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STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

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

PRE-HEARING COMMENTS OF THE

LOS ANGELES DEPARTMENT OF WATER AND POWER

October 4, 2017

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I. INTRODUCTION

In 2007, to help fulfill its ambitious renewable energy goals, the Los Angeles Department of Water and Power executed two power purchase agreements with the Powerex Corporation of British Columbia for the purchase of up to 50 megawatts of renewable energy from small hydro facilities located throughout British Columbia and the Pacific Northwest. DWP committed approximately $186 million on behalf of its customers over the four-year, nine-month contract term. In 2011, four years after DWP executed the agreements, the California Legislature passed the California Renewable Energy Resources Act, known as SBX1-2. SBX1-2 brought DWP and other publicly-owned utilities under the Energy Commission's renewable energy procurement accounting rules for the first time so as to ensure, going forward, a uniform statewide system for counting all of the State's electric utilities' renewable energy obligations. Prior to SBX1-2, the renewable energy objectives of DWP and all other POUs were subject to the sound discretion of their respective governing bodies, acting in furtherance of, and beholden to, the interests of their citizen customers.

The issue to be decided by the Energy Commission in this proceeding is relatively straightforward. In enacting SBX1-2, did the Legislature, as DWP contends, grandfather POUs' renewable resource procurement contracts executed prior to adoption of SBX1-2? This would include the Powerex contracts, which DWP executed in good faith at a time when it was not subject to the Energy Commission's "guidebook" and on which contracts DWP reasonably relied to satisfy in part its renewable resource objectives. Or did the Legislature intend to subject those good-

faith contracts to the risk of non-compliance, thereby creating the scenario at issue here in which DWP, after obligating itself to pay up to $186 million, may be required to pay an additional $22 million in penalties for renewable energy it has previously bought and paid for?

Section 399.16(d)(1) of the public utilities code, added by the Legislature as part of SBX1-2, plainly states "*any contract* . . . originally executed prior to June 1, 2010 *shall count in full* toward the procurement requirements established pursuant to this article, if . . . the renewable energy resource was eligible under the rules in place as of the date when the contract was executed." The "rules in place" at the time it executed its small hydro contracts in 2007 refers to DWP's then-applicable renewable portfolio standard (RPS) rules, and not the then-inapplicable Energy Commission guidebook. To interpret the statute otherwise is inconsistent with its plain meaning and illogical as it would require DWP to have followed, and be bound by, statutes and guidance documents from which it was exempt.

To the extent the Energy Commission believes there is ambiguity with respect to which rules are intended to govern contracts executed prior to SBX1-2 – i.e., if section 399.16(d)(1) permits more than one reasonable interpretation – then it is appropriate and necessary to consider the statute's legislative history so as to determine what the Legislature intended. Here, that history unquestionably shows the Legislature *did* intend to grandfather the POUs' previously-executed contracts, including DWP's renewable energy purchases from small hydro units in British Columbia and the Pacific Northwest.

Accordingly, DWP respectfully requests that the Energy Commission refrain from adopting the Committee's proposed decision that would not count generation from DWP's small hydro purchases towards DWP's RPS program and thereby potentially impose approximately $22 million in non-compliance penalties on DWP ratepayers. Instead, the Energy Commission should find, as the Legislature intended, that DWP's small hydro purchases were grandfathered renewable procurement contracts that count in full toward its procurement requirements for 2011. In addition, for the reasons stated below, DWP respectfully requests that the Energy Commission adopt the Committee's proposed decision that certifies for RPS compliance DWP's Harbor, Haynes, Scattergood and Valley generating facilities based on its purchase of bio-methane to generate electricity.

II. BACKGROUND FACTS[1]

A. DWP's Powerex Small Hydro Grandfathered Contracts.

DWP, like other POUs, were historically exempt from California's mandatory RPS requirements. Even before SB 1078, the State's first RPS that required investor-owned utilities to procure 20% of their electric retail sales requirements from eligible renewable resources by the end of 2017, DWP had established goals and standards to help it be a leader in procuring renewable energy and in fighting climate change. And as the Legislature continued to increase and accelerate those goals, DWP remained at the forefront, including adoption in 2005 of a voluntary 20% RPS by 2017. DWP

[1] DWP has previously provided a thorough summary of all applicable facts and thus it is necessary to include just a few key facts here. *See, e.g.*, DWP's Initial and Reply Responses to the Committee's Scoping Order Dated July 27, 2016, submitted September 1 and 21, 2016, respectively. *See also*, DWP's January 20, 2017 Comments.

reached a 29% RPS in 2016 and has now committed more than $1 billion towards its renewable energy goals.

In March 2007, in furtherance of these goals, DWP's board approved two power purchase agreements with Powerex Corporation[2] for the sale by Powerex of renewable electric energy generated from small hydro facilities located throughout British Columbia and the U.S. Pacific Northwest, for a term of four years and nine months (April 2007 – December 2011). Consistent with DWP's RPS, the contracts required that all energy sold be generated by small hydro generating facilities with nameplate capacity ratings of 30 MW or less, and which specifically recognized such energy as "renewable." The selection of Powerex by DWP was the result of a three-year open and public competitive bid process in which DWP selected significant amounts of renewable energy to help fulfill its 20% RPS.

