

## DOCKETED

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Apple Valley Choice Energy

Clean Power Alliance

CleanPowerSF

Desert Community Energy

East Bay Community Energy Authority

Lancaster Choice Energy

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Peninsula Clean Energy

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Redwood Coast Energy Authority

San Jose Clean Energy

Silicon Valley Clean Energy Authority

Sonoma Clean Power

Valley Clean Energy Alliance

February 23, 2018

California Energy Commission

Docket Unit, MS-4

**Re: Docket No. 16-OIR-05**

1516 Ninth Street

Sacramento, CA 95814-5512

**CalCCA Comments on Assembly Bill 1110 Implementation Draft Proposal for Power Source Disclosure**

California Community Choice Association (“CalCCA”) hereby submits its comments on the Revised Assembly Bill 1110 Implementation Proposal for Power Source Disclosure (“Revised Proposal”) filed on January 17, 2018. CalCCA appreciates this opportunity to comment on the Revised Proposal and strongly urges the California Energy Commission (“CEC”) staff to modify the Revised Proposal to ensure that the new regulations do not result in inconsistent, misleading and potentially illegal state regulations and create significant cost increases for California ratepayers.

**I. Introduction**

CalCCA represents the interests of California’s Community Choice Aggregators (“CCAs”) in the legislature and at jurisdictional regulatory agencies, including the CEC. CalCCA’s current operational members include Apple Valley Choice Energy, Clean Power Alliance, CleanPowerSF, Desert Community Energy, East Bay Community Energy, Lancaster Choice Energy, MCE, Monterey Bay Community Power, Peninsula Clean Energy, Pioneer Community Energy, Pico Rivera Innovative Municipal Energy, Redwood Coast Energy Authority, Silicon Valley Clean Energy, Sonoma Clean Power, City of San Jose, and Valley Clean Energy.

CalCCA also has several affiliate members that anticipate becoming operational members soon, including Central Coast Power, City of Corona, City of Hermosa Beach, City of San Jacinto, City of Solana Beach, City of Industry, Coachella Valley Association of Governments, and Western Riverside Council of Governments.

CCA growth and expansion is driving much of the development of renewable energy in California and beyond. Many of CalCCA’s members have developed procurement strategies to exceed the State’s Renewable Portfolio Standard (“RPS”) mandates to achieve Greenhouse Gas (“GHG”) emission reduction targets set by local communities. These procurement strategies have been established in accordance with the rules of the RPS program as well as industry best practices for GHG emission accounting.

**II. CalCCA Supports Several Changes Proposed in the Revised Proposal**

*Advancing local energy choice*

CalCCA appreciates the CEC staff's efforts in soliciting and incorporating changes suggested by stakeholders in the comments on the first draft proposal. Specifically, CalCCA supports the revised treatment of Asset Controlling Supplier ("ACS") resources, and the removal of line loss adjustment factor for imports.

Instead of generally treating ACS resources as unspecified resources,<sup>1</sup> the Revised Proposal allows specified purchases of system power from an ACS to be claimed as the mix of fuel types comprising the ACS' system resources.<sup>2</sup> CalCCA supports this change and appreciates the CEC staff's recognition of the unique GHG emissions factor of ACS resources that can be traced to specified sources. Several CCAs have contracted ACS resources due to their zero- or low-carbon content to meet their local GHG emissions reduction goals. This change is consistent with the procurement strategies of many CCAs, as well as the California Air Resources Board's ("CARB") Mandatory Reporting Requirement ("MRR") program.

In the Revised Proposal, the staff proposed to remove the line loss adjustment for imports.<sup>3</sup> CalCCA supports this decision, and agrees with the staff's rationale that the inclusion of the line loss adjustment factor for imports would have created accounting complexities, inconsistency with other state reporting regimes, as well as confusion for customers.

### **III. CalCCA Continues to Be Concerned with the Treatment of Firmed-and-Shaped Products and Unbundled RECs**

CalCCA is concerned that the proposed treatments of firmed-and-shaped products and unbundled RECs incorrectly accounts for the GHG emissions attributes of these resources. These proposals have significant legal flaws, will disrupt the renewable energy market, and increase costs for ratepayers.

