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

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## TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION .....	1
II. ARGUMENT .....	2
A. The Port has failed to comply with express statutory and regulatory optional compliance measure requirements. ....	2
B. The Port has not met its own standard for substantial compliance and incorrectly identifies the intent for such a finding. ....	4
C. The Port’s assertions regarding public knowledge and participation and Port Commissioner direction are not a substitute for meeting statutory and regulatory adoption requirements. ....	7
D. Adjudication of whether the Port has complied with optional compliance measure requirements is separate and apart from the Commission’s consideration of penalties or financial harm to the Port and other mitigating factors. ....	9
E. The Commission’s consideration of mitigating circumstances is for the purpose of excusing or waiving noncompliance with the RPS procurement requirement, not for dismissing the subject complaint against the Port. ....	11
F. Additional evidence regarding Staff’s communications with the Port after CP 1 ended contradicts the Port’s argument that it considered and established optional compliance measures during CP 1. ....	12
III. CONCLUSION.....	14

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisor*  
(1968) 263 Cal.App.2d 41 ..... 8

**Statutes**

Government Code

§ 54950 ..... 8  
§§ 54950 et seq. .... 8

Harbors & Navigation Code

§ 6270 ..... 8

Public Utilities Code

§ 399.11 subd. (e)(1) ..... 5, 6  
§ 399.30 subd. (d), ..... 4  
§ 399.30 subd. (d)(2)(B) ..... 2  
§ 399.30 subd. (o) ..... 3, 4

**Regulations**

California Code of Regulations, Title 20

Cal. Code Regs., tit. 20, § 1240 ..... 2, 3  
Cal. Code Regs., tit. 20, § 1240 subd. (a)(1) ..... 3  
Cal. Code Regs., tit. 20, § 1240 subd. (d)(1) ..... 10  
Cal. Code Regs., tit. 20, §§ 3200-3208 ..... 2  
Cal. Code Regs., tit. 20, § 3206 ..... 2, 4, 12  
Cal. Code Regs., tit. 20, § 3206 subd. (a)(2) ..... 6  
Cal. Code Regs., tit. 20, § 3206 subd. (b) ..... 2, 3  
Cal. Code Regs., tit. 20, § 3207 subd. (d) ..... 12  
Cal. Code Regs., tit. 20, § 3207 subd. (d)(6) ..... 12

**Other Authorities**

Senate Bill 350 ..... 4  
*Final Statement of Reasons (FSOR)* ..... 4  
*Initial Statement of Reasons (ISOR)* ..... 3

## I. INTRODUCTION

California Energy Commission Staff (“Staff”) are providing this *Staff Reply Brief to Committee Questions and Issues Identified in the September 7, 2018 Notice* (“Staff Reply Brief”) in response to the Stockton Port District (the “Port”) *Port of Stockton Brief Addressing Legal Issues Identified in September 7, 2018, Notice of Committee Hearing* (“Port Opening Brief”)<sup>1</sup> which was filed in response to the *Briefing Order* issued by the Committee dated September 18, 2018.<sup>2</sup>

The Port Opening Brief has not established that the Port has met the requirements to apply optional compliance measures to excuse its noncompliance with RPS procurement requirements. Firstly, the Port has not shown it has met express statutory and regulatory optional compliance measure requirements. Furthermore, it has not shown it has met its own stated standard for substantial compliance of these requirements. In addition, the Port’s attempt to provide assurances regarding public knowledge and participation and Port Commissioner direction cannot act as a substitute for Port compliance with statutory and regulatory adoption requirements.

The Port Opening Brief arguments concerning mitigating factors are misplaced. Adjudication of whether the Port has complied with optional compliance measure requirements is separate and apart from the California Energy Commission’s (“Commission”) consideration of penalties or financial harm to the Port and other mitigating factors. The Commission’s consideration of mitigating circumstances is for the purpose of excusing or waiving noncompliance with the RPS procurement requirement, not for dismissing the subject complaint against the Port.

