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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 BRIEF ADDRESSING SUGGESTED PENALTIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION	1
II. ZERO PENALTIES	1
III. MITIGATING CIRCUMSTANCES JUSTIFY ZERO PENALTIES	4
A. Reasonable Actions in Attempting to Satisfy RPS Procurement Requirements	4
B. Timing Associated with Enactment of Senate Bill X1-2	4
C. Port Serves as Economic Driver	5
D. Penalizing Port Could Impact Port’s Renewable Energy Procurement Efforts	5
E. Section 1240(d) Factors	6
IV. CONCLUSION	8

TABLE OF AUTHORITIES

Statutes

Government Code

§ 9600(a)	5
-----------------	---

Health and Safety Code

Part 6, commencing with § 38580, of Division 25.5	2
§ 38580	2
Article 3, commencing with § 42400,	2
§ 42403	2
§ 42403(b)	2

Public Utilities Code

§ 399.30(o)	1
§ 399.30(p)	4

Regulations

Cal. Code Regs., tit. 20, § 1240(d)(1).....	3, 6, 7
Cal. Code Regs., tit. 20, § 1240(g)	1, 2

Other Authorities

Senate Bill 2 (also known as X1-2)	4, 5
Senate Bill 100	2

I. INTRODUCTION

California Energy Commission Staff (“Staff”) is providing this brief in response to the Committee’s *Briefing Order* of January 9, 2019, which directs each party to “file a brief addressing suggested penalties should the Committee find the Stockton Port District noncompliant.”¹

Staff recommend that the Stockton Port District (“Port”) be assessed zero (\$0) penalties should the Committee find the Port in noncompliance. Throughout this proceeding, Staff has maintained that the Port’s noncompliance should be excused by the California Energy Commission (“Commission”) because of mitigating factors. If the Committee finds that the Commission does not have authority to waive or excuse the Port’s noncompliance based on mitigating factors, and therefore that a Notice of Violation should be prepared against the Port for referral to the California Air Resources Board (“CARB”) to consider penalties, Staff recommends that the CARB waive any penalties against the Port because of mitigating factors.

II. ZERO PENALTIES

Staff recommend that the Port be assessed zero (\$0) penalties should the Committee find the Port in noncompliance. Zero penalties are justified based on the mitigating factors discussed and considered as part of this proceeding.

As previously noted in the *Staff Opening Brief to Committee Questions and Issues Identified in the September 7, 2018 Notice*, section 1240(g) of the Commission’s regulations, *Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities* (“RPS Regulations”),² permits the Commission to include, in its decisions regarding a local publicly owned electric utility’s (“POU”) noncompliance with the RPS, suggested penalties for the CARB to consider as may be appropriate.³ Section 1240(g) does not provide direction or guidance on the range of penalties that may be suggested to the CARB, and does not preclude the Commission from recommending no penalties if justified based on mitigating factors.

¹ TN 226287.

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

³ Refer to TN 225002, pp. 30-31.

While section 1240(g) states that “[a]ny suggested penalties shall be comparable to penalties adopted by the California Public Utilities Commission for noncompliance with a Renewables Portfolio Standard requirement for retail sellers,” neither the Commission’s RPS Regulations nor the statute authorizing the CARB to assess penalties define “comparable penalties.”

The CARB’s authority to assess penalties is based on Public Utilities Code section 399.30(o)(1) which provides in pertinent part as follows:

Upon a determination by the Energy Commission that a local publicly owned electric utility has failed to comply with this article, the Energy Commission shall refer the failure to comply with this article to the State Air Resources Board, which may impose penalties to enforce this article consistent with Part 6 (commencing with Section 38580) of Division 25.5 of the Health and Safety Code. Any penalties imposed shall be comparable to those adopted by the commission [CPUC] for noncompliance by retail sellers. (Pub. Util. Code, § 399.30, subd. (o)(1).)⁴

