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<b>Filer:</b>	Justin Wynne
<b>Organization:</b>	Braun Blaising Smith Wynne
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**STATE OF CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION**

In the Matter of:

Complaint Against Stockton Port District for  
Noncompliance With the Renewables Portfolio  
Standard

Docket No. 18-RPS-01

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**PORT OF STOCKTON BRIEF  
ADDRESSING LEGAL ISSUES IDENTIFIED IN  
SEPTEMBER 7, 2018 NOTICE OF COMMITTEE HEARING**

Justin Wynne  
Braun Blaising Smith Wynne, PC  
915 L Street, Suite 1480  
Sacramento, CA 95814  
(916) 326-5813  
wynne@braunlegal.com

Attorney for the Port of Stockton

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**PORT OF STOCKTON BRIEF  
ADDRESSING LEGAL ISSUES IDENTIFIED IN  
SEPTEMBER 7, 2018 NOTICE OF COMMITTEE HEARING**

The Port of Stockton (“Port”) hereby submits this Brief in response to the *Briefing Order* (“Order”) issued on September 19, 2018. In the Order, the Committee directs the Port to file a brief “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.”<sup>1</sup>

**I. INTRODUCTION**

The Port urges the California Energy Commission (“Commission”) to dismiss the *Complaint by California Energy Commission Executive Director Against the Stockton Port District* (“Complaint”), filed on January 8, 2018, on the merits because the Port has substantially complied with the requirements for both a cost limitation and a delay of timely compliance condition. As described below, the Port fully met all requirements for the use of both a cost limitation and a delay of timely compliance condition, except for express adoption by the Port’s Governing Board. Consistent with the well-established principle of substantial compliance, the

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<sup>1</sup> Briefing Order at 1.

Port's actions were clearly consistent with the overall purpose of the Renewables Portfolio Standard Program ("RPS"), consistent with the purpose of both the cost limitation and delay of timely compliance condition, and the lack of adoption had no negative impact on the Port's customers' ability to be informed of the renewable procurement and associated ratemaking activities of the Port.

Alternatively, the Commission should dismiss the Complaint on the grounds that mitigating circumstances clearly excuse any non-compliance with the RPS. The Commission has broad discretion in penalty proceedings such as this to craft an outcome that is both fair and administratively reasonable.

Applying a penalty to the Port would have the exact opposite effect intended by the RPS program. Punishing a small utility for its good faith effort to develop local renewable generation would discourage POUs from developing projects that can provide the most benefit to their local communities. Forcing customers to pay the increased rates necessary to cover a penalty, despite acknowledging that these same customers and the local economy are disproportionately harmed by rate increases is a fundamentally unreasonable outcome. An overly rigid and hyper-technical RPS that results in harsh penalties regardless of the good faith efforts of the obligated utility and the consequences to the local community is clearly at odds with the purpose of the RPS. The Commission must reach a result that is fair and provides the correct incentives.

## **II. RESPONSES TO QUESTIONS IN NOTICE OF COMMITTEE HEARING**

### **A. What Are the Elements of the Cost Limitation Compliance Options and Which of Those Elements Did the Port Comply With Fully and Which Partially?**

Local publicly owned electric utilities (“POUs”), as defined in California Public Utilities Code Section 224.3,<sup>2</sup> are authorized to meet the requirements of the RPS through the use of a cost limitation.<sup>3</sup> Pursuant to Section 399.30(d)(2)(B), the cost limitation adopted by the POU Governing Board must be consistent with the requirements specified in Section 399.15(c), which is the parallel statutory section directing the California Public Utilities Commission (“CPUC”) to adopt a cost limitation for retail sellers.

The Commission is directed to adopt enforcement procedures for POUs, pursuant to which the Commission can determine if a POU has complied with the requirements of the RPS program.<sup>4</sup> The Commission originally adopted these Enforcement Procedures on September 6, 2013. Sections 3206(a)(3) and 3207(d)(6) contain the provisions relevant to POU cost limitations. The basic elements of the cost limitation requirements, as implemented in the Commission’s Enforcement Procedures, is described in detail in *Commission Staff’s Evaluation of the Port of Stockton’s Applied Optional Compliance Measures for the 2011-2013 Compliance Period*.<sup>5</sup> With one narrow exception, the Port generally agrees with the Staff’s description of the elements of the cost limitation and the assessment of the Port’s actions in compliance with that element.

Before discussing these elements, the Port notes that the relevant statutory provisions for a cost limitation were substantially amended by Senate Bill (“SB”) 350 (stats. 2015). Despite this subsequent amendment, the relevant test is the statutory language that was in place during

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<sup>2</sup> Unless otherwise noted, all statutory references are to the California Public Utilities Code.

<sup>3</sup> Cal. Pub. Util. Code § 399.30(d)(2)(B).

<sup>4</sup> Cal. Pub. Util. Code § 399.30(o).