Furthermore, additional evidence regarding Staff’s communications with the Port after the end of Compliance Period 1 (“CP 1”) contradicts the Port’s argument that it considered and established optional compliance measures during CP 1. Staff has added additional evidence to the record to support its positions on this point as well as address other points raised by the Port Opening Brief.

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<sup>1</sup> TN 225003, Port Opening Brief.

<sup>2</sup> TN 224754, Briefing Order.

## II. ARGUMENT

### A. The Port has failed to comply with express statutory and regulatory optional compliance measure requirements.

The Port Opening Brief acknowledges that the statutory and regulatory structure of the RPS program, including optional compliance measure requirements, are spelled out in detail with little flexibility provided to individual local publicly owned electric utilities (“POUs”).<sup>3</sup> As covered in detail in the *Staff Opening Brief to Committee Questions and Issues Identified in the September 7, 2018 Notice* (“Staff Opening Brief”), the Port has failed to satisfy the clear and express requirements in the statutes and regulations regarding POU governing body planning and adoption of optional compliance measures.<sup>4</sup>

One of the primary requirements raised in the complaint and at issue in this proceeding is section 3206(b) of the Commission RPS regulations, *Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* (“RPS Regulations”).<sup>5</sup> Section 3206 governs the application of optional compliance measures and section 3206(b) specifically 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 Port acknowledges this as a requirement, but instead of addressing compliance with the requirement, the Port argues that compliance is not necessary because this requirement does not appear in the statute.<sup>6</sup> Instead of requiring the Port to meet express regulatory language requiring its optional compliance measures be adopted, in place, and described in a procurement plan or enforcement program, the Port argues that the Commission should adjudicate this matter based on the statutory language from Public Utilities Code section 399.30(d)(2)(B) alone.<sup>7</sup> The Port is wrong. In order for the Port’s procurement deficits to be excused by the application of one or more optional compliance measures, the Port must meet all applicable requirements, including applicable regulatory requirements.

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<sup>3</sup> TN 225003, Port Opening Brief, p. 16.

<sup>4</sup> TN 225002, Staff Opening Brief, pp. 3-7 and 10-13.

<sup>5</sup> These regulations are codified in the Cal. Code Regs. tit 20, §§ 1240 and 3200-3208.

<sup>6</sup> See TN 225003, Port Opening Brief, pp. 4 and 10.

<sup>7</sup> See TN 225003, Port Opening Brief, pp. 4 and 10.

A complaint can be filed against a POU based on noncompliance with regulatory requirements. Public Utilities Code section 399.30(o) directs the Commission to adopt regulations specifying procedures for enforcement of the RPS, including a process for issuing a notice of violation against a POU for failure to comply with the RPS.<sup>8</sup> Pursuant to this legislative directive the Commission’s adopted RPS Regulations were approved by the State of California Office of Administrative Law on August 28, 2013, and became effective on October 1, 2013.<sup>9</sup> And under section 1240 of the RPS Regulations, the Commission’s Executive Director has the authority to file a complaint against a POU “for failure to meet a Renewables Portfolio Standard requirement, *or any regulation, order, or decision adopted by the Commission . . .*”<sup>10</sup> The complaint filed against the Port alleges that the Port failed to meet regulatory requirements, including section 3206(b), and therefore any adjudication of whether optional compliance measures excuse the Port’s procurement deficits must include an adjudication of whether the Port satisfied these requirements.