The cost to DWP ratepayers of the Powerex small hydro purchases over the almost five-year term was capped at $186,204,000 and the purchases were expected to fulfill approximately 2% of DWP's overall RPS goals. Under the contracts, DWP was entitled to all renewable energy credits associated with each megawatt-hour of energy delivered. The Powerex contracts expired on December 31, 2011.

B. POUs' RPS Responsibilities Under Section 387 And SBX1-2.

Prior to SBX1-2, POUs, including DWP, were exempt from Energy Commission RPS requirements and instead were responsible for creating and abiding by their "self-

[2] Powerex was established in 1988 as a wholly-owned electricity marketing subsidiary of BC Hydro, Canada's third largest electric utility. http://www2.powerex.com/AboutUs.aspx

established Renewables Portfolio Standard resource eligibility rules" to govern their renewable goals.[3] Prior to adoption of SBX1-2, section 387(a) of the public utilities code stated that "[e]ach governing body of a [POU] . . . 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." And while "retail sellers" were required to certify their eligible renewable energy resources for purposes of RPS compliance under the Energy Commission's tracking and accounting standards, POUs were specifically exempt.[4]

In short, prior to SBX1-2, DWP and other POUs had no statutory or other obligation to certify their renewable resources or have their contracts approved by the Energy Commission. Instead, these responsibilities were subject to the rules adopted by DWP's governing body and the governing bodies of other POUs. As such, each POU was able to determine through the exercise of its sound discretion which renewable resources qualified as eligible under their respective RPS policies.[5]

Enactment of SBX1-2, effective December 10, 2011, changed the renewables accounting requirements, going forward, for DWP and other POUs. SBX1-2 included two principal provisions intended to transition DWP from its locally-controlled RPS

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[3] *See, e.g., The Progress of California's Publicly-Owned Utilities in Implementing Renewables Portfolio Standards,* KEMA, 2008, California Energy Commission. Publication Number CEC-300-2008-005, p.1 (TN212421), LA000280.

[4] The definition of "retail seller" specifically excludes "a local publicly owned electric utility." Pub. Util. Code § 399.12(g)(4)(C) (2010).

[5] *See, e.g.,* DWP Initial Response, at 5-11.

programs to an RPS program administered by the Energy Commission. First, SBX1-2 amended the definition of "eligible renewable energy resource" in section 399.12(e)(1) to include a grandfathering provision requiring that the Energy Commission certify certain energy *facilities* that may have been previously approved by a POU's board under section 387 if certain conditions were met.

Second, SBX1-2 amended section 399.16 to include a provision intended to grandfather renewable *contracts* POUs had previously executed. As amended, section 399.16(d)(1) provides:

> "any *contract* . . . originally executed prior to June 1, 2010, *shall count in full toward* the procurement requirements established pursuant to this article, if . . . the renewable energy resource was eligible under the rules in place as of the date when the contract was executed."

Pub. Util. Code § 399.16(d)(1)(emphasis supplied). Thus, to transition from previously unregulated to regulated (at least for purposes of procurement counting), the Legislature stated that "any contract" a POU had previously executed which satisfied its own renewable energy rules "shall count in full" towards its respective RPS obligations. In other words, where a POU had executed a contract prior to June 2010 which the POU previously found had satisfied its particular rules for purposes of its own voluntary renewable energy goals, the Legislature stated that the POU could continue to count on that contract for its now mandatory reporting obligations.

C. The Committee's Proposed Decision.

By letter dated February 28, 2014, Energy Commission staff denied certification of DWP's Harbor, Haynes, Scattergood and Valley generating facilities which were burning bio-methane under two separate bio-methane delivery contracts. DWP appealed that

decision to the Energy Commission and by motion dated July 22, 2016 added the Powerex small hydro contracts to the appeal. Following a lengthy administrative hearing in which DWP submitted approximately 400 exhibits, nine witness declarations (fact and expert), and which hearing included multiple briefs from both DWP and staff, the Committee issued its proposed decision on January 5, 2017, which it updated on September 25, 2017.

The proposed decision found DWP's generating facilities eligible for certification. Specifically, the proposed decision found (1) the facilities met the definition of "eligible renewable energy resource" and (2) the bio-methane purchases were not inconsistent with the third edition of the Energy Commission's guidebook.[6] As discussed further below, DWP agrees with the result with respect to the proposed decision's treatment of the Haynes, Harbor, Scattergood and Valley generating facilities not because it agrees the contracts were subject to the Energy Commission's guidebook but because the contracts satisfied DWP's rules and also happened to satisfy the parameters set out in the Energy Commission's guidebook.

With respect to the Powerex contracts, however, the proposed decision adopts staff's interpretation *in toto* and finds the various small hydro facilities that provided energy under the Powerex PPAs – facilities DWP did not own or control and some of which were located in Canada – were nonetheless required to meet the definition of an "eligible renewable energy resource" under section 399.12(e)(1)(C). There is no separate definition of "eligible renewable energy resource" under the public utilities code. Instead,

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[6] DWP executed a bio-methane delivery agreement with Shell Energy North America, LP in February 2008 and a bio-methane delivery agreement with Atmos Energy Marketing in July 2009.

it simply incorporates the definition of "renewable electrical generation facility" under section 25741 of the public resources code. Pub. Util. Code § 399.12(e).[7] The proposed decision finds that section 399.16 requires DWP to "first establish" that the small hydro facilities underlying the Powerex contracts met the definition of an "eligible renewable energy resource" and that "application of Section 399.12(e)(1)(C) to the BC Hydro facilities does not result in their certification." Proposed Decision at 15. The proposed decision makes this finding not because it performed any section 25741 analysis of any of the various Powerex small hydro facilities, but "because LADWP did not seek certification of the BC Hydro facilities, and the deadline for doing so was December 13, 2013."[8]