#### **A. Treatment of Firmed-and-Shaped Products**

Firmed-and-shaped products are bundled products in which RECs and energy are transacted together, and GHG emissions intensity disclosure should be based on the electricity purchased from the generator that produced the bundled RECs. Recognizing firmed-and-shaped products' zero-emission attributes is consistent with California statute and the RPS program, as well as the industry standard of GHG emissions accounting protocol.<sup>4</sup> The Revised Proposal correctly recognizes the renewable attributes contained in the RECs for this power by proposing that these transactions qualify as "eligible renewables" in the power mix.<sup>5</sup> In sharp contrast, the staff proposes that the emissions factor of the substitute power that is able to be contractually delivered into California should be used to calculate the GHG emissions of the electricity product, instead of the emissions factor of the specified renewable generator from which the electricity and RECs were sourced.<sup>6</sup>

#### **1. The Revised Proposal Ignores Both the Technical Realities and Market Rules for Power Content Category ("PCC") 2 Transactions, Which Are Intended to Recognize Both Their Energy and Zero-Emission Attributes.**

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<sup>1</sup> 2017 Draft Proposal at page 16.

<sup>2</sup> Revised Proposal at page 22.

<sup>3</sup> Revised Proposal at page 2.

<sup>4</sup> GHG Protocol Scope 2 Guidance: An Amendment to the GHG Protocol Corporate Standard. World Resources Institute.

<sup>5</sup> Revised Proposal at page 21.

<sup>6</sup> *Id.*

First, firm-and-shaped energy and RECs are transacted together because the generators of the RECs cannot directly deliver their energy to a California balancing authority at the exact time the energy is produced. The REC acknowledges the generation of the renewable energy and is defined to include *all* of its environmental attributes, including specifically its lower or zero GHG-emission attribute.<sup>7</sup> The REC contractually tracks the GHG emissions-free attribute of the energy delivered, and must be retired, which prevents double-counting of this attribute. There cannot be double counting of emissions between production and consumption of electricity, due to the fact that direct emissions can only be measured at the point of generation, not at the point of consumption. This is because a single MWh of electricity consumption cannot be directly traced back to the generator (whether delivered by a generator interconnected to a California balancing authority or outside a California balancing authority). Neither electrons nor GHG emissions necessarily follow these boundaries. Instead, electricity contracts and RECs are the only means of tracking the delivery and consumption of energy and GHG attributes.

While the CPUC and CARB have determined that a REC cannot be used as an *emissions reduction credit* (i.e. an offset) under CARB's Cap-and-Trade Program, those decisions were made in the specific context of cap-and-trade. In determining that the avoided GHG emissions attribute would be included in the REC but have a "zero value" as a compliance offset under the cap, the CPUC reasoned that, *within a capped emissions compliance framework*, the generation of new GHG emissions-free electricity does not necessarily result in actual overall emissions reductions by the state, but instead "frees up" allowances for other polluters to use to comply.<sup>8</sup> The CPUC's reasoning was specific to whether the avoided emissions attributes could be used as compliance offsets.<sup>9</sup> The Power Content Label ("PCL"), by contrast, is intended to provide information to consumers about the attributes of the electricity sourced on their behalf.<sup>10</sup> It is not a compliance-based emissions reduction system operating under a fixed cap. A REC is still defined to contain the zero-emission attribute of the electricity generated.<sup>11</sup> This contractual tracking system should be used as the basis for disclosure of the GHG emission intensity of electricity procured to serve California ratepayers.

The Revised Proposal cited the need to use MRR as the basis of the accounting methodology.<sup>12</sup> While MRR data can be used as a foundational database for calculating emissions,

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<sup>7</sup> CPUC Decision 08-08-028 at page 17 ("Other than certain specified exceptions, the REC carries 'all renewable and environmental attributes associated with the production of electricity from the eligible renewable energy resource. . . ' underlying it. *First and foremost, those attributes include lower, low, or no polluting emissions from the generation itself, and independence from the use of fossil fuels for the generation.*") (emphasis added); *see also id.*, Ordering Paragraph 1; Pub. Util. Code §399.12(h) ("Renewable energy credit' includes all renewable and environmental attributes associated with the production of electricity from the eligible renewable energy resource, except for an emissions reduction credit issued pursuant to Section 40709 of the Health and Safety Code and any credits or payments associated with the reduction of solid waste and treatment benefits created by the utilization of biomass or biogas fuels").

