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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

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

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

The Port of Stockton ("Port") hereby submits this Reply Brief in response to the *Briefing Order* ("Order") issued on September 19, 2018. In the Order, the Committee directs the Port to file briefs and reply 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] California Energy Commission ("Commission") Staff ("Staff") filed an opening brief on October 16, 2018, responding to the Order.

I. REPLY TO STAFF OPENING BRIEF

As demonstrated in the Port's Opening Brief, the Port acted in good faith to comply with the Renewables Portfolio Standard Program ("RPS") during the first Compliance Period. The Port's actions, including its efforts to develop a local, solar facility in its service territory, along with the contents of the Port's Procurement Plan and the properly noticed public meeting where it presented its plan to its customers amounts to substantial compliance with both the cost limitation and delay of timely compliance provisions of the RPS. As described below, Staff has

[1] Briefing Order at 1.

not provided sufficient support for its claim that the Port has not met the standard of substantial compliance.

A. Staff's Argument Ignores the Historical Context of the First Compliance Period.

Staff's Opening Brief substantially relies on the language included in various provisions in the Commission's *Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* ("RPS Regulations").[2] For example, Staff asserts that:

> [u]nder 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.[3]

Staff's emphasis on the precise language in the RPS Regulations, ignores the actual history of the Commission's regulatory development-process during this period. The RPS Regulations were adopted and approved by the Office of Administrative Law ("OAL") very late in the first Compliance Period, and well after most of the key events at issue in this proceeding occurred. The Commission cannot demand strict compliance with regulations that simply were not in place in a reasonable amount of time, given the nature and scope of the RPS.

As originally enacted by Senate Bill ("SB") 2-1X, Public Utilities Code section 399.30(n) directed the Commission as follows: "**On or before July 1, 2011**, the Energy Commission shall adopt regulations specifying procedures for enforcement of this article. . . . ."[4] This obviously presented a significant challenge to the Commission because SB 2-1X was not approved by the Governor until April of 2011. At the time, there was discussion of a possible clean-up bill that

[2] Cal. Code Reg., title 20, §§ 1240, 3200-3208.
[3] Staff Opening Brief at 11.
[4] Cal. Pub. Util. Code § 399.30(n) (stats. 2011, 1st Ex. Sess., ch. 1).

would have potentially fixed various issues, such as tight deadlines.[5] However, no such clean-up legislation was ever passed, and the July 1, 2011 deadline remained in place up until 2015, when it was eliminated by SB 350 (stats. 2015).

Despite this deadline, the Commission did not adopt the RPS Regulations until June 12, 2013. The RPS Regulations were then subject to review by the OAL, and were not approved until September 9, 2011, and were not effective until October 1, 2013.[6] This meant that any POU seeking guidance from the RPS Regulations would not have had finalized regulations until over 90 percent of the first compliance period had elapsed. This is particularly burdensome with the RPS because it involves long-term planning, developing new generation resources, and executing complicated contracts.

In contrast, the California Public Utilities Commission ("CPUC") adopted decisions implementing the new RPS provisions on a much shorter time frame. For example, the decision implementing the new procurement quantity requirements and the decision implementing the portfolio balance requirement were both adopted in December of 2011.[7] The remaining major compliance requirements were adopted by the CPUC in June of 2012,[8] a full fifteen months before the Commission completed its regulatory process.

The late adoption of the RPS Regulations is not merely a consideration as part of the mitigating factors that can support dismissing the Complaint. The timing also goes directly to compliance, and in particular, whether the regulatory language can be relied upon as the standard

[5] *See, e.g.*, Assembly Floor Analysis, Senate Bill 2-1X, Mar. 15, 2011, at 4 ("Although some stakeholders are concerned that this bill is not "perfect," there is discussion of a "clean-up" RPS bill to address some of the technical and outstanding issues. Some of the reports and findings required by state agencies will need to be updated. In addition, provisions may need clarity on how POU penalties will stay in the service territory of POU to assist with it attaining its RPS goals, how many state agencies will regulate compliance, how CPUC will interpret resource adequacy metrics, and other unresolved fixes.").
[6] OAL Approval Letter No. 2013-0718-05 S.
[7] D.11-12-052 (issued on December 21, 2011); D.11-12-020 (issued on December 5, 2011).
[8] D.12-06-038 (issued on June 27, 2012).