Because the proposed decision's finding with respect to the Powerex contracts is inconsistent with the plain language of section 399.16(d)(1) and its legislative history, the Energy Commission should not follow it. To the extent the Energy Commission follows the proposed decision, its disallowance of DWP's Pacific Northwest hydro purchases for the first year of the first compliance period (the day before SBX1-2 took effect) is expected to cost DWP ratepayers an estimated $22 million in penalties.[9]

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[7] " 'Eligible renewable energy resource' means an electrical generating facility that meets the definition of a 'renewable electrical generation facility' in Section 25741 of the Public Resource Code . . . ."

[8] Proposed Decision, at 16. Indeed, in footnote 36, the proposed decision states "[w]e question, but need not decide, whether out-of-country BC Hydro facilities could be shown to satisfy the requirement of Public Resources Code section 25741 that 'it is developed and operated in a manner that is as protective of the environment as a similar facility in the state.'"

[9] As it currently stands, the proposed decision would deem more than 400,000 RECs as ineligible to be counted toward DWP's compliance period 1 requirements. Under section 399.30(p)(1), where the Energy Commission finds that a POU has failed to

III. DISCUSSION

A. The Plain Language Of Section 399.16(d)(1) And Its Legislative History Require That The Powerex Contracts Count In Full Towards DWP's RPS Procurement Obligations.

The proposed decision's interpretation of section 399.16(d)(1) is inconsistent with its plain, unqualified meaning. And to the extent there is any ambiguity as to which "rules in place" DWP was intended to be governed by prior to adoption of SBX1-2 – its own rules adopted under authority of former section 387 of the public utilities code, or those of the Energy Commission's guidebooks from which POUs were specifically exempt – then it is necessary to look at the statute's legislative history so as to determine the Legislature's intent. And that history clearly shows the Legislature intended to grandfather DWP's Powerex contracts, as these were contracts DWP found eligible under its own rules at the time of their execution.

1. The plain language of section 399.16(d)(1) requires that DWP's Powerex purchases count in full for RPS compliance.

Section 399.16(d)(1) states, plainly, that "*any contract* . . . originally executed prior to June 1, 2010 *shall* count in full toward the procurement requirements established pursuant to this article, if . . . the renewable energy resource was eligible under the rules in place as of the date when the contract was executed." (Emphasis added). Under California law, where the words of a statute are clear and unambiguous, reviewing bodies

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comply with provisions of the public utilities code, it "shall" refer the matter to the State Air Resources Board, which may then impose penalties on the violator, which penalties "shall be comparable" to the penalties adopted by the Public Utilities Commission for noncompliance by retail sellers. The CPUC has established a penalty structure of $50/REC for retail sellers.

are to follow its plain, ordinary meaning as this is the most reliable indicator of what the legislature intended. *See, e.g., People v. Abillar*, 51 Cal. 4th 47, 55 (2010).

Section 399.16(d)(1) is not, as suggested by staff and the proposed decision, qualified by section 399.12(e)(1)(C). Section 399.12(e)(1)(C) states as follows:

> [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).

Section 399.12(e)(1)(C) refers to certification of a "facility," as in a "renewable electrical generation facility" under section 25741 of the public resources code. In approving the Powerex PPAs, DWP's board approved – consistent with section 399.16(d)(1) – "*contracts*" for the purchase of renewable energy from many different small hydro facilities located throughout the Pacific Northwest.[10]

The distinction is critical to this matter. It is common utility industry practice for utilities to purchase electricity through contracts. In this case, what was important to DWP, and what it required under the agreements for purposes of satisfying its own RPS rules at the time, was that the power come from "small hydroelectric generating facilities," i.e., those under 30 MW but which were otherwise scattered throughout the Pacific Northwest and British Columbia. But other than ensuring the facilities be under

[10] *See*, DWP Initial Response at 18, quoting from DWP's letter to the Los Angeles City Council: "The *Agreement[s]* will allow the [DWP] to purchase renewable energy from *RPS qualified hydroelectric facilities* for the purpose of supplying renewable electricity to the ratepayers of Los Angeles [to] . . . enable the DWP to meet 1.9% of its RPS goal." (Emphasis supplied).

30 MW, DWP did not undertake, or require Powerex to undertake, an analysis of whether any of the particular facilities satisfied the section 25741 definition of "renewable electrical generation facility," as such an analysis was not required in 2007 when DWP executed the contracts. Indeed, in 2007, DWP was specifically *exempt* from such a requirement.

In enacting section 399.16(d)(1), the Legislature was certainly cognizant that an $186 million renewables contract which DWP executed in good faith, long before adoption of SBX1-2, and on which DWP was reasonably relying to meet part of its renewable energy goals, should not be subject to a later question of whether any of the Powerex hydro facilities met the section 25741 definition of "renewable electrical generation facility."[11] For instance, one of the section 25741 criteria for a facility located

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[11] Under section 25741, "renewable electrical generation facility" means, among other things, a facility that meets *all* of the following criteria:

(1) The facility uses . . . small hydroelectric generation of 30 megawatts or less . . . .

