

DOCKETED	
Docket Number:	18-RPS-01
Project Title:	Complaint Against the Stockton Port District re: RPS Program Compliance
TN #:	225000
Document Title:	Staff Opening Brief to Committee Questions and Issues Identified in the September 7, 2018 Notice
Description:	N/A
Filer:	Patty Paul
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	10/16/2018 4:46:13 PM
Docketed Date:	10/16/2018

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

In the Matter of:

COMPLAINT AGAINST STOCKTON PORT
DISTRICT FOR NONCOMPLIANCE WITH THE
RENEWABLES PORTFOLIO STANDARD

Docket No. 18-RPS-01

**STAFF OPENING BRIEF TO COMMITTEE QUESTIONS AND ISSUES IDENTIFIED
IN THE SEPTEMBER 7, 2018 NOTICE**

Gabriel Herrera
Mona Badie
Chief Counsel's Office
California Energy Commission
1516 9th Street, MS 14
Sacramento, CA 95814
Telephone: (916) 654-3951
Fax: (916) 654-3843
Email: gabe.herrera@energy.ca.gov
Email: mona.badie@energy.ca.gov

Dated: October 16, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION	1
II. BACKGROUND AND SUMMARY	1
III. OPTIONAL COMPLIANCE MEASURES.....	2
A. Optional Compliance Measures: Generous Off-ramps to Compliance	2
1. Cost Limitation Requirements	3
2. Delay of Timely Compliance Requirements	4
B. The Port did not Satisfy the Cost Limitation or Delay of Timely Compliance Optional Compliance Measure Requirements	5
1. The Port did not have any optional compliance measure rules in its Port Procurement Plan as required by section 3206(b) of the RPS Regulations	6
2. There is no evidence the Port adopted optional compliance measure rules at a noticed public meeting as required by section 3206(b) of the RPS Regulations.....	6
3. The remaining cost limitation and delay of timely compliance requirements were partially or fully satisfied and are not at issue in these proceedings.....	7
IV. SUBSTANTIAL COMPLIANCE	9
A. The Legal Standard for Substantial Compliance	9
B. The Port has Not Substantially Complied with Optional Compliance Measure Requirements	10
C. The Requirements at Issue in this Proceeding are Mandatory and Cannot be Reduced to Being Merely Procedural Directory Requirements	16
V. MITIGATING FACTORS.....	19
A. Port's Additional Mitigating Factors	19
B. Applicability of Mitigating Factors in Section 1240	24
C. Staff's Application of Reasonableness Standard	26
D. Authority to Consider Mitigating Circumstances to Excuse Noncompliance	28
E. Recommendation to CARB if Port Excused by Mitigating Circumstances	29
VI. OTHER ISSUES	30
A. Opportunity to Suggest Penalties, As Appropriate	30
VII. CONCLUSION.....	31

TABLE OF AUTHORITIES

Cases

<i>City of San Jose v. Superior Court of Santa Clara County</i> (1974) 12 Cal.3d 447.....	10
<i>Hall v. City of Los Angeles</i> (1941) 19 Cal.2d 198.....	9, 10
<i>International Longshoremen’s and Warehousemen’s Union v. Board of Supervisors</i> (1981) 116 Cal.App.3d 265.....	9
<i>Loehr v. Ventura County Community College District</i> (1983) 147 Cal. App.3d 1071.....	10
<i>Matus v. Board of Administration of California Public Employees’ Retirement System</i> (2009) 177 Cal.App.4 th 598.....	17
<i>People v. McGee</i> (1977) 19 Cal.3d 948.....	17
<i>Stasher v. Harger-Haldeman</i> (1962) 58 Cal.2d 23.....	9

Statutes

Government Code	
§ 54950, et seq. (Ralph M. Brown Act)	21
Harbors and Navigation Code	
§ 6250	21
Public Utilities Code	
§ 399.16(c)	28
§ 399.30(a)	12
§ 399.30(b)	12
§ 399.30(c)	12, 27, 28
§ 399.30(d)	12
§ 399.30(o)	28
§ 399.30(p)	24, 28

Regulations

Cal. Code Regs., tit. 20, § 1240(d)	22, 24
Cal. Code Regs., tit. 20, § 1240(g)	29, 30
Cal. Code Regs., tit. 20, § 1240(h)	30
Cal. Code Regs., tit. 20, § 3206(a)	3, 4, 5, 11
Cal. Code Regs., tit. 20, § 3206(b)	3, 6, 11, 12, 13
Cal. Code Regs., tit. 20, § 3206(d)	22, 24

Cal. Code Regs., tit. 20, § 3206(g)	12
Cal. Code Regs., tit. 20, § 3207(c)	27
Cal. Code Regs., tit. 20, § 3207(d)	4, 27
Cal. Code Regs., tit. 20, § 3207(g)	12

Other Authorities

Senate Bill 2 (also known as X1-2).....	14
Senate Bill 100	24
Senate Bill 1078	12, 13
Legis. Counsel Dig., Sen. Bill 1078 (2001-2002 Reg. Sess.)	13

I. INTRODUCTION

California Energy Commission Staff (“Staff”) are providing this opening brief in response to the Committee’s *Briefing Order* of September 18, 2018, which directs the parties to “file briefs addressing the legal issues identified in the September 7, 2018 Notice of Committee Hearing, discussed at the September 18, 2018 Committee Hearing, and/or which the parties believe are relevant.”¹

II. BACKGROUND AND SUMMARY

The complaint before you alleges that the Stockton Port District (the “Port”) failed to satisfy two separate Renewables Portfolio Standard (“RPS”) procurement requirements for Compliance Period 1, 2011 -2013 (“CP 1”) - the procurement target requirement and the portfolio balance requirement. The complaint also alleges that the Port sought to apply both the cost limitation and delay of timely compliance optional compliance measures towards its procurement target deficit, but did not meet the requirements to do so, and therefore the Port should be found in noncompliance with the RPS for CP 1 and issue a notice violation unless the California Energy Commission (“Commission”) finds that mitigating circumstances allow for waiver of the Port’s noncompliance. The complaint identifies mitigating circumstances for excusing the Port’s procurement deficits and not finding the Port in noncompliance. The Port has identified additional mitigating factors that support a waiver of its noncompliance.

As requested by the Committee, this brief details the requirements applicable to the cost limitation and delay of timely compliance optional compliance measures and explains why the Port has failed to satisfy these requirements. Staff also presents the legal standard for substantial compliance, and explains why the Port has failed to meet it. The brief also discusses the additional factors identified by the Port and whether these factors should be considered “mitigating factors” in excusing the Port’s procurement deficits and alleged noncompliance with the RPS. Additionally, the brief discusses the Commission’s authority to waive or excuse the Port’s noncompliance based on mitigating circumstances.

Lastly, as an additional issue for the Committee to consider, the brief raises the issue of penalties and asks that Staff be given the opportunity to propose suggested penalties, if any,

¹ TN 224754.

against the Port in the event the Commission determines all of the following: 1) that the Port did not comply with its RPS procurement requirements; 2) the Port's procurement deficits are not excused by the application of optional compliance measures; and 3) that the Commission does not have authority to waive or excuse the Port's noncompliance based on mitigating circumstances. Although it Staff's position that the Commission does have authority to waive or excuse noncompliance based on mitigating circumstances, if the Committee determines otherwise, it is appropriate to give Staff an opportunity to suggest penalties against the Port.

III. OPTIONAL COMPLIANCE MEASURES

A. Optional Compliance Measures: Generous Off-Ramps to Compliance

Under the RPS, if a local publicly owned electric utility ("POU") does not meet the procurement requirements of a given compliance period, the POU may apply optional compliance measures to satisfy its RPS procurement requirements and thereby be deemed in compliance with the RPS. These optional off-ramps to compliance are available to POUs contingent on meeting applicable RPS regulatory requirements. The available optional compliance measures include cost limitation and delay of timely compliance.

These are extremely generous off-ramps to compliance. The availability of these off-ramps means that a POU that has failed to meet the RPS procurement requirements has a legally sanctioned means of still being deemed in compliance with the RPS if it satisfies regulatory requirements to apply optional compliance measures to its RPS planning and actions during the compliance period. At its most generous, it would essentially allow a POU to procure zero eligible renewable energy generation during the compliance period and still be deemed in compliance with the RPS if it satisfied the requirements to use either the cost limitation or delay of timely compliance optional compliance measures at any time during the compliance period.

The Port sought to apply both the cost limitation and delay of timely compliance optional compliance measures. The requirements for both can be found in the Commission's regulations, *Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* ("RPS Regulations"),² as detailed below.

² These regulations are codified in the California Code of Regulations, title 20, sections 1240 and 3200 – 3208.

