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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

**CALIFORNIA ENERGY COMMISSION STAFF COMMENTS TO THE  
COMMITTEE REVISED PROPOSED DECISION DATED OCTOBER 5, 2017**

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## **I. Introduction**

California Energy Commission (CEC) Staff (Staff) respectfully submits these Comments in response to the Committee Proposed Decision, as revised, dated October 5, 2017 (Revised Proposed Decision).<sup>1</sup>

Staff supports the Committee's Revised Proposed Decision and its analysis of the applicable Renewables Portfolio Standard (RPS) Program statutes and CEC Guidebook and decision to not count the Renewable Energy Credits (RECs) from the British Columbia hydroelectric (BC Hydro) facilities that LADWP procured under its power purchase agreements with Powerex Corp (Powerex BC Hydro PPAs).<sup>2</sup> The Revised Proposed Decision correctly concludes that the procurement of RECs under the Powerex BC Hydro PPAs cannot be used to satisfy LADWP's RPS procurement requirements, because the BC Hydro facilities were not certified by CEC for the RPS.<sup>3</sup>

The Revised Proposed Decision arrives at the same conclusions as the Committee's original Proposed Decision, dated January 5, 2017 (January 5, 2017 Proposed Decision), which Staff had previously supported.<sup>4</sup> The Revised Proposed Decision clarifies factual points raised by Staff and LADWP in their respective comments to the January 5, 2017 Proposed Decision and addresses legal and equitable arguments raised by LADWP. Staff supports the Committee's additional analysis and conclusions in the Revised Proposed Decision pertaining to LADWP's legal and equitable arguments.

## **II. The Committee correctly determined that the “rules in place” referenced in the RPS statutes refers to the RPS statutory and CEC RPS Eligibility Guidebook rules, not the POU adopted rules.**

Staff supports the Committee's analysis of the RPS statutory references to the “rules in place” in the Revised Proposed Decision. As determined by the Committee, the “rules in place” referenced in Public Utilities Code sections 399.12.6 and 399.16 refer to the RPS

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<sup>1</sup> TN 221308, revised Committee Proposed Decision, dated October 5, 2017 and TN 221388, Corrected Signature Page, which revises the date on the signature page of Revised Proposed Decision from February 24, 2017, to October 5, 2017 (hereinafter collectively referred to as the Revised Proposed Decision).

<sup>2</sup> TN 221308, Revised Proposed Decision, p. 16. The Revised Proposed Decision also acknowledges that the Powerex BC Hydro PPAs allowed for the use of both hydroelectric and non-hydroelectric resources. Refer to TN 221308, footnote 13, pp. 7-8. Refer also to TN 215482, Staff Comments to the January 5, 2017 Proposed Decision, footnote 2, p. 1.

<sup>3</sup> TN 221308, Revised Proposed Decision, p. 20.

<sup>4</sup> Refer to TN 215482, Staff Comments to the January 5, 2017 Proposed Decision, p. 1.

program statutes and CEC RPS Eligibility Guidebook rules, not the local publicly owned electric utility (POU) adopted rules.<sup>5</sup> Staff supports the Committee’s conclusion that a generating facility must therefore meet the statutory definition of an “eligible renewable energy resource” and the requirements of the CEC RPS Eligibility Guidebook in place at the time of contract execution.<sup>6</sup>

**A. The Committee’s Revised Proposed Decision interpretation of the “rules in place” is consistent with the development of the RPS program into a uniform statewide program.**

SBX1-2 subjected POUs to the same RPS certification requirements applicable to retail sellers.<sup>7</sup> As stated in the Revised Proposed Decision there is no distinction between POUs and retail sellers as to what resources are eligible under the RPS program.<sup>8</sup>

As stated by the Committee, prior to SB X1-2, POUs had discretion to establish and enforce their own RPS rules.<sup>9</sup> Unlike retail sellers, which were required to meet their RPS procurement requirements with electricity procured from eligible renewable energy resources certified by the CEC, a POU could establish its own eligibility requirements for renewable resources to meet the POU’s pre-SBX1-2 RPS rules. As a result, the RPS rules for POUs could vary from POU to POU and differ from the requirements applicable to retail sellers.

After SBX1-2, POUs became subject to the same or similar RPS requirements as retail sellers.<sup>10</sup> SBX1-2 requires the governing board of a POU to take actions in order for the POUs to comply with the same or similar requirements applicable to retail sellers including: procurement targets for the same compliance periods applicable to retail sellers;<sup>11</sup> ensuring that quantities of eligible renewable energy resources procured for the first compliance period are equal to the same percentage required of retail sellers;<sup>12</sup> ensuring that the quantities of eligible renewable energy resources procured for all other compliance periods reflect reasonable progress in each of the intervening years sufficient to ensure the same procurement requirements

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<sup>5</sup> TN 221308, Revised Proposed Decision, Conclusions of Law No. 11, p. 35.