(2) The facility satisfies one of the following requirements: (A) is located in the state or near the border of the state with the first point of connection to the transmission network of a "balancing authority area" (as defined in Section 399.12 of the public utilities code) primarily located within the state; (B) has its first point of interconnection to the transmission network outside the state, within the Western Electricity Coordinating Council (WECC) service area, and satisfies <u>all</u> of the following requirements: (i) commences initial commercial operation after January 1, 2005.; (ii) will not cause or contribute to any violation of a California environmental quality standard or requirement; (iii) participates in the accounting system to verify compliance with the renewables portfolio standard once established by the [commission] pursuant to subdivision (b) of section 399.25 of the public utilities code; (C) meets the requirements of clauses (ii) and (iii) in subparagraph (B), but does not meet the requirements of clause (i) of subparagraph (B) because it commenced initial operation prior to January 1, 2005, if the facility satisfies either of the following requirements: (i) the electricity is from incremental generation resulting from expansion or repowering of the facility; (ii) electricity generated by the facility was procured by a retail seller or local publicly owned electric utility as of January 1, 2010;

in Canada – and there were many under the Powerex contracts – is whether the particular facility was "developed and operated in a manner that is as protective of the environment as a similar facility" located in California. Such a question is difficult if not impossible to answer in the context of contracts like the Powerex contracts.[12] Indeed, because the Energy Commission's guidebooks were themselves unsettled and still evolving at the time, SBX1-2 required the Energy Commission "to study and provide a report . . . 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." Pub. Res. Code § 25741.5 (repealed on January 1, 2015 pursuant to section 10231.5 of the Government Code). The question proved so difficult, however, that the Energy Commission didn't adopt its report until January 2014, or approximately two and one-half years after the report was supposed to be completed, and more than six years after DWP had executed its Powerex contracts.

Thus, because neither DWP nor the Legislature was willing to risk not counting the renewable energy procured under multi-million dollar contracts that a POU had reasonably relied on prior to adoption of SBX1-2 – that is, unwilling to risk the very situation the proposed decision now presents – the Legislature stated in section 399.16(d)(1), without restriction or qualification, that "any contract" executed prior to June 1, 2010 "*shall* count in full" toward DWP's RPS procurement requirements

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

[12] As stated in footnote 8, the Committee believed it unnecessary to undertake such inquiry.

if the resource was eligible under the rules in place when the contract was executed, which in the case of the facilities providing energy under the Powerex contracts, was true. DWP recognizes that *going forward* from the effective date of SBX1-2 it will need to demonstrate compliance with SBX1-2. But consistent with the purpose of a grandfathering clause, which is to give entities being brought under new regulations for the first time the right to honor their existing contracts without being subjected to likely punitive requirements as a result of the new regulations,[13] section 399.16(d)(1) exempts *all* pre-June 2010 contracts, provided they met the POUs' rules in effect at the time of its execution.

Under SBX1-2, the Legislature provided a separate provision if POUs wanted to seek grandfather status for any "*facilities*" it had previously approved to meet its section 387 requirements. Whereas utilities' renewable energy contracts were grandfathered under section 399.16(d)(1) with no reference to section 25741 conditions with respect to a "renewable electrical generation facility," any facility that a utility sought to certify for purposes of its RPS requirements would be subject to section 399.12(e). And unlike section 399.16(d)(1), section 399.12(e) specifically includes a requirement the facility meet the definition of "renewable electrical generation facility" under public resources code section 25741.

For example, certification of a POU's existing "facility" under section 399.12(e) is consistent with how DWP successfully sought certification of energy produced by

[13] *See, e.g., People ex rel. San Francisco Bay Conservation and Development Commission* (1968) 69 Cal.2d 533, 548 (grandfathering clauses serve to preclude harsh and inequitable results).

DWP's aqueduct hydroelectric generation facilities operated as part of a "water supply or conveyance system,"[14] including DWP's Upper Gorge Power Plant Unit 1, Middle Gorge Power Plant Unit 1, Control Gorge Power Plant Unit 1, and its units for DWP's San Francisquito Power Plant No. 1 and 2.[15] In those applications, because DWP owned the facilities and could attest that DWP had, consistent with the statute, approved its facility for purposes of its section 387 requirements and had in fact procured renewable energy from such facility "as of December 31, 2005," the Energy Commission appropriately certified such facilities under section 399.12(e).

Section 399.16(d)(1), on the other hand, provides that any *contract* entered into by a POU prior to June 1, 2010 "shall" be grandfathered for purposes of State RPS requirements if the contract was eligible under the rules in place at the time the contract was executed. It does so to protect the sanctity of contracts like the Powerex contracts, contracts on which DWP has spent more than one hundred million dollars of ratepayer money on the basis of its good faith pursuit of renewable energy objectives developed under rules to which it was specifically bound. The "rules in place" plainly and logically refer to rules in place that were specifically applicable to DWP *at that time*, and not to the Energy Commission's guidebook from which it was specifically exempt. If the Legislature had intended that each of the facilities that underlie each and every such pre-June 2010 contract must meet the definition of section 25741 of the public resources code, it could have expressly stated so. It did not. To the contrary, in adopting

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14 Pub. Util. Code § 399.12(e)(1)(A).

15 CEC-RPS-ID numbers 62000A, 62001A, 62002A, 62003A, 62004A, 62005A, 61996A, 61997A, 61998A, 61999A.

section 399.16(d)(1), the Legislature expressly allowed contracts executed prior to June 1, 2010 to count in full towards a POU's RPS obligations, provided the contract satisfied the POU's rules in place at the time of contract execution. To find otherwise would be illogical and inconsistent with the statute's plain language.

