for the parties to submit additional information in advance of the Committee determination of the legal issues, noting as follows:

The Committee may have additional questions regarding the BC Hydro issues. We won't know for sure until after we review the reply filings due on September 21.<sup>12</sup>

Refer also to the transcript of the September 6, 2016 Committee Status Conference, which indicates that further Committee questions might be necessary.<sup>13</sup>

At no time has the Committee stated that the responses and replies to the Committee's initial set of questions would constitute all submissions, responses, and briefings for this proceeding, and that the parties were now precluded from submitting additional documents and other evidence.

## 2. LADWP's Motion Conflicts with Its Own Status Report Filed on July 8, 2016.

As stated above, in its Status Report for the July 13, 2016 Committee Status Conference, LADWP proposed a two-phased approach whereby the first phase would address statutory interpretation and applicable eligibility standards and the second phase would address the factual

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<sup>10</sup> Committee Scoping and Scheduling Orders and Order Granting Motion to Add Consideration of 2007 British Columbia Hydroelectric Generation Contracts, TN 212485, page 2.

<sup>11</sup> TN 212485, page 2.

<sup>12</sup> Summary of Committee Order and Report After September 6, 2016, Closed Session. TN 213513, page 1, point 5.

<sup>13</sup> Transcript of September 6, 2016 Committee Status Conference, TN 213622, page 9.

disputes.<sup>14</sup> This two-phased approach was agreed to by Staff and adopted by the Committee as discussed above.

LADWP's Motion relies on assumptions that are not consistent with its own Status Report. LADWP's Motion and Staff's Response are being filed at a time when the first phase of the proceeding has not been completed, so it is premature to enter into the second factual dispute phase of the proceeding where evidence will be reviewed and evaluated by the Committee. LADWP's Motion assumes a different proceeding approach than the two-phased approach agreed to by the parties and adopted by the Committee. It assumes evidentiary hearings are not taking place and instead the submission, review, and evaluation of evidence will be incorporated into the parties' responses and replies to Committee scoping questions and review thereof. It also assumes that the deadline for the parties' responses to the Committee's initial set of questions is the effective deadline for the parties to submit all documents or declarations in these proceedings, including any documents, declarations, or other information that be required in response to any subsequent Committee questions. This does not make sense and is unreasonable given where the parties are in the proceeding.

### **III. DECLARATIONS AND DOCUMENTS FILED BY STAFF COMPLY WITH COMMITTEE REQUIREMENTS AND REGULATIONS.**

#### **A. Declarations Filed by Staff Comply with Committee Requirements and Should Not be Excluded.**

The Committee allowed for the filing of declarations by Staff. During the Status Conference of September 9, 2016, when LADWP first raised evidence concerns, Hearing Officer Kramer indicated that if the questioned documents down the road were going to be important, that Staff should be prepared to address LADWP's concerns at the appropriate time.<sup>15</sup> After the Committee returned from closed session, Hearing Officer Kramer encouraged Staff to address LADWP's concerns by filing a declaration or other appropriate method.<sup>16</sup> Additionally, in the Committee's order of September 6, 2016, as memorialized in the September 7, 2016 memorandum of Hearing Officer Paul Kramer, Staff was directed to "address LADWP's concerns about a lack of foundation for specified staff documents by declaration(s) meeting

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<sup>14</sup> Los Angeles Department of Water and Power Status Report for July 13, 2016 Committee Status Conference, TN 212206, page 13.

<sup>15</sup> Transcript of September 6, 2016 Committee Status Conference, TN 213622, page 8.

<sup>16</sup> Transcript of September 6, 2016 Committee Status Conference, TN 213622, page 10.

evidentiary standards or other appropriate means.”<sup>17</sup> There was no deadline from the Committee and Staff dutifully complied by filing declarations from two Staff members on September 21, 2016, and supplemental declarations on October 12, 2016, to support Staff’s Statement of Disputed Facts.

## **B. Documents Filed by Staff Comply with Applicable Requirements and Should Not be Excluded**

In its Motion, LADWP makes various arguments for excluding Staff documents and statements included in Staff’s Statement of Disputed Facts. The three principle arguments put forth in LADWP’s Memorandum of Points and Authorities are that Staff missed the briefing “deadline” for submitting documents, Staff cannot authenticate third party contracts, and Staff cannot offer expert witness testimony. In the Table of Objections included with the Motion, LADWP gives other reasons for objecting to Staff documents and statements included in Staff’s Statement of Disputed Facts, including lack of foundation, conjecture, hearsay, legal statements (or arguments) and conclusions, and lack of relevancy. These additional reasons, however, are not discussed or supported in LADWP’s Memorandum of Points and Authorities.