<sup>5</sup> Exhibit 2005.



the relevant time period, which was January 1, 2011 through December 31, 2013. Courts have stated this principle as follows:

Generally, statutes operate prospectively only . . . In the words of the United States Supreme Court, “The ‘principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.’”<sup>6</sup>

However, because the SB 350 amendments simply streamlined the cost limitation requirements by eliminating unnecessary provisions, the actual impact of this change is minimal. The analysis for purposes of this proceeding is unlikely to differ based on the version of Section 399.15(b) that is applied.

1. First Element - The POU described the adopted cost limitation rules in its RPS procurement plan or enforcement program. (Section 3206(b))

The first requirement set forth by Staff in its Evaluation is that the POU must describe the adopted cost limitation rules in its RPS procurement or enforcement plan.<sup>7</sup> The Port disagrees with this characterization by Staff. While the Port acknowledges that Section 399.30(d)(2)(B) requires that a POU Governing Board “adopt” the cost limitation, no further direction is given. Specifically, there is no statutory requirement that the cost limitation be described in a ***procurement plan or enforcement program***. A cost limitation adopted separate from other RPS documents would be sufficient to meet the requirements of Section 399.30(d)(2)(B).

The Port has acknowledged that its governing board did not expressly adopt a cost limitation. However, the Port’s Commission regularly directed Port staff to operate the utility in a manner that resulted in rates that were below the rates of Pacific Gas and Electric Company (“PG&E”) and that restored the financial health of the Port.<sup>8</sup> These were not mere

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<sup>6</sup> *Myers v. Philip Morris Companies, Inc.*, 28 Cal. 4th 828, 840–41 (2002) (citing *Landgraf v. USI Film Products*, *supra*, 511 U.S. at p. 265, 114 S.Ct. 1483).

<sup>7</sup> Exhibit 2005, CEC000129.

<sup>8</sup> Declaration of Steve Escobar, Exhibit 1004, at 1.

recommendations, meeting these goals is essential to the continued operation of the utility. The whole purpose for the Port to offer electric service is to provide lower and stable rates to encourage new businesses to locate to an economically disadvantaged area and serve as an economic driver.

While the Port did not expressly adopt a cost limitation, it did hold a properly noticed public meeting where its *Renewables Portfolio Standard Procurement Plan* (“Procurement Plan”), dated November 20, 2012, was presented. While the Procurement Plan did not use the term “cost limitation,” the concept was very clearly expressed. First, the Procurement Plan directly describes the financial conditions of the utility:

During 2009 and 2010 the Port's retail electric sales dropped significantly due to the turn down in the economy. However, in late 2010 and 2011 the sales started to rebound. Because of the poor economy, 2009 through the first half of 2011 operations resulted in reduced electricity sales and significant stress on the Port's electric utility financials. During this period, the Port's retail electric rates were slightly under the nearby investor owned utility. The combination of the turndown in the economy and the need for competitive rates resulted in constraints being placed on utility expenses to remain competitive while addressing the reduced retail sales.<sup>9</sup>

Further, the Procurement Plan discusses the consequences of these financial conditions and the impact relative to PG&E's rates:

Its electricity supply was provided by one supplier from 2003 through May of 2011 under a fixed price, full requirements, and electricity contract. In early 2011 the Port of Stockton staff explored options to meet the requirements of the Renewable Portfolio Standard. At that time the price of wholesale electricity under its contract was approximately \$0.088/kWh. Including all other capital and utility expenses the average cost of service was approximately \$0.16/kWh. Table 2 compares the Port's commercial and industrial electricity rates to the nearby investor owned utility's retail electricity rates.<sup>10</sup>

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<sup>9</sup> Exhibit 2005, CEC000146.

<sup>10</sup> Exhibit 2005, CEC000146- CEC000147.

The Procurement Plan then describes how the first planned solar development would have pushed the Port's rates to exceed PG&E's rates:

In an April 15, 2011 letter to the Port the developer advised the Port that the cost of the project would require a payment of approximately \$140/MWHR (\$0.14/kWh) to go forward. **Including this cost in the Port's cost structure would require a rate increase pushing the Port's retail rate in excess of PG&E's thereby making the Port non-competitive with PG&E.**<sup>11</sup>

Finally, the Procurement Plan discusses the cost consequences of future RPS Procurement activities.<sup>12</sup> In total, the Procurement Plan clearly articulates the need to restore the financial health of the utility and that future procurement activities are limited to the extent that they would exceed PG&E's rates.