2. To the extent there is ambiguity, the legislative history of SBX1-2 shows the Legislature intended to grandfather DWP's small hydro purchases.

While staff and the Committee's proposed decision disagree the plain language of section 399.16(d)(1) requires counting in full the RECs from DWP's small hydro purchases under the Powerex contracts, they nonetheless admit the statute is, at least, ambiguous. *See,* Proposed Decision, at p. 14, conceding the statute with respect to the "rules in place" is "vaguely worded;" and at p. 27, that the "RPS Program statutes" do not "speak directly to the meaning of the phrase 'rules in place.'" In interpreting a statute where the language is clear, reviewing bodies must follow its plain meaning. If the statutory language permits more than one reasonable interpretation, however, reviewing bodies may consider various extrinsic aids, including, most importantly, the purpose of the statute and its legislative history. In the end, courts and other reviewing bodies "must select the construction that comports most closely with the apparent intent of the Legislature with a view to promoting rather than defeating the general purpose of the statute," and avoid an interpretation that would lead to unintended results. *See, e.g., In re Michael D.* (2002, Third District) 100 Cal.App.4th 115,121.

Here, the legislative history of SBX1-2 unambiguously demonstrates the Legislature intended to grandfather POUs' renewable resource contracts, including the

contracts that DWP had in place at the time the legislation was enacted. For instance, the Bill Analysis of SBX1-2 by the Senate Energy, Utilities and Communications Committee, dated February 15, 2011, states as follows:

> Current law exempts local publicly owned utilities (POUs) from the state RPS program and instead directs these utilities to implement and enforce their own renewable energy purchase programs that recognize the intent of the Legislature to encourage increasing use of renewable resources. This bill *grandfathers all contracts* consummated by an IOU, ESP or *POU* prior to June 1, 2010. *Going forward*, all contracts for an electricity product would be required to meet the requirements of a 'loading order' that mandates minimum and maximum quantities of three product categories (or 'buckets') . . . . (Emphasis supplied).

The Fiscal Summary prepared by the Senate Appropriations Committee, dated February 23, 2011, provides as follows:

> Existing law also requires publicly owned utilities to adopt their own Renewables Portfolio Standard. . . . This bill increases the state's Renewable Portfolio Standard requirement to 33 percent of electricity supply by 2020 and broadens the Renewable Portfolio Standard mandate *to include* publicly owned utilities. . . . Under the bill, *all existing renewable energy contracts signed by June 1, 2010 would be "grandfathered" into the program. Going forward*, new renewable energy contracts must meet a "loading order" that categorizes renewable resources. (Emphasis supplied).

In addition, the Bill Analysis of the Senate Rules Committee, with respect to SBX1-2, dated February 23, 2011, states as follows:

> Under the bill, all existing renewable energy contracts signed by June 1, 2010 would be *"grandfathered" into the program*. Going forward, new renewable energy *contracts* must meet a "loading order" that categorizes renewable resources. (Emphasis supplied).

The "loading order" or three "bucket" categories referenced in the legislative history refer to the types of electricity products that will qualify to meet a utility's renewable portfolio requirements *going forward* from the effective date of the new law

and are spelled out in section 399.16(b), which, not surprisingly, SBX1-2 added *as part of an entirely new provision* in the public utilities code. Section 399.16(b) requires that going forward, utilities will need to procure their eligible renewable energy resources from one of three portfolio content categories:

> (1) renewable energy resource products that either (A) have a first point of interconnection with a California balancing authority, a first point of interconnection with distribution facilities used to serve end users within a California balancing authority area, or are scheduled from the eligible renewable energy resource into a California balancing authority without substituting electricity from another source, or (B) have an agreement to dynamically transfer electricity to a California balancing authority; (2) "firmed and shaped" energy resource products providing "incremental electricity" and scheduled into a California balancing authority; or (3) energy resource products, including unbundled renewable energy credits, that do not qualify under (1) or (2).

Thus, the legislative history plainly shows the Legislature distinguished between contracts executed prior to and after June 1, 2010, and that these contracts would have very different requirements for purposes of satisfying a utility's RPS procurement obligations.

The legislative history of Assembly Bill 2196 with respect to bio-methane procurement agreements, effective as of January 1, 2013, provides similarly compelling history the Legislature intended to grandfather existing contracts, and that only *going forward* would the contracts be subject to Energy Commission guidebook accounting. For instance, the analysis of the Senate Energy, Utilities and Communications Committee during its fiscal hearing regarding AB 2196, dated June 25, 2012, stated:

> *Current law* [i.e., *section 399.16(d)(1)*] permits procurements and contracts for renewable generation, executed prior to June 1st, 2010, *to count in full toward a retail seller or POU's RPS requirements and, further, exempts*

> *those contracts* from three product categories for bucket requirements. (Emphasis supplied).

And the Senate Floor analysis of Assembly Bill 2196, third reading, dated August 31, 2012 states:

> To finesse a transition from the 20 percent, by 2010, RPS Program, to the 33 percent, by 2020, program, SBX1-2 *grandfathered all RPS contracts entered into prior to June 1st, 2010, and provided that those contracts will count in full under the new program requirements*. (Emphasis supplied).