for compliance. The timing of the effective date of the RPS Regulations means that the vast majority of POU compliance activities in the first Compliance Period occurred prior to having finalized regulations and were essentially a guess based on the relevant ***statutory*** language. The Port's Procurement was developed and released on November 20, 2012, and the public meeting to discuss the plan was held on December 20, 2012, a full nine months before the Commission adopted the RPS Regulations. Yet, Staff urges the Commission to rely on the requirements of the RPS Regulations to evaluate compliance.

Due to the late date of the adoption of the RPS Regulations, the Commission should exclusively look to the relevant statutory language. The only relevant statutory language is found in Section 399.30(d):

> The governing board of a local publicly owned electric utility **may adopt** the following measures:
>
> > (1) Rules permitting the utility to apply excess procurement in one compliance period to subsequent compliance periods in the same manner as allowed for retail sellers pursuant to Section 399.13.
> >
> > (2) Conditions that allow for delaying timely compliance consistent with subdivision (b) of Section 399.15.
> >
> > (3) Cost limitations for procurement expenditures consistent with subdivision (c) of Section 399.15.[9]

Section 399.30(d) simply directs that the POU governing board may "adopt" one of the specified optional compliance mechanisms. There is no statutory requirement that the optional compliance mechanisms must be adopted as part of a procurement plan or an enforcement program. Indeed, if that had been the intent of the Legislature, specific direction could have been included. For example, Public Utilities Code section 399.30(m) ("subdivision (m)")

[9] Cal. Pub. Util. Code § 399.30(d) (stats. 2011, 1st Ex. Sess., ch. 1).

provides a partial exemption for POUs meeting certain portfolio requirements. Subdivision (m) expressly states:

> The governing board of a local publicly owned electric utility **shall demonstrate in its renewable energy resources procurement plan** required pursuant to subdivision (f) that any cancellation or divestment of the commitment would result in significant economic harm to its retail customers that cannot be substantially mitigated through resale, transfer to another entity, early closure of the facility, or other feasible measures.[10]

Subdivision (d) does not include this express reference for a procurement plan. Where the Legislature uses a term in one part of a statute and excludes it in another, significance must be given to the difference in language.

B. The Port's Actions Do Not Constitute an Entire Failure to Comply.

Staff's Opening Brief asserts the following:

> 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 its RPS procurement requirements. . . . **[T]his 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.[11]

This assertion by Staff takes an unreasonably narrow view of the actions by the Port during the first Compliance Period. As the Port has established, Port Staff developed an RPS Procurement Plan, made that plan available to customers through a bill insert, and held a properly noticed public meeting to present that plan to its customers and the public. While this RPS Procurement Plan did not use the express terms "cost limitation" or "delay of timely compliance," the

[10] Cal. Pub. Util. Code § 399.30(m)(1)(B).
[11] Staff Opening Brief at 6 (emphasis added).

essential elements of both requirements were described at length in the document in sufficient detail that the Port's customers would be well aware of the Port's intended plan.

Staff argues that this cannot be full or partial compliance because there was no formal adoption. However, staff fails to support this argument with any analysis as to why the fundamental purpose of the RPS generally, or the cost limitation or delay of timely compliance provisions specifically, necessitates formal adoption. Rather than evaluating the need and purpose of adoption, Staff provides two arguments relating to the role of POU governing boards: (1) the original RPS adopted by the Legislature gives the POU governing boards the primary role in implementing the RPS; and (2) because compliance with the RPS takes significant time, effort, and planning, that the Legislature recognized "the importance of having a POU's governing body make any necessary procurement planning decisions, including how a POU could implement available off-ramps towards compliance."[12]

Both of these arguments are unpersuasive. First, the RPS that existed for POUs pursuant to SB 1078 (stats. 2002) was fundamentally different from the RPS created by SB 2-1X. The prior RPS was essentially a voluntary program that was left completely to the discretion of the POU governing board without any role or oversight by the Commission. That the governing board of a POU played a primary role in such a structure is neither surprising nor particularly instructive in light of the mandatory and comprehensive compliance structure created by SB 2-1X.