Finally, because the Port has a very small number of customers, the Port is in a unique position to hold one-on-one meetings with a very large percentage of its customer base. During 2012, Port staff regularly met individually with customers to discuss rate issues and to discuss the Port's RPS procurement strategy.<sup>13</sup>

Overall, the Port had a highly engaged Commission that provided clear direction to Port staff regarding the needed structure of a cost limitation. The Port held a public meeting and publicly released its Procurement Plan, which clearly discussed the financial pressures and needs of the Port and reiterated the Port Commission's direction to improve the financial health of the utility and keep rates below PG&E's. The Port's customers were well-informed and in regular communication with Port staff on rate issues, including the impacts of RPS procurement activities. As described below, this clearly meets the standard for substantial compliance and is

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<sup>11</sup> Exhibit 2005, CEC000147 (emphasis added).

<sup>12</sup> Exhibit 2005, CEC000148- CEC000151

<sup>13</sup> Exhibit 1003 at 1.

consistent with the purpose of the RPS generally, as well as the cost limitation provision specifically.

2. Second Element - The POU's governing board established cost limitation rules that it deemed would prevent a disproportionate rate impact. (Section 3206(a)(3)(B)(I))

The second element noted by Staff is that the POU's governing board must establish cost limitation rules that "it deemed would prevent a disproportionate rate impact."<sup>14</sup> The Port agrees with the assessment of Staff that: "But for the fact that the Port's cost limitation was not formally adopted, **the Port addressed the requirement to establish cost limitation rules that it deemed would prevent a disproportionate rate impact.**"<sup>15</sup> Staff correctly conclude that "[t]he Port justified its application of a cost limitation, citing depressed economic conditions, including the bankruptcy of the City of Stockton; high local unemployment; the need to attract and retain business and industry; competition with PG&E; the need to maintain operating reserves; and its small size and lack of resources."<sup>16</sup>

3. Third Element - The POU considered the following information when adopting its cost limitation rules:
  - The information in its most recent RPS procurement plan
  - The estimated cost of building, owning, and operating RPS eligible resources
  - The potential that planned resource additions may be delayed or canceled.(Section 3206(a)(3)(C}{(I)-(3))

The Port generally agrees with Staff's assessment in its Evaluation that:

But for the fact that the Port's cost limitation was not formally adopted, the Port, through its Executive Director, addressed the requirement to rely on the most recent RPS procurement plan, the estimated cost of building, owning, and operating RPS eligible resources, and the potential that planned resource additions may be delayed or canceled, in adopting its cost limitation.<sup>17</sup>

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<sup>14</sup> Exhibit 2005 CEC000130.

<sup>15</sup> Exhibit 2005, at CEC000130 (emphasis added).

<sup>16</sup> *Id.*

<sup>17</sup> Exhibit 2005, at CEC000130.

4. Fourth Element - The POU reported the dollar amount of the established cost limitation for the compliance period and the amount that it spent on RPS procurement during the compliance period. The POU also reported an estimate of the amount it would have needed to spend to meet the full RPS procurement requirements for the compliance period. (Section 3207(d)(6)(A))

The Port generally agrees with Staff's assessment in its Evaluation that:

The Port addressed the requirement to report its cost limitation in dollars, the amount it spent on RPS procurement, and an estimate of the total cost to procure sufficient electricity products to meet its RPS procurement requirements.<sup>18</sup>

5. Fifth Element - The POU applied all of its RPS procurement expenditures toward the cost limitation, and applied only those procurement expenditures permitted by its adopted cost limitation rules. (Section 3206(a)(3)(B)(2) and 3206(a)(3)(D))

The Port generally agrees with Staff's assessment in its Evaluation that:

But for the fact that the Port's cost limitation was not formally adopted, the Port addressed the requirements to ensure that the costs of all procurement credited toward achieving the RPS are counted toward the limitation and to apply only those types of procurement expenditures that are permitted under the adopted cost limitation rule.<sup>19</sup>

6. Sixth Element- The POU did not apply any indirect costs, including costs for those items listed below, toward its adopted cost limitation rules:
  - Imbalance energy charges
  - Sale of excess energy
  - Decreased generation from existing resources
  - Transmission upgrades
  - Costs associated with relicensing any POU-owned hydroelectric facilities. (Section 3206(a)(3)(B)(3))

The Port generally agrees with Staff's assessment in its Evaluation that:

But for the fact that the Port's cost limitation was not formally adopted, the Port addressed the requirement that procurement expenditures applied do not include any indirect expenses. The Port stated that its reported costs did not include indirect costs associated with imbalance energy charges, sale of excess energy, decreased generation from existing resources, transmission upgrades, or the costs associated with relicensing any hydroelectric facilities.<sup>20</sup>

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<sup>18</sup> Exhibit 2005, at CEC000131.

<sup>19</sup> Exhibit 2005, at CEC000132.

<sup>20</sup> Exhibit 2005, at CEC000132.