<sup>8</sup> CPUC Decision 08-08-028 at page 23; Courtney Smith, Rajinder Sahota, and Edward Randolph, "Public Comment on June 15, 2015 Workshop on RECs, the Oregon Renewable Portfolio Standard, and energy imports into California via the western Energy Imbalance Market," (August 2, 2017), Public Comments on Renewable Energy Certificates Associated with Energy Imported into the California Energy Imbalance Market at page 9, *available at*: <http://www.oregon.gov/energy/energy-oregon/Documents/2017-Public-Comments-RECs-EIM.pdf>.

<sup>9</sup> CPUC Decision 08-08-028 at page 17 (distinguishing between the lower or zero GHG emissions attributes unequivocally included in a REC and the reduction of emissions elsewhere, or avoided emissions included in a REC); *see generally id.* at pages 17-27.

<sup>10</sup> Cal. Pub. Util. Code §398.4(k)(1) ("Each retail supplier shall disclose . . . the greenhouse gas emissions intensity of *any electricity portfolio offered to its retail customers.* . . .") (emphasis added), (k)(2) ("The Energy Commission shall . . . [a]dopt a methodology . . . for the calculation of greenhouse gas emissions intensity *for each purchase of electricity by a retail supplier to serve its retail customers.*") (emphasis added).

<sup>11</sup> CPUC Decision 08-08-028 at page 17.

<sup>12</sup> Revised Proposal at page 5.

fundamentally MRR is intended to measure *source* emissions, as recognized in the Revised Proposal,<sup>13</sup> and does not align with the procurement and *distribution* of emissions in the electricity system. In other words, MRR is a source-based GHG reporting mechanism, whereas the PCL, which is focused on the portfolio of an electricity retailer’s consumer product used to serve retail customers. For these reasons, the Revised Proposal’s treatment of the GHG emissions of firm-ed-and-shaped transactions is flawed and should be revised.

## 2. The Revised Proposal’s Distinction between the GHG Emissions Intensity Accounting and Disclosure Requirements for “Directly Delivered” and “Firm-ed-and-Shaped” Products is Subject to Litigation under the Dormant Commerce Clause.

The Revised Proposal would distinguish the GHG emissions intensity accounting and disclosure requirements for “directly delivered” and “firm-ed-and-shaped” electricity resources on the basis of geography, which is *per se* invalid under the “dormant” Commerce Clause of the U.S. Constitution.<sup>14</sup> The Revised Proposal’s distinctions between “directly delivered” and “firm-ed-and-shaped” sources are all contingent on contractual delivery of electricity into a California balancing authority.<sup>15</sup> Among other geographic distinctions, the Revised Proposal provides that only electricity products imported from outside a California balancing authority must be treated as firm-ed-and-shaped.<sup>16</sup> Thus, even if a facility whose first point of interconnection is with a California balancing authority sells a firm-ed-and-shaped product or otherwise uses substitute power, it would be treated as “directly delivered.”<sup>17</sup> Under this framework, an LSE would disclose the GHG intensity of the renewable generator that produced the contracted-for electricity for a directly delivered procurement, but would be required to disclose the GHG emissions intensity of the substitute electricity necessary to contractually deliver electricity into California for out-of-state firm-ed-and-shaped procurements.<sup>18</sup>

This proposal amounts to discrimination against interstate commerce in violation of the dormant Commerce Clause.<sup>19</sup> The U.S. Supreme Court has “upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State’s nondiscriminatory alternatives will prove unworkable”<sup>20</sup> and that “the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.”<sup>21</sup> Here, there is no legitimate, non-protectionist rationale for this discrimination because there is no actual difference in GHG emissions associated with an out-of-state bundled transaction for RECs and electricity (*i.e.*, a firm-ed-and-shaped procurement) and an in-state bundled transaction (*i.e.* a directly delivered

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<sup>13</sup> *Id.*

<sup>14</sup> See *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (“[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.”) (internal citations omitted); see also, *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) (“Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.”).