1. Cost Limitation Requirements

In its September 7, 2018 *Notice of Committee Hearing* (“Hearing Notice”), the Committee asked what the elements are for the cost limitation optional compliance measure.³ The cost limitation optional compliance measure requirements are set out in the RPS Regulations, specifically sections 3206 and 3207, and consist of what could be broken down into the following six elements:

(1) The POU’s optional compliance measure rules, adopted at a noticed public meeting, are in place and described in the POU’s renewable energy resources procurement plan or enforcement program for a given compliance period.⁴

(2) The POU’s adopted rules for cost limitations on the procurement expenditures used to comply with its RPS procurement requirements ensure that:

- a. The limitation is set at a level that prevents disproportionate rate impacts;
- b. The costs of all procurement credited toward achieving the RPS are counted toward the limitation; and
- c. Procurement expenditures do not include any indirect expenses including, without limitation, imbalance energy charges, sale of excess energy, decreased generation from existing resources, transmission upgrades, or the costs associated with relicensing any POU-owned hydroelectric facilities.⁵

(3) In adopting its cost limitation rules, the POU relies on:

- a. Its most recent renewables energy resources procurement plan;
- b. Procurement expenditures that approximate the expected cost of building, owning, and operating eligible renewable energy resources; and
- c. The potential that some planned resource additions may be delayed or canceled.⁶

(4) The POU applies only those types of procurement expenditures that are permitted under its adopted cost limitation rule.⁷

³ TN 224659, p. 2, question 1.

⁴ Cal. Code Regs., tit. 20, § 3206, subd. (a) and (b).

⁵ Cal. Code Regs., tit. 20, § 3206, subd. (a)(3)(B)(1)-(3).

⁶ Cal. Code Regs., tit. 20, § 3206, subd. (a)(3)(C)(1)-(3).

⁷ Cal. Code Regs., tit. 20, § 3206, subd. (a)(3)(D).

(5) The POU's adopted cost limitation rules include planned actions to be taken in the event the projected cost of meeting the RPS procurement requirements exceeds its cost limitation.⁸

(6) The POU reports to the Commission the cost limitation in dollars spent during the compliance period; provides the Commission with an estimate of what the total cost for the POU would have been to procure sufficient electricity products to meet its RPS procurement requirements for the compliance period; and reports to the Commission the actions taken in response to RPS procurement expenditures meeting or exceeding the cost limitation.⁹

2. Delay of Timely Compliance Requirements

In its Hearing Notice, the Committee asked what the elements are for the delay of timely compliance optional compliance measure.¹⁰ The delay of timely compliance optional compliance measure requirements are also set out in the RPS Regulations sections 3206 and 3207. For the delay of timely compliance optional compliance measure a POU must show that one or more of the enumerated causes under section 3206(a)(2)(A)(1) – (3) was the case of its delay of timely compliance. Here, the Port presented information responding to the cause of delay under 3206(a)(2)(A)(2)¹¹ so the following are the seven elements for that path:

(1) The POU's optional compliance measure rules, adopted at a noticed public meeting, are in place and described in the POU's renewable energy resources procurement plan or enforcement program for a given compliance period.¹²

(2) The POU's adopted rules permit the POU to make a finding that conditions beyond the control of the POU exist to delay timely compliance with the RPS procurement requirements and the POU demonstrates that it would have met its RPS procurement requirements but for the cause of delay which is one or more of three enumerated causes.¹³

⁸ Cal. Code Regs., tit. 20, § 3206, subd. (a)(3)(E).

⁹ Cal. Code Regs., tit. 20, § 3207, subd. (d)(6)(A).

¹⁰ TN 224659, p. 2, question 1.

¹¹ "Permitting, interconnection, or other circumstances have delayed procured eligible renewable resource projects, or there was insufficient supply of eligible renewable energy resources available to the POU."

¹² Cal. Code Regs., tit. 20, § 3206, subd. (a) and (b).

¹³ Cal. Code Regs., tit. 20, § 3206, subd. (a)(2)(A).

(3) Permitting, interconnection, or other circumstances delayed procured eligible renewable energy resource projects, or there is an insufficient supply of eligible renewable energy resources available to the POU.¹⁴

(4) The POU prudently managed portfolio risks, including, but not limited to, holding solicitations for RPS-eligible resources with outreach to market participants and relying on a sufficient number of viable projects to achieve RPS procurement requirements.¹⁵

(5) The POU sought to develop either its own eligible renewable energy resources, transmission to interconnect to eligible renewable energy resources, or energy storage used to integrate eligible renewable energy resources.¹⁶

(6) The POU procured an appropriate minimum margin of procurement above the level necessary to comply with the RPS to compensate for foreseeable delays or insufficient supply.¹⁷

(7) The POU took reasonable measures to procure cost-effective distributed generation and allowable unbundled RECs.¹⁸

B. The Port Did Not Satisfy the Cost Limitation or Delay of Timely Compliance Optional Compliance Measure Requirements.

In its Hearing Notice, the Committee asked whether the Port complied with the elements of the cost limitation and delay of timely compliance optional compliance measures and which elements were complied with fully or partially, and what the supporting facts are for these conclusions.¹⁹ As shown below, the Port failed to meet the regulatory requirements described above, and therefore cannot apply the cost limitation or delay of timely compliance optional compliance measures towards its RPS procurement requirements for CP 1.

The first requirement for both the cost limitation and delay of timely compliance is the same. It requires that a POU's optional compliance measure rules be adopted at a noticed public meeting, in place, and described in the POU's renewable energy resources procurement plan or enforcement program for a given compliance period if the POU wants to rely on them to satisfy

¹⁴ Cal. Code Regs., tit. 20, § 3206, subd. (a)(2)(A)(2).

¹⁵ Cal. Code Regs., tit. 20, § 3206, subd. (a)(2)(A)(2)(i).

¹⁶ Cal. Code Regs., tit. 20, § 3206, subd. (a)(2)(A)(2)(ii).

¹⁷ Cal. Code Regs., tit. 20, § 3206, subd. (a)(2)(A)(2)(iii).

¹⁸ Cal. Code Regs., tit. 20, § 3206, subd. (a)(2)(A)(2)(iv).

¹⁹ TN 224659, p. 2, questions 1 and 2.

its RPS procurement requirements.²⁰ As shown below, this requirement was not satisfied by the Port, fully or partially. The evidence shows there were no optional compliance measure rules in a Port renewable energy resources procurement plan or enforcement program during CP 1 and no optional compliance measure rules were adopted by the Port at a noticed public meeting or otherwise. The remaining requirements for both optional compliance measures were partially or fully satisfied and are not at issue.

1. The Port did not have any optional compliance measure rules in its Port Procurement Plan as required by section 3206(b) of the RPS Regulations.

The *Joint Statement of Stipulated Facts and Remaining Contested Factual Issues* (“Joint Facts”) filed by the parties shows that the Port’s Renewable Resources Procurement Plan dated November 20, 2012²¹ (“Port Procurement Plan”) in effect during CP 1, does not include any mention of optional compliance measures in it. Furthermore, there is no evidence that the Port had an RPS enforcement program in place during CP 1.

In paragraph 5 of the Joint Facts filed by the parties, the Port agrees that the Port Procurement Plan “does not describe or otherwise include RPS optional compliance measures such as a delay of timely compliance or a cost limitation.”²² There is no evidence the Port had an enforcement program during CP 1. And per the Port, the Port Procurement Plan was the only procurement plan the Port had during CP 1.²³ Indeed, in paragraph 6 of the Joint Facts, the Port acknowledges that “the Port did not have a renewable energy resources procurement plan or enforcement program in place during CP 1 describing RPS optional compliance measures such as a delay of timely compliance or a cost limitation.”²⁴

2. There is no evidence the Port adopted its Port Procurement Plan or any optional compliance measure rules at a noticed public meeting as required by section 3206(b) of the RPS Regulations.

²⁰ Cal. Code Regs., tit. 20, § 3206, subd. (b).

²¹ Exhibit 2005, TN 224692, Bates Nos. 142-152.

²² Exhibit 2011, TN 224172, p. 3.

²³ Exhibit 2005, TN 224692, Bates No. 204, Port’s Response to Staff’s September 5, 2017 Data Request.

²⁴ Exhibit 2011; TN 224172, p. 3.