7. Seventh Element- The adopted cost limitation rules include actions the POU planned to take if it met or exceeded its cost limitation, and the POU reported on the actions it took after meeting or exceeding its cost limitation. (Section 3206(a)(3)(E) and 3207(d)(6)(A))

The Port generally agrees with Staff's assessment in its Evaluation that:

But for the fact that the Port did not formally adopt cost limitation rules, the Port addressed the requirement to report actions planned and taken in response to meeting or exceeding its cost limitation.<sup>21</sup>

The implication of exceeding the cost limitation is that there is no longer an obligation to procure additional resources for that compliance period. After the failure of the first solar project, and the expenses caused by the delay of the second project, the Port turned its focus toward the second compliance period. The Port is in full compliance with the second compliance period requirements and is also on track to meet the third compliance period requirements.

**B. What are the elements of the Delay of Time Compliance Options and Which of Those Elements Did the Port Comply With Fully and Which Partially?**

Similar to a cost limitation, POUs are also authorized to meet the requirements of the RPS through the use of a delay of timely compliance condition.<sup>22</sup> Pursuant to Section 399.30(d)(2)(A), the delay of timely compliance condition adopted by the POU Governing Board must be consistent with the requirements specified in Section 399.15(b), which is the parallel statutory section directing the CPUC to adopt rules for delay of timely compliance for retail sellers.

The Commission's Enforcement Procedures address delay of timely compliance in Sections 3206(a)(2) and 3207(c)(2)(H). Commission Staff's Evaluation provides a description of the basic elements of delay of timely compliance and the relevant assessment of the Port's

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<sup>21</sup> Exhibit 2005, at CEC000133.

<sup>22</sup> Cal. Pub. Util. Code § 399.30(d)(2)(A).

compliance with each element. With the exception of the issue described below, the Port generally agrees with the Staff's description of the required elements and the conclusions regarding the Port's compliance.

1. First Element - The POU described the adopted delay of timely compliance measure in its RPS procurement plan or enforcement program. (Section 3206(b))

The first element of delay of timely compliance identified by Staff is that the "POU described the adopted delay of timely compliance measure in its RPS procurement plan or enforcement program."<sup>23</sup> As clarified above, the relevant statutory language requires adoption, but does not require that the delay of timely compliance be included in a procurement plan or an enforcement program. However, the Port acknowledges that the Port's Commission did not expressly adopt a delay of timely compliance condition.

While there was no express adoption, the Port Commission was extensively involved in the RPS procurement activities of the Port. The Port Commission was regularly briefed during its public meetings on the projects and gave extensive direction to Port staff regarding the projects. The Port's Procurement Plan, which was presented to the Port's customers at a publicly noticed meeting, included a detailed description of the planned solar projects and the circumstances that led to the failure of the initial project:

During 2010 and 2011 Port staff was working with a renewable developer to construct a utility scale, roof mounted, 15-20 MW photovoltaic system. The system would make use of approximately 30 of the warehouse roofs on Rough & Ready Island to host PV arrays that would produce renewable electric energy. The Port, in conjunction with the developer had completed the PG&E required System Impact Study as well as some preliminary work with the California Independent System Operator. The project concept involved constructing the PV system, transmitting a majority portion of the power through the Port's electric system to its interconnection with PG&E where the developer would sell the remaining output to another party. The Port would participate in the project to the extent necessary to meet the requirements of the Renewable Portfolio Standard.

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<sup>23</sup> *Id* at CEC000133.

By April 2011 much of the planning work necessary to develop a project cost estimate had been completed. In an April 15, 2011 letter to the Port the developer advised the Port that the cost of the project would require a payment of approximately \$140/MWHR (\$0.14/kWh) to go forward. Including this cost in the Port's cost structure would require a rate increase pushing the Port's retail rate in excess of PG&E's thereby making the Port non-competitive with PG&E. In addition, the CAISO had determined that it required a major Deliverability Study to determine the impact on the transmission system within the Stockton Area and that could not be accomplished during 2011. The developer also participated in the PG&E PV solicitation without success. The cost issues as well as the failure to have PG&E accept the Rough & Ready Solar Project in the bid process resulted in the developer stopping the project. The Port had to regroup to determine a better course of action to address the RPS requirements.<sup>24</sup>

While the term “delay of timely compliance” is not used in the Procurement Plan, the Procurement Plan clearly describes the justification for the use of this provision. This document provided clear notice to Port customers of the conditions necessitating the use of this provision and provided a public forum for customers to raise questions and concerns.

Additionally, as described above, the Port held extensive one-on-one meetings with customers during this time period to discuss rates and RPS procurement. The two projects that the Port had been attempting to develop would have been located on the Port's property and thus would have been in very close proximity to the Port's customers. This was not an investment in some remote facility, but something the customers would have seen and interacted with on a daily basis. The Port's customers were engaged in and well-aware of the Port's procurement strategies.

As described below, the Port's actions clearly meet the standard of substantial compliance for this element of the delay of timely compliance provision.