<sup>6</sup> TN 221308, Revised Proposed Decision, pp. 8-12, 27-28.

<sup>7</sup> SBX1-2 (Stats. 2011, first ex. Sess., Ch. 1), Public Utilities Code § 399.25. See also TN 213757, Staff Reply to LADWP’s Initial Response, pp. 2-3.

<sup>8</sup> TN 221308, Revised Proposed Decision, pp.14-15.

<sup>9</sup> TN 221308, Revised Proposed Decision, Conclusions of Law No. 2, pp. 34. See also SB 1078 (Stats. 2002, Ch. 561).

<sup>10</sup> TN 221308, Revised Proposed Decision, Conclusions of Law No. 6, pp. 34-35. See also SBX1-2 (Stats. 2011, first ex. Sess., Ch. 1).

<sup>11</sup> Public Utilities Code § 399.30(b); for retail sellers see Public Utilities Code § 399.15(b)(1).

<sup>12</sup> Public Utilities Code § 399.30, subd. (c)(1); for retail sellers see Public Utilities Code § 399.15(b)(2)(B).

applicable to retail sellers;<sup>13</sup> requiring that the POU procure not less than 33 percent of retail sales from eligible renewable energy resources in all subsequent years, the same as retail sellers;<sup>14</sup> and adopting procurement requirements consistent with the procurement requirements for retail sellers under Public Utilities Code section 399.16.<sup>15</sup> Public Utilities Code § 399.30(d) also allowed a POU to adopt excess procurement, delay of timely compliance, and cost limitation measures consistent with those same measures applicable to retail sellers.<sup>16</sup>

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

Public Utilities Code section 399.25(a) (also from SBX1-2) authorizes only the CEC to certify eligible renewable energy resources for the RPS for both retail sellers and POUs. By charging the CEC with sole responsibility for determining which eligible renewable energy resources qualify as a “renewable electrical generation facility” and for certifying such resources as eligible for the RPS, the legislature placed retail sellers and POUs on equal footing and subjected them to one set of rules, the CEC’s rules, for determining which eligible renewable energy resources qualify under the RPS program.

If the “rules in place” provisions of Public Utilities Code sections 399.12.6(a) or 399.16(d) were to be construed, as argued by LADWP, to mean a POU’s rules rather than the CEC’s rules, there would be conflicts in how the law is interpreted and applied throughout the state. There would be one set rules for certifying facilities for retail sellers (the CEC RPS Eligibility Guidebook rules) and different sets of rules for certifying facilities for POUs (those under each POU’s pre-SBX1-2 RPS rules, which at the time could have been as many as 44 sets

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<sup>13</sup> Public Utilities Code § 399.30(c)(2); for retail sellers see Public Utilities Code § 399.15(b)(2)(B).

<sup>14</sup> Former Public Utilities Code § 399.30(c)(2); for retail sellers see Public Utilities Code § 399.15(b)(2)(B).

<sup>15</sup> Public Utilities Code § 399.30(c)(3).

<sup>16</sup> Public Utilities Code § 399.30(d), which references Public Utilities Code §§ 399.13, 399.15(b), and 399.15(c), applicable to retail sellers.

of rules). This would result in a facility possibly having different certification statuses depending on which utility, retail seller or POU, and which particular POU, purchased electricity from the facility.<sup>17</sup>

**B. SBX1-2 provided narrowly tailored exceptions for very few POU resources that meet stringent specified criteria and did not grandfather all procurement eligible under a POU's pre-SBX1-2 RPS rules.**

As the Committee correctly concluded, the Legislature did not grandfather all procurement eligible under a POU's pre-SBX1-2 RPS rules. Instead, the Legislature provided narrowly tailored exceptions for a few of the POUs that meet stringent criteria.<sup>18</sup> These narrowly tailored exceptions are set forth in Public Utilities Code sections 399.30(g), (h), (i), (j), (k), and (l), as well as other provisions from Article 16 (commencing with section 399.11), which allowed for the incorporation of specific resources under specific conditions. The provisions of Public Utilities Code sections 399.30(k) and 399.30(l) were added by the Legislature in subsequent enactments,<sup>19</sup> and thereby further support the position that the legislature did not intend to grandfather all procurement under a POU's pre-SBX1-2 rules. The Legislature's approach under SBX1-2 and the subsequent enactments is apparent from these provisions and does not square with LADWP's interpretation of a wholesale grandfathering of all POU pre-SBX1-2 resources under Public Utilities Code sections 399.12(e)(1)(C) and 399.16(d)(1).

**III. LADWP's renewable energy resources must meet the definition of an "eligible renewable energy resource" under Public Utilities Code section 399.12(e)(1)(C).**

The Committee correctly determined that Public Utilities Code section 399.16(d) requires resources to be "eligible renewable energy resources," even though the Legislature used the term "renewable energy resources" in section 399.16(d)(1).<sup>20</sup> This interpretation is consistent with goals and design of California's RPS program.