Taken together, this legislative history reflects the then-existing understanding of the Legislature as the bills progressed through the various legislative committees on their way to and even after their enactment. As the California Supreme Court has explained:

> It is well established that reports of legislative committees . . . are part of a statute's legislative history and may be considered when the meaning of a statute is uncertain. . . . The rationale for considering committee reports when interpreting statutes is that it is reasonable to infer that those who actually voted on the proposed measure read and considered the materials in explanation of it, and that the materials therefore provide some indication of how the measure was understood at the time by those who voted to enact it.

Hutnik v. U.S. Fidelity and Guaranty Co., 47 Cal.3d 456, 465 (1988).

Last, in their May 18, 2016 letter to Energy Commission Chairman Weisenmiller, a delegation of ten California Assembly Members stated:

> The passage of the California Renewable Energy Resources Act (SBX1-2) in 2011, for the first time, brought POUs, like LADWP, under state jurisdiction through the CEC. The CEC, after evolving its rulemaking over a number of years, is now considering applying those rules retroactively to investments made years ago. If allowed to enforce retroactive rulemaking and LADWP's contracts are not counted in full by the CEC. LADWP ratepayers may face a potential liability of $130 million. . . . [The] *[g]randfathering provisions in SBX1-2 were intended by the Legislature to seamlessly transition* from a voluntary program of renewable energy for POUs to a mandatory program. SBX1-2 *also stipulated that the CEC "shall" certify procured renewable energy resources under the rules in place at the time of contract execution*. The Legislature provided

> grandfathering language in SBX1-2 and later in Assembly Bill (AB) 2196, to expressly account for the investments made on behalf of the public by POUS *to ensure those investments would be fully counted by the CEC*.

(Emphasis supplied).[16]

Despite the clear expression of legislative intent that POUs' pre-June 2010 procurement contracts count "in full" towards RPS eligibility, the proposed decision treats this history as mere "generalized statements," relying on a legislative report and the SBX1-2 digest to justify its seeming indifference. The first report, the Report of the Assembly Committee on Natural Resources, dated as of March 7, 2011, however, simply states that SBX1-2 added new exceptions for "certain small IOUs and POUs, relaxing these utilities' obligations to procure eligible renewable energy resources, according to their particular circumstances." Proposed Decision at 14. And the Legislative Counsel's Digest[17] for SBX1-2 simply included a generalized statement that SBX1-2 "would repeal

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[16] The September 25, 2017 proposed decision, at footnote 30, states the Committee declined to consider the legislators' letter because (1) its reliance on *City of Brentwood v. Central Valley Regional Water Quality Control Board (2004) 123 Cal.App.4th* 714, and (2) the "post hoc opinions proffered by [DWP] could not have been considered by the Legislature when it was debating the bill." Quoting from *Quintano v. Mercury Casualty Co*. (1995) 11 Cal.4th 1049, 1062 & fn. 5, *City of Brentwood* simply repeated the well-known principle that letters expressing the opinions of individual legislators *can be irrelevant* to an issue of statutory construction, which of course depends on the intent of the entire Legislature, not of individual legislators. *City of Brentwood* at 728. But *City of Brentwood* specifically recognizes that while a letter from individual legislators may be irrelevant in some instances, *they also be can be very important* to understanding legislative intent. In *City of Brentwood*, the court specifically found the legislator's letter *particularly relevant* to its review of the legislative history at issue in that case ("[w]e reject the City's argument that the letter is not an appropriate subject of judicial notice regarding the legislative history of the statute"). Here, given the May 18, 2016 letter was submitted by no less than ten different legislators, the prudent course of action would be for the Energy Commission to take administrative notice of the letter to help it understand what the Legislature truly intended by "rules in place" rather than fail *to even consider it*.

[17] One of the two legislative histories on which the Committee relies to find the Legislature did not intend to grandfather POUs' contracts in full is a legislative counsel's

[POUs' previous exemption], and instead *generally* make the requirements of the RPS program applicable to local publicly owned electric utilities." *Id*. (Emphasis supplied). But neither of these reports contradict nor are they inconsistent with the Legislature's intent to grandfather contracts executed prior to June 1, 2010 "*in full.*"

The Committee has acknowledged that the phrase "rules in place" is subject to more than one possible interpretation. To the extent there is ambiguity, the legislative history of SBX1-2 overwhelmingly shows the Legislature intended – through section 399.16(d)(1) – to grandfather all existing contracts entered into by DWP and other POUs prior to June 1, 2010. Only *going forward* from the effective date of SBX1-2 would DWP and other POUs' newly executed contracts be subject to Energy Commission accounting and section 399.16 "buckets."