2. Second Element - The POU demonstrated that it would have satisfied its RPS procurement requirements if it had not encountered the delay. (Section 3206(a)(2)(A))

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<sup>24</sup> Exhibit 2005, CEC000147-CEC000148.



The Port generally agrees with Staff's assessment in its Evaluation that: "The Port addressed the requirement to demonstrate that it would have met its RPS procurement requirements but for the cause of delay."<sup>25</sup> As Commission Staff noted:

the Port anticipated that the 20 MW solar project would provide sufficient electricity products to meet its full RPS procurement requirements; however, due to circumstances beyond its control, the project was cancelled. The Port then pursued a smaller, 1.5 - 2 MW solar project, the output of which it intended to supplement with REC purchases, but this project, too, was delayed for reasons beyond the Port's control and ultimately suspended in favor of more cost-effective options.<sup>26</sup>

3. Third Element - The POU prudently managed portfolio risks, including:
  - Holding solicitations for RPS-eligible resources
  - Relying on a sufficient number of projects the POU considered viable for meeting the RPS procurement requirement. (Section 3206(a)(2)(A)(2)(i))

The Port generally agrees with Staff's assessment in its Evaluation that: "The Port addressed the requirement to prudently manage portfolio risks, including but not limited to holding solicitations and relying on a sufficient number of viable projects to achieve the RPS procurement requirements."<sup>27</sup> Given its size, it would be unreasonable to anticipate that the Port would have been able to have multiple projects in development at the same time. While multiple simultaneous projects may make sense for larger utilities, the cost for a utility the size of the Port would be unmanageable, and the output received from multiple projects would far exceed the Port's need. Furthermore, securing a contract for energy that the Port would never need would unnecessarily expose the Port to undue market risk.

4. Fourth Element - The POU sought to develop at least one of the following:
  - Its own RPS-eligible resources
  - Transmission to interconnect to RPS-eligible resources
  - Energy storage used to integrate RPS-eligible resources. (Section 3206(a)(2)(A)(2)(ii))

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<sup>25</sup> Exhibit 2005, CEC000134.

<sup>26</sup> *Id.*

<sup>27</sup> Exhibit 2005, at CEC000135

The Port generally agrees with Staff's assessment in its Evaluation that: "The Port addressed the requirement to seek to develop either its own RPS-eligible resources, transmission to connect to RPS-eligible resources, or energy storage used to integrate RPS-eligible resources."<sup>28</sup> Obviously, the Port focused its efforts on developing its own local generation, and so clearly meets this element.

5. Fifth Element - The POU procured at a level above its RPS requirements to compensate for foreseeable delays or insufficient supply. (Section 3206(a)(2)(A)(2)(iii))

The Port generally agrees with Staff's assessment in its Evaluation that: "The Port addressed the requirement to procure an appropriate minimum margin above the level necessary to comply with the RPS to compensate for foreseeable delays or insufficient supply."<sup>29</sup> As described under element 3, procuring resources to compensate for a project failure would be impossible for a utility the size of the Port. A single project was going to provide all of the generation necessary for the Port to meet its RPS procurement requirement. To procure additional resources to protect against project failure would essentially require the Port to procure double the necessary resources. Such an interpretation would be cost prohibitive.

6. Sixth Element - The POU took reasonable measures to procure cost-effective distributed generation and allowable unbundled RECs. (Section 3206(a)(2)(A)(2)(iv))

The Port generally agrees with Staff's assessment in its Evaluation that: "The Port addressed the requirement to take reasonable measures to procure cost-effective distributed generation and allowable unbundled RECs."<sup>30</sup> After the solar project failed, the Port purchased sufficient unbundled RECs, thereby satisfying this element.

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<sup>28</sup> Exhibit 2005, at CEC000135.

<sup>29</sup> Exhibit 2005, at CEC000136.

<sup>30</sup> Exhibit 2005, at CEC000136.

### C. What Legal Standards Should be Used For Determining Whether the Port's Actions Constitute Substantial Compliance?

#### 1. Applicable Legal Standard for Substantial Compliance

It is well-settled caselaw that “[u]nless the intent of the statute can only be served by demanding strict compliance with its terms, substantial compliance is the governing test.”<sup>31</sup> Furthermore, “[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 character of the act to be done, and from the consequences which would follow the doing or failure to do that particular act at the required time.”<sup>32</sup> Therefore, in evaluating whether the Port was in substantial compliance, we must first look to the intent of the RPS as a whole, next at the purpose of the cost limitation and delay of timely compliance provisions individually, then at the nature of the act, and finally we must look at the consequences of a failure to expressly adopt the provisions.