As noted in the Revised Proposed Decision, a statute should be construed so that effect is given to all its provisions and no part will be inoperative or superfluous, void or insignificant.<sup>21</sup>

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<sup>17</sup> Refer to TN 215482, Staff Comments to the January 5, 2017 Proposed Decision, p.3.

<sup>18</sup> TN 221308, Revised Proposed Decision, p. 11.

<sup>19</sup> Refer to Senate Bill 591 (Stats. 2013, ch. 520) and Senate Bill 350 (Stats. 2016, ch. 547) as discussed in TN 213757, Staff Reply to LADWP's Initial Response, p. 7.

<sup>20</sup> TN 221308, Revised Proposed Decision, pp. 11-12.

<sup>21</sup> TN 221308, Revised Proposed Decision, p. 16.

Public Utilities Code section 399.12(e) defines an “eligible renewable energy resource” and requires the CEC in subdivision (e)(1)(C) to certify a facility as an eligible renewable energy resource for the RPS if “if the facility is a ‘renewable electrical generation facility’ as defined in Section 25741 of the Public Resources Code.” (Pub. Util. Code, sec. 399.12, subd. (e)(1)(C).) The Committee’s interpretation of Public Utilities Code section 399.12(e)(1)(C) includes the requirement that a resource meet the definition of a “renewable electrical generation facility” from Public Resources Code section 25741. Under this interpretation no words or provisions under Public Utilities Code section 399.12(e)(1)(C) are rendered surplusage and every word included by the Legislature when it passed SBX1-2 is given effect. Additionally, the context of SBX1-2, with the creation of a more uniform statewide RPS program governing retail sellers and POU’s, is given effect as well.

LADWP’s interpretation of Public Utilities Code section 399.12(e)(1)(C) ignores and does not give effect to an entire clause -- “if the facility is a ‘renewable electrical generation facility’ as defined in Section 25741 of the Public Resources Code.” This would not give meaning to every part of the statute and would render an entire clause superfluous.<sup>22</sup>

Furthermore, as Staff noted in its comments to the January 5, 2017 Proposed Decision, LADWP’s interpretation of Public Utilities Code section 399.12(e)(1)(C) would render even more provisions of the statute superfluous. If Public Utilities Code section 399.12(e)(1)(C) were intended to grandfather all POU resources adopted under each POU’s pre-SBX1-2 RPS rules as argued by LADWP, then the provisions of Public Utilities Code sections 399.12(e)(1)(D), 399.30(g), 399.30(h), 399.30(j), 399.30(k) and 399.30(l), which carved out exemptions for specific POU resources, would also be rendered superfluous since these exemptions would grandfather many of the same resources that would have already been grandfathered under Public Utilities Code section 399.12(e)(1)(C).<sup>23</sup> There would have been no need for the Legislature to enact the exemptions for these specific POU resources, because the POU resources would have already been grandfathered by virtue of Public Utilities Code section 399.12(e)(1)(C).

In its comments on the January 5, 2017 Proposed Decision, LADWP argues that the reference in Public Utilities Code section 399.12(e)(1)(C) to Public Resources Code section

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<sup>22</sup> TN 221308, Revised Proposed Decision, pp. 15-16.

<sup>23</sup> Refer to TN 215482, Staff Comments to the January 5, 2017 Proposed Decision, p. 5.



25741 was intended to exclude generation from “large hydroelectric generating facilities as a grandfathered resource under SBX1-2” and that LADWP, unlike other POU, did not treat generation from large hydroelectric facilities as a renewable resource under its pre-SBX1-2 program.<sup>24</sup> Contrary to its assertion, LADWP did treat large hydroelectric generation facilities as an eligible resource under its pre-SBX1-2 program, if “large” includes any hydroelectric generation facility that exceeds the 30 megawatt size limit for “small hydroelectric generation” in Public Resources Code section 25741.<sup>25</sup> LADWP’s pre-SBX1-2 program included as an eligible resource LADWP’s aqueduct hydroelectric generation facilities, which exceeded 30 megawatts in size.<sup>26</sup>

Prior to SBX1-2, at least twenty-one POU, including LADWP, implemented policies or programs pursuant to former Public Utilities Code section 387 that treated large hydroelectric generation facilities greater than 30 MW as an eligible resource under the POU’s policies or programs.<sup>27</sup>

**IV. The BC Hydro facilities do not qualify for RPS certification; therefore LADWP’s BC Hydro REC claims cannot be counted towards LADWP’s RPS procurement requirements.**

**A. The Committee correctly determined that certification of eligible renewable energy resources is exclusively in the Energy Commission’s purview.**

Public Utilities Code section 399.25(a) authorizes only the CEC to certify eligible renewable energy resources for the RPS for both retail sellers and POU.