The Commission’s rationale for the RPS Regulations was explained in its *Initial Statement of Reasons* (“ISOR”) for the rulemaking for the RPS Regulations.<sup>11</sup> The ISOR was published in March 2012 and explains the Commission’s rationale for the rulemaking, stating in pertinent part as follows:

The proposed regulations establish the rules and procedures by which the Energy Commission will assess a POU’s procurement actions and determine whether those actions meet the RPS procurement requirements in the law. The proposed regulations determine what POU action is required by the law; so when the Energy Commission evaluates a POU’s actions, it may determine whether the POU complied with the law. The proposed regulations require POU’s to submit various information and reports to the Energy Commission, so the Energy Commission may verify and determine compliance with the RPS, and, if appropriate, issue a notice of violation and correction for a POU’s failure to comply and refer the violation to the ARB for potential penalties.

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The proposed regulations will also help the POU’s by providing direction and guidance on how the Energy Commission will interpret, apply and enforce the law, so the POU’s can plan accordingly in procuring renewable electricity to meet their RPS requirements.<sup>12</sup>

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<sup>8</sup> Pub. Util. Code, § 399.30 subd. (o).

<sup>9</sup> TN 225545, approval notice from the State of California Office of Administrative Law.

<sup>10</sup> Cal. Code Regs., tit. 20, § 1240, subd. (a)(1) (italics added).

<sup>11</sup> TN 225543, Initial Statement of Reasons for Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities, CEC-300-2013-004.

<sup>12</sup> ISOR, pp. 3-4.

In the Commission's *Final Statement of Reasons* ("FSOR") for the same rulemaking, the Commission further responded to comments from POU's regarding the Commission's authority to adopt the RPS Regulations and establish criteria for optional compliance measure rules under section 3206 of the RPS Regulations.<sup>13</sup> The Commission's response to these comments are included in the FSOR, Attachment A, response no. 90, which states as follows:

The Energy Commission, based on the authority granted in Public Utilities Code section 399.30 (l) [now subdivision (o)], must ensure that the rules adopted by the POU's under section 3206 are consistent with statutory language in Public Utilities Code section 399.30 (d), if the POU intends to use the rules to satisfy or delay its procurement requirements. Only those rules that are determined to be consistent with the statute may be applied to satisfy, reduce or delay a POU's compliance with the RPS procurement requirements. This determination does not preclude a POU from adopting rules that do not comport with the RPS requirements. It does, however, preclude a POU from taking advantage of such rules in order to avoid an RPS procurement requirement. Consequently, if the Energy Commission determines a POU's rules do not comport with the requirements of the statute the Energy Commission will not apply those rules in determining the POU's compliance with the RPS procurement requirements.<sup>14</sup>

It also should be noted that in the Port Opening Brief, the Port refers to Senate Bill 350 and states that changes to the cost limitation requirements under Senate Bill 350 are not likely to affect the analysis for purposes of this proceeding.<sup>15</sup> Staff agrees that the changes in law under Senate Bill 350 are not relevant for purposes of analyzing the cost limitation requirements under this proceeding.

**B. The Port has not met its own standard for substantial compliance and incorrectly identifies the intent for such a finding.**

The Port's substantial compliance argument in its Port Opening Brief fails on two counts. Firstly, it does not show that the Port has met its own stated standard for substantial compliance. Secondly, the Port incorrectly identifies the intent at issue for a finding of substantial compliance.

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<sup>13</sup> TN 225544, Final Statement of Reasons Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities, CEC-300-2013-004-F.

<sup>14</sup> FSOR, pp. A-44 and A-45.

<sup>15</sup> TN 225003, Port Opening Brief, pp. 3-4.

The Port has failed to meet the standard it presented in its own Port Opening Brief. The Port Opening Brief cites a case holding that when determining substantial compliance, courts first look to express language in determining intent, and if there is no express language, it will look to the terms of the statute construed as a whole, the nature and character of the act, and the consequences of doing or not doing that act.<sup>16</sup> Although the Port Opening Brief confirms that statutory and regulatory optional compliance measure requirements are spelled out in detail,<sup>17</sup> the Port chooses to ignore express statutory and regulatory language and look instead to other indications of intent behind the requirements. Moreover, in doing so, the Port incorrectly identifies the intent behind the requirements at issue.