During Staff's evaluation of the Port's application of optional compliance measures, Staff made a data request dated September 5, 2017, which asked, "Did the Port adopt its RPS procurement plans under resolution? If so, please submit a copy of the final resolutions under which they were adopted. If not, how were the RPS procurement plans approved by the Port's governing board? (If there are minutes, or any other documentation showing adoption, please provide)."²⁵ The Port responded by directing Staff to Resolution 7681²⁶ and stated that the plan was made available to the Port's tenants in late November 2012 through a notice to tenants, and there was a public meeting to go over the plan and receive comments on December 20, 2012.²⁷ However, in the Joint Facts, paragraph 1, the Port admits that Resolution 7681 does not include any items related to a renewable energy resources procurement plan or enforcement program, the RPS, or RPS optional compliance measures such as a cost limitation.²⁸ And in the Joint Facts, paragraph 2, the Port admits that the "December 20, 2012 public meeting was not a meeting of the Port Board of Commissioners" and, at the meeting, "the Port Board of Commissioners did not take any action in the form of an adopted resolution, ordinance or otherwise take formal action related to a renewable energy resource procurement plan or enforcement program, the RPS, or RPS optional compliance measures."²⁹

Furthermore, paragraphs 7 and 8 of the Joint Facts acknowledge that the Port Board of Commissioners ("Port Commission"), the governing board for the Port, did not take any additional action on or before December 31, 2013 (which is the final day of CP 1) in the form of an adopted resolution, ordinance, or otherwise take formal action regarding a delay of timely compliance or cost limitation optional compliance measure for RPS CP 1,³⁰ further confirming the Port did not adopt any optional compliance measure rules at a noticed public meeting during CP 1.

3. The remaining cost limitation and delay of timely compliance requirements were partially or fully satisfied and are not at issue in these proceedings.

²⁵ Exhibit 2005; TN 224692, Bates No. 204.

²⁶ See Exhibit 2005; TN 224692, Bates No. 138.

²⁷ Exhibit 2005; TN 224692, Bates No. 204.

²⁸ Exhibit 2011, TN 224172, p. 1.

²⁹ Exhibit 2011; TN 224172, p. 2.

³⁰ Exhibit 2011; TN 224172, p. 3.

As to the remaining cost limitation requirements, numbers (2) - (6) detailed above, Staff found that the Port could be said to have partially satisfied these requirements in relation to its general rate cap and reserve policy, but since the Port did not have adopted RPS cost limitation optional compliance rules, none of the elements of these requirements were fully met.³¹

The closest thing that the Port had to an RPS cost limitation was a general rate cap and reserve policy that applied to the entire Port budget. The Port provided documentation of its general rate setting and reserve policies and procedures, which it called a cost limitation in the context of communicating with Staff regarding its application of RPS optional compliance measures.³² However, this rate cap and reserve policy, with a rate cap of 95 percent of PG&E's rates and a minimum reserve of 10 percent, was established policy prior to and independently of the RPS and appears to apply to its entire budget, not just RPS implementation.³³ In the Port's Supplemental Compliance Report Response to Commission Data Request Dated July 19, 2017, the Port states "the Port of Stockton's Governing Board has a long-standing policy that the electric rates for Port customers should be less than the comparable rates for PG&E.... In addition to meeting these rate goals, the Port must also maintain certain levels of reserves."³⁴ Staff evaluated the cost limitation requirements against the general rate cap and reserve policy, but the analysis found the requirements were only partially met since there was no actual RPS cost limitation optional compliance measure.³⁵

As to the remaining delay of timely compliance requirements, numbers (2) – (7) detailed above, Staff found that the Port met these requirements for CP 1.³⁶

Since Staff's evaluation of requirements 2-6 of the cost limitation optional compliance measure and 2-7 of the delay of timely compliance optional compliance measure do not appear to be at issue in these proceedings,³⁷ further discussion beyond what is contained in Staff's Evaluation of the Port of Stockton's Applied Optional Compliance Measures is not warranted at this time.

³¹ Exhibit 2005, TN 224692, Bates Nos. 130-133.

³² See Exhibit 2005, TN 224692, Bates Nos. 197-201 and 204-206.

³³ See Exhibit 2005; TN 224692, Bates No. 198.

³⁴ Exhibit 2005; TN 224692, Bates Nos. 197-198.

³⁵ See Evaluation of the Port of Stockton's Applied Optional Compliance Measures included in Exhibit 2005, TN 224692, Bates Nos. 128-136.

³⁶ See Exhibit 2005, TN 224692, Bates Nos. 134-136.

³⁷ See Port Response, TN 223100, p. 3.

IV. SUBSTANTIAL COMPLIANCE

A. The Legal Standard for Substantial Compliance

In its Hearing Notice, the Committee asked what legal standard should be used to determine whether the Port's actions constitute substantial compliance.³⁸ The doctrine of substantial compliance has been defined and applied by the courts. The courts define substantial compliance as compliance with the substance essential to every reasonable objective or requirement of the statute. Courts, however, will not apply the doctrine of substantial compliance if there is an entire failure to comply with a particular statutory objective or requirement.

The California Supreme Court defines substantial compliance as "actual compliance in respect to the substance essential to every reasonable objective of the statute."³⁹ It has similarly held that "a defect in the form of compliance is not fatal so long as there is substantial compliance with the essentials of the requirement."⁴⁰

In cases where there has been an entire failure to comply with a particular objective or requirement in the statute, the courts have not found substantial compliance.

In *International Longshoremen's and Warehousemen's Union v. Board of Supervisors*, the Fourth District Court of Appeal held that substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute," and when there is "actual compliance as to all matters of substance then mere technical imperfections of form" should not result in noncompliance.⁴¹ In *International Longshoremen's*, plaintiffs filed an action to set aside an emission standard amendment because it violated CEQA.⁴² The court held that the defendant's CEQA notice was not in substantial compliance with CEQA because the deficiencies in the notice were not just technical imperfections, they were "matters of substance."⁴³

³⁸ TN 224659, pp. 1-2, question 3.

³⁹ *Stasher v. Harger-Haldeman* (1962) 58 Cal.2d 23, 29.

⁴⁰ *Hall v. City of Los Angeles* (1941) 19 Cal.2d 198, 202.

⁴¹ *International Longshoremen's and Warehousemen's Union v. Board of Supervisors* (1981) 116 Cal.App.3d 265, 273.

⁴² *Id.* at 268.

⁴³ *Id.* at 273. The court finding that the project description was deficient; the notice failed to state that the project was determined to be exempt; the notice didn't provide the guidelines citation or give a statement of reasons to support a finding of exemption. *Id.*

Furthermore, in *Hall v. City of Los Angeles*, the California Supreme Court acknowledged that courts have “held that a defect in the form of compliance is not fatal so long as there is substantial compliance with the essentials of the requirement.”⁴⁴ In *Hall*, Plaintiff appealed from a judgment dismissing her personal injury action.⁴⁵ The dismissal was upheld due to her failure to comply with the claims requirement to specify the location of the accident in her claim.⁴⁶ In finding there was an “entire failure . . . to comply with one of the mandates of the statute,” the court held that “[s]ubstantial compliance cannot be predicated upon no compliance” and did not apply the doctrine of substantial compliance.⁴⁷

Similarly, in *Loehr v. Ventura County Community College District*, the court held that the doctrine of substantial compliance “cannot cure total omission of an essential element.”⁴⁸ In *Loehr*, a former employee of defendant sued for wrongful termination and reinstatement.⁴⁹ The court held that “even a cursory reading” of the letter plaintiff alleged constituted his timely claim “demonstrates that it fails to satisfy the test of substantial compliance.”⁵⁰

B. The Port has not Substantially Complied with Optional Compliance Measure Requirements

In its Hearing Notice, the Committee asked the parties, in “[a]pplying the facts in the record to the standard, explain why or why not the Port’s actions meet the applicable legal standards for substantial compliance.”⁵¹

Under the case law as described above, substantial compliance cannot be found when there is no compliance with an essential element or objective of the requirements. The RPS Regulations require a POU to adopt its optional compliance measure rules if it wants to use them

⁴⁴ *Hall v. City of Los Angeles* (1941) 19 Cal.2d 198, 202. See also *City of San Jose v. Superior Court of Santa Clara County* (1974) 12 Cal.3d 447, 456 (only where there has been “[s]ome compliance with all the required elements – but compliance has been [d]efective”, will the test of substantial compliance control. When there has been a “failure to comply entirely with a particular statutory requirement . . . the more liberal test of substantial compliance has not been applied – the courts recognizing ‘(s)ubstantial compliance cannot be predicated on no compliance.’”).

⁴⁵ *Id.* at 200.

⁴⁶ *Id.* at 203.

⁴⁷ *Id.* at 202.

⁴⁸ *Loehr v. Ventura County Community College District* (1983) 147 Cal. App.3d 1071, 1083.

⁴⁹ *Id.* at 1076.

⁵⁰ *Id.* at 1083.