As Staff noted in its comments on the January 5, 2017 Proposed Decision, if each POU had discretion to determine which renewable resources qualify as an “eligible renewable energy resource” for purposes of the RPS program under SBX1-2, there could be 44 different sets of rules for making this determination; one set of rules for each POU in existence in California at

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<sup>24</sup> TN 215479, LADWP Comments to the Committee Proposed Decision of January 5, 2017, pp. 8-9.

<sup>25</sup> Refer to Public Resources § 25741 (a), which defines a “renewable electrical generation facility” to mean “a facility that meets all of the following criteria: (1) The facility uses . . . small hydroelectric generation of 30 megawatts or less, . . .”

<sup>26</sup> Refer to TN 213391, LADWP City Council File 03-2688 - Treatment of Hydro Facilities in LADWP 2005 RPS Policy. Refer also to TN 213980, Supplemental Declaration of Courtney Smith, paragraphs 7, 8, and 9, and TN 213906, CEC RPS Certificate issued to LADWP’s Middle Gorge Power Plant-Unit 1, TN 213907, CEC RPS Certificate issued to LADWP’s Gorge Power Plant-Unit 1, and TN 213908, CEC RPS Certificate issued to LADWP’s Control Gorge Power Plant-Unit 1.

<sup>27</sup> TN 212421, *The Progress of California’s Publicly Owned Utilities in Implementing Renewables Portfolio Standards*, December 2008, CEC-300-2008-005, Table 1, pp. 12-13.

the time of SBX1-2's passage.<sup>28</sup> SBX1-2 repealed Public Utilities Code section 387 and any discretion the POUs might have had in this regard, and established a single, statewide RPS program applicable to retailer sellers and POUs.<sup>29</sup>

**B. The Committee correctly determined that certification is a prerequisite to applying RECs toward RPS program compliance and therefore LADWP's BC Hydro procurement cannot be counted towards LADWP's RPS procurement obligations.**

As acknowledged by the Committee, LADWP never applied for certification of its BC Hydro facilities.<sup>30</sup> If LADWP wanted to count the procurement of electricity generation from the BC Hydro facilities to satisfy its RPS procurement requirements, either LADWP or Powerex Corp needed to apply to the CEC for RPS certification of the facilities on or before December 31, 2013.

**V. The Revised Proposed Decision correctly addresses LADWP's additional legal and equitable arguments.**

The Revised Proposed Decision correctly addresses the additional legal arguments raised by LADWP in its comments to the January 5, 2017 Proposed Decision regarding the statutory interpretation of Public Utilities Code sections 399.12(e)(1)(C) and 399.16(d), the legislative history supporting the "grandfathering" provisions in these statutes, and the retroactivity of Senate Bill (SB) X1-2, and also correctly addresses LADWP's equity arguments. Staff supports the Committee analysis on these arguments in the Revised Proposed Decision.

**A. The Revised Proposed Decision properly interpreted the provisions of Public Utilities Code sections 399.12(e)(1)(C) and 399.16(d).**

The Revised Proposed Decision properly interpreted Public Utilities Code sections 399.12(e)(1)(C) and 399.16(d) to require that only "eligible renewable energy resources" count towards POU compliance with the RPS, starting with the first compliance period which began January 1, 2011. LADWP argued in its comments to the January 5, 2017 Proposed Decision that

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<sup>28</sup> TN 215482, Staff Comments to the January 5, 2017 Proposed Decision, pp. 5-6.

<sup>29</sup> See TN 213474, Staff Response to the Committee's Order of July 27, 2016, pp. 58-59, and TN 213757, Staff Reply to LADWP's Initial Response, pp. 2-3.

<sup>30</sup> TN 221308, Revised Proposed Decision, p. 8. Refer also to Refer to TN 213980, Supplemental Declaration of Courtney Smith, p. 1, para. 5.

there was not express language in SBX1-2 to support its application before December 10, 2011.<sup>31</sup> SBX1-2 did not affect resources claimed by a POU for purposes of a POU's RPS policies under former Public Utilities Code section 387. It affected resources claimed by a POU for purposes of the RPS under SBX1-2 starting January 1, 2011.

The Revised Proposed Decision properly determined that SBX1-2 applied to the first compliance period beginning January 1, 2011. The language of SBX1-2 clearly evidences a desire by the Legislature that the new RPS procurement requirements under SBX1-2 start on January 1, 2011, even though SBX1-2 did not take effect until December 10, 2011.