This statute provides that the CARB may impose penalties consistent with Part 6, commencing with section 38580, of Division 25.5 of the Health and Safety Code. Section 38580 provides that “[a]ny violation of any rule, regulation, order, emission limitation, emissions reduction measure, or other measure adopted by the state board” is subject to those penalties set forth in Article 3, commencing with section 42400, of the Health and Safety Code.⁵ In turn, when assessing civil penalties for any such violation, Health and Safety Code section 42403 requires that all relevant circumstances be taken into consideration, including, but not limited to, the following factors:

- (1) The extent of harm caused by the violation.
 - (2) The nature and persistence of the violation.
 - (3) The length of time over which the violation occurs.
 - (4) The frequency of past violations.
 - (5) The record of maintenance.
 - (6) The unproven or innovative nature of the control equipment.
 - (7) Any action taken by the defendant, including the nature, extent, and time of response of the cleanup and construction undertaken, to mitigate the violation.
 - (8) The financial burden to the defendant.
- (Health & Saf. Code, § 42403, subd. (b)(1)-(8).)

⁴ Senate Bill 100 (Stats, 2018, ch. 312) renumbered Public Utilities Code section 399.30(p)(1) to section 399.30(o)(1) effective January 1, 2019.

⁵ Health and Safety Code, § 38580.

Many of the above factors were incorporated into section 1240(d)(1) of the Commission's RPS Regulations, and were considered and discussed in the parties' briefs in this proceeding. It is appropriate to consider these mitigating factors when recommending any penalties for the CARB to consider.

Regarding retail sellers, the CPUC established a penalty structure for retail sellers in Decision 14-12-023.⁶ This decision establishes a penalty rate of \$50/REC for a retail seller's procurement target deficiency or portfolio balance requirement deficiency,⁷ and sets the penalty amount based on the larger of the penalty for the procurement target violation alone or the penalty for portfolio balance requirement violation alone, so as not to penalize the retail reseller twice for the same procurement deficiency.⁸ In addition, the decision caps the maximum penalty for retail sellers other than the large investor owned utilities (Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company) at 50 percent of the retail seller's procurement target requirement for the compliance period multiplied by \$50/REC, or the maximum penalty applicable to large investor owned utilities, whichever is less.⁹ In addition, the decision establishes a process whereby a retail seller may request a waiver of its procurement target requirement and/or a reduction of its portfolio balance requirement as a means to reduce its penalties.¹⁰ In Decision 18-05-026, the CPUC maintained this penalty structure for retail sellers.¹¹

In the first RPS compliance period, the CPUC found that six retail sellers failed to comply with their RPS procurement requirements. Four of these retail sellers paid maximum penalties pursuant to the penalty structure established in Decision 14-12-023 and Decision 18-05-026, and two of the retail sellers filed motions for a waiver of their procurement target

⁶ Decision 14-12-023, *Decision Setting Enforcement Rules for the Renewables Portfolio Standard Program, Implementing Assembly Bill 2187, and Denying Petitions for Modification of Decision 12-06-038*, issued December 5, 2014.

⁷ Decision 14-12-023, p. 40 and Ordering Paragraph 27.

⁸ Decision 14-12-023, pp. 41-42, Ordering Paragraph 28.

⁹ Decision 14-12-023, pp. 46-47, Ordering Paragraph 30.

¹⁰ Decision 14-12-023, pp. 11-19 and 28-31, and Ordering Paragraphs 2-26.

¹¹ Decision 18-05-026, *Decision Implementing Senate Bill 350 Provision on Penalties and Waivers in the Renewables Portfolio Standard Program and Denying Petition for Modification of Decision 17-06-026*, issued June 6, 2018, pp. 9-10 and 13-14, and Ordering Paragraph 1.

requirements as means to reduce their penalties.¹² These waiver motions are still pending before the CPUC.