Second, the RPS Procurement Plan is not a planning document in the sense that it is not a mechanism used by POUs to review or approve procurement decisions. The rate-setting, planning, contract approval, and project approval processes are necessarily subject to approval

[12] Staff Opening Brief at 12-13.

by the POU governing board pursuant to statutory restrictions applicable to each type of governmental structure for each POU. This authority is not affected by the RPS Procurement Plan process. In this case, Staff has not asserted that the Port Commission did not properly approve the relevant solar projects or its electric rates.

C. Staff's Argument that the Port's Cost Limitation is Inadequate is Unpersuasive and not Consistent with the Record or Staff's Evaluation.

In assessing the Port's compliance with the elements of a cost limitation beyond adoption, Staff asserts:

> 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.
>
> 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**.[13]

In contrast to Staff's Opening Brief, Staff's Evaluation did not hedge its description of the Port's cost limitation with such "could be said to have" language. Instead, Staff's Evaluation unequivocally stated:

> 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.[14]

Further, the statement in Staff's Opening Brief that the Port's cost limitation was based on a reserve policy that applied to the ***entire*** Port Budget is factually inaccurate. The Port has never asserted that the operating reserve element of its cost limitation was applicable to the entire Port Budget. Additionally, the Port's cost limitation was not a "general rate cap," but was instead a formula based directly on PG&E's rates. The Port provided the following description

[13] Staff Opening Brief at 8 (emphasis added).
[14] Exhibit F, CEC 000130.

of its cost limitation in its *Supplemental Compliance Report Response to CEC Data Request dated 7/19/2017*:

> In addition to meeting these rate goals, the Port must also maintain certain levels of reserves. This is necessary to ensure that that the **electric utility is a viable part of the Port's overall operations** and can continue to operate. If the Port cannot maintain sufficient minimum operating reserves or if the Port cannot provide rates that are sufficiently lower than the surrounding investor owned utility, and then it is very likely that the Port would cease to operate the electric utility.
>
> The Board has given Port Staff the authority to implement these two policies. Based on this direction, the Port has established a target of setting rates that are no higher than 95% of PG&E rates and a minimum reserve policy of 10%. Therefore, the Port implemented its cost limitation in a manner that meets both of these goals.
>
> As a part of a two tier cost limitation rule, at the beginning of each fiscal year budget cycle, the Port reviews its prior year operating reserve and electric rate performance. Then the Port sets its **electric budget** and commercial/industrial rates to reflect costs and be at or below ninety-five percent (95%) of the local IOU's similar commercial/industrial rates with an operating reserve at or above 10%. Therefore, upon adoption of the FY budget the retail rates and associated cost limitations included in the budget/rate assumptions are approved by the Board for that year.[15]

The Port's cost limitation is clearly based on a reserve policy specific to the Port's ***electric budget*** and not the entire Port Budget. Additionally, the Port's cost limitation formula does not apply a general rate cap but, instead, includes a formula designed to ensure competitiveness with the surrounding investor owned utility. Therefore, Staff's Opening Brief inaccurately describes the nature of the Port's cost limitation. A policy to prevent RPS-related rate spikes disproportionate to surrounding utilities and a policy to ensure the continued operation of the utility is the proper foundation of a cost limitation.

[15] Exhibit F, CEC 000198.

D. Staff Misapplies the Relevant Caselaw Articulating the Legal Standard for Substantial Compliance.

The Staff Opening Brief presents an overly narrow test for measuring substantial compliance, focusing on cases where there is an entire failure to comply with a particular objective or requirement of the statute. As described above, Staff has not provided sufficient justification to support its argument that there has been such an entire failure. The cases relied on by Staff all include a missing element or action that was essential to serve a key purpose of the relevant statute.