The following Public Utilities Code provisions, added by SBX1-2, evidence the Legislature's intent to specifically apply SBX1-2's requirements to the first compliance period which started January 1, 2011:

- Section 399.15(b)(1)(A) specifies that the first RPS compliance period for retail sellers starts on January 1, 2011. Section 399.30(b) specifies that the first RPS compliance period for POUs starts on January 1, 2011.
- Section 399.30(b)(2)(B) specifies that the quantity of eligible renewable energy resources to be procured by retail sellers for the first compliance period between January 1, 2011, and December 31, 2013, shall equal to an average of 20% of retail sales. Section 399.30(c)(1) specifies that the quantity of eligible renewable energy resources to be procured by POUs for the first compliance period between January 1, 2011, and December 31, 2013, shall equal to an average of 20% of retail sales.
- Section 399.16(c) specifies retail seller portfolio balance requirements applicable to contracts executed after June 1, 2010 for each compliance period, including compliance period 1. The requirements of section 399.16(c) apply to the POUs under section 399.30(c)(3).

It should be noted that CEC provided a process and an extended grace period for POUs to certify pre-SBX1-2 resources for the RPS under SBX1-2.<sup>32</sup> This process allowed applications for certification of pre-SBX1-2 resources and stated that if certified, the generation from these facilities could be counted back to January 1, 2011 (even though the applications for certification were submitted to the CEC after SBX1-2 took effect) in order for POUs to comply

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<sup>31</sup> TN 215479, LADWP Comments to the January 5, 2017 Proposed Decision, p.5.

<sup>32</sup> TN 213474 Staff Response to the Committee's Order of July 27, 2016, p.70.

with SBX1-2.<sup>33</sup> This allowed POU's the opportunity to count pre-SBX1-2 resources towards the first compliance period of the new RPS program requirements under SBX1-2, even though a POU would not be applying for certification of these resources until after SBX1-2 took effect. Many POU's took advantage of this process, but LADWP did not with respect to the BC Hydro facilities.

If LADWP wanted to count the procurement of electricity generation from the BC Hydro facilities starting on January 1, 2011 to satisfy its RPS procurement requirements under SBX1-2, either LADWP or Powerex Corp would have needed to apply for RPS certification of the facilities on or before December 31, 2013. As acknowledged by the Committee, neither LADWP nor Powerex applied to the CEC to certify any of the BC Hydro facilities as eligible renewable energy resources.<sup>34</sup>

**B. The Revised Proposed Decision properly considered the legislative history of the “grandfathering” provisions in SBX1-2.**

LADWP argues that the Committee did not properly consider the legislative history LADWP submitted.<sup>35</sup> However, as Staff noted in its Reply Comments to LADWP's Initial Response to the Committee Order of July 27, 2016, the statements in the legislative committee analyses cited by LADWP do not support LADWP's position.<sup>36</sup> These statements do not speak to a POU's policies or programs under Public Utilities Code section 387, or indicate that resources procured under such policies or program would be grandfathered on a wholesale basis, as LADWP argues. Instead, these statements merely recognize that SBX1-2 would excuse the pre-June 1, 2010 contracts of IOUs, ESPs, and POU's from the more rigorous “bucket” requirements specified in Public Utilities Code section 399.16. Under Public Utilities Code section 399.16(d), pre-June 1, 2010 contracts may qualify as “count in full” procurement, provided the contracts are for otherwise eligible renewable energy resources.

The Revised Proposed Decision properly considered and interpreted the legislative history of SBX1-2 when recognizing that SBX1-2 provided narrowly tailored exceptions for pre-SBX1-2 resources that met stringent criteria, rather than adopting a wholesale grandfathering of

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<sup>33</sup> TN 213474 Staff Response to the Committee's Order of July 27, 2016, p.70.

<sup>34</sup> TN 221308, Revised Proposed Decision, p. 8.

<sup>35</sup> TN 215479, LADWP Comments to the January 5, 2017 Proposed Decision, p. 8.

<sup>36</sup> TN 213757, Staff Reply to LADWP's Initial Response, p. 10.

all POU pre-SBX1-2 resources.<sup>37</sup> The Revised Proposed Decision indicates that the Committee considered all the legislative history in the record.<sup>38</sup> In interpreting the statutory provisions at issue, the Committee used the well-established rule of statutory interpretation that when interpreting a statute, the statute should be looked at as a whole<sup>39</sup> and also that effect should be given, if possible, to every clause and word of a statute.<sup>40</sup> The Committee's resulting interpretation is sound, well-reasoned, and is supported by the statutory text and legislative history.

In its comments on the Proposed Revised Decision, LADWP points to language from several legislative committee bill analysis of SBX1-2 to support its argument that the Legislature intended to grandfather all POU pre-SBX1-2 resources.<sup>41</sup> For example, it refers to language in the bill analysis of the Senate Energy, Utilities, and Communication Committee, dated February 15, 2011, which states:

“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’).”<sup>42</sup>

LADWP argues that this language shows that the Legislature intended to grandfather all POU contracts consummated prior to June 1, 2010. The language cited, however, refers to the contract consummated by an “IOU, ESP, or POU.” At the time SBX1-2 was being considered by the Legislature, IOUs and ESPs were already required to meet their RPS procurement requirements using eligible renewable energy resources that satisfied Public Resource Code section 25741.<sup>43</sup> Consequently, there would be no need to “grandfather” an IOU or ESP's contracts in the manner argued by LADWP.