##### *(a) Intent of the RPS as a Whole*

Section 399.11 provides the findings and declarations for the RPS Program, which includes its overarching purpose and goals. Specifically, Section 399.11(b) lists a variety of goals including; increasing diversity in resources, reducing air pollution, meeting GHG reduction targets, and providing stable electric rates.<sup>33</sup> A key provision, however, is in Section 399.11(e)(1), which states:

[s]upplying electricity to California end-use customers that is generated by eligible renewable energy resources is necessary to improve California’s air quality and public health, **particularly in disadvantaged communities** identified pursuant to Section 39711 or the Health and Safety Code, and the commission shall ensure rates are just and reasonable, and **are not significantly affected by the procurement requirements of this article.**<sup>34</sup>

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<sup>31</sup> *Downtown Palo Alto Com. for Fair Assessment v. City Council*, 180 Cal. App. 3d 384, 394 (1986).

<sup>32</sup> *Id* at 395.

<sup>33</sup> Pub. Util. Code § 399.11(b).

<sup>34</sup> Pub. Util. Code § 399.11(e)(1) (emphasis added).

In other words, the overall purpose of the RPS is to increase the amount of renewable generation that is serving California, with a particular emphasis on generation located in or impacting disadvantaged communities, in a manner that does not substantially increase rates.

***(b) Purpose of Cost Limitation***

There is limited statutory history describing the intent of the cost limitation provisions applicable to both POUs and retail sellers. However, the amendments of SB 350 shed light on the primary intent of the cost limitation by eliminating most of the prior requirements. The core remaining language is that the cost limitation must be “set at a level that prevents **disproportionate** rate impacts.”<sup>35</sup> Disproportionate is not defined in the Public Utilities Code, and thus it should be given its ordinary meaning. Pursuant to Black’s Law Dictionary (10<sup>th</sup> Ed. 2014), “disproportionate” is defined as “Having too much or too little in relation to something else; not suitable in comparison with something else in size, amount, importance, etc.” The most reasonable and plain meaning of the term in this context is that the cost limitation prevents disproportionate rate impacts in relation to other utilities’ customers. There should not be any individual community or group of ratepayers that bears an undue burden, or is disproportionately harmed by achieving the RPS. Where there are unique circumstances that impact a utility, such as unemployment, poverty, financial challenges for the utility, structural limitation, or unique customers, there can be a basis for limiting the cost of the program and the overall rate impact.

***(c) Purpose of Delay of Timely Compliance.***

The purpose of the delay of timely compliance provision is to provide utilities with the assurance that they will not be punished for their good faith efforts to develop renewable generation. The complex nature of developing a project, particularly within California means

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<sup>35</sup> Cal. Pub. Util. Code 399.15(c) (emphasis added).

that there are a host of circumstances that can delay or terminate a renewable project that are completely outside the control of a utility. These can include potential delays in permitting, interconnection, financing, local regulations, broader economic conditions, labor availability, and many more issues.

Where a utility has made a good faith effort and has planned reasonably, the customers, and community, served by the utility should not be punished for non-compliance caused by events the utility was powerless to prevent. If utilities were to be subject to penalties for a failure to comply resulting from a project failing despite good faith efforts, this would act as a strong disincentive to develop new projects. Instead, utilities would likely look to out-of-state projects where development risks may be lower or to existing generation. In particular it would act as a strong disincentive to developing resources in the utility's community.

***(d) Nature and Character of the Act to be Done***

The RPS program is implemented through a comprehensive statutory and regulatory structure. The procurement amounts, resource types, deadlines, and optional compliance mechanisms are spelled out in detail with little flexibility provided to the individual POUs. The relevant statutory sections direct POUs to adopt both an Enforcement Program<sup>36</sup> and a Procurement Plan.<sup>37</sup> However, the statute provides little guidance on what the difference between these documents is and the relative importance of each. For example, if a POU was otherwise compliant with the RPS but had not updated the compliance targets its Procurement Plan to reflect a more recent statute (for example SB 100), would that POU be out of compliance with the RPS? If so, what rationale would support a finding of non-compliance when the actual RPS requirement is strictly detailed in statute and compliance is mandatory.

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<sup>36</sup> Cal. Pub. Util. Code § 399.30(e).

<sup>37</sup> Cal. Pub. Util. Code § 399.30(a)(1).

The primary purpose of the procurement plan/enforcement program adoption requirement is to acknowledge the authority that local governing boards have and limited role of the Commission over POU. This is particularly true in comparison to the role of the CPUC relative to investor owned utilities. As stated in Section 399.30(n), POU governing boards maintain complete control over “the mix of eligible renewable energy resources procured by the utility and those additional generation resources procured by the utility for purposes of ensuring resource adequacy and reliability” and “[t]he reasonable costs incurred by the utility for eligible renewable energy resources owned by the utility.”<sup>38</sup>

The purpose of the procurement plan/enforcement program adoption requirement is not primarily to inform the public. First, the RPS program is very complex and it is exceedingly difficult for a typical customer to translate the RPS information into a straightforward understanding of how much renewables their utility is procuring. This complexity and confusion of the RPS includes: (1) multi-year compliance periods; (2) differences between the date of generation and the date of retirement; (3) the excess procurement rules; (4) historic carryover; (5) the meaning and relevance of the portfolio content categories, including grandfathered resources; and (6) special rules for unique POUs. Instead, it is much clearer for a customer to understand the actual procurement decisions of their POU and the rate impacts of that procurement. Both of these are not accomplished through a Procurement Plan, but through individual Governing Board actions. Further, customers are much more likely to look to their power content label to understand how their utility is performing on the procurement of renewable power compared to other utilities and the state average.