<sup>15</sup> Revised Proposal at 20-21; see also *id.* at 16.

<sup>16</sup> Revised Proposal at 20-21.

<sup>17</sup> *Id.* at 20.

<sup>18</sup> *Id.* at 20-21.

<sup>19</sup> See, e.g., *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) (holding that an Ohio law offering a tax credit for in-state ethanol blended into gasoline “impose[d] an economic disadvantage upon out-of-state sellers”).

<sup>20</sup> *Granholm v. Heald*, 544 U.S. 460, 492-493 (2005) (holding that New York’s and Michigan’s justifications for discriminatory wine import laws – keeping alcohol out of the hands of minors and facilitating tax collection – were not legitimate local purposes for which there were no reasonable nondiscriminatory alternatives.).

<sup>21</sup> *New Energy Co.*, 486 U.S. at 271.

procurement).<sup>22</sup> As discussed above, neither electrons nor GHGs track these geographic distinctions. Electrons from a facility with its first point of interconnection with a California balancing authority may actually serve load outside of California. GHG emissions have a global, rather than a local, impact. Instead, contractual obligations determine what constitutes “delivered” electricity and also track the GHG-free attributes of purchased power. The important distinction for California electricity consumers is the GHG emissions intensity of electricity sources procured on their behalf. This measure is tracked on the basis of RECs. Because there is no actual difference in GHG emissions, there is no reason, “apart from their origin,” to treat firm-and-shaped procurements differently from directly delivered ones as the staff has proposed.<sup>23</sup> The Revised Proposal therefore is not “demonstrably justified by a valid factor unrelated to economic protectionism” in violation of the dormant Commerce Clause.<sup>24</sup>

Finally, even if a court could find that this distinction is even-handed and based on a valid, non-protectionist, local rationale, any such local benefits are greatly outweighed by the burden the distinction would impose on out-of-state renewable generators, LSEs, and their customers.<sup>25</sup> These burdens include devaluing GHG-free electricity products (in some cases, for which an LSE has already contracted in compliance with the RPS), requiring incorrect, misleading and confusing disclosures of GHGs that do not tie to the PCL classification of this electricity as “renewable” or to RPS requirements, and the increased costs associated with qualifying out-of-state renewable electricity as directly delivered, such as obtaining a continuous physical transmission path or a dynamic transfer contract, which are not available to all out-of-state generators, or the price premiums associated with procuring GHG-free substitute power.<sup>26</sup> These real and substantial burdens on interstate commerce greatly outweigh any local benefits of the discriminatory proposal, which are tenuous at best. Thus, the Revised Proposal’s distinction between the GHG emissions intensity accounting and disclosure requirements for “directly delivered” and “firm-and-shaped” electricity procurements is subject to litigation risk and could be found to violate the dormant Commerce Clause.

## **B. Treatment of Unbundled RECs**

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<sup>22</sup> See *id.* at 278 (a state may successfully defend a statute that facially discriminates against interstate commerce only “by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives”) Cf. *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1089-1090 (9th Cir. 2013) (finding that the geographic distinction resulting from in California’s implementation of the Low Carbon Fuel Standard were based on actual differences in GHG emission intensity, which was a legitimate, nondiscriminatory reason for the differential treatment of out-of-state ethanol producers).

<sup>23</sup> See *Philadelphia*, 437 U.S. at 627.

<sup>24</sup> See *Healy v. Beer Inst.*, 491 U.S. 324, 340-341 (1989).

<sup>25</sup> See *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 678 (1981) (holding that “the substantiality of the burden on interstate commerce” imposed by Iowa’s prohibition on double tractor-trailers outweighed the state’s safety interest and the deference usually accorded to state highway regulations); *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 891 (1988) (holding that an Ohio tolling statute effectively requiring an out-of-state corporation not registered to do business in Ohio to appoint a resident agent for service of process and to submit to the jurisdiction of Ohio courts imposed a burden on interstate commerce that exceeded any local interest Ohio might have in the statute).