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<sup>37</sup> TN 221308, Revised Proposed Decision, p. 11.

<sup>38</sup> TN 221308, Revised Proposed Decision, p. 13, FN 30.

<sup>39</sup> TN 221308, Revised Proposed Decision, p. 10.

<sup>40</sup> TN 221308, Revised Proposed Decision, p. 16.

<sup>41</sup> TN 221380, LADWP Comments to Revised Proposed Decision, pp. 15-17.

<sup>42</sup> TN 221380, LADWP Comments to Revised Proposed Decision, p. 16.

<sup>43</sup> Refer to Senate Bill 107 (Stats. 2006, ch. 464), effective January 1, 2007. SB 107 amended various provisions in the Public Utilities Code and Public Resources Code, applying the RPS procurement requirements to “retail sellers,” which included electrical corporations (IOUs), community choice aggregators, and electric service providers (ESPs) pursuant to Public Utilities Code section 399.12 (e).

When referring to these legislative committee bill analyses, LADWP misinterprets the RPS procurement requirements for product categories or “buckets.” In its comments on the Revised Proposed Decision, LADWP states:

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 requirement *going forward* from the effective date of the new law . . .”<sup>44</sup>

Contrary to LADWP’s comments, Public Utilities Code section 399.16 (c), as enacted by SBX1-2, makes clear that these bucket requirements apply to procurement associated with “contracts executed after June 1, 2010,” rather than from procurement going forward from the effective date of SBX1-2 (December 10, 2011).<sup>45</sup>

Additionally, LADWP misinterprets the provision of Public Utilities Code section 399.16 (d)(2) applicable to electrical corporations. In its comments to the Revised Proposed Decision LADWP argues that Staff’s interpretation of Public Utilities Code section 399.16(d) does not make sense because it would subject electrical corporations to more than one requirement concerning resource eligibility.<sup>46</sup> LADWP argues that since section 399.16(d) states that contracts executed before June 1, 2010 shall count in full if all listed conditions are met, and one of the listed conditions is for a resource to be eligible and another is for an electrical corporation to have a California Public Utilities Commission-approved contract, then the eligibility condition does not need to be met since the contract approval condition would already have been met and satisfied.<sup>47</sup> Under LADWP’s interpretation, having a statutory provision contain more than one eligibility requirement necessarily makes all but one of the requirements inapplicable. This interpretation ignores the Legislature’s will and authority in creating the RPS program and its requirements. In addition, it ignores the Legislature’s explicit language that contracts executed before June 1, 2010 would count in full “if *all* of the following conditions are met” (emphasis added).<sup>48</sup> The Legislature did not say “if one of the following conditions are met” or “if one or

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<sup>44</sup> TN 221380, LADWP Comments to Revised Proposed Decision, p. 16-17. Refer also to LADWP Comments to Revised Proposed Decision p. 20, where it states “Only *going forward* from the effective date of SBX1-2 would DWP and other POU’s newly executed contracts be subject to Energy Commission accounting and section 399.16 ‘buckets.’”

<sup>45</sup> Refer to Public Utilities Code section 399.16 (c), subd. (1) – (3), all of which specify a June 1, 2010 date.

<sup>46</sup> TN 221380 LADWP Comments to Revised Proposed Decision, p. 23.

<sup>47</sup> TN 221380 LADWP Comments to Revised Proposed Decision, p. 24.

<sup>48</sup> Public Utilities Code section 399.16(d)(2).

more of the following conditions are met.” The statute requires that “all” of the conditions be met in order for contracts executed prior to June 1, 2010 to count in full.

LADWP argues that under Public Utilities Code section 399.16(d) if an electrical corporation’s contract is approved by the California Public Utilities Commission, the electrical corporation does not to demonstrate that the generation facility underlying the approved contract meet the definition of a “renewable electrical generation facility.”<sup>49</sup> LADWP argues that therefore it follows that POU’s should not have to establish eligibility of facilities underlying their approved contracts.<sup>50</sup> However this argument is misguided, because all generating facilities used by an electrical corporation to meet the RPS must be certified by the CEC as an eligible renewable energy resource. Electrical corporations have been subject to this requirement since the inception of the RPS under SB 1078.<sup>51</sup> As stated in the Revised Proposed Decision, certification is a necessary prerequisite for applying RECs towards RPS program compliance.<sup>52</sup>