The briefing “deadline” argument is addressed above and, in Staff’s view, is completely without merit.

### **1. Third Party Contracts**

LADWP argues that all third-party contracts submitted by Staff in support of its position should be excluded because Staff is not a party to the contracts and, therefore, cannot authenticate them. LADWP also argues that the contracts should be excluded as hearsay.<sup>18</sup> LADWP’s arguments are directed at paragraphs 4, 12, 13, 16, and 19 of the Declaration of Christina Crume.<sup>19</sup> In the declaration, Ms. Crume declares under penalty of perjury that the third party contracts docketed by Staff in the proceeding are true and correct copies of the contracts received by the Energy Commission.

In support of its Motion, LADWP relies on CCR, title 20, section 1212 (c)(2), which provides that the findings of a decision in an adjudicatory proceeding “may be based on any

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<sup>17</sup> Summary of Committee Orders and Report After September 6, 2016, Closed Session, TN 213513, page 1, point 4.

<sup>18</sup> LADWP Motion, TN 214304, page 6.

<sup>19</sup> Declaration of Christina Crume. TN 213755.

evidence in the hearing record, if the evidence is the sort of information on which responsible persons are accustomed to relying on in the conduct of serious affairs.” (20 CCR § 1212 (c)(2).) LADWP also relies on section 1212 (c)(3), which provides that “[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions.” (20 CCR § 1212 (c)(2).

Contrary to LADWP’s assertions, the third party contracts can be authenticated by virtue of the circumstances under which they were submitted to the Energy Commission. Evidence Code section 1410 does not establish a strict requirement as to how a party authenticates a writing, stating that “[n]othing in this article shall be construed to limit the means by which a writing may be authenticated or proved.” (Evid. Code § 1410.) (*Ramos v. Westlake Services, LLC* (2015) 242 Cal.4<sup>th</sup> 674, 684, citing *People v. Skiles* (2011) 51 Cal.4<sup>th</sup> 1178, 1187.)

The third party contracts in question are the Calpine EIF KC biogas Purchase Agreement, the PG&E Microgy Contract, the SMUD Shell Transaction Confirmation, the LADWP Transaction Confirmation with Shell Energy N. America, LP, and the LADWP Transaction Confirmation with Atmos Energy Marketing. These third-party contracts were submitted to the Energy Commission in conjunction with applications for Renewables Portfolio Standard (RPS) certification submitted by Calpine, PG&E, SMUD, and LADWP and to verify that the biogas procured pursuant to the contracts satisfied the Energy Commission’s eligibility requirements as specified in the RPS Eligibility Guidebook, Third and Fourth Editions. The Calpine, PG&E, and SMUD applications for certification were submitted under the RPS Eligibility Guidebook, Third Edition, for the Los Medanos Energy Center and Pastoria Energy Facility, Gateway Generating Station, and Cosumnes Power Plant, respectively.<sup>20</sup> The LADWP applications for certification were submitted under the RPS Eligibility Guidebook, Fourth Edition, for the Scattergood, Harbor, Haynes, and Valley facilities.<sup>21</sup> Applications for RPS certification must be submitted with an attestation by an authorized officer or agent of the applicant that certifies the truth of the information included in the application and supporting documentations. The attestation required under the RPS Eligibility Guidebook, Third Edition, was as follows:

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<sup>20</sup> TN 213474, page 16.

<sup>21</sup> The RPS Eligibility Guidebook, Fourth Edition, was adopted by the Energy Commission on December 15, 2010, and was in effect when LADWP initially submitted its applications for certification of the Scattergood, Harbor, Valley, and Haynes facilities in July 2011. TN 213288, Staff Memo, page 1-2, footnote 3.

I am an authorized officer of the above-noted facility owner, an authorized agent of the facility owner, or a retail seller contracting with the above noted facility owner and with authority to submit this application on the facility owner's behalf, hereby submit this application on behalf of said facility owner for certification of the facility as a renewable facility eligible for California's RPS or certification as eligible for California's RPS. I have read the above information as well as the *Renewables Portfolio Standard Eligibility Guidebook*, the *Overall Program Guidebook for the Renewable Energy Program*, and the *New Renewable Facilities Program Guidebook* and understand the provisions of these guidebooks and my responsibilities. I acknowledge that the receipt of any certification approval from the Energy Commission is conditioned on the acceptance and satisfaction of all program requirements as set forth in the *Renewables Portfolio Standard Eligibility Guidebook* and the *Overall Program Guidebook for the Renewable Energy Program*. **I declare under penalty of perjury that the information provided in this application and any supplemental forms and attachments is true and correct to the best of my knowledge.**<sup>22</sup>