⁵¹ TN 224659, p. 3, question 4.

to satisfy its RPS procurement requirements. Additionally, the RPS Regulations require that optional compliance measure rules be in a POU's adopted renewable energy resources procurement plan or enforcement program for a given compliance period in order to be able to rely on them to satisfy or delay its RPS procurement requirements.⁵² Based on the facts in the record, the Port's actions do not meet the legal standard for substantial compliance. The Port has not met two essential elements of the regulatory requirements and objectives thereunder. Therefore, under the case law, the Port cannot be found to have substantially complied with optional compliance measure requirements.

Under the RPS Regulations, one essential requirement and objective of the optional compliance measure provisions is that a POU adopt its optional compliance measure rules if it wants to use them to satisfy its RPS procurement requirements. The regulatory provisions concerning optional compliance measures is replete with references to adopted optional compliance measure rules indicating the importance of this requirement. Sections 3206(a), 3206(b), and 3206(g) all use the words adopt, adoption, adopting or adopted when referencing a POU's optional compliance measure rules.

Section 3206(a) contains numerous references to POU adoption. Section 3206(a) states that "[i]n meeting its RPS procurement requirements, the governing board of a POU may adopt at a noticed public meeting any of the following [optional compliance] measures."⁵³ And section 3206(a)(2)(A) states that "[a] POU may adopt rules permitting the POU to make a finding that conditions beyond the control of the POU exist to delay the timely compliance with the RPS procurement requirements...."⁵⁴ In addition, section 3206(a)(3) governing cost limitation contains the following provisions -- section 3206(a)(3)(A): "A POU may adopt rules for cost limitations on the procurement expenditures used to comply with its RPS procurement requirements"; section 3206(a)(3)(C): "In adopting cost limitation rules, the POU shall rely on the following"; section 3206(a)(3)(D): "When applying procurement expenditures under an adopted cost limitation rule, the POU shall apply only those types of procurement expenditures that are permitted under the adopted cost limitation rule"; and section 3206(a)(3)(E): "Adopted cost limitation rules shall include...."⁵⁵

⁵² Cal. Code Regs., tit. 20, § 3206(b).

⁵³ Cal. Code Regs., tit. 20, § 3206, subd. (a)(2)(A) (emphasis added).

⁵⁴ Cal. Code Regs., tit. 20, § 3206, subd. (a)(2)(A) (emphasis added).

⁵⁵ Cal. Code Regs., tit. 20, § 3206, subd. (a)(3) (emphasis added).

Additionally, section 3206(b) requires that “[r]ules adopted under this section 3206 shall be in place and described in a POU’s renewable energy resources procurement plan or enforcement program for a given compliance period if the POU intends to rely on these rules to satisfy or delay its RPS procurement requirements. The Commission may, when hearing a complaint against a POU under section 1240, consider the date of adoption of any rules adopted pursuant to this section that the POU relied upon to satisfy or delay its RPS procurement requirements.”⁵⁶

Furthermore, section 3206(g) states: “In determining a POU’s compliance with the RPS procurement requirements, the Commission will not consider the application of any rule or rule revision adopted by a POU under section 3206 that the Commission determines does not comply with Public Utilities Code section 399.30, these regulations, or any applicable order or decision adopted by the Commission pertaining to the RPS.”⁵⁷

Therefore, Staff is rightly requiring that the Port’s purported optional compliance measure rules be adopted for them to be used as an off-ramp to compliance.

Additionally, under the main statutory section governing RPS compliance by POU’s, POU actions are described and required in the context of adoption by its governing board. Public Utilities Code section 399.30(a) states “each local publicly owned electric utility shall adopt and implement a renewable energy resources procurement plan”⁵⁸ While section 399.30(b) states that the “governing board shall implement procurement targets”,⁵⁹ and section 399.30(c) requires that the “governing board of a locally publicly owned electric utility. . . adopt procurement requirements”⁶⁰ Furthermore, section 399.30(d), which governs the application of optional compliance measures by POU’s, states that the “governing board of a local publicly owned electric utility may adopt” the specified optional compliance measures.⁶¹

Indeed, the significance of POU governing body participation has been part of the RPS since its inception. Senate Bill 1078⁶² (SB 1078), which first established the RPS in 2002, added section 387 to the Public Utilities Code requiring that “[e]ach governing body of a local publicly

⁵⁶ Cal. Code Regs., tit. 20, § 3206, subd. (b) (emphasis added).

⁵⁷ Cal. Code Regs., tit. 20, § 3206, subd. (g) (emphasis added).

⁵⁸ Pub. Util. Code §399.30(a) (emphasis added).

⁵⁹ Pub. Util. Code §399.30(b) (emphasis added).

⁶⁰ Pub. Util. Code §399.30(c) (emphasis added).

⁶¹ Pub. Util. Code §399.30(d) (emphasis added).

⁶² Senate Bill 1078 (2001-2002 Reg. Sess.)

owned electric utility . . . shall be responsible for implanting and enforcing a renewables portfolio standard”⁶³ The Legislative Counsel Digest also stated that SB 1078 “would require the governing board of a local publicly owned electric utility to be responsible for implementing and enforcing a renewables portfolio standard....”⁶⁴

Creating a renewables portfolio on the scale required in California takes significant time, effort, and planning on the part of all electric service providers. Therefore, it is reasonable that the legislature would recognize the importance of having a POU’s governing body make any necessary procurement planning decisions, including how a POU could implement any available off-ramps towards compliance. Requiring POU adoption necessarily requires that RPS decisions are considered, deliberated, and made at the highest levels of POU governance and in a public transparent process.

A second essential requirement for the application of optional compliance measures is section 3206(b) of the RPS Regulations, which requires that optional compliance measure rules “be in place and described in a POU’s renewable energy resources procurement plan or enforcement program for a given compliance period if the POU intends to rely on these rules to satisfy or delay its RPS procurement requirements.”⁶⁵

As discussed in Section III above, there is no evidence in the record that any optional compliance measures were adopted by the Port in, or even separate and apart from, a noticed public meeting. Furthermore, the Port Procurement Plan does not include any optional compliance measure rules. Since the Port has not met the essential elements and objectives of the regulatory requirements, substantial compliance cannot be found.

In the Port of Stockton Response to Committee Response to Staff Motion to Bifurcate and Order for Additional Information dated March 30, 2018, the Port acknowledges that the “Port’s RPS Procurement Plan does not expressly reference a cost limitation or delay of timely compliance provision.”⁶⁶ Instead, the Port stated that the following five items constitute either full or substantial compliance:

- (1) The Port’s delegation of authority to the Port Director pursuant to Resolution #7681;
- (2) The Port’s public meeting on December 20, 2012 presenting its RPS Procurement Plan;

⁶³ Senate Bill 1078 (2001-2002 Reg. Sess. §3 adding Pub. Util. Code §387) (emphasis added).

⁶⁴ Legis. Counsel Dig., Sen. Bill 1078 (2001-2002 Reg. Sess.) p. 3 (emphasis added).

⁶⁵ Cal. Code Regs., tit. 20, § 3206, subd (b).

⁶⁶ TN 223100, p. 4.

- (3) The content of the RPS Procurement Plan;
- (4) The Port Staff discussion of the RPS and compliance options made to the Port Commission during the Port Commission meeting adopting the Port's Budget (which Staff assumes refers to the Port's 2013/2014 fiscal year budget); and
- (5) the Port Commission adoption of the 2013/14 Port Budget.

The Port's arguments concerning item (1), the Port's delegation of authority to the Port Director pursuant to Resolution #7681, are negated by paragraph 1 of the Joint Facts where the Port admits that Resolution 7681 does not include any items related to a renewable energy resources procurement plan or enforcement program, the RPS, or RPS optional compliance measures such as a cost limitation.⁶⁷ Indeed, when you review resolution 7681, its primary concern is electricity rates and an electrical service provision agreement.⁶⁸ Additionally, Resolution #7681 is purported to have been considered and acted upon by the Port Commission in August 2010, the year prior to the enactment of Senate Bill X1-2,⁶⁹ which first applied the optional compliance measures to POUs.

The Port's arguments regarding item (2), the Port's public meeting on December 20, 2012, presenting its RPS Procurement Plan, are also negated by the Joint Facts. In paragraph 2 the Port admits that the "December 20, 2012 public meeting was not a meeting of the Port Board of Commissioners," and at the meeting "the Port Board of Commissioners did not take any action in the form of an adopted resolution ordinance or otherwise take formal action related to a renewable energy resource procurement plan or enforcement program, the RPS, or RPS optional compliance measures."⁷⁰

And as to item (3), the content of the RPS Procurement Plan, as previously stated in the Joint Facts, the Port agrees that the Port Procurement Plan "does not describe or otherwise include RPS optional compliance measures such as a delay of timely compliance or a cost limitation" and "the Port did not have a renewable energy resources procurement plan or enforcement program in place during RPS CP 1 describing RPS optional compliance measures such as a delay of timely compliance or a cost limitation."⁷¹

⁶⁷ Exhibit 2011; TN 224172, p. 1.