III. MITIGATING CIRCUMSTANCES JUSTIFY ZERO PENALTIES

In the subject complaint against the Port, Staff identified mitigating circumstances for excusing the Port's procurement deficits and not finding it in violation of the RPS requirements.¹³ Additionally, the Port has identified two other mitigating factors that Staff agrees further justify a recommendation that the Port not be assessed any penalties. These additional mitigating factors were discussed in the *Staff Opening Brief to Committee Questions and Issues Identified in the September 7, 2018 Notice*.¹⁴ Below, Staff summarizes the pertinent mitigating factors addressed in the complaint against the Port and in Staff's opening brief.

A. Reasonable Actions in Attempting to Satisfy RPS Procurement Requirements

The Port's actions in attempting to satisfy its RPS procurement requirements appear to be reasonable. The Port demonstrated that it would have satisfied its RPS procurement requirements if it had not encountered delays in the development of two proposed solar facilities. The Port also demonstrated that it held solicitations for RPS-eligible resources, relied on a sufficient number of projects, sought to develop its own RPS-eligible resources, and took reasonable measures to procure cost-effective distributed generation and allowable unbundled renewable energy credits (RECs).¹⁵

B. Timing Associated with Enactment of Senate Bill X1-2

The timing associated with the enactment of SB X1-2 (Stats. 2011, 1st ex. sess., ch. 1) may have affected the Port's efforts to satisfy its RPS procurement requirements.¹⁶ SBX1-2 subjected the Port and other POUs for the first time to the same or similar RPS requirements as retail sellers of electricity, and required POUs to meet these procurement requirements using eligible renewable energy resources certified for the RPS by the Commission. SBX1-2 was

¹² Penalties were paid by Commerce Energy (Just Energy Solutions, Inc.), Commercial Energy of California, Direct Energy Business, LLC, and Tiger Natural Gas, Inc. Motions for waivers were filed by Gexa Energy California, LLC, and Liberty Power Holding LLC.

¹³ TN 222161-1, pp. 11-13.

¹⁴ TN 225002, pp. 19-26.

¹⁵ Refer to TN 222161-1, pp. 12-13.

¹⁶ Refer to TN 222161-1, p. 13.

signed into law on April 12, 2011, but became effective on December 10, 2011,¹⁷ approximately one year into the 2011-2013 compliance period. Since POUs were not subject to this mandate prior to the enactment of SBX1-2, the timing associated with the enactment of SBX1-2 may have limited the ability for POUs such as the Port to adequately plan for and procure sufficient eligible renewable resources to meet the 2011-2013 RPS compliance period procurement requirements. This is especially true as electricity procurement decisions may require years of upfront planning, particularly for the development of new facilities. Additionally, the timing of the enactment of SBX1-2 impacted the Commission's ability to adopt its RPS Regulations in a timeframe that provided POUs with additional guidance on how to comply with the RPS, including the adoption and application of optional compliance measures.

C. Port Serves as Economic Driver

The Port has stated that it serves as an economic driver in an area of the state that faces persistently high levels of poverty and unemployment, that it is a not-for-profit entity and that all of its costs are passed through to its customers, and that applying a penalty to the Port would increase costs to customers and diminish the Port's ability to attract new businesses to the region, thereby resulting in harm to the broader community served by the Port.¹⁸ The potential financial harm to the Port is a mitigating factor that should be considered in assessing penalties. As Staff previously noted, however, it has no basis for disputing or confirming the Port's position that if found in violation of the RPS and assessed penalties, it would increase the Port's costs to customers, diminish the Port's ability to attract new businesses to the region, and result in harm to the broader community served by the Port.¹⁹

D. Penalizing Port Could Impact Port's Renewable Energy Procurement Efforts

The Port has stated that subjecting it to costly legal proceedings and potential penalties could impact the financial viability of the Port and make it more difficult for the Port to procure sufficient renewable energy to meet its RPS procurement requirements, which it argues would be contrary to the purposes of the RPS Program.²⁰ Staff agrees that the potential financial harm to

¹⁷ SBX1-2 became effective 91 days after the adjournment of the 2011-2012 first extraordinary legislative session pursuant to Government Code section 9600(a).

¹⁸ TN 223100, p. 6.