1. International Longshoremen's and Warehousemen's Union v. Board of Supervisors ("*ILWU*")

Staff relies on *ILWU* for the rule that "substantial compliance means 'actual compliance in respect to the substance essential to every reasonable objective of the statute . . . .'"[16] Staff describes the deficiency in the case as follows: "The court held that the defendant's [California Environmental Quality Act ("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.'"[17] However, a deeper analysis of the facts in this case demonstrates that is it clearly distinguishable from the matter before the Commission in this proceeding. In *ILWU*, the San Bernardino County Board of Supervisors doubled the allowable NOx emissions for two steam boilers that would provide electricity to an alkaline mining facility.[18] The Board of Supervisors determined that this action was exempt from the CEQA because it was an action "for the protection of the environment and natural resources."[19] Under CEQA (at the time), when a local

[16] Staff Opening Brief at 9 (citing ILWU, 116 Cal. App. 3d 265, 273).
[17] *Id.*
[18] Int'l Longshoremen's & Warehousemen's Union v. Bd. of Supervisors, 116 Cal. App. 3d 265, 269 (981)
[19] *Id.*

agency determined that a project was exempt form CEQA, that local agency was required to file a notice of exemption that included:

> (1) A brief description of the project,
> (2) A finding that the project is exempt, including a citation to the State Guidelines section under which it is found to be exempt, and
> (3) A brief statement of reasons to support the findings.[20]

However, the Board of Supervisors made no finding that the project was exempt, no citation to the Guidelines, and provided no reasons supporting an exemption.[21] Further, none of the classes of projects identified in the CEQA Guidelines as categorically exempt applied in any way to the project. As a result, the Appellate Court applied a longer statute of limitations for raising objections and also determined that the doubling of NOx would reasonably have a significant effect on the environment and was thus not eligible for the CEQA exemption.

It is therefore clear that *ILWU* was not merely about a failure to formally adopt something or to use the correct terminology. The Board of Supervisors intended to substantially increase pollution without citing to a CEQA Guideline exemption. Further, this case deals with consumer protection where there is a heightened standard for demonstrating substantial compliance. Fundamentally, the Board was taking actions that were inconsistent with the goals of CEQA:

> It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to **preventing environmental damage**, while providing a decent home and satisfying living environment for every Californian.[22]

[20] *Id.* at 172-173.
[21] *Id.*
[22] Cal. Pub. Res. Code § 21000(g).

ILWU is not analogous to this proceeding. Instead, the Board of Supervisors took an action counter to the clear intent of CEQA and failed to provide any justification for their action.

2. Hall v. City of Los Angeles

Staff relies on *Hall v. City of Los Angeles* for a narrow articulation of the substantial compliance doctrine, stating that "[t]he court held that '[s]ubstantial compliance cannot be predicated upon no compliance' and did not apply the doctrine of substantial compliance."[23] However, *Hall* is one of many cases that deals with the narrow issue of complaints for personal injury suffered from some defect on public property. In many of these cases, the plaintiff does not provide sufficient information to support the claim. Indeed, the *Hall* court does not even apply the doctrine of substantial compliance:

> **The present case is governed not by the doctrine of substantial compliance but 'by the principles enunciated in Cooper v. County of Butte, . . . and Spencer v. City of Calipatria . . . .** In each of these cases it was held that the filing of an unverified claim is not a substantial compliance with the requirements of the statute. **The failure to state the place of the accident is as serious a defect as is the failure to verify the claim**. **Indeed no part of the claim can be of more importance to the city officials than that part which gives them information to enable them to locate the point where the alleged accident occurred and to make proper investigation of the condition of the premises**.[24]

These cases are not general substantial compliance doctrine cases, but are instead articulating a narrow rule only applicable to these types of claims cases. There is a very specific and important rationale for this narrow application: "the purpose of these [claims] statutes is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without expense of litigation.[25]

[23] Staff Opening Brief at 10.
[24] Hall v. City of Los Angeles, 19 Cal. 2d 198, 202-03 (1941).
[25] Gong v. City of Rosemead, 226 Cal. App. 4th 363, 374 (2014)

The RPS Complaint proceeding before the Commission is not a "claims" case and is not comparable to the facts or finding in *Hall*. The Port's failure to use express terms and to formally adopt its Procurement Plan is not comparable to omitting the location of an accident from a claim for personal injury. As the court stated in *Hall*, the lack of a location functionally prevents any investigation of the accident. This inhibits the core purpose of these claims statutes. In the case of the Port, there is not comparable inhibition to the core purpose of the RPS Program or the optional compliance mechanisms.