The attestation required under the RPS Eligibility Guidebook, Fourth Edition, was as follows:

I am an authorized officer or agent of the above-noted facility owner or a retail seller contracting with the above noted facility owner and with authority to submit this application on the facility owner's behalf, and hereby submit this application on behalf of said facility owner for certification of the facility as a renewable facility eligible for California's RPS. I have read the above information as well as the *Renewables Portfolio Standard Eligibility Guidebook* and the *Overall Program Guidebook for the Renewable Energy Program*, and understand the provisions, eligibility criteria, and requirements of these guidebooks and my responsibilities. I acknowledge that the receipt of any certification approval from the Energy Commission is conditioned on the facility owner's acceptance and satisfaction of all program requirements as set forth in the *Renewables Portfolio Standard Eligibility Guidebook* and the *Overall Program Guidebook for the Renewable Energy Program*. **I declare under penalty of perjury that the information provided in this application and any supplemental forms and attachments is true and correct to the best of my knowledge and that I am authorized to submit this application on the facility owner's behalf.**<sup>23</sup>

Under CCR, title 20, section 1212 (c)(2), it is appropriate to base findings for a Committee decision on Staff's consideration of the aforementioned third-party contracts, because these contracts are the sort of information upon which the Energy Commission and Staff, as "responsible persons," are accustomed to relying on when certifying facilities for the RPS under

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<sup>22</sup> RPS Eligibility Guidebook, Third Edition, Form CEC-RPS-1A, Section VII. (Emphasis in bold font added.) TN 213249.

<sup>23</sup> RPS Eligibility Guidebook, Fourth Edition, Form CEC-RPS-1A, Section VI. (Emphasis in bold font added.) TN 213250.

the RPS Eligibility Guidebooks. Staff's actions in relying upon the third party contracts are reasonable, because these contracts were submitted by Calpine, PG&E, SMUD, and LADWP in conjunction with applications for RPS certification, which were attested to under penalty of perjury by authorized officers or agents of these entities.

The submission of false or falsified contracts is against the self-interest of the applicants because of the potential consequences to the applicants, including the subsequent revocation of an applicant's RPS certification if any of the information submitted as part of or in support of an application is determined to be misrepresented or false. The *Overall Program Guidebook for the Renewable Energy Program* specified the potential consequences if applicants misrepresented or falsified information. Specifically, the *Overall Program Guidebook for the Renewable Energy Program* provided as follows in Chapter VII, Enforcement Action:

## 2. Fraud and Misrepresentation

The Committee may initiate an investigation of any awardee who the Committee has reason to believe may have misstated, falsified, or misrepresented information in applying for registration, funding, or RPS certification, invoicing for a funding award payment, or reporting any information required by these *Guidelines*. Based on the results of the investigation, the Committee may take any action it deems appropriate, including, but not limited to, revocation of the registration, cancellation of the funding award or RPS certification, recovery of any overpayment, and, with the concurrence of the Commission, recommending the Attorney General initiate an investigation and prosecution pursuant to Government Code Section 12650, et seq., or other provisions of law.<sup>24</sup>

Moreover, California Evidence Code section 1230 recognizes a hearsay exception for declarations against interest. Section 1230 provides as follows:

Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true. (Evid. Code § 1230.)

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<sup>24</sup> Overall Program Guidebook for the Renewable Energy Program, Second Edition, adopted December 19, 2007, pub. no. CEC-300-2007-003-ED2-CMF, page. 14, available at <http://www.energy.ca.gov/2007publications/CEC-300-2007-003/CEC-300-2007-003-ED2-CMF.PDF>. The Overall Program Guidebook defines "Awardee" on page 5 as "[a]n individual or entity awarded or reserved grant funding or certified as RPS eligible, or both, pursuant to these *Guidelines*" and defines "Guidelines" on page 5 as "[t]he guidelines governing the Renewable Energy Program, including aspects related to RPS eligibility..." which includes the "the following: *Overall Program Guidebook . . . Renewables Portfolio Standard Eligibility Guidebook*."

If the contracts or any other information submitted by Calpine, PG&E, SMUD, and LADWP in conjunction with their respective applications for RPS certification were misrepresented or false, it would be contrary to their respective pecuniary or proprietary interest given the consequences of submitting misrepresented or false information, as specified in the Overall Program Guidebook for the Renewable Energy Program. Calpine, PG&E, SMUD, and LADWP were aware of these consequences, since an authorized officer or agent from each entity submitted the applications for certification acknowledging that 1) they were submitting the application on behalf of the facility owner, 2) they had read the information in the application and in the *Renewables Portfolio Standard Eligibility Guidebook* and the *Overall Program Guidebook for the Renewable Energy Program*, 3) they understood the provisions of these guidebooks and their responsibilities, 4) the receipt of any certification approval from the Energy Commission was conditioned on the acceptance and satisfaction of all program requirements as set forth in the *Renewables Portfolio Standard Eligibility Guidebook* and the *Overall Program Guidebook for the Renewable Energy Program*, and 5) they declared under penalty of perjury that the information provided in the application and any supplemental forms and attachments was “true and correct to the best of my knowledge.”