***(e) Consequences of Failure to Take Action***

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<sup>38</sup> Cal. Pub. Util. Code § 399.30(n).

When determining the consequence of a failure to take action in this context, it is essential to evaluate the impact to the customer of the POU. Did the process that the POU used significantly reduce the opportunity of the customer to be informed and to raise concerns with a particular course of action? Were there any negative financial consequences to the customer? It is also relevant to consider how much flexibility in design of the cost limitation or the delay of timely compliance condition the POU actually has. In the case of the delay of timely compliance requirements, the relevant statutory provision is very prescriptive and a POU would typically copy the statutory directly into their procurement plan. Similarly, the structure of the a cost limitation provision, including the counting rules and consequences of exceeding the limit are narrowly construed. In either case, what impact would the customer reasonably be able to have on the outcome of the design of the mechanism. Additionally, timing is relevant as well. If the events leading to the need for a delay of timely compliance condition or a cost limitation have already occurred (*e.g.*, a project has failed, and/or alternate sources of RPS-eligible resources are prohibitively expensive), what would a customer be able to change. The only real impact would be to urge their POU to not exercise the option to avoid a penalty.

**D. Applying the Facts in the Record to the Standard, Explain Why or Why Not the Port's Actions Meet Applicable Legal Standards for Substantial Compliance?**

1. The Port's Actions are Fully Consistent with the Intent of the RPS.

The generating resources that the Port attempted to build in its service territory would have met the goals of the RPS. The Port attempted to procure a 30 MW solar facility located within its service territory, which would have supported a diversified portfolio, helped meet greenhouse gas reduction targets, and reduced air pollution. The facility would have been located in a disadvantaged community as designated by Section 39711 or the Health and Safety Code. Furthermore, the facility would have been located in a local capacity area where it would have

provided increased resource adequacy value. This facility would have met nearly every goal expressed by the RPS and is exactly the type of resource that the RPS seeks to encourage utilities to develop.

## 2. Consistent with the Purpose of the Cost Limitation

As described above, the Port has clearly demonstrated that its customers would face a disproportionate impact from a rate spike that would have been necessary to fully comply with the RPS during the first compliance period. The Port serves an economically disadvantaged community that faces high unemployment and poverty. The Port serves as an economic driver for this community. Further, the nature of Port's customers means that they are mobile and can relocate to other ports based on economic conditions. Because the Port is small and has very few customers, the impact of losing even a few could have serious financial consequences. Finally, the Port was particularly impacted by the recent financial downturn, and during the Compliance Period 1, the Port's financial security was a major issue.

The purpose of the cost limitation provision is to protect customers that face exactly these types of unique circumstances so that no one community faces a disproportionate burden associated with the RPS. Providing protections to the Port's customers is fully consistent with the RPS. Imposing a penalty on the Port would cause disproportionate harm to the Port and would threaten the ability of the Port to meet future RPS requirements, the exact opposite intent of the cost limitation provision.

## 3. Consistent with purpose of Purpose of Delay of Timely Compliance

As described above, the Port expended extensive efforts and funds to attempt to develop two different local solar projects. In both cases, the projects failed due to circumstances outside of the control of the Port. The exact purpose of the delay of timely compliance provision is to



encourage these types of projects and to protect a utility in this circumstance. If the Commission does not apply the delay of timely compliance provision to this circumstance it may have a chilling effect on the willingness of utilities take such a risk. This is particularly of small utilities like the Port that face even greater risks because of the small number of projects that they can reasonably pursue.

4. Nature of the Action Not Taken and the Consequences of the Failure to Formally Adopt.

The Port's customers had a full and undiminished opportunity to be informed of the Port's strategy to comply with the RPS. There is no functional difference between the public meeting held by the Port to present its Procurement Plan and formal meeting of the Port Commission where the adoption would have occurred. The information contained in the Port's Procurement Plan contained the essential elements of a cost limitation, including both the need to return to financial health and the need to beat PG&E rates. Similarly, the information contained in the Procurement Plan fully described the projects the Port attempted to develop and the reasons why those projects failed. The Port's customers had a fair opportunity provide input to the Port Commission on the planned solar projects and the rate impacts of the RPS program through any of the many Port Commission Meetings where these items were discussed.

Further, because the statutory requirements for both delay of timely compliance and a cost limitation are prescriptive in nature, a Port customer would have been limited to arguing that the Port should not exercise this right and accept a penalty.