The Port Opening Brief argues that substantial compliance with the optional compliance measure requirements can be predicated on actions consistent with the general intent behind the entire RPS program.<sup>18</sup> This is a gross overstatement of how the doctrine of substantial compliance is applied by the courts. When there is express language, the intent behind a requirement should not be viewed so broadly that any action related to the furtherance of the general intent behind a program or statutory framework would constitute substantial compliance with a specific requirement. Under the Port's reasoning basically any of its actions related to renewable energy procurement would support a finding it has substantially complied with all RPS requirements, including optional compliance measure requirements, and would essentially do away with the requirement that the Port comply with any specific, expressly stated requirements under the RPS program.

The Port also misidentifies the intent behind one of the requirements of the cost limitation optional compliance measure. In the Port Opening Brief, the Port correctly states that the main intent behind the cost limitation optional compliance measure is to avoid disproportionate rate impacts.<sup>19</sup> However, the Port incorrectly states that the "most reasonable and plain meaning" of disproportionate rate impacts is in relation to other utilities' rates.<sup>20</sup> This is not a reasonable interpretation since a majority of utilities subject to the RPS are not in direct competition with one another. In stating RPS program goals, Public Utilities Code section 399.11(e)(1) requires that "rates are just and reasonable, and are not significantly affected by the procurement

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<sup>16</sup> See TN 225003, Port Opening Brief, p. 14.

<sup>17</sup> TN 225003, Port Opening Brief, p. 16.

<sup>18</sup> See TN 225003, Port Opening Brief, pp. 14-15 and 18.

<sup>19</sup> TN 225003 Port Opening Brief, p. 15.

<sup>20</sup> TN 225003 Port Opening Brief, p. 15.

requirements . . .”<sup>21</sup> There is no indication that different utilities’ rates are to be compared, just that existing rates not be significantly affected. Therefore, the most reasonable interpretation of the intent behind the cost limitation optional compliance measure is that the procurement of renewable energy not disproportionately impact existing customer rates. The only way to determine this would be to compare existing rates to any increases in rates due to renewable energy procurement and limiting increases in a way that would prevent disproportionate rate impacts to customers.

The Port additionally misidentifies the intent behind the requirements of the delay of timely compliance optional compliance measure. In the Port Opening Brief, the Port argues that the intent behind the delay of timely compliance provisions is “to provide utilities with the assurance that they will not be punished for their good faith efforts to develop renewable generation.”<sup>22</sup> This is not accurate. The language in the delay of timely compliance optional compliance measure requirements are directed towards allowing POU’s to adopt rules to excuse noncompliance where specific enumerated circumstances lead to “conditions beyond the control of the POU.”<sup>23</sup> There is no language discussing punishment or assurances to POU’s that if they make a good faith effort, they will be found in compliance with the RPS. Therefore, the most reasonable interpretation of the intent behind the delay of timely compliance optional compliance measure is for POU’s to be excused for noncompliance if their adopted rules allow that certain enumerated circumstances exist beyond their control which prevent them from meeting their procurement requirements.

Additionally, the Port misidentifies the purpose behind the adoption requirement. The Port argues that the purpose behind the RPS procurement plan adoption requirement is to acknowledge the Port’s authority level and the Commission’s limited role over POU’s.<sup>24</sup> If the statutes and regulations wanted to point out what a POU can do under the RPS versus what the Commission can do, it does not need to include the word adoption for such an intent. It is more reasonable to determine that the consistent and repeated use of the word “adopt” in the RPS statutes and regulations requires that the POU governing body actually adopt its procurement plan and enforcement program, including any optional compliance measure rules. As stated in

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<sup>21</sup> Pub. Util. Code, § 399.11 subd. (e)(1).

<sup>22</sup> TN 225003, Port Opening Brief, p. 15.

<sup>23</sup> Cal. Code Regs., tit. 20, § 3206 subd. (a)(2).