Additionally, Evidence Code section 1222 recognizes a hearsay exception for party admissions when made by a person authorized by the party to make the statement. Section 1222 provides as follows:

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

- (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and
- (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence. (Evid. Code § 1222.)

The applications for RPS certification of LADWP's Scattergood, Harbor, Haynes, and Valley facilities based on biogas procured under the Transaction Confirmations with Shell Energy N. America, LP, and Atmos Energy Marketing, along with the supporting documentation for these applications including copies of the Transaction Confirmations themselves, were submitted by LADWP representative Oscar Herrera. In the applications for certification, Mr. Herrera identified his title as Electrical Engineer for LADWP and declared under penalty perjury

that he was authorized to submit the applications on behalf of LADWP. As such, it is appropriate to attribute any statements in the applications or supporting documents submitted by Mr. Herrera that are against the pecuniary or proprietary interests of LADWP, including the consequences of any false or misrepresented information, against LADWP.

Lastly, it should be noted that the contracts submitted by Calpine, PG&E, SMUD, and LADWP are being offered to show the reliance that Staff placed on these documents in evaluating the applications for RPS certification and determining RPS eligibility. Staff's response to the Committee's questions in Scoping and Scheduling Orders discussed the certification of the Calpine, PG&E, and SMUD facilities to 1) show how the applications for these facilities were evaluated based on the biomethane delivery requirements under the RPS Eligibility Guidebook, Third Edition, 2) show that all applications submitted under the Third Edition Guidebook were evaluated in the same manner with respect to biomethane delivery, and 3) show how LADWP's applications differed from those of Calpine, PG&E, and SMUD with respect to the biomethane delivery requirements.

## 2. Other Third Party Documents

Other third party documents submitted by Staff in support of its position should likewise be admissible and not excluded from evidence if these documents were submitted to the Energy Commission in conjunction with applications for RPS certification. Any such documents submitted in conjunction with an application for RPS certification would have been attested to under penalty of perjury by authorized officers or agents of the applicant. Under CCR, title 20, section 1212 (c)(2), it would be appropriate to base findings for a Committee decision on Staff's consideration of any such third-party documents, because these contracts are the sort of information upon which the Energy Commission and Staff, as "responsible persons," are accustomed to relying on when certifying facilities for RPS certification under the RPS Eligibility Guidebooks. These documents can be authenticated as discussed above and also fall within the hearsay exceptions discussed above.

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### 3. Expert Witness Testimony

LADWP argues that Staff is offering expert witness testimony concerning the interstate pipeline system.<sup>25</sup> LADWP's arguments are directed at paragraphs 10, 20, and 22 of the Declaration of Christina Crume,<sup>26</sup> paragraphs 11 and 13 of the Supplemental Declaration of Christina Crume,<sup>27</sup> and Staff's Statement of Disputed Facts nos. 42, 43, 44, 46, 47, and 49, all of which proffer statements of fact, not expert witness opinion testimony.

Under Evidence Code section 801(a), expert witness opinion testimony is admissible if it relates to a "subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*People v Brown* (2004) 33 Cal. 4th 892, 905.) Under Evidence Code section 800(a), if a witness is not testifying as an expert, his testimony in the form of an opinion is limited to the witness's own perception of the facts. (*People v Farnam* (202), 28 Cal. 4th 107, 153.)

However, the paragraphs in the Declaration and Supplemental Declaration of Christina Crume that LADWP objects to are not opinions, but statements of fact based on Ms. Crume's personal knowledge as supported by her declarations. Paragraph 10 of the Declaration is a statement of fact regarding definitions for interstate pipeline terminology that Ms. Crume obtained from the website of the Interstate Natural Gas Association of America on August 31, 2016. Paragraph 20 of the Declaration is a statement of fact regarding definitions for interstate pipeline terminology that Ms. Crume obtained from the website of Spectra Energy on August 31, 2016. Paragraph 22 of the Declaration is a statement of fact regarding the absence of communications from local publicly owned electric utilities to Staff concerning the use of biomethane. Paragraph 11 of the Supplemental Declaration is a statement of fact regarding the terminology used by Staff to refer to the delivery requirements for biogas injected into a natural gas transportation pipeline system. Paragraph 13 of the Supplemental Declaration is a statement of fact regarding the facilities that were certified by Staff under the RPS Eligibility Guidebook, Third Edition, based on biogas injected into a natural gas transportation pipeline system.