⁶⁸ Exhibit 2005; TN 224692, Bates No. 138.

⁶⁹ Senate Bill 2 (2011-2012, 1st Ex. Sess.).

⁷⁰ Exhibit 2011; TN 224172, p. 2.

⁷¹ Exhibit 2011; TN 224172, p. 3, pars. 5 and 6.

The Port's position regarding item (4), the Port Staff discussion of the RPS and compliance options made to the Port Commission during the Port Commission meeting adopting the Port's Budget, is also contrary to the Joint Facts wherein the Port stipulated in paragraph 3 that the agenda for the Port Board of Commissioners' meeting where it considered and approved the budget, "does not include a renewable energy resource procurement plan or enforcement program, the RPS, or RPS optional compliance measures such as a delay of timely compliance or a cost limitation" and the Port Board of Commissioners "did not take action, in the form of an adopted resolution, ordinance or otherwise, at its June 3, 2013 meeting to adopt or approve a renewable energy resource procurement plan or enforcement program or RPS optional compliance measures such as a delay of timely compliance or a cost limitation."⁷²

Furthermore, the declarations of Chris Kiriakou and Steve Escobar do not substantiate the factual assertion that there was a discussion of the RPS and optional compliance options during the Port Commission meeting adopting the Port's 2013/2014 fiscal year budget on June 3, 2013. The declarations indicate guidance was provided to declarants concerning rates being below PG&E's, but nothing in relation to the RPS or a cost limitation optional compliance measure. In his declaration, Chris Kiriakou states that he received "verbal guidance" from Port Commissioners "to ensure Port rates were lower than comparable rates offered by PG&E by a sufficient amount and that the Port must build up an operating reserve."⁷³ In his declaration, Steve Escobar states that he received "clear guidance" in the form of "verbal communications that the Port's electric rates must be lower than the rates offered by Pacific Gas and Electric Company by a sufficient amount and that the Port must build up sufficient operating reserves in order for the Port to continue to operate its electric utility."⁷⁴ Additionally, in his declaration, Steve Escobar states that during the June 3, 2013 Port Commission Meeting he described the RPS requirements to Port Commissioners, but he does not indicate that there were any discussions with Port Commissioners regarding optional compliance measures including delay of timely compliance and cost limitations, or that he received any guidance or direction from the Commissioners regarding optional compliance measures.⁷⁵ Also, both declarations state that the

⁷² Exhibit 2011; TN 224172, pp. 2-3, par. 3.

⁷³ Exhibit 1003; TN 2231790, p. 2, par. 8.

⁷⁴ Exhibit 1004; TN 223791, p. 1, par. 5.

⁷⁵ Exhibit 1004; TN 223791, p. 2, par. 8.

verbal communications occurred prior to June 3, 2013, which was the date of the meeting and purported approval of the Port's 2013/2014 fiscal year budget.

Regarding item (5), the Port Commission adoption of the 2013/14 Port Budget, in the Joint Facts the Port stipulated in paragraph 3 that "[a]part from the budget item for the Rough & Ready Solar Power Plant, the Port Budget for Fiscal Year 2013 – 2014 does not include any items or discussion related to the RPS, a renewable energy resource procurement plan or enforcement program, or RPS optional compliance measures such as a delay of timely compliance or a cost limitation."⁷⁶ Moreover, in the Joint Facts the Port also stipulated in paragraph 3 that the agenda for the Port Board of Commissioners' meeting where it considered and approved the budget, "does not include a renewable energy resource procurement plan or enforcement program, the RPS, or RPS optional compliance measures such as a delay of timely compliance or a cost limitation," and the Port Board of Commissioners "did not take action, in the form of an adopted resolution, ordinance or otherwise, at its June 3, 2013 meeting to adopt or approve a renewable energy resource procurement plan or enforcement program or RPS optional compliance measures such as a delay of timely compliance or a cost limitation."⁷⁷ Therefore, this item does not support full or substantial compliance with optional compliance measure requirements as argued by the Port.

It should be noted that the evidence the Port has put forward only appears to address the cost limitation optional compliance measure, not the delay of timely compliance optional compliance measure.

C. The Requirements at Issue in this Proceeding are Mandatory and Cannot be Reduced to Being Merely Procedural Directory Requirements.

In its Hearing Notice, the Committee asked whether the procedural requirement for the adoption of optional compliance measure rules is directory, rather than mandatory, rendering substantial compliance available as a defense for the Port.⁷⁸

The difference between mandatory and directory requirements has been defined by the courts and is most commonly used in the context of procedural requirements.

⁷⁶ Exhibit 2011; TN 224172, p. 2, par. 3.

⁷⁷ Exhibit 2011; TN 224172, pp. 2-3, par. 3.

⁷⁸ TN 224659, pp. 1-2, question 3.

In the case of *People v. McGee*, the California Supreme Court has held that the distinction of whether a requirement is directory or mandatory turns on whether an entity's failure to meet the requirement has an invalidating effect on that entity's subsequent action.⁷⁹ The Court stated that if the failure is determined to have an invalidating effect, the requirement is mandatory and if the failure does not invalidate the subsequent action, the requirement is directory.⁸⁰ The Court went on to note that in order to determine whether a statutory provision is mandatory or directory the court must ascertain the legislative intent and "[i]n the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and the character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time."⁸¹ The Court also held that when statutory procedures are intended for a citizen's protection they are mandatory, not directory.⁸² In *McGee*, defendants appealed their fraud conviction alleging that the state failed to seek restitution before bringing its charges, which was a mandatory prerequisite.⁸³ The court found the requirement to be mandatory due to its analysis of the legislative intent behind the requirement and its purpose to protect those accused of welfare fraud,⁸⁴ and since the state did not seek restitution before bringing certain charges, the conviction judgment was reversed as to those charges.⁸⁵

In *Matus v. CalPERS*, the court similarly held that a directory or mandatory designation turns on "whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates."⁸⁶ In making this determination, courts look to legislative intent behind the procedure's purpose or function.⁸⁷ "If the procedure is essential to promote the statutory design, it is 'mandatory' and noncompliance has an invalidating effect. If not, it is directory."⁸⁸ The court also looked to the

⁷⁹ *People v. McGee* (1977) 19 Cal.3d 948, 958.

⁸⁰ *Id.*

⁸¹ *Id.* at 962.

⁸² *Id.* at 966.

⁸³ *Id.* at 957.

⁸⁴ *Id.* at 959-961.

⁸⁵ *Id.* at 965-966.

⁸⁶ *Matus v. Board of Administration of California Public Employees' Retirement System* (2009) 177 Cal.App.4th 598, 608.

⁸⁷ *Id.* at 609.

⁸⁸ *Id.*

“likely consequences” of holding a requirement mandatory to try to “ascertain whether those consequences would defeat or promote the purpose of the enactment.”⁸⁹ In *Matus*, plaintiffs challenged CalPERS’ compliance with Administrative Procedures Act procedural requirements in reviewing a proposed decision awarding benefits.⁹⁰ CalPERS alleged that the requirement at issue was directory rather than mandatory, and therefore its failure did not divest it of its authority to review the proposed decision.⁹¹ The court disagreed. The court acknowledged that time limits are usually deemed to be directory unless the legislature clearly expresses a contrary intent.⁹² In its holding, the court stated that the statutory scheme, when read as a whole, requires an agency to follow the procedures at issue and the intent behind the requirements is to assure the aggrieved party a hearing and decision within a limited period of time.⁹³ Otherwise the process would become meaningless.⁹⁴

Applying the case law to this proceeding, it is clear that the requirements at issue are intended to be mandatory. As discussed in Section IV.B above, the express statutory language requires the participation of the POU governing board in RPS planning. Also, the repeated reference to adopted optional compliance measures in the regulations indicates adoption as a mandatory requirement. Thus, the RPS framework indicates that POU governing bodies are required to participate in and adopt their RPS plans, including optional compliance measure rules they want to apply toward RPS compliance.

However, this is not just a case about deficiency with a procedural requirement, although that has been alleged. Invalidating a Port action is similarly not at issue. Consequently, the importance of the distinction between directory and mandatory for purposes of this proceeding may be misplaced. Here, Staff is not alleging that the Port established optional compliance measure rules and just failed to procedurally adopt them. Staff is alleging the Port did not establish any optional compliance measures rules that meet RPS regulatory requirements, adopted or not.

⁸⁹ *Id.*

⁹⁰ *Id.* at 604.

⁹¹ *Id.* at 608.

⁹² *Id.* at 609.

⁹³ *Id.* at 610.

⁹⁴ *Id.* at 610.