¹⁹ Refer to TN 225002, pp. 22-23.

²⁰ TN 223100, p. 7.

the Port is a mitigating factor. As discussed above, the financial burden to the POU is a mitigating factor that should be considered in assessing penalties. The assessment of penalties could impact the Port's financial viability and make it more difficult to procure sufficient renewable energy in the future to meet its RPS requirements. While penalties would not affect the second RPS compliance period (2014-2016), since this compliance period has already ended, the assessment of penalties could affect the third compliance period (2017-2020) and future compliance periods because the Port is still procuring renewable energy for the third compliance period and presumably planning for future compliance periods. If the assessment of penalties causes the Port to exceed its budget for procuring renewable energy for the third compliance period, or subsequent compliance periods, then the Port may need to reduce its renewable energy procurement or other services because of budget shortfalls. The Port's reduction of renewable energy procurement could affect its RPS compliance in the future and thereby undermine the goals of the RPS program.²¹

That said, however, the resulting impact to the RPS program would be the same if the Port's renewable energy procurement was reduced due to a properly adopted and applied optional compliance measure. Additionally, the financial harm or burden to the Port due to penalties or legal costs associated with noncompliance needs be balanced in light of the Port's other mitigating circumstances. If a POU could easily skirt a RPS violation by arguing the penalty would have a financial burden on the POU or its customers, it could discourage the POU from engaging in the careful planning, consideration, and adoption of optional compliance measures in accordance with the RPS statute and the RPS Regulations. For this reason, when a POU's alleged financial harm or burden is raised as a mitigating factor, it should be considered in light of the POU's other mitigating circumstances.

E. Section 1240(d) Factors

Section 1240(d)(1) of the RPS Regulations lists the following factors:

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

²¹ Refer to TN 225002, pp. 23-24.

Regarding the harm caused by the violation (section 1240(d)(1)(A)), it is presumed that a violation by the Port will cause indirect harm to the state, because the Port's under-procurement of renewable energy means that an additional amount of non-renewable energy was generated and procured to meet the Port's retail sales needs, thereby increasing the negative effects to the state associated with the environmental impacts and GHG emissions from this non-renewable energy. However, the state would have suffered these same negative effects from the non-renewable energy if the Port had properly adopted optional compliance measures and applied these measures to excuse its RPS procurement deficits.²²

Regarding the nature, expected persistence, and history of violations (section 1240(d)(1)(B) and (C)), the subject complaint against the Port is for noncompliance of the first RPS compliance period (2011-2013), so Staff has no basis for comparing the Port's actions in prior RPS compliance periods. However, according to the Port, it has procured sufficient RPS-eligible resources to meet its RPS procurement requirements for Compliance Period 2 (2014-2016), and anticipates that it will be able to procure sufficient RPS-eligible resources to satisfy its RPS procurement requirements for Compliance Period 3 (2017-2020).²³

Regarding actions taken to mitigate the alleged violation (section 1240(d)(1)(D)), the Port took various steps to procure renewable energy to meet its RPS procurement requirements, and these steps appear to be reasonable.²⁴ As discussed above, the Port demonstrated that it would have satisfied its RPS procurement requirements if it had not encountered delays in the development of two proposed solar facilities. The Port also demonstrated that it held solicitations for RPS-eligible resources, relied on a sufficient number of projects, sought to develop its own RPS-eligible resources, and took reasonable measures to procure cost-effective distributed generation and allowable unbundled RECs.

The financial burden to the Port (section 1240(d)(1)(E)) is addressed above.

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²² Refer to TN 225002, pp. 24-25.

²³ TN 223100, p. 7. Refer also to discussion at TN 225002, p. 25.

²⁴ Refer to TN 225002, pp. 25-26.

IV. CONCLUSION

For the reasons discussed in this brief, Staff recommend that the Port be assessed zero (\$0) penalties should the Committee find the Port in noncompliance.

Dated this 23rd day of January 2019.

Respectfully submitted,
CALIFORNIA ENERGY COMMISSION

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