Likewise, fact nos. 42, 43, 44, 46, 47, and 49 in Staff's Statement of Disputed Facts are statements of fact, not opinions. Fact no. 42 is a statement of fact about the adoption date of the RPS Eligibility Guidebook, Second Edition, and the requirements established in that guidebook

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<sup>25</sup> LADWP Motion, TN 214304, page 7

<sup>26</sup> Declaration of Christina Crume. TN 213755.

<sup>27</sup> Supplemental Declaration of Christina Crume. TN 213981.

for biogas injected into a natural gas transportation pipeline system. Both the adoption date and biogas requirements are stated in the guidebook itself. Refer to the preface box at the beginning of the guidebook and pages 22-23 of the guidebook docketed as TN 213298. Fact no. 43 is also a statement of fact about the biogas requirements stated in the RPS Eligibility Guidebook, Second Edition itself. Fact no. 44 is a statement of fact about the Energy Commission's rationale regarding requirements for biogas injected into a natural gas transportation pipeline system. Fact no. 46 is a statement of fact about the adoption date of the RPS Eligibility Guidebook, Third Edition, and the requirements in that guidebook for biogas injected into a natural gas transportation pipeline system. Both the adoption date and biogas requirements are stated in the RPS Eligibility Guidebook, Third Edition itself. Refer to the preface box at the beginning of the guidebook and pages 20-21 of the guidebook docketed as TN 213291. Fact no. 47 is a statement of fact about the terminology Staff uses to refer to the delivery requirements for biogas injected into a natural gas transportation pipeline system. Fact no. 49 is a statement of fact about the facilities that were certified by Staff under the RPS Eligibility Guidebook, Third Edition, based on biogas injected into a natural gas transportation pipeline system.

#### 4. Lack of Foundation

In its Table of Objections, LADWP lists "lacks foundation" as one of the grounds for objecting to statements included in the Declarations and Supplemental Declarations of Christina Crume and Courtney Smith. However, the statements included in the Declarations and Supplemental Declarations are based on the personal knowledge of Ms. Crume and Ms. Smith. The Declarations and Supplemental Declarations of Ms. Crume and Ms. Smith provide a foundation for their respective statements. Specifically, the Declaration and Supplement Declaration of Ms. Crume state i) that she is an Energy Commission Specialist I in the Renewables Portfolio Standard unit at the Energy Commission, ii) that she has worked at the Energy Commission since 2012, and iii) that her responsibilities include certifying electrical generation facilities as eligible renewable energy resources for the RPS, advising the Energy Commission regarding the use of biomethane and hydroelectric resources for the RPS, including conducting staff analysis for implementing legislation relating to the resources, analyzing energy data, and researching and developing rules and procedures for the RPS certification of facilities as specified in the Energy Commission's adopted RPS Eligibility Guidebook. As such, Ms.

Crume possesses personal knowledge concerning the Energy Commission's requirements and procedures for certifying facilities under the RPS Eligibility Guidebooks, the eligibility requirements in the guidebooks including requirements for biogas/biomethane and hydroelectric generation, the rationale for such requirements, the certification applications received by the Energy Commission, and whether those applications were approved, and the facilities ultimately certified by the Energy Commission for the RPS.

Similarly, the Declaration and Supplement Declaration of Ms. Smith state i) that she has worked at the Energy Commission since June 2015, ii) that she is the Deputy Director of the Renewable Energy Division at the California Energy Commission, iii) that her responsibilities include planning, organizing, and directing the programs in the Renewable Energy Division including overseeing administration of the Energy Commission's Renewables Portfolio Standard responsibilities, and iv) that her responsibilities also include advising the Energy Commission, Governor's Office, members of the Legislature and other governmental agencies on matters related to renewable energy and the RPS, and participating in the development, evaluation, and implementation of Energy Commission and State energy policy. As such, Ms. Smith possesses personal knowledge concerning documents that the Energy Commission has developed or adopted concerning the RPS, such as the RPS Eligibility Guidebooks and other RPS-related documents readily available on the Energy Commission's website, and facilities the Energy Commission has certified for the RPS, which are readily available from records in the Renewable Energy Division.