<sup>26</sup> LSEs are limited in their ability to procure carbon-free substitute electricity by transmission rights due to the significant cost burden, as well as the availability of transmission rights, which are typically obtained by large out-of-state generators/energy importers who transact in California.

The staff proposes that unbundled RECs not be included in the GHG emissions intensity calculation, and to be reported separate from the renewable energy categories of the PCL as a footnote to reflect the percentage of associated retail sales.

CalCCA disagrees with this approach and urges the staff to revise the proposal and reflect the retail sales of unbundled RECs based on their associated renewable energy sources. Unbundled RECs are generated by eligible renewable energy resources recognized by the RPS,<sup>27</sup> and contain the associated environmental attributes resulting from the use of the renewable generation.

AB 1110 requires the disclosure of the portion of annual sales derived from unbundled RECs, but it does not provide that unbundled RECs be excluded from the eligible renewables category of the power mix.<sup>28</sup> Excluding unbundled RECs from the eligible renewables category in the PCL portrays an inaccurate emissions profile of purchased electricity by a retailer, which would result in inconsistency with the RPS statute. The generation source type associated with unbundled RECs should be reported in the power mix to recognize the renewable and environmental attributes of these RECs.

### **C. Ratepayer Impacts of the Revised Proposal**

As discussed by several stakeholders in comments on the original AB 1110 implementation proposal, the proposed accounting and disclosure of the GHG emissions intensity of firm-and-shaped transactions would be very confusing to ratepayers. While the “eligible renewable” attributes of this power are recognized and it is therefore counted in this category for the power mix, if the lower or zero GHG emissions associated with this bundled power are not recognized in the PCL, this will be highly confusing to consumers. Moreover, this disparate treatment is misleading because, as discussed above, there is no actual GHG emissions difference between the RECs associated with a bundled transaction with a generator with its first point of interconnection within a California balancing authority and one that is within the firm-and-shaped category.

CalCCA and its members are also highly concerned about the cost impact that will be imposed on all California ratepayers if the CEC adopts the proposed treatments of firm-and-shaped products and unbundled RECs. Because these proposals strip away the zero-emission attribute of these resources that have been purchased at a premium on behalf of California customers, retail suppliers with strong GHG reduction goals, such as CCAs, will be forced to purchase “directly delivered” resources, whose energy and RECs both receive zero-emission treatment under the Revised Proposal. Because PCC 1 resources are significantly more costly than firm-and-shaped resources and unbundled RECs, ratepayers will likely experience significant cost increase as a result, despite the fact that there is no actual, verifiable difference in GHG emissions of the electricity procured.

## **IV. Conclusion**

In summary, CalCCA strongly supports the CEC staff’s recognition of the specified sources included in an ACS’ system mix and the elimination of the transmission loss factor. Unfortunately, however, the Revised Proposal retains some of the significant problems in the 2017 draft. In failing to properly account for the lower or zero GHG emissions attributes of firm-and-shaped transactions, the Revised Proposal relies on flawed reasoning and would discriminate against interstate commerce, create a litigation risk, and confuse, mislead and increase costs to California’s

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<sup>27</sup> § 399.16(b)(3), (c).

<sup>28</sup> Cal. Pub. Util. Code § 398.4(h)(7).

ratepayers. The Revised Proposal also errs in failing to categorize unbundled RECs as eligible renewable resources under the power mix. Based on the foregoing concerns as well as those articulated in stakeholder comments filed on the original draft proposal, CalCCA respectfully requests that the CEC modify the Revised Proposal as follows:

- CEC staff should modify the Revised Proposal so that all types of RECs are reported in the year the REC is be retired.
- Firmed-and-shaped products should be assigned the GHG emissions intensity of the contracted electricity bundled with the RECs, as the RECs associated with those products contain both their renewable energy and GHG emissions attributes.
- The generation source type associated with unbundled RECs should be reported in the power mix to recognize the renewable and environmental attributes of these RECs.

CalCCA believes that these requests are reasonable, consistent with existing California law and the statutory purpose of AB 1110, and will clearly educate consumers about their electricity product without disrupting the electricity market and increasing the cost for California ratepayers.

Sincerely,

Beth Vaughan  
Executive Director  
CalCCA