The Port's customers were therefore not negatively impacted by the lack of formal adoption of a cost limitation or a delay of timely compliance provision. However, applying penalties would both impose increased costs for customers and a community that will be disproportionately harmed and punish a POU for attempting to develop its own local generation.

Therefore, the Commission should find that the Port substantially complied the requirements for both a cost limitation and delay of timely compliance condition.

## **E. MITIGATING FACTORS**

### **1. Address the Applicability of the Mitigating Factors Identified in § 1240(d)(1) to the Resolution of the Complaint.**

The mitigating factors identified in Section 1240(d)(1) serve two purposes: (i) the Commission has the authority to dismiss a complaint on the basis of mitigating circumstances if the Commission determines that a violation is fully excused, and no penalty is appropriate; and (ii) if the Commission does refer a violation to ARB, then it must make factual findings on mitigating circumstances which the ARB will rely on for purposes of assessing a penalty. As stated during the Hearing, the Port generally agrees with Commission Staff's characterization of the mitigating factors identified Section 1240(d)(1). The Port confirms that it was in full compliance with the RPS requirements in Compliance Period 2 and is on track to meet the requirements of Compliance Period 3.

### **2. What is the Legal Authority for the Parties' Request that the Energy Commission Rely on Mitigating Factors as a Basis for Waiving or Excusing RPS Noncompliance Based on Mitigating Factor?**

This is a significant and new question of statutory interpretation, and in such cases, it is useful to start with the rules of statutory construction. While a great number of cases provide guidance on this issue, the following is pertinent to the case at hand:

[s]tatutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers – one that is practical rather than technical, and that will lead to a wise policy rather than to mischief or absurdity.' '[i]n construing a statute the courts may consider the consequences that might flow from a particular interpretation. They will construe the statute with a view to promoting rather than to defeating its general purpose and the policy behind it.'<sup>39</sup>

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<sup>39</sup> *City of Costa Mesa v. McKenzie*, 30 Cal. App. 3d 763, 770 (1973) (citing *Anaheim Union Water Co. v. Franchise Tax Bd.*, 26 Cal.App.3d 95, 105, 102 (1972); *Bush v. Bright*, 264 Cal.App.2d 788, 792 (1968)).

Administrative agencies have been provided with wide discretion in penalty proceedings.<sup>40</sup> In this case, the Commission must ensure that the RPS is implemented in a fashion that is not unreasonably burdensome to the POUs subject to this process or to the state agencies that must implement it. It would be unreasonably burdensome and lead to absurd results if the Commission were to refer findings of violation to the Air Resources Board (“ARB”), when the Commission had determined that mitigating circumstances fully justify dismissing the complaint. For the affected POU, they would face a much longer and costly process despite a determination that their noncompliance is justified. Further, there are a host of minor and technical violations that the Commission could find for the RPS, such as missed deadlines or incomplete filings. If the Commission were to refer all of these to the ARB, it would have disastrous consequences to both agencies.

### **III. CONCLUSION**

The Commission needs to ensure that this program is designed to serve the actual purpose of the RPS, which is to increase the development of renewable resources. The Commission must balance the need to protect the integrity of the program, while at that same time, not creating an overly technical and rigid system. It must also be fair to the POUs and their ratepayers and be applied consistently and transparently.

In this matter, the Port has met all of the requirements for a cost limitation and delay of timely compliance condition except for an express reference, formally adopted by the Port Commission. The Port’s actions were fully consistent with the overall purpose of the RPS and

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<sup>40</sup> See *Hanna v. Dental Bd. of California*, 212 Cal. App. 4th, 759, 764 (2012) (“the administrative agency’s exercise of discretion as to the discipline to be imposed will not be disturbed unless a manifest abuse of discretion is shown... ‘This rule is based on the rationale that ‘the courts should pay great deference to the expertise of the administrative agency in determining the appropriate penalty to be imposed.’”).

the specific purpose of the cost limitation and delay of timely compliance provisions. The Port's public process adequately informed their customers of the Port's plans for RPS compliance, and formal adoption would not have provided any additional value to customers. In contrast, imposing a penalty on the Port would have direct consequences on the Port's customers and the community it serves. A rate shock to the Port could threaten the viability of the utility and have cascading consequences to the broader community. This is the opposite intent of the RPS. Alternatively, the Commission must have the authority to dismiss a complaint without needing to refer every violation to the ARB. The mitigating factors described by the Commission Staff with the additional factors raised by the Port justify dismissal.

Dated: October 16, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Justin Wynne", with a stylized flourish at the end.

Justin Wynne  
Braun Blaising Smith Wynne PC  
915 L Street, Suite 1480  
Sacramento, CA 95814  
(916) 326-5813  
wynne@braunlegal.com

Attorney for the Port of Stockton