<sup>24</sup> TN 225003, Port Opening Brief, p. 17.

the Staff Opening Brief, complying with the RPS takes significant planning and effort. Therefore, it is reasonable that the legislature included the requirement for a POU governing body to adopt its procurement plans, enforcement programs, and any optional compliance measures to ensure that these decisions are considered, deliberated, and made at the highest levels of POU governance and in a public transparent process.<sup>25</sup>

**C. The Port's assertions regarding public knowledge and participation and Port Commissioner direction are not a substitute for meeting statutory and regulatory adoption requirements.**

The Port makes various arguments to downplay applicable adoption requirements. The Port claims that its lack of adoption had no negative impact on its customers' ability to be informed of the renewable procurement and associated ratemaking activities of the Port.<sup>26</sup> The Port also argues that its public process adequately informed customers and formal adoption would not have provided any additional value to customers.<sup>27</sup> Additionally, the Port claims that the RPS is too complex for a typical customer to understand, and customers are more likely to look to power content labels for information regarding their utility's renewable power procurement.<sup>28</sup> The Port goes on to argue that there is no functional difference between the public meeting Port staff held to present its draft RPS procurement plan and a formal meeting of the Port Board of Commissioners where adoption would have occurred.<sup>29</sup>

To support its claim, the Port states that Port staff regularly met with customers to discuss rates and RPS procurement<sup>30</sup> and Port Commissioners directed Port staff, outside of formal adoption and the Port's RPS procurement plan, on RPS procurement planning and rates.<sup>31</sup> It should be noted that these statements only allege communication directed at Port staff -- customers communicating with Port staff and Port Commissioners communicating with Port staff. There is no showing that customers communicated with the Port's governing body or individual Port Commissioners, either directly or through Port staff as an intermediary, and therefore, there is no showing of public participation in the Port's decision-making.

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<sup>25</sup> TN 225002, Staff Opening Brief, pp. 11-13.

<sup>26</sup> TN 225003, Port Opening Brief, pp. 2 and 20.

<sup>27</sup> TN 225003, Port Opening Brief, p. 23.

<sup>28</sup> TN 225003, Port Opening Brief, p. 17.

<sup>29</sup> TN 225003, Port Opening Brief, p. 20.

<sup>30</sup> TN 225003, Port Opening Brief, pp. 6 and 11.

<sup>31</sup> TN 225003, Port Opening Brief, pp. 4, 6, and 10.

The Port’s assertions of sufficiency fly in the face of long-standing requirements concerning transparent public decision-making processes at all levels of public governance. The Port’s assurances regarding alleged customer knowledge and participation opportunities, as well as Port Commissioner verbal direction, are not a substitute for meeting statutory and regulatory adoption requirements.

As discussed in the Staff Opening Brief<sup>32</sup> and the *Staff Comments Regarding Additional Evidence Filed by the Stockton Port District* (“Staff Comments Regarding Additional Evidence”),<sup>33</sup> the Port is subject to the Ralph M. Brown Act (“Brown Act”). The expressly stated intent of the Brown Act is that actions and deliberations of public agencies, such as the Port, be taken openly, and that public servants not have “the right to decide what is good for the people to know and what is not good for them to know.”<sup>34</sup> By enacting the Brown Act, the legislature has decided how a public body, such as the Port, shall conduct open and public meetings, notice its meetings, post agendas, and conduct governing body participation.<sup>35</sup> It does not allow public bodies, such as the Port, to decide the minimum level of information and participation it affords select members of the public. Except in cases where the law specifically permits a local legislative body to meet in closed session, the Brown Act has been interpreted to mean that all local legislative body deliberative processes, including discussion, debate and acquisition of information, be open and available for public scrutiny.<sup>36</sup>

Additionally, as discussed in the Staff Comments Regarding Additional Evidence, the Port is subject to Harbor and Navigation Code section 6270 which similarly requires the powers of the Port to be exercised through formal action via an ordinance or resolution passed by a majority vote of the Port Board of Commissioners.<sup>37</sup>

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<sup>32</sup> See TN 225002, Staff Opening Brief, pp. 20-21.

