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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 COMMENTS
ON THE COMMITTEE PROPOSED DECISION**

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The Port of Stockton (“Port”) hereby submits these comments to the California Energy Commission (“Commission”) on the *Committee Proposed Decision* (“CPD”), docketed on March 29, 2019. In these comments, the Port urges the Commission to reject the CPD because, counter to the conclusions of the CPD, (1) the Port substantially complied with the requirements for both a cost limitation and a delay of timely compliance pursuant to the Renewables Portfolio Standard (“RPS”) Program; and (2) the Commission has broad authority to dismiss a complaint on the basis of mitigating circumstances or where the Commission determines that the comparable penalties that would be imposed by the California Public Utilities Commission (“CPUC”) on a retail seller would be a full waiver. If the Commission does not reject the CPD on these grounds, the Port requests that, at a minimum, the Commission modify the Findings of Fact and Conclusions of Law to provide necessary additional direction to the California Air Resources Board (“ARB”).

I. SUBSTANTIAL COMPLIANCE

The CPD describes the doctrine of substantial compliance as follows:

Substantial compliance is a judicial concept that excuses certain imperfections in fulfilling specific legal requirements. Substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute. Where there is compliance as to all matters of substance, technical deviations are not to be given the stature of noncompliance. [] The doctrine of substantial compliance does not apply at all when a statute's requirements are mandatory, instead of merely directory. [] A mandatory statute “is one that is essential to the promotion of the overall statutory design and thus does not permit substantial compliance.”¹

Based on this articulation of the substantial compliance doctrine, the CPD concludes that “the statutory requirement that a governing board adopt optional compliance measures is mandatory: adoption by the governing board is essential to the overall statutory design of the RPS Program.”² While the CPD acknowledges the Port’s public meeting on its RPS Procurement Plan and customer outreach efforts, the CPD concludes that these actions were “not sufficient to satisfy the requirement that the governing board adopt an RPS Plan and optional compliance measures.”³

The Port disagrees with this determination by the CPD. 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 a 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 improve the financial stability of the Port and the need to provide rates sufficiently lower than those of the surrounding investor

¹ CPD at 8 (internal citations omitted).

² CPD at 9.

³ CPD at 10.

owned utility, Pacific Gas and Electric. 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 an 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.

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 to the Port would both impose increased costs on the Port's customers and have negative consequences on a community that will be disproportionately harmed.

As the Port described at length in the *Port Of Stockton Brief Addressing Legal Issues Identified In September 7, 2018 Notice Of Committee Hearing*, filed on October 16, 2018, the substantial compliance standard applies unless “the intent of the statute can only be served by demanding strict compliance with its terms”⁴ To determine the intent “*[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.”⁵ In the case of the RPS, express intent language is provided in Public Utilities Code section 399.11.

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.⁶ 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

⁴ *Downtown Palo Alto Com. for Fair Assessment v. City Council*, 180 Cal. App. 3d 384, 394 (1986).

⁵ *Id* at 395 (emphasis added).

⁶ Pub. Util. Code § 399.11(b).

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.**⁷

The express 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. In discussing the overall intent of the RPS, the CPD makes no reference to Section 399.11.

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 of 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.

Further, the intent of the applicable optional compliance mechanisms is relevant as well. The core requirement of the cost limitation provision is that the limit be “set at a level that prevents **disproportionate** rate impacts.”⁸ Based on the plain meaning of this language, the clear intent is that 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

⁷ Pub. Util. Code § 399.11(e)(1) (emphasis added).

⁸ Cal. Pub. Util. Code 399.15(c) (emphasis added).

for the utility, structural limitation, or unique customers, those circumstances justify limiting the cost of the program and the overall rate impact.

Again, finding the Port to have substantially complied is consistent with this intent. The Port's 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 its community. Further, the nature of the 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 customers could have serious financial consequences. Finally, the Port was particularly impacted by the last financial downturn, and during the first compliance period, the Port's financial security was a major issue. Providing protections to the Port's customers is fully consistent with the RPS.

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 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, and labor availability. 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.

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. This is particularly true for small utilities like the Port, which face even greater risks because of the small number of projects that they can reasonably pursue.

In light of all these reasons, the Commission should find that the Port substantially complied with the requirements for both a cost limitation and a delay of timely compliance condition.