In its comments on the Revised Proposed Decision, LADWP additionally states that the Legislature, in enacting Public Utilities Code section 399.16 (d)(1) under SBX1-2, was “cognizant” of the Powerex BC Hydro PPAs, and suggests that the Legislature took action to ensure these contracts were not subject to a later question of eligibility based on the requirements of Public Resources Code section 25741 for a “renewable electrical generation facility.”<sup>53</sup> LADWP goes on to give as an example of the Legislature’s action in this regard - the legislative report that the CEC was required to prepare to analyze run-of-river hydroelectric generation facilities in British Columbia (BC).<sup>54</sup> This legislative report was required pursuant to former Public Resources Code section 25741.5, as enacted by SBX1-2, which provided in pertinent part as follows:

(a) By June 30, 2011, after providing public notice and an opportunity for public comment, including holding at least one public workshop, and following consultation with interested government entities, the commission [CEC] shall study and provide a report to the Legislature that analyzes run-of-river hydroelectric generation facilities in British Columbia, including whether these facilities are, or should be, included as renewable electrical generation facilities pursuant to Section 25741 or eligible renewable

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<sup>49</sup> TN 221380 LADWP Comments to Revised Proposed Decision, p. 24.

<sup>50</sup> TN 221380 LADWP Comments to Revised Proposed Decision, p. 24.

<sup>51</sup> Refer to SB 1078 (Stats. 2002, ch. 516), enacting Public Utilities Code section 399.11 et seq.

<sup>52</sup> TN 221308, Revised Proposed Decision, p. 16.

<sup>53</sup> TN 221380, LADWP Comments to Revised Proposed Decision, p. 11.

<sup>54</sup> TN 221380, LADWP Comments to Revised Proposed Decision, pp. 11 - 12.

energy resources pursuant to Article 16 (commencing with Section 399.11) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code.

(Pub. Resources Code, sec. 25741.5, repealed effective January 1, 2015)

The legislative report required by former section 25741.5 was not part of the Legislature's action to excuse BC hydroelectric facilities from the "renewable electrical generation facility" requirements of Public Resources Code section 25741, as LADWP suggests. Section 25741.5 merely required the CEC to analyze and prepare a report with recommendations on BC hydroelectric facilities.<sup>55</sup> Section 25741.5 did not authorize or otherwise permit the CEC to certify the BC hydroelectric facilities for the RPS under SBX1-2. This is true even if the CEC's report had recommended that these BC hydroelectric facilities be included as "renewable electrical generation facilities" for the RPS. Existing law in Public Resources Code section 25741 (a)(2) and (3) already included requirements on the RPS eligibility of out-of-state and out-of-country facilities, which applied to the BC hydroelectric facilities. If the BC hydroelectric facilities did not satisfy these existing requirement in section 25741 (a)(2) and (3), the requirements would need to be amended by the Legislature in order for these facilities to qualify for the RPS under SBX1-2.

LADWP's reliance on section 25741.5 is misplaced. The enactment of section 25741.5 was not part of a plan by the Legislature to excuse BC hydroelectric facilities from the existing requirements of section 25741 for a "renewable electrical generation facilities," but instead was a vehicle for the Legislature to gather additional information on the BC hydroelectric facilities; information it could use at some future date to consider whether or to what extent these facilities could be utilized for the RPS.

Additionally, it should be noted that LADWP's comments on the Revised Proposed Decision leave out critical information concerning the timeline of events regarding the CEC's legislative report on BC hydroelectric facilities, and indicate the report was adopted by the CEC two and one-half years after it was supposed be completed.<sup>56</sup> LADWP neglected to explain in its comments that Public Resources Code section 25741.5 did not take effect until December 10, 2011.<sup>57</sup> This was more than 5 months after the June 30, 2011 due date specified in section

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<sup>55</sup> See also TN 213474, Staff Response to the Committee's Order of July 27, 2016, p. 87 – 88, discussing the findings of the CEC legislative report on BC hydroelectric facilities.

<sup>56</sup> TN 221380, LADWP Comments to Revised Proposed Decision, p. 12.

<sup>57</sup> Refer to SBX1-2 (Stats. of 2011, first ex. sess, ch. 1, sec. 7), enacting Public Resources Code section 25741.5, effective December 10, 2011.



25741.5 for the legislative report. Therefore, the law requiring CEC to study and prepare a report after public notice, an opportunity for comment, at least one workshop, and other consultation requirements, went into effect over five months after the report was due to the Legislature.

**C. It was appropriate for the Committee to reject LADWP's equitable arguments regarding its Powerex BC Hydro PPAs.**

In its comments to the January 5, 2017 Proposed Decision, LADWP argues that a Committee determination that energy procured under the Powerex BC Hydro PPAs cannot be counted towards LADWP's RPS procurement requirements would cause undue prejudice and substantial harm to LADWP and its ratepayers if the determination became final.<sup>58</sup> According to LADWP, it paid over \$46 million dollars for the energy procured under the Powerex BC Hydro PPAs and claimed for RPS compliance period 1, and this economic benefit would be taken away from LADWP's ratepayers if the Committee determination became final.<sup>59</sup> Additionally, LADWP argues that the Committee's failure to provide credit or count LADWP's procurement from the Powerex BC Hydro PPAs could result in a potential penalty in excess of \$22 million from the California Air Resources Board (CARB).<sup>60</sup>