<sup>33</sup> TN 23908, Staff Comments Regarding Additional Evidence, p. 7.

<sup>34</sup> Gov. Code, § 54950.

<sup>35</sup> See Gov. Code, § 54950 et seq.

<sup>36</sup> See *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisor*, (1968) 263 Cal.App.2d 41.

<sup>37</sup> Harb. & Nav. Code, § 6270. See also TN 23908, Staff Comments Regarding Additional Evidence, pp. 8-9 and TN 225002, Staff Opening Brief, pp. 20-21.

Furthermore, as discussed above and in Staff’s Opening Brief, express language in the RPS statutes require RPS planning and adoption by a POU’s governing board.<sup>38</sup> Additionally, the RPS Regulations contain clear requirements regarding the public process and information necessary for a POU to adopt and apply optional compliance measures to satisfy its RPS procurement requirements.<sup>39</sup>

These laws do not allow a POU to avoid adoption or action by its governing board based on a POU’s claim it would not provide additional value to its customers. Similarly, these provisions don’t allow POU’s to decide the minimum level of public participation and information to be afforded by the POU. Therefore, the Port should not be excused from RPS statutory and regulatory adoption and governing body participation requirements based on its assertions regarding public knowledge and participation and Port Commissioner direction.

**D. Adjudication of whether the Port has complied with optional compliance measure requirements is separate and apart from the Commission’s consideration of penalties or financial harm to the Port and other mitigating factors.**

In its Port Opening Brief, when addressing its claimed substantial compliance with the elements of the cost limitation and delay of timely compliance optional compliance measures, the Port repeatedly references penalties and the financial harm that it and its customers would be subject to, suggesting that such penalties and financial harm are factors in determining whether the elements of a cost limitation or delay of timely compliance measure are satisfied. For example, the Port states that “[i]mposing 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”<sup>40</sup> and “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.”<sup>41</sup>

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<sup>38</sup> See TN 225002, Staff Opening Brief, pp. 12-13.

<sup>39</sup> See TN 225002, Staff Opening Brief, pp. 3-5 and 11-12.

<sup>40</sup> TN 225003, Port Opening Brief, p. 19.

<sup>41</sup> TN 225003, Port Opening Brief, p. 20.

However, the potential penalties and financial harm that a POU may be subject to are not elements of the cost limitation or delay of timely compliance optional compliance measures as detailed in the Staff Opening Brief. Instead, such penalties and financial harm may be considered “mitigating factors” consistent with section 1240 (d)(1) of the RPS Regulations. As discussed in the Staff Opening Brief, one of the mitigating factors specifically listed in section 1240 (d)(1) is “the financial harm to the POU.”<sup>42</sup> Therefore, it would be appropriate for the Commission to consider the potential financial harm to the Port in determining whether to excuse or waive the Port’s noncompliance with the RPS procurement requirements of CP 1. It would not, however, be appropriate for the Commission to consider the Port’s potential financial harm in determining whether the Port satisfied the requirements for adopting and applying cost limitation or delay of timely compliance optional compliance measures.