## 5. Hearsay

Apart from the hearsay objections discussed above, LADWP's Table of Objections lists "hearsay" as one of the grounds for objecting to statements included in the Declarations and Supplemental Declarations of Christina Crume and Courtney Smith. LADWP lists hearsay as a basis for objecting to statements in Ms. Crume and Ms. Smith's declarations confirming 1) the adoption or issuance of official Energy Commission documents, such as the adoption of editions of the RPS Eligibility Guidebook and RPS verification reports or the issuance of certificates of the RPS certification, and 2) Staff's interpretation and application of the rules and requirements under the RPS Eligibility Guidebook. As discussed above, the statements included in the Declarations and Supplemental Declarations of Ms. Crume and Ms. Smith are based on their

personal knowledge as employees of the Energy Commission implementing and administering the Energy Commission's RPS functions. As such, Ms. Crume and Ms., Smith can speak to the Energy Commission's adoption of various editions of the RPS Eligibility Guidebook, the issuance of certificates of RPS certification under the RPS Eligibility Guidebook, and Staff's interpretation and application of the eligibility requirements under the RPS Eligibility Guidebook. The law recognizes a hearsay exception for official records and other official writings under Evidence Code section 1280, which provides as follows:

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:

- (a) The writing was made by and within the scope of duty of a public employee.
  - (b) The writing was made at or near the time of the act, condition, or event.
  - (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.
- (Evid. Code § 1280.)

The hearsay exception under 1280 covers the various editions of the RPS Eligibility Guidebook, the RPS verification reports, and the issuance of certificates of RPS certification. The various edition of the guidebook were adopted by the Energy Commission pursuant to Public Resources Code section 25747(a) and promptly published after adoption by posting the guidebook editions on the Energy Commission website in accordance with the Energy Commission existing practice. The RPS verification reports were adopted by the Energy Commission in accordance with the procedures specified in the RPS Eligibility Guidebook and promptly published after adoption by posting the reports on the Energy Commission's website. The certificates of RPS certification issued to facilities such as those of PG&E, SMUD, Calpine, and LADWP are issued pursuant to the requirements and procedures specified in the RPS Eligibility Guidebook only after Staff determines that the requirements and procedures have been satisfied.

#### **IV. ALL DOCUMENTS FILED BY STAFF AND STATEMENTS INCLUDED IN STAFF'S STATEMENT OF DISPUTED FACTS ARE RELEVANT TO THE PROCEEDING.**

Evidence Code section 210 defines "relevant evidence" to mean "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the

action.” (*People v. Lewis* (2001) 25 Cal. 4th 610, 639.) All of the documents filed by Staff and statements included in Staff’s Statement of Disputed Facts are relevant to the issues of the Appeal as discussed in Staff’s response to the Committee questions in the Scoping and Scheduling Orders.

**A. Documents and Statements of Fact Related to RPS Eligibility Guidebook, Second Edition**

Staff’s documents and statements of fact related to the RPS Eligibility Guidebook, Second Edition, are relevant to prove the origins of the Energy Commission’s RPS eligibility requirements for biogas injected into a natural gas transportation pipeline system. As discussed in Staff’s response to the Committee questions in the Scoping and Scheduling Orders, the Energy Commission had not established requirements prior to the Second Edition for the RPS eligibility of biogas injected into a natural gas transportation pipeline system.<sup>28</sup>

**B. Documents and Statements of Fact Related to the RPS Eligibility Guidebook, Third Edition, the Requirements In this Guidebook, and How these Requirements Were Applied to Other POU Facilities**

Staff’s documents and statements of fact related to the RPS Eligibility Guidebook, Third Edition, are relevant because it is the requirements in the Third Edition that are being applied in the subject Appeal to determine the RPS eligibility of LADWP’s Scattergood, Harbor, Valley, and Haynes facilities based on the biomethane<sup>29</sup> procured under LADWP’s Transaction Confirmation with Shell Energy N. America, LP, and Transaction Confirmation with Atmos Energy Marketing. Staff’s documents and statements of fact regarding how Staff applied the eligibility requirements of the Third Edition Guidebook to other applicants under the Third Edition Guidebook show how Staff interpreted and applied these eligibility requirements under the Third Edition Guidebook. These documents and the statements of fact confirm that Staff applied the eligibility requirements consistently to all applicants that applied for RPS certification under the Third Edition Guidebook. For example, copies of the RPS certifications

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<sup>28</sup> Response of California Energy Commission Staff to Questions in Committee’s Order of July 27, 2016, pages 6-8. TN 213474.