V. MITIGATING FACTORS

The Hearing Notice lists several questions regarding issues related to the Port's mitigating circumstances. These issues are summarized as follows:

- (1) Are the additional factors identified by the Port considered “mitigating factors” for purposes of excusing the Port’s noncompliance with the RPS?
- (2) Do these additional factors fall within the “mitigating factors” specified in section 1240(d)(1) of the RPS Regulations?
- (3) Did Staff apply the same “reasonableness standard” to the RPS Procurement Target and Portfolio Balance requirements that it applied to the reporting deadlines for POU reporting?
- (4) Does the Commission have authority to waive or excuse the Port’s noncompliance with the RPS based on mitigating factors?
- (5) If the Commission finds that mitigating factors waive or excuse the Port’s non-compliance with the RPS, what should the Commission provide to the California Air Resources Board?

These issues are addressed separately below.

A. Port’s Additional Mitigating Factors

The Port identified three additional factors in its *Port of Stockton Response to Committee Response to Staff Motion to Bifurcate and Order for Additional Information* (Port Response), which it argues supports a Commission decision excusing its RPS procurement deficits and alleged violation.⁹⁵ These factors are 1) Staff delays in the optional compliance review process, 2) the Port serves as an economic driver to an economically disadvantaged region of the state, and 3) penalizing the Port would be inconsistent with the purpose of the RPS Program because it could impact the financial viability of the Port and its renewable energy procurement efforts.

Staff does not agree that the Port’s first factor is a “mitigating factor” for purposes of excusing the Port’s noncompliance with the RPS. However, the Port’s second and third factors may be considered “mitigating circumstances” because these factors relate to the financial harm or burden on the Port if it is found to have violated the RPS requirements.

⁹⁵ TN 223100.

The Port's additional factors are addressed separately below.

1. Staff Delays in the Optional Compliance Review Process

In the Port Response, the Port states that it filed its CP 1 Annual Report and Compliance Period Report by the applicable deadlines.⁹⁶ However, it argues that Staff did not request specific information on the Port's optional compliance mechanisms until July 15, 2016, and did not seek further information on these compliance mechanisms until July 17, 2017. The Port argues this slow timeline for the optional compliance review is a significant mitigating factor.⁹⁷

Staff disagrees with the Port's argument that Staff's delay is a mitigating factor. Nothing Staff did (or failed to do) after CP 1 ended had any effect on the Port's action during CP 1. The Port would have needed to take action during CP 1 to formally adopt optional compliance measures in order to be able to rely on those measures after the compliance period ended.⁹⁸

Moreover, the primary reason for Staff finding that the Port did not meet the optional compliance measure requirements is that the Port Commission did **not** adopt delay of timely compliance or cost limitation optional compliance measures prior to the end of CP 1. In Exhibit 2005, *Staff's Evaluation of Port of Stockton's Applied Optional Compliance Measures for the 2011-2013 Compliance Period*, Staff found that there were facts and circumstances upon which the Port could have relied in establishing delay of timely compliance and/or cost limitation optional compliance measures, and if these measures had been adopted and applied by the Port, would have excused the Port's RPS procurement deficits.⁹⁹ However, as discussed in Section III.B. above, no such optional compliance measures were adopted by the Port for CP 1.

As discussed in the *Staff Comments Regarding Additional Evidence Filed by the Stockton Port District* (Staff Comments On Additional Port Evidence), the Port has provided no evidence to show that its governing board, the Port Board of Commissioners, took action to formally adopt optional compliance measures during CP 1 in accordance with its governing authority, Harbors

⁹⁶ TN 223100, p. 5. The deadline for filing both the CP 1 Annual Report and Compliance Period Report pursuant to the RPS Regulations was July 1, 2014. (Cal. Code Regs., tit. 20, § 3207, subd. (c) and (d).) The Port provides no evidence to support its claim that it filed the reports by the applicable deadlines, nor can it. According to data compiled by Staff, the Port's reports were not timely or complete when filed. These facts are not relevant here, however, because Staff did not hold POUs to the deadlines specified in the regulations and accepted a POU's report even though the report was late or incomplete when initially submitted.

⁹⁷ TN 223100, pp. 5-6.

⁹⁸ Cal. Code of Regs., tit. 20, § 3206, subd. (b).

⁹⁹ Exhibit 2005, TN 224692, Bates Nos. 129-133.

and Navigation Code section 6250, and the Ralph M. Brown Act (Government Code section 54950, et seq.).¹⁰⁰

In the Joint Facts, the Port acknowledges that it did **not** adopt optional compliance measures. This is acknowledged by statements in paragraphs II.6, II.7 and II.8 of the Joint Facts, which provide as follows:

6. The Port did not have a renewable energy resource procurement plan or enforcement program in place during RPS Compliance Period 1 describing RPS optional compliance measures such as a delay of timely compliance or cost limitation.
7. The Port Board of Commissioners did not take action on or before December 31, 2013, in the form of an adopted resolution, ordinance or otherwise take formal action, regarding a delay of timely compliance optional compliance measure for RPS Compliance Period 1.
8. The Port Board of Commissioners did not take action on or before December 31, 2013, in the form of an adopted resolution, ordinance or otherwise take formal action, regarding a cost limitation optional compliance measure for RPS Compliance Period 1.

(Exhibit 2011, TN 224172, p. 3, pars. 6, 7 & 8.)

The Port is **not** arguing that the Port Commission actually adopted optional compliance measures and that the Port is unable to locate relevant records concerning the adoption of such measures because of Staff's delay. Instead, it is arguing that it is possible that evidence may have been lost.

If the Port actually adopted optional compliance measures, it would have been obligated to submit information concerning these measures to the Commission within 30 days of adoption pursuant to section 3206 (c) of the RPS Regulations. This section provides as follows:

Any rule or rule revision adopted under this section [3206] shall be submitted to the Commission within 30 calendar days after adoption. The rule or rule revision shall be submitted along with all reports, analyses, findings, and any other information upon which the POU relied in adopting the rule or rule revision. (Cal. Code Regs., tit. 20, § 3206, subd. (c).)

If the Port adopted optional compliance measures, it could have submitted all relevant information concerning such measures to the Commission in a timely and contemporaneous manner as required by section 3206 (c), thereby avoiding the potential risk of losing relevant evidence related to such measures. However, the Port did **not** adopt optional compliance measures and therefore was not in a position to submit information pursuant to section 3206 (c).

¹⁰⁰ TN 223908, pp. 6-9.

The Port is only raising the issue of Staff's delay now, because the Port did not in fact adopt optional compliance measures, so it is piecing together documents and information after-the-fact – after CP 1 ended – to suggest that it did adopt such measures.

Furthermore, if the Port had wanted to obtain an earlier Staff assessment of any Port optional compliance measure, the Port could have requested a review by the Commission Executive Director pursuant to section 3206 (d) of the RPS Regulations. This section provides:

A POU may request the Executive Director of the Commission to review any rule or rule revision adopted under this section 3206 to determine consistency with the requirements of Public Utilities Code section 399.30.
(Cal. Code Regs., tit. 20, § 3206, subd. (d).)

If Port adopted optional compliance measures, it could have requested a timely review of any such measure by the Commission Executive Director, thereby avoiding the potential risk of losing relevant evidence related to the measure. Here, however, the Port was not in a position to request a timely review of any optional compliance measures pursuant to section 3206 (d), because no such measures were adopted.

2. Port Serves as Economic Driver

The Port argues that it serves as an economic driver in an area of the state that faces persistently high levels of poverty and unemployment. It argues that it is a not-for-profit entity, and that all of its costs are passed through to its customers. It also argues that applying a penalty to the Port would increase costs to customers and diminish the Port's ability to attract new businesses to the region, and thereby result in harm to the broader community served by the Port.¹⁰¹

Staff agrees that the potential financial harm to the Port is a mitigating factor. Section 1240 (d)(1) of the RPS Regulations permits a POU, in its answer to a complaint, to include information deemed relevant by the POU regarding any mitigating or otherwise pertinent factors related to any alleged violation or to a possible monetary penalty that could be imposed if noncompliance was determined.

Section 1240 (d)(1) specifically identifies “[t]he financial burden to the POU.”¹⁰² The Port could have considered the financial costs to its ratepayers, via disproportionate rate impacts,

¹⁰¹ TN 223100, p. 6.

¹⁰² Cal. Code Regs., tit. 20, § 1240, subd. (d)(1)

in establishing a cost limitation optional compliance measure. It is appropriate to consider the financial consequences to the Port if the Port is determined to be in noncompliance with the RPS.