Regarding the Port’s potential financial harm, no penalties have been proposed against the Port for its noncompliance with the RPS procurement requirements. In fact, Staff has argued that there are compelling reasons for excusing the Port’s procurement deficits and not finding it in violation of the RPS requirements.<sup>43</sup>

Also, while the Port claims that applying penalties would “both impose increased costs for customers and a community that will be disproportionately harmed,”<sup>44</sup> it provides no support for this statement. First of all, no penalties are being proposed at this point. But, even if penalties were proposed and certain, the Port has provided no evidence to indicate the Port would raise the electricity rates of its customers. Rather than raising electricity rates, which could increase a Port customer’s overall electricity costs, it seems possible that the Port could decide instead to cut other services, or raise costs for other services, as way of offsetting the costs associated with any potential penalties. Additionally, it is unclear how such penalties would disproportionately harm the community served by the Port, which the Port claims is an “economically disadvantaged community.”<sup>45</sup> The Port has previously indicated that it does not provide electric service to residential customers, and that all of its customers are either commercial or industrial customers.<sup>46</sup>

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<sup>42</sup> TN 225002, Staff Opening Brief, pp. 22-23.

<sup>43</sup> Refer to TN 222161-1, Complaint, p. 11, and TN 225002, Staff Opening Brief, pp. 22-26.

<sup>44</sup> TN 225003, Port Opening Brief, p. 20.

<sup>45</sup> TN 225003, Port Opening Brief, p. 19.

<sup>46</sup> TN 224693, Exhibit 2006, Bates no. 536.

**E. The Commission’s consideration of mitigating circumstances is for the purpose of excusing or waiving noncompliance with the RPS procurement requirement, not for dismissing the subject complaint against the Port.**

In its Opening Brief, the Port argues that administrative agencies have wide discretion in penalty proceedings, and therefore, in this case, the Commission must “ensure the RPS is implemented in a fashion that is not unreasonably burdensome to the POUs subject to this [complaint proceeding] process or to the state agencies that must implement it.”<sup>47</sup> The Port argues that it would be unreasonably burdensome and lead to absurd results if the Commission were to refer a finding of violation to the California Air Resources Board when the Commission has determined that “mitigating circumstances fully justify dismissing the complaint.”<sup>48</sup>

Staff agrees that the Commission has discretion, based on the RPS statute establishing the Commission as trier of fact, to consider mitigating circumstances in deciding whether to waive or excuse noncompliance of the RPS procurement requirements. However, the Commission’s consideration of mitigating circumstances is for the purpose of excusing or waiving noncompliance with the RPS procurement requirement, not for dismissing the subject complaint against the Port. In Staff’s view, it would only be appropriate for the Commission to dismiss the complaint if the Commission found that the Port, had in fact, satisfied its RPS procurement requirements or, alternatively, that the Port had satisfied the requirements to properly adopt and apply a cost limitation or delay of timely compliance optional compliance measure, and the application of such optional compliance measures excuses the Port’s RPS procurement deficits for CP 1.

It should also be noted that the Port Opening Brief states that the Port is in full compliance with Compliance Period 2.<sup>49</sup> However, under Public Utilities Code section 399.25, the determination of whether a POU has met its RPS compliance requirements rests with the Commission and as of today’s date the Commission has not adopted any final verification reports for POUs for Compliance Period 2.

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<sup>47</sup> TN 225003, Port Opening Brief, p. 22.

<sup>48</sup> TN 225003, Port Opening Brief, p. 22.

<sup>49</sup> TN 225003, Port Opening Brief, pp. 9 and 21.

**F. Additional evidence regarding Staff's communications with the Port after CP 1 ended contradicts the Port's argument that it considered and established optional compliance measures during CP 1.**

The additional evidence provided by Staff regarding its communications with Port staff during the compliance verification process for CP 1 suggests that the Port did not consider optional compliance measures until long after CP 1 ended on December 31, 2013, and only after Staff followed up with Port staff in October of 2014. This additional evidence does not support the Port's argument that its considered and established cost limitation and delay of timely compliance optional compliance measures during CP 1.