3. Loehr v. Ventura County Community College District

Staff also relies on *Loehr v. Ventura County Community College District*, for the principle that substantial compliance cannot cure total omission of an essential element.[26] *Loehr* is very similar to *Hall*, in that it deals with a defective claims case. In *Loehr*, a former community college district employee brought a claim for wrongful termination.[27] However, the action was brought after the statute of limitations had run.[28] The plaintiff argued that pursuant to the Tort Claims Act, he had submitted a letter that constituted a written claim within the necessary time period.[29] Pursuant to the Tort Claims Act, such a written claim must include certain minimum information, including a statement of facts, the injury suffered and amount claimed, and the name of the public employee that caused the injury.[30] The purpose for this information is to allow the public agency to make an adequate investigation of the merits of the claim and potentially settle without the cost of litigation.[31] This is the exact same rationale and purpose as in *Hall*. In *Loehr*, the actual letter sent by plaintiff did not include: (1) any claim for

[26] Staff Opening Brief at 10.
[27] Loehr v. Ventura Cty. Cmty. Coll. Dist., 147 Cal. App. 3d 1071, 1076 (1983).
[28] *Id.* at 1077.
[29] *Id.*
[30] *Id.* at 1081.
[31] *Id.* at 1083.

damages, including an amount; (2) no discussion at all of the relevant facts and circumstances that give rise to the claim; (3) no mention at all of key defendants; and (4) no claim as to the timing of the relevant events.[32] The court concluded that "plaintiff's letter requesting reinstatement was insufficient as a matter of law to satisfy the requirements of a claim."[33]

Loehr does not support Staff's contention that the Port did not substantially comply with the RPS, or more specifically, the cost limitation or delay of timely compliance provisions. First, this is another narrow claims statute case, which has its own extensive and specific caselaw. Further, the missing information in *Loehr* was essential for the core purpose of the relevant statutory provision, to allow a public agency to adequately investigate a claimed injury and to potentially settle. There is simply no analogy between the plaintiff's failed action in *Loehr* and the Port's actions in this proceeding. There is no essential statutory purpose that cannot be carried out because of the Port's actions.

4. People v. McGee

Staff cites *People v. McGee* for the principle that in order to determine whether a statutory provision is mandatory or directory, the court must look to the intent of the statute as a whole, the nature and character of the act to be done, and the consequences that would flow from the doing or failure to do an act.[34] As Staff correctly notes, the court held that where statutory procedures are intended to protect citizens, the provisions are considered mandatory.[35] In *McGee*, a husband and wife were accused of criminal welfare fraud, but were denied a statutory right to provide restitution before charges were filed.[36] Based on an extensive review of the

[32] *Id.*
[33] *Id.* at 1084
[34] Staff Opening Brief at 17 (citing People v. McGee, 19 Cal. 3d 948, 958 (1977)).
[35] *Id.* (citing People v. McGee, 19 Cal. 3d 948, 962)
[36] People v. McGee, 19 Cal. 3d 948, 957.

relevant legislative history, the court concluded that the purpose of the restitution statute was to protect individuals accused of welfare fraud, and thus it was mandatory.[37]

While Staff have cited *McGee,* Staff does not analyze the matters in this proceeding pursuant to this standard. Staff make no arguments regarding the purpose of the overall statute, the nature of the act, or the consequences of non-action. Instead, Staff simply asserts:

> 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.[38]

These arguments are unpersuasive. The Port's Commission is necessarily directly involved in RPS planning through the normal public agency approval process for contracts and projects. The RPS Regulations were adopted after the relevant actions by the Port and so late in the Compliance Period that they cannot be relied on over the express language in the statute. Staff has also not asserted nor demonstrated that the RPS program is primarily intended to protect citizens, as was the case in *McGee*. Staff has not demonstrated that mandatory application should be applied in this proceeding.