<sup>29</sup> The terms “biomethane” and “biogas” are used interchangeability in this Response. As noted in the Staff’s response to the Committee questions in the Scoping and Scheduling Orders, biomethane is biogas that is upgraded or otherwise conditioned so the gas may be transported offsite to a power plant through the natural gas transportation pipeline system. See TN 213474, page 6, footnote 15.

for the PG&E Gateway Generating Station, SMUD Cosumnes Power Plant, Calpine Los Medanos Energy Center, and Calpine Pastoria Energy Facility confirm Staff's application of the biomethane eligibility requirements to these applicants under the Third Edition Guidebook.<sup>30</sup> Copies of these certifications under the Third Edition Guidebook also tend to disprove LADWP's claim that the Energy Commission's biomethane delivery requirements conflict with FERC's regulations, because it is not possible to satisfy both FERC's regulations and the Energy Commission's biomethane delivery requirements.<sup>31</sup>

**C. Documents and Statement of Facts Related to RPS Certification of LADWP Facilities Based on the 2009 Shell and Atmos Contracts.**

Staff's documents and statements of fact related to the Staff's determinations regarding applications submitted by LADWP to Staff for RPS certification based on LADWP's 2009 Shell and Atmos contracts is relevant because LADWP raised Staff's interpretation and application of the RPS requirements in the Appeal.

Paragraphs 15-17 of the Supplemental Declaration of Christina Crume<sup>32</sup> and Paragraphs 50, 51, and 55 of Staff's Statement of Disputed Facts<sup>33</sup> are objected to by LADWP in part based on relevancy. These paragraphs discuss the determinations Staff made with regards to LADWP's application for RPS certification at issue in this Appeal and what requirements and documents were used to make those determinations. These are the exact determinations at issue that are being appealed by LADWP.

**D. Documents and statement of facts related to eligibility of LADWP's Gorge hydroelectric generation facilities.**

Staff's documents and statements of fact related to the Staff's RPS certification of LADWP's Gorge hydroelectric generation facilities is relevant because it relates to Staff's arguments concerning the interpretation of SBX1-2, which is an issue LADWP raised in its Appeal.

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<sup>30</sup> See Response of California Energy Commission Staff to Questions in Committee's Order of July 27, 2016, pages 15-19. TN 213474.

<sup>31</sup> See Reply of California Energy Commission Staff to LADWP's Initial Response to the Committee's Scoping Order of July 27, 29, pages 15-17. TN 213757.

<sup>32</sup> LADWP Motion, TN 214304, pages 13-14.

<sup>33</sup> LADWP Motion, TN 214304, pages 44-45.

LADWP is objecting to the relevancy of Paragraphs 20-31 of Staff's Statement of Disputed Facts Staff which concern Staff's certification of three different LADWP hydroelectric facilities under the Public Utilities Code section 399.12(e)(1)(A).

Staff has argued that LADWP's interpretation of SBX1-2 is not consistent with express statutory language because if the Legislature had intended to grandfather all section 387 policy resources, as argued by LADWP, then other provisions enacted by the Legislature, such as Public Utilities Code section 399.12(e)(1)(A) would be rendered surplusage, which should be avoided in statutory interpretation. It is relevant therefore that LADWP has applied for and received certification of various facilities based on Public Utilities Code section 399.12(e)(1)(A), which would effectively be superfluous under its own reading of SBX1-2.

**V. LADWP'S STATEMENT OF DISPUTED FACTS REGARDING LEGAL ARGUMENTS SHOULD BE TREATED IN THE SAME MANNER AS STAFF'S STATEMENT OF DISPUTED FACTS.**

In its Table of Objections, LADWP lists "legal statements and conclusions" (or legal arguments and conclusions) as one of the grounds for objecting to statements included in Staff's Statement of Disputed Facts. LADWP gives this reason when a Staff's statement of fact is either citing to or summarizing a provision in law, or identifying Energy Commission action in response to a law. For example, LADWP's objection no. 34 objects to fact no. 1 in Staff's Statement of Disputed Facts. Staff fact no. 1 summarizes the fact that SB 1078 added Article 16 (commencing with section 399.11) to chapter 2.3 of part 1 of Division 1 of the Public Utilities Code, entitled the "California Renewables Portfolio Standard." Another example is LADWP's objection no. 46, which objects to fact no. 46 in Staff's Statement of Disputed Facts. Staff's fact no. 46 identifies the date the Energy Commission adopted guidelines governing the certification of eligible renewable energy resources for the RPS for retail sellers and POUs pursuant to Public Utilities Code section 399.25.

These statements of fact in Staff's Statement of Disputed Facts are not unlike many of the statements of fact in LADWP's Statement of Disputed Facts. Refer, for example, to fact nos. 5, 33, 34, 116, 117, 174, 221, 222, 224, and 225 in LADWP's Statement of Disputed Facts. Fact no. 5 in LADWP's Statement of Disputed Facts states:

SB 1078 added PUC Section 387(a) which 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.’ A voluntary program for POU’s.<sup>34</sup>

Nowhere in Public Utilities Code section 387, as added by SB 1078, did the law refer to a “voluntary program” for local publicly owned electric utilities.