B. The Proposed Decision Misinterprets Section 399.16(d) And Section 399.12(e).

Despite the clear language and legislative intent of section 399.16(d)(1) to count in full *all* POU pre-June 2010 renewable power contracts eligible under their own rules in place at the time of SBX1-2 adoption, the proposed decision, following staff's recommendation, finds that section 399.16(d)(1), when read with section 399.16(d)(3) – which places limitations on contract *amendments* – cannot be interpreted to allow POUs to count in full their resources and contracts under their own rules because it would lead to a parade of unintended consequences. Proposed Decision at 12. The only concern to which the proposed decision cites, however, is that if POUs were able to count all of their

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digest. Notably, in its footnote 30 of the proposed decision, the Committee specifically criticizes DWP for using a legislative counsel digest to show the Legislature did intend to grandfather such contracts. The Committee cannot have it both ways.

pre-June 2010 contracts under their own "rules in place," POUs would be able to count renewable resources from "large hydroelectric generating facilities" greater than 30 or 40 MW, something, the proposed decision states, has been allowed under the Energy Commission's RPS rules only in limited circumstances. The September 25 proposed decision attempts to justify its earlier reasoning by stating that if "rules in place" meant "POU rules," then "any" resource a POU allowed under its RPS "no matter how incongruent with the Article 16 requirements, would count towards a POU's Article 16 procurement obligations as long as the contract was entered into by the statutory deadline." Proposed Decision at 12. Such an interpretation takes the statute's plain language out of the clean energy context, with the implication being that a POU could count in full *any* contract under which it was purchasing power including, presumably, from a non-renewable generating facility (e.g., coal, natural gas, etc.). This of course would not only be inconsistent with DWP's prior obligations under section 387, it would result in an absurd interpretation of section 399.16(d)(1). And the Energy Commission knows full well that statutes are to be interpreted to avoid absurd results. *See, e.g., People v. Abillar*, 51 Cal. 4th 47, 56 (2010); *Silver v. Brown*, 63 Cal.2d 841, 845 (1966)(literal words of a statute may be disregarded to avoid absurd result).

Moreover, on this point the proposed decision is wrong on several fronts. First, the proposed decision misinterprets section 399.16(d)(3). That section provides as follows:

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

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

Section 399.16(d)(3) simply acts as a further *limit, not expansion* of a POUs' ability to count pre-existing procurement contracts. It states that procurement contract amendments after June 2010 can count in full, but only if the amendment doesn't interfere with three critical contractual provisions: (1) the capacity (or size, as measured in megawatts) of the purchase; (2) the amount of electric energy (i.e., megawatt-hours) purchased; and (3) the type of renewable resource involved (e.g., no replacing hydro with wind, etc.). And while there are many other provisions that parties could amend in a power purchase agreement, such as pricing, overall term, indemnification, events of default, performance assurances, etc., section 399.16(d)(3) prohibits the counting of any contract amendment that would alter any of the three most essential renewable energy characteristics required for counting a resource under an RPS program – capacity, amount of energy delivered, and type of resource. Thus, the proposed decision's rationale that section 399.16(d)(1), when read with section 399.16(d)(3), will lead to unintended consequences lacks both legal and factual basis. And in any event, since there are no amendments at issue here, the rationale is simply conjecture and inapplicable.

Second, to the extent the proposed decision seeks to prevent POUs from seeking to count renewable energy from large hydro *facilities* – such as the Hoover Dam – this is a solution in search of a problem. If a POU wanted to grandfather such facility, it would

need to do so under section 399.12(e) – which specifically incorporates the definition of "renewable electrical generating facility" as defined in section 25741 of the public resource code, and which definition specifically *excludes* hydro facilities greater than 30 MW – and not section 399.16(d)(1). In any event, because DWP determined that Hoover Dam was an ineligible resource in 2004, it specifically excluded it from its RPS. Thus, the hypothetical concern called out in the proposed decision is inapplicable to DWP.[18]

Last, that the Legislature intended to grandfather DWP's previously-executed contracts on a stand-alone basis without it "first" having to establish that its small hydro purchases met the definition of a "renewable electrical generation facility" at the time it signed the contracts is made even more clear by looking at section 399.16(d)(2).

Section 399.16(d)(2) states as follows:

> (d) Any contract or ownership agreement originally executed prior to June 1, 2010, shall count in full toward the procurement requirements established pursuant to this article, if all of the following conditions are met: . . .
> (2) For an electrical corporation, the contract has been approved by the commission, even if that approval occurs after June 1, 2010.

Section 399.16(d)(2) plainly states that a contract of an "electrical corporation" – as defined in section 218 of the public utilities code – shall count in full toward its procurement obligations if the contract "has been approved by the commission" – i.e., the *Public Utilities Commission* and not the Energy Commission [*see* section 399.11 referring to the CPUC as the "commission" and the Energy Commission as the "Energy Commission"] – even if that approval occurs after June 1, 2010. Despite the unambiguous language of section 399.16(d)(2), under its interpretation of the statute,

[18] *See*, *e.g.*, TN213475, pp 5-7.

staff would have the Energy Commission believe that an electrical corporation, after having had its contract approved by the Public Utilities Commission, would still be required to demonstrate that whatever generating "facility" was providing renewable energy under the contract also meets the definition of an "renewable electrical generation facility" under section 25741 of the public resources code. Such an interpretation, which flows naturally from staff's interpretation of section 399.16(d), is plainly inconsistent with the unambiguous language of 399.16(d)(2). Just as an electrical corporation which had its contract approved by the "commission" need not demonstrate that the generation facilities underlying the contract also first meet the definition of "renewable electrical generation facility," the same is true for any POU which approved its *contracts* under its own RPS rules in place prior to June 1, 2010. To suggest otherwise would ignore all canons of statutory construction.