5. Matus v. CALPERS

Finally, the Staff Opening Brief cites to *Matus v. CALPERS* for the principle that courts will treat a particular action as mandatory if it is "essential to promote the statutory design . . . ."[39] In *Matus*, CALPERS rejected an Administrative Law Judge's proposed decision awarding a widow additional retirement benefits due to a miscalculation in her deceased husband's

[37] *Id.* at 959-961.
[38] Staff Opening Brief at 18.
[39] *Id.* at 17 (citing Matus v. Bd. of Admin., 177 Cal. App. 4th 597, 608 (2009).

benefits.[40] CALPERS delayed certain procedural actions to prevent the initiation of a 100-day limit on taking future action so that it could secure enough time to obtain an opinion from the Legislative Counsel on the retirement calculation.[41] The widow filed a petition for writ of mandate, but CALPERS sought to stay the proceeding because the 100 days had not elapsed.[42] CALPERS further argued that the 100-day limit on taking action was directory rather than mandatory. The court disagreed, finding that the 100-day limit on taking action was necessary for a key statutory purpose: to provide a timely resolution for the aggrieved party. Without this limit, a state agency could delay a proceeding indefinitely.

As with *McGee*, Staff fails to articulate how this case provides support to their argument. There is no similar intent or purpose in the RPS (timely resolution of claims). The Port's actions have not impeded any fundamental purpose of the RPS. In contrast, the Port made a full and good faith effort to comply with the RPS in the manner most in line with the purpose of the RPS, developing local renewables in a disadvantaged community. The Port's actions have protected its rate payers from disproportionate rate impacts and put the Port on the path to now be in full compliance with the RPS. The cases cited by Staff simply do not support Staff's argument.

II. ADDITIONAL MITIGATING FACTORS

A. Staff Delay in the Optional Compliance Review.

Staff disagrees with the Port's assertion that Staff's delay in review is a mitigating factor.[43] Staff argues that "[n]othing Staff did (or failed to do) after CP 1 ended had any effect on the Port's action during CP 1."[44] Despite making this assertion, Staff also criticizes the

[40] Matus v. Bd. of Admin., 177 Cal. App. 4th 597, 602 (2009).
[41] *Id.*
[42] *Id.* at 604.
[43] Staff Opening Brief at 20.
[44] *Id.*

Declarations of Chris Kiriakou and Steve Escobar for not providing sufficient details about the guidance and discussions between Port Staff and the Port Commission.[45]

This is exactly the reason that a delay in the review process is a clear mitigating factor. As time goes by, memories fade and documents may be lost or more difficult to find. This delay has impeded the Port's ability to present a full case in this proceeding. This concept is one of the core reasons that statutes of limitations exist. This principle was articulated in *Wood v. Elling* Corporation as follows:

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber **until evidence has been lost, memories have faded, and witnesses have disappeared**. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.[46]

Similarly, this principle has also be articulated as follows:

> The purpose of any limitations statute is to require diligent prosecution of known claims thereby providing necessary finality and predictability in legal affairs, and **ensuring that claims will be resolved while the evidence bearing on the issues is reasonably available and fresh**.[47]

The Port's position is not novel or controversial. The substantial delay in the review process is properly a mitigating factor.

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[45] *Id.* at 15-16.
[46] Wood v. Elling Corp., 20 Cal. 3d 353, 362 (1977) (emphasis added).
[47] Kaiser Found. Hosps. v. Workers' Comp. Appeals Bd., 39 Cal. 3d 57, 62 (1985) (internal citations omitted) (emphasis added).

III. CONCLUSION

The Port appreciates the opportunity to submit this Reply Brief.

Dated: October 30, 2018

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