Staff has no basis for disputing or confirming the Port's argument that if found in violation of the RPS and assessed penalties, that it would increase the Port's costs to customers, diminish the Port's ability to attract new businesses to the region, and result in harm to the broader community served by the Port. Nor can Staff speculate whether the CARB would penalize the Port if the Commission found the Port in violation of the RPS and not otherwise excused by the application of optional compliance measures or mitigating circumstances.

3. Penalizing the Port would be inconsistent with the RPS program and could impact the Port's renewable energy procurement efforts.

The Port argues that subjecting it to costly legal proceedings and potential penalties could impact the financial viability of the Port and make it more difficult for the Port to procure sufficient renewable energy to meet its RPS procurement requirements. It argues this would be contrary to the purposes of the RPS Program.¹⁰³

Staff agrees that the potential financial harm to the Port is a mitigating factor. As discussed above, the financial burden to the POU is a mitigating factor that may be considered. Here, the Port is arguing that its legal costs and potential penalties could impact its financial viability and make it more difficult to procure sufficient renewable energy to meet its RPS requirements. While the Port's legal costs and potential penalties would not affect the second RPS compliance period (2014-2016), since this compliance period has already ended, it could affect the third compliance period (2017-2020) and future compliance periods because the Port is still procuring renewable energy for the third compliance period and presumably planning for future compliance periods. If legal costs and penalties cause the Port to exceed its budget for procuring renewable energy for the third compliance period, or subsequent compliance periods, then the Port may need to reduce its renewable energy procurement or other services because of budget shortfalls.

The Port's reduction of renewable energy procurement in the future could affect its RPS compliance in the future and thereby undermine the goals of the RPS program. However, in

¹⁰³ TN 223100, p. 7.

terms of the RPS program goals, the resulting impact would be the same if the Port's renewable energy procurement was reduced due to an adopted optional compliance measure.

However, the financial harm or burden to a POU due to penalties or legal costs associated with noncompliance needs be balanced in light of other alleged mitigating circumstances. If a POU could easily skirt a RPS violation by arguing the penalty would have a financial burden on the POU or its customers, it could discourage POUs from engaging in the careful planning, consideration, and adoption of optional compliance measures in accordance with the RPS statute and the RPS Regulations. For this reason, when a POU's alleged financial harm or burden is raised as a mitigating factor, it should be considered in light of the POU's other alleged mitigating circumstances.

B. Applicability of Mitigating Factors in Section 1240 of Regulations

As discussed above, section 1240 (d)(1) of the RPS Regulations permits a POU, in its answer to a complaint, to include information deemed relevant by a POU regarding mitigating factors, including, but not limited to the following:

- (A) The extent to which the alleged violations has or will cause harm.
 - (B) The nature and expected persistence of the alleged violation.
 - (C) The history of past violations.
 - (D) Any actions taken by the POU to mitigate the alleged violation.
 - (E) The financial burden to the POU.
- (Cal. Code Regs., tit. 20, § 1240, subd. (d)(1).)

The factors specified in section 1240 (d)(1) are not exhaustive and are based on factors in Health and Safety Code section 42403 (b), which the CARB may consider in assessing penalties against a POU pursuant to Public Utilities Code section 399.30 (p)(1).¹⁰⁴

Regarding the harm caused by the violation (section 1240 (d)(1)(A)), it is presumed that a violation by the Port will cause indirect harm to the state, because the Port's under-procurement of renewable energy means that an additional amount of non-renewable energy was generated

¹⁰⁴ Public Utilities Code section 399.30 (p)(1) provides: *Upon a determination by the Energy Commission that a local publicly owned electric utility has failed to comply with this article, the Energy Commission shall refer the failure to comply with this article to the State Air Resources Board, which may impose penalties to enforce this article consistent with Part 6 (commencing with Section 38580) of Division 25.5 of the Health and Safety Code. Any penalties imposed shall be comparable to those adopted by the commission [CPUC] for noncompliance by retail sellers.* Section 399.30 (p)(1) was renumbered as section 399.30 (o)(1) as result of SB 100 (Stats, 2018, ch. 312), which takes effect January 1, 2019.

and procured to meet the Port's retail sales needs, thereby increasing the negative effects to the state associated with the environmental impacts and GHG emissions from this non-renewable energy.

As discussed above, however, the state would have suffered these same negative effects from the non-renewable energy if the Port had adopted optional compliance measures and applied these measures to excuse its RPS procurement deficits.

Regarding the nature, expected persistence and history of violations (section 1240 (d)(1)(B) and (C)), the subject complaint against the Port is for noncompliance of the first RPS compliance period (2011-2013), so Staff has no basis for comparing the Port's actions in prior RPS compliance periods. However, according to the Port's Response, the Port has procured sufficient RPS-eligible resources to meet its RPS procurement requirements for Compliance Period 2 (2014-2016), and anticipates that it will be able to procure sufficient RPS-eligible resources to satisfy its RPS procurement requirements for Compliance Period 3 (2017 – 2020).¹⁰⁵

Regarding actions taken to mitigate the alleged violation (section 1240 (d)(1)(D)), the Port reported taking various steps to procure renewable energy to meet its RPS procurement requirements. As discussed in Exhibit No. 2005, *Staff's Evaluation of Port of Stockton's Applied Optional Compliance Measures for the 2011-2013 Compliance Period* (Staff Evaluation Of Optional Compliance Measures),¹⁰⁶ the Port reported entering into a development agreement in 2010 to purchase renewable energy from a proposed 20 MW rooftop solar facility located on the Port's warehouse facilities. The proposed project would have sold power to both PG&E and the Port, as the output was more than seven times the size of the Port's total retail load. The Port anticipated that the project would be fast tracked and operational by late 2011. The 20 MW project required a System Impact Study (SIS) to be performed by PG&E in conjunction with CAISO, which was initiated by the Port in November 2010. However, the Port reported that the project fell into an area of a transmission user not addressed in the CAISO tariff, and the CAISO would not include the project in its transmission cluster study because it did not fit the parameters of its transmission tariff. The Port further reported that after multiple cluster study

¹⁰⁵ TN 223100, p. 7.

¹⁰⁶ Exhibit 2005, TN 224692.

issues with PG&E and the CAISO, and due to overall project costs, the developer abandoned the project.¹⁰⁷

The Port had anticipated an output of over 70,000 megawatt hours (MWh) from the 20 MW solar project during CP 1, significantly more than its RPS procurement target of 7,357 MWh, as stated in Exhibit 2000, *Renewables Portfolio Standard Verification Results: Port of Stockton, Compliance Period 1*. Furthermore, the Port stated that it intended to purchase sufficient amounts from the project to meet the RPS procurement requirements, but due to circumstances beyond the Port's control, the development was delayed and could not be completed.¹⁰⁸

The Port responded to the 20 MW project cancellation by pursuing a smaller, "right-sized" project. In November 2012, the Port issued a revised RPS procurement plan focusing on the development of a 1.5–2 MW local solar project that would produce 2,500 MWh of portfolio content category (PCC or "Bucket") 1 electricity products, and the output of which the Port would supplement with the purchase of unbundled RECs, qualifying as PCC 3. However, according to the Port, a new System Impact Study was required for the proposed smaller solar project pursuant to the terms of the Port's interconnection agreement with PG&E. The Port reported that it requested and paid PG&E for the System Impact Study on January 3, 2013, but the study was not completed until January 2014. Upon completion of the study, which found no significant impacts, the Port re-evaluated the cost effectiveness of the project compared to other renewable market options for RPS compliance and suspended the project in favor of purchasing electricity from RPS-certified generation in 2017.¹⁰⁹

The financial burden to the POU (section 1240 (d)(1)(E)) is addressed above in Section V.A.2.

C. Staff's Application of Reasonableness Standard

Staff did not apply a *reasonableness* standard to the RPS Procurement Target Requirement or the Portfolio Balance Requirement. In Staff's view, it is **not** appropriate to apply

¹⁰⁷ Exhibit 2005, TN 224692, Bates No. 134.

¹⁰⁸ Exhibit 2005, TN 224692, Bates No. 134.

¹⁰⁹ Exhibit 2005, TN 224692, Bates Nos. 134-136.

a reasonable standard to the Procurement Target Requirement or the Portfolio Balance Requirement, because these are statutory-imposed procurement requirements.

Staff applied a rule of reason with respect to reporting deadlines and other similar procedural deadlines. For example, the RPS Regulations required a POU to report by October 31, 2013, on its RPS procurement for the first two years of CP 1.¹¹⁰ The RPS Regulations also require a POU to report annually thereafter by July 1 on its RPS procurement for the prior calendar year.¹¹¹ The RPS Regulations also require a POU to report by July 1, 2014, on its RPS procurement for the CP 1.¹¹²

Because October 31, 2013, was the first deadline for POUs to report their annual RPS procurement under the RPS Regulations, and July 1, 2014 was the first deadline for POUs to report subsequent annual RPS procurement and RPS procurement for CP 1, Staff did not hold POUs to the deadlines specified in the regulations. Staff accepted a POU's report even though the report was late or incomplete when initially submitted.