C. The Energy Commission Should Adopt The Proposed Decision With Respect To DWP's Bio-methane Purchases.

The proposed decision finds that DWP's Harbor, Haynes, Scattergood and Valley generating facilities, which generated electric energy from burning bio-methane from two delivery contracts DWP originally executed in 2008 and 2009, were required to first show they satisfied the definition of "eligible renewable energy resource" under "the rules in place" at the time the delivery contracts were executed and that the applicable standards were the Energy Commission's guidebook, and not DWP rules. Here, the applicable phrase "rules in place" is contained in section 399.12.6(a)(1), [19] the grandfathering provision specific to bio-methane contracts. The proposed decision found

[19] Section 399.12.6 was adopted as part of AB 2196 and effective as of January 1, 2013 and thus effective after section 399.16(d)(1).

that the Harbor, Haynes, Scattergood and Valley generating facilities and the applicable bio-methane agreements met the definition of "eligible renewable energy resource" under the Energy Commission's guidebook and therefore found the resources could count toward DWP's RPS program requirements.

DWP disagrees that the applicable "rules in place" refer to the Energy Commission's guidebook and not DWP's rules. But because the facilities satisfied DWP's rules and also satisfied the Energy Commission's guidebook at the time DWP executed its bio-methane delivery contracts, DWP respectfully requests that the Energy Commission follow the proposed decision's result with respect to the Harbor, Haynes, Scattergood and Valley generating facilities.

D. The Energy Commission Has The Discretion To Avoid An Unjust Result.

To promote economic development, enhance sustainability, and combat climate change, the City of Los Angeles, the State's largest city and home to millions of Californians, has a long and admirable history of committing to clean energy infrastructure so as to ensure that future Californians and others may enjoy this great state for generations to come. Fortunately, this vision is shared by the Energy Commission, many other California governmental and corporate entities, and the majority of its citizens. And because of this shared vision, California is an indisputable leader in clean energy, environmental protection, and economic strength.

And whatever can now be said about small, run-of-river hydro facilities that underlie the Powerex contracts, there is no dispute that when DWP entered these contracts in 2007 following a three-year competitive bid process, four years before

enactment of SBX1-2, and six years before the Energy Commission's January 2014 run-of-river report, its intentions were to purchase energy that qualified as "renewable." Thus, DWP respectfully submits that any decision by the Energy Commission in 2017 which effectively penalizes DWP for a decision it made in 2007 that was not only legal at the time but perfectly rational would be patently unjust.

The Energy Commission has broad authority under the public resources code to avoid such an unjust result. Under section 25218(e), the Energy Commission may "take any action" it deems reasonable and necessary to carry out its powers under "this division,"[20] and such powers are to be "liberally construed" in furtherance of the broad, encompassing objectives of the "division," a key one of which is to "encourage . . . the development of renewable energy resources." Pub. Res. Code. § 25000.1.[21]

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[20] Pursuant to section 25000, under the header "Short title," the term "division" refers to the *entirety* of the Warren-Alquist State Energy Resources and Conservation and Development Act, i.e., the public resources code. "This *division* shall be known and may be cited as the Warren-Alquist State Energy Resources Conservation and Development Act," and includes the Energy Commission's Renewable Resources Program under Chapter 8.6 (Pub. Res. Code §§ 25740, *et seq*.) and the California Renewable Energy Resources Act (Pub. Util. Code §§ 399.11, *et seq*). (Emphasis supplied).

[21] In the September 25, 2017 updated proposed decision, the Committee attempts to limit the Energy Commission's ability to exercise its discretion to "take any action" so as to promote the purposes of Warren-Alquist Act by stating the term "division" is limited to "Division 15 of the Public Resources Code." Proposed Decision at 32. Not only is it puzzling as to why the Committee would seek to find ways to *limit*, and not expand the Energy Commission's ability to find a judicious resolution of this matter should it so choose, the statement turns this proceeding on its head. Division 15 of the public resources code is the section of the code under which the Energy Commission derives *all* of its authority, including interpreting sections of the public utilities code, or any other statute. If the Energy Commission isn't acting pursuant to its Division 15 authority in this proceeding, then it has no authority to act at all. In any event, the Warren-Alquist Act specifically states that the "provisions specifying any power or duty of the commission shall be *liberally construed*, in order to carry out the objectives of this division." Pub. Res. Code § 25218.5 (emphasis supplied).

The September 25, 2017 updated proposed decision explicitly recognizes that DWP's pre-existing section 387, voluntary obligations "ended on December 10, 2011" and its new mandatory SBX1-2 obligations began thereafter and that "SBX1-2 and its constituent statutes were *prospective in operation and effect*." Proposed Decision at 19 (emphasis supplied). DWP agrees. Thus one such action the Energy Commission could easily take here would be to allow DWP to count in full all energy from its Powerex contracts, but limit the period *only* from January 1, 2011 through December 9, 2011 (i.e., the day before SBX1-2 took effect), a timeframe entirely consistent with the proposed decision's recognition of when DWP's obligations ended under the prior regime and began under the new regime. It is indisputable that such action is within the Energy Commission's broad discretion. Perhaps more important than anything, however, such action could put an end to this dispute and allow DWP and the Energy Commission to rededicate their joint efforts on furthering a clean, sustainable energy future.

IV. CONCLUSION

DWP thanks the Energy Commission for its consideration of this important matter. For the reasons discussed above and in DWP's previous comments, and based on all of the evidence and arguments submitted into the record, DWP respectfully requests that the Energy Commission find that DWP's Powerex contracts count in full towards its RPS obligations; and that it confirm the result of the proposed decision with respect to DWP's use of bio-methane procured under delivery agreements for its Harbor, Haynes, Scattergood and Valley generating stations.

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Respectfully submitted,

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