LADWP's argument regarding the loss of economic benefits associated with the energy procured under the Powerex BC Hydro PPAs is overstated, because LADWP was still able to utilize this energy for the very purpose for which it was procured - to comply with LADWP's Pre-SBX1-2 program in accordance with former Public Utilities Code section 387 and provide energy to its customers. As the Committee noted in the Revised Proposed Decision, there is no evidence that the Committee's "rules in place" interpretation impaired LADWP's ability to comply with section 387 or diminished the value of the benefit accrued from its acquisition and use the BC Hydro generation.<sup>61</sup> Nor is there evidence that SBX1-2 or the Committee's interpretation has affected LADWP's pre-SBX1-2 rights and obligations, or impaired the Powerex BC Hydro PPAs in any way.<sup>62</sup>

Moreover, it is premature and too speculative to say at this point in time whether LADWP will or will not be found in noncompliance with the RPS. If it is ultimately determined

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<sup>58</sup> TN 215479, LADWP Comments to January 5, 2017 Proposed Decision, p. 9.

<sup>59</sup> TN 215479, LADWP Comments to January 5, 2017 Proposed Decision, pp. 10-11.

<sup>60</sup> TN 215479, LADWP Comments to January 5, 2017 Proposed Decision, p. 11.

<sup>61</sup> TN 221308, Revised Proposed Decision, pp. 18-19.

<sup>62</sup> TN 221308, Revised Proposed Decision, pp. 19.

that LADWP did not satisfy its RPS procurement requirement for compliance period 1, its under-procurement may nevertheless be excused by the application of cost limitations or other optional compliance measures, as permitted by CEC's Enforcement Procedures for the RPS for POU's (California Code of Regulations, title 20, sections 1240 and 3200 -3208).<sup>63</sup> Furthermore, if LADWP is not excused by the application of an optional compliance measure, and a complaint for noncompliance is initiated against LADWP pursuant to 20 CCR section 1240, LADWP will have an opportunity in its answer to the complaint to raise any mitigating or otherwise pertinent factors related to any alleged violation or to a possible penalty that may be imposed if noncompliance is determined.<sup>64</sup> If a complaint for noncompliance is filed against LADWP, it would be appropriate at that time for LADWP to put forth in its answer any equitable arguments for the CEC to consider in addressing the complaint. This would be the case for any POU subject to a complaint of noncompliance under 20 CCR, section 1240.

Lastly, in Staff's view it was appropriate for the Committee to reject LADWP's equitable arguments regarding the BC Hydro generation, because the RPS eligibility of this generation was not properly presented as an appeal for consideration pursuant to Section VIII.C of the CEC's RPS Eligibility Guidebook, 7<sup>th</sup> Edition. Under Section VIII.C, appeals will be considered only upon a showing that factors other than those described in the guidebook were applied by the CEC in denying or revoking the RPS certification of a facility.<sup>65</sup> However, neither LADWP nor Powerex ever applied to CEC to certify any of the BC Hydro facilities as eligible renewable energy resources for the RPS.<sup>66</sup> Consequently, LADWP had no basis for appeal rights under Section VIII.C of the RPS Eligibility Guidebook, 7<sup>th</sup> Edition, since Staff had denied no applications for RPS certification.

The purpose of the Committee's review under the appeal process in Section VIII.C of the RPS Eligibility Guidebook was to determine whether Staff applied the CEC's adopted rules and requirements for RPS certification correctly. The purpose of this appeal process is not to evaluate the CEC's adopted certification rules and determine whether the rules should be changed and new rules adopted. Yet, this is essentially what LADWP is seeking. Granting LADWP's request for equitable relief to allow the BC Hydro generation to count for LADWP's RPS procurement

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<sup>63</sup> Referenced hereafter as 20 CCR.

<sup>64</sup> Refer to 20 CCR § 1240(d)(1).

<sup>65</sup> TN 213251, RPS Eligibility Guidebook, 7<sup>th</sup> Edition, Section VIII.C, p. 113.

<sup>66</sup> TN 221308, Revised Proposed Decision, p. 8.

obligations would excuse these facilities from the RPS certification requirements and is tantamount to establishing new CEC rules, which goes beyond the scope of the appeal rights contemplated by Section VIII.C of the RPS Eligibility Guidebook.

## **VI. Conclusion**

Staff supports the Committee's Revised Proposed Decision and its analysis of the applicable RPS Program statutes and CEC Guidebook and its decision to not count the RECs from the BC Hydro facilities that LADWP procured under its Powerex BC Hydro PPAs.

Dated this 6th day of October 2017

Respectfully submitted,  
CALIFORNIA ENERGY COMMISSION

*/S/ GABRIEL HERRERA*

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