In Staff's view, applying a rule of reason to the reporting deadlines is appropriate, since this was the first reporting on RPS procurement by POUs due under the RPS Regulations. However, Staff does not believe it is appropriate to apply a rule of reason to the RPS procurement target requirement or the portfolio balance requirements, because these requirements are statutorily imposed unlike the Commission's regulatory reporting deadlines.

The RPS statute expressly provides for the procurement target and portfolio balance requirements. The RPS procurement target requirement is established and imposed by Public Utilities Code section 399.30 (c), which required for CP 1 that a POU procure a quantity of eligible renewable energy resources to equal an average of 20 percent of its retail sales over Compliance Period 1.¹¹³ The RPS portfolio balance requirement is established and imposed by Public Utilities Code section 399.16 (c), which required for CP 1 that a POU procure no less than 50 percent of the electricity products procured under contracts or ownership agreements executed on or after June 1, 2010, and credited towards the Port's RPS procurement target, meet the

¹¹⁰ Cal. Code Regs., tit. 20, § 3207, subd. (c), required a POU to report by September 1, 2013, or 30 days after the effective of the regulations, which took effective October 1, 2013. Hence, the first annual report was due by October 31, 2013.

¹¹¹ Cal. Code Regs., tit. 20, § 3207, subd. (c).

¹¹² Cal. Code Regs., tit. 20, § 3207, subd. (d).

¹¹³ Pub. Util. Code, § 399.30, subd. (c)(1).

criteria for Portfolio Content Category 1, and no more than 25 percent of these electricity products meet the criteria of Portfolio Content Category 3.¹¹⁴

The RPS statute includes specific exemptions from the RPS requirements for select POU's, but there are no specific exemptions for the Port.

Staff did not consider whether any other POU's Annual Reports or Compliance Period Reports for CP 1 were submitted by the due dates specified in the RPS Regulations, or whether these reports were complete when initially submitted, in determining whether the POU had complied with the RPS requirements. In determining compliance for CP 1, Staff only evaluated a POU's compliance with the RPS procurement target requirement and portfolio balance requirement, and whether a POU's procurement deficits were excused by optional compliance measures adopted and applied in accordance with the RPS Regulations.

D. Authority to Consider Mitigating Circumstances to Excuse Noncompliance

The Commission has authority based on the RPS statute establishing the Commission as trier of facts to consider mitigating circumstances in deciding whether to waive or excuse noncompliance of the RPS procurement requirements. The RPS statute contemplates that the Commission will serve as the trier of fact regarding a POU's noncompliance with the RPS procurement requirements. The statute specifically provides that the Commission "shall adopt regulations specifying procedures for the enforcement" of the RPS against POU's and that the Commission's regulations "shall include a public process under which the Energy Commission may issue a notice of violation and correction against a local publicly owned electric utility for failure to comply" and for referral of violations to the CARB.¹¹⁵ In addition, the statute provides that "[u]pon a determination by the Energy Commission that a local publicly owned electric utility has failed to comply" the Commission "shall refer the failure to comply" to CARB, which may impose penalties to enforce the RPS.¹¹⁶

As the trier of fact with respect to a POU's noncompliance with the RPS, it is appropriate for the Commission's final decision on any complaint to include all findings of fact upon which the CARB may rely in assessing a penalty. If mitigating factors exist, these mitigating factors

¹¹⁴ Pub. Util. Code, §§ 399.16, subd. (c), and 399.30, subd. (c)(1).

¹¹⁵ Pub. Util. Code, § 399.30, subd. (o).

¹¹⁶ Pub. Util. Code, § 399.30, subd. (p)(1).

should be addressed as part of the Commission’s final decision on a complaint, so the CARB has the benefit of the Commission’s factual analysis in the event the POU is found in noncompliance and a notice of violation is issued against the POU for referral to the CARB. This is necessary because the Commission’s final decision and supporting record will serve as the basis for any subsequent action by the CARB regarding the assessment of penalties. The CARB does not intend to, and should not, re-adjudicate the Commission’s final decision regarding any POU violations set forth in the decision or any Commission findings of fact regarding the decision.

The RPS Regulations specifically provide that the final decision of complaints against POUs include “all findings, including findings regarding mitigating and aggravating circumstances related to noncompliance” and that the decision “may also include findings regarding mitigating and aggravating factors,” upon which CARB may rely in assessing a penalty against the POU.¹¹⁷

E. Recommendation to CARB if Port Excused by Mitigating Circumstances

If the Commission finds the Port did not comply with the RPS procurement requirements and its procurement deficits are not completely excused by the application of optional compliance measures or by mitigating circumstances, then Staff recommends that the Commission 1) issue a Notice of Violation to the Port based on the final Commission decision and 2) refer the violation to the CARB for its consideration in assessing possible penalties against the Port.

If the Commission finds the Port did not comply with the RPS procurement requirements, but its procurement deficits are completely excused by the application of optional compliance measures or by mitigating circumstances, then Staff recommends that the Commission 1) not issue a Notice of Violation to the Port and 2) notify the CARB of the Commission’s determination and provide the CARB with a copy of the Commission’s final decision for CARB’s information.

Staff’s recommendations are consistent with the RPS Regulations. If the Commission’s final decision determines an RPS violation has occurred, the regulations provide that “Commission staff shall forward a notice of violation, based on the final decision of the full

¹¹⁷ Cal. Code Regs., tit. 20, § 1240, subd. (g).

Commission, together with the records of the proceedings, to the Air Resources Board for a determination of a penalty.”¹¹⁸ Under the RPS Regulations, a Notice of Violation would be issued only if the Commission’s final decision determined an RPS violation occurred and was not otherwise excused by the application of an optional compliance measure or mitigating circumstances.

VI. OTHER ISSUES

A. Opportunity to Suggest Penalties, if Appropriate

If the Commission finds the Port did not comply with the RPS procurement requirements, that the Port’s procurement deficits are not completely excused by the application of optional compliance measures, and that the Commission does not have authority to waive or excuse the Port’s noncompliance based on mitigating factors, then Staff requests that it be given an opportunity to provide recommendations regarding suggested penalties, if any, for the Commission to recommend CARB consider as may be appropriate.

Section 1240 (g) of the RPS Regulations permits the Commission to include, in its decisions regarding a POU’s noncompliance with the RPS, suggested penalties for the CARB to consider as may be appropriate. Specifically, section 1240 (g) provides as follows:

The decision of the full Commission shall be a final decision. There is no right of reconsideration of a final decision issued under this section 1240. The decision will include all findings, including findings regarding mitigating and aggravating factors related to noncompliance. The decision may also include findings regarding mitigating and aggravating factors upon which the California Air Resources Board may rely in assessing a penalty against a local publicly owned electric utility pursuant to Public Utilities Code section 399.30, subdivisions (o) and (p). The decision may also include suggested penalties for the California Air Resources Board to consider, as appropriate. Any suggested penalties shall be comparable to penalties adopted by the California Public Utilities Commission for noncompliance with a Renewables Portfolio Standard requirement for retail sellers.

(Cal. Code Regs., tit. 20, § 1240, subd. (g), emphasis added.)

In the subject complaint against the Port, Staff did not include any suggested penalties against the Port because Staff believed, based on the mitigating circumstances known at that time, that there were compelling reasons to excuse the Port’s procurement deficits and not find it

¹¹⁸ Cal. Code Regs., tit. 20, § 1240, subd. (h)(1).

in violation of the RPS requirements.¹¹⁹ Since then, the Port has identified several other mitigating factors, as discussed above, which should be considered in excusing the Port's procurement deficits and waiving its noncompliance.

VII. CONCLUSION

For the reasons discussed in this brief, the Committee should find that the Port did not meet its RPS procurement requirements and is not excused by the application of delay of timely compliance or cost limitation optional compliance measures, but that the Port's noncompliance is nevertheless excused by mitigating circumstances and therefore, the Port should not be found to be in violation of the RPS requirements.

Dated this 16th day of October 2018.

Respectfully submitted,
CALIFORNIA ENERGY COMMISSION

/S/ Gabriel Herrera

Gabriel Herrera

/S/ Mona Badie

Mona Badie

GABRIEL HERRERA
MONA BADIE
Chief Counsel's Office
CALIFORNIA ENERGY COMMISSION
1516 9th Street, MS 14
Sacramento, CA 95814
Telephone: (916) 654-3951
Fax: (916) 654-3843
Email: gabe.herrera@energy.ca.gov
Email: mona.badie@energy.ca.gov

¹¹⁹ TN 222161-1, p. 11.