Another example is fact no. 117 in LADWP’s Statement of Disputed Facts, which states:

SBX1-2 did not deem British Columbia hydroelectric generating facilities ineligible for the RPS when the legislation became effective.<sup>35</sup>

SBX1-2 did not include a statement to this effect anywhere in the law.

If the Committee grants LADWP’s Motion to exclude Staff statements identified as “legal statements (or arguments) and conclusion” in LADWP’s Motion, then the Committee should exclude similar statements from LADWP’s Statement of Disputed Facts. To this end, Staff requests an opportunity at a later date to submit a motion for this purpose once the Committee has determined the full scope of the issues in the appeal.

## **VI. STAFF DOCUMENTS AND STATEMENTS ADMISSIBLE CONDITIONALLY**

If the Committee decides that any of documents submitted by Staff or any of the statements included in Staff’s Statement of Disputed Facts are inadmissible for the reasons stated in LADWP’s Motion, Staff requests that Committee admit the evidence conditionally subject to Staff providing additional support for the evidence later in the proceeding in accordance with Evidence Code section 403. Section 403 provides in pertinent part:

- (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:
  - (1) The relevance of the proffered evidence depends on the existence of the preliminary fact;
  - (2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;
  - (3) The preliminary fact is the authenticity of a writing; or

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<sup>34</sup> LADWP’s Statement of Disputed Facts and Supporting Evidence, page 2. TN 213985.

<sup>35</sup> LADWP’s Statement of Disputed Facts and Supporting Evidence, page 18. TN 213985.



- (4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.
- (b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial. (Evid. Code § 403.)

Under section 403, the Committee may admit evidence conditionally subject to Staff providing additional support for the admissibility of evidence later during the second phase of the proceeding when the Committee decides whether and to what extent evidentiary hearings will be required.

## **VII. APPEAL SHOULD BE DECIDED ON MERITS.**

The Committee should decide this appeal based on the merits and not exclude documents or statements of fact prematurely from the proceedings.

LADWP itself has stated that a decision on the merits is of uttermost importance to the RPS program and the Commission's duties thereunder and that the Committee should consider all arguments and evidence. As stated by LADWP in its Status Report, the Commission has a "*paramount* duty to ensure that California's Renewable Portfolio Standard ("RPS") enacted under SBX1-2 and Assembly Bill 2196 ("AB 2196") is interpreted and implemented by the Commission and staff in a manner that is consistent with the statutory provisions and expressed legislative intent."<sup>36</sup> LADWP's Status Report went on to state that "[t]he Commission, therefore, can and should consider all arguments and evidence to ensure that the Commission's interpretation and implementation of the California's RPS is consistent with the enabling legislation."<sup>37</sup> LADWP followed up with the statement that "principles of equity and due process warrant the Committee's and Commission's full consideration of the merits in this proceeding."<sup>38</sup>

Staff agrees with these sentiments. Staff did not object to LADWP's motion to add and consolidate the additional BC Hydro RPS-eligibility claims to the subject appeal proceeding and has not objected to any of the documents and declarations filed by LADWP to date.

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<sup>36</sup> LADWP Status Report for July 13, 2016 Committee Status Conference, TN 212206, page 3.

<sup>37</sup> LADWP Status Report for July 13, 2016 Committee Status Conference, TN 212206, pages 3-4.

<sup>38</sup> LADWP Status Report for July 13, 2016 Committee Status Conference, TN 212206, page 4 (emphasis in original).

Once the Committee has determined the full scope of the issues in the appeal, and the parties have had an opportunity to proffer additional evidence as necessary, including any documents or information that may be obtained through the parties' requests for discovery, the parties should be permitted to move for the exclusion of any irrelevant or unsupported evidence. At that time, the parties will be in a better position to know what evidence is or is not relevant given the issues identified by the Committee.

## **VIII. CONCLUSION**

For the above reasons, Staff requests that the Committee deny LADWP's Motion in its entirety. If the Committee grants LADWP's Motion to exclude Staff statements identified as "legal statements (or arguments) and conclusion," then the Committee should exclude similar statements from LADWP's Statement of Disputed Facts. To this end, Staff requests an opportunity at a later date to submit a motion for this purpose once the Committee has determined the full scope of the issues in the appeal. If the Committee decides that any of documents submitted by Staff, or any of statements included in Staff's Statement of Disputed Facts, are inadmissible for the reasons stated in LADWP's Motion, Staff requests that the Committee admit the evidence conditionally subject to Staff providing additional support for the evidence later in the proceeding.

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Dated this 14<sup>th</sup> of November 2016

Respectfully submitted,

CALIFORNIA ENERGY COMMISSION

*/S/ Gabriel Herrera*

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**Gabriel Herrera**

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