Under section 3207(d) of the RPS Regulations, POUs were required to submit a compliance period report for CP 1 by July 1, 2014.<sup>50</sup> If the POU's compliance period report indicated the POU's RPS procurement requirements were not met, the POU was required to include in the compliance period report documentation to justify the POU's application of any optional compliance measures adopted by the POU in accordance with section 3206 of the RPS Regulations.<sup>51</sup>

According to data compiled by Staff, the Port provided an incomplete Compliance Period Report by the July 1, 2014 deadline and submitted additional information on July 3, 2014, but the report was still missing an attestation form for the Western Renewable Energy Generation Information System (WREGIS).<sup>52</sup> On July 28, 2014, Staff notified the Port that information was missing from its report, and on July 29, 2014, the Port provided the additional information.<sup>53</sup> On August 12, 2014, Staff made a preliminary determination that the Port's Compliance Period 1 Report was complete.<sup>54</sup>

At no point prior to October 2014 did the Port indicate in the information reported as part of its Compliance Period Report that the Port intended to apply optional compliance measures as specified in the California Code of Regulations, title 20, section 3206.<sup>55</sup> The Port changed this indication after Staff informed the Port on October 13, 2014, that Staff's preliminary results showed the Port had an RPS procurement deficit and that the Port had not indicated it was

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<sup>50</sup> Cal. Code of Regs., tit. 20, §3207, subd. (d).

<sup>51</sup> Cal. Code of Regs., tit. 20, §3207, subd. (d)(6).

<sup>52</sup> TN 225594, Declaration of Emily Lemei, paragraph 10.

<sup>53</sup> TN 225594, Declaration of Emily Lemei, paragraph 10.

<sup>54</sup> TN 225594, Declaration of Emily Lemei, paragraph 10.

<sup>55</sup> TN 225594, Declaration of Emily Lemei, paragraph 11.

applying optional compliance measures or provided any supporting documentation for doing so in its Compliance Period reporting.<sup>56</sup> The Port subsequently provided information indicating that it was applying the cost limitation optional compliance measure.<sup>57</sup>

On July 18, 2016, Staff provided additional guidance to the Port on the documentation needed to support the identified application of the cost limitation optional compliance measure.<sup>58</sup> Staff further provided a draft Verification Results Report to the Port on December 20, 2016.<sup>59</sup> Following receipt of the draft Verification Results Report, on January 3, 2017, the Port indicated that it additionally wanted to apply the delay of timely compliance optional compliance measure.<sup>60</sup>

These facts suggest that the Port did not consider cost limitation or delay of timely compliance optional compliance measures until long after CP 1 ended and only after Staff had followed up in October 2014 about the Port’s application of optional compliance measures. These facts do not support the Port’s position that its considered and established these optional compliance measures during CP 1. Note too that these facts refute the assertions made by the Port in its *Port of Stockton Response to Committee Response to Staff Motion to Bifurcate and Order for Additional Information* (“Port Response”). In the Port Response, the Port wrongly states that it “submitted its Compliance Period 1 Annual Reports and Compliance Report by applicable deadlines.”<sup>61</sup>

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<sup>56</sup> TN 225594, Declaration of Emily Lemei, paragraph 11.  
<sup>57</sup> TN 225594, Declaration of Emily Lemei, paragraph 11.  
<sup>58</sup> TN 225594, Declaration of Emily Lemei, paragraph 12.  
<sup>59</sup> TN 225594, Declaration of Emily Lemei, paragraph 12.  
<sup>60</sup> TN 225594, Declaration of Emily Lemei, paragraph 12.  
<sup>61</sup> TN 223100, Port Response, p. 5.

### III. CONCLUSION

For the reasons discussed in the Staff Opening Brief and this Staff Reply Brief, the Commission should find that the Port did not meet its RPS procurement requirements and is not otherwise excused by the application of the cost limitation or delay of timely compliance optional compliance measures, but that the Port's noncompliance is nevertheless excused by mitigating circumstances and therefore, the Port should not be found in violation of the RPS requirements for CP 1.

Dated this 30<sup>th</sup> day of October 2018.

Respectfully submitted,  
CALIFORNIA ENERGY  
COMMISSION

*/S/ Mona Badie*

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**Mona Badie**

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