II. COMMISSION AUTHORITY TO DISMISS A COMPLAINT

A. The Commission Has Broad Discretion to Dismiss or Waive a Complaint.

The CPD incorrectly finds that the Commission lacks the authority to waive or excuse a complaint due to mitigating circumstances.⁹ As the basis for this finding, the CPD relies on the following: (1) Public Utilities Code section 399.30(o)(1) does not reference mitigating circumstances; and (2) the Commission’s regulations require that the Commission “include findings regarding mitigating circumstances in its decision and may include such findings ‘upon which the California Air Resources Board [] may rely in assessing a penalty’ for RPS noncompliance.”¹⁰ Based on these statutory and regulatory provisions, the CPD concludes that once the Commission “determines noncompliance, only the ARB has the authority to consider mitigating circumstances when determining to assess a penalty or not.”¹¹

The Commission’s authority pursuant to Public Utilities Code section 399.30(n) and (o) is quasi-legislative because the Commission is expressly directed to adopt “regulations,” and the

⁹ CPD at 12.

¹⁰ CPD at 12-13.

¹¹ CPD at 13.

statute does not prescribe the manner in which the Commission must perform this duty.¹² When a state agency is exercising quasi-legislative authority, that agency has broad discretion, and a court will uphold the agency's actions unless they are "arbitrary, capricious, or lacking in evidentiary support."¹³ Courts will look to the action to ensure that the agency "adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute."¹⁴

The structure established by Public Utilities Code section 399.30(o) and (n) creates a *primary* role for the Commission and a *narrow* role for the ARB. The Commission determines whether there was a violation, establishes a complete and final factual record, makes necessary conclusions of law, assesses all mitigating factors, and determines whether to refer the complaint to the ARB. In contrast, the ARB's role is to set a penalty amount and provide a mechanism for collecting the penalty from the publicly owned utility ("POU"). The clear reason why the Commission was not given the role of collecting the penalty amount from the POUs was a lack of an existing regulatory framework. Currently, any retail seller RPS penalties are deposited into the Electric Program Investment Charge Fund ("EPIC").¹⁵ The EPIC program generally does not fund projects located in POU service territories, and thus it would be inappropriate for POU penalties to be put into that fund.

Where the Commission determines that mitigating circumstances justify a complete waiver, or where the Commission determines that pursuant to the CPUC's waiver process, a complaint would be waived, the Commission is fully within its authority to dismiss the

¹² Quasi-legislative regulations are those adopted pursuant to the Legislature's express delegation of substantive rulemaking authority and are entitled to substantial deference by courts. *Kawamura v. Organic Pastures Dairy Co. LLC*, 160 Cal. App. 4th 1374, 1388 (2008).

¹³ *Schwartz v. Poizner*, 187 Cal. App. 4th 592, 598 (2010).

¹⁴ *Id.*

¹⁵ Cal. Pub. Util. Code § 399.15(b)(8).

complaint without referral to the ARB. In such a case, there is no need for the ARB to determine the penalty amount or to collect funds from a POU. Further, the Commission is better suited to make this determination because it oversees the hearing and complaint process, including developing and evaluating the full factual record. The Commission also has the RPS expertise, verifies POU RPS compliance, and certifies RPS-eligible facilities.

The ARB has clarified that it does not intend to readjudicate matters decided by the Commission.¹⁶ However, if the Commission refers a violation to the ARB where it recommends no penalty be imposed, the Commission would necessarily be forcing the ARB to readjudicate these issues. As opposed to determining an appropriate penalty amount, determining if a waiver is justified would require ARB staff to independently determine if a waiver or a functional waiver is merited based on the record. The POU would be forced to essentially start the complaint process over at a new agency, but with a much more limited ability to present its case. Such a repetitive and burdensome process is not a reasonable or fair implementation of Section 399.30(n) and (o).

III. RECOMMENDED AMENDMENTS TO CPD

The ARB has previously proposed adopting regulations to support its enforcement of the RPS Program for POUs.¹⁷ While that process started in early 2016, no regulations were adopted. The Port understands that it is likely that the ARB will reinitiate a process to either adopt regulations or otherwise provide guidance in the very near future. Unfortunately, the scheduled Commission vote on the CPD will occur before ARB's process moves forward. The Port must

¹⁶ CEC 000595, Initial Statement of Reasons for Enforcement Procedures, March 2013, at 48.

¹⁷ See, *Notice of Public Workshop to Discuss the Proposed Renewables Portfolio Standard Program Enforcement Regulation*, April 20, 2016.

therefore provide comments on the CPD without the benefit of knowing what regulations or guidance the ARB will adopt.

If the Commission approves the CPD, then the Port requests that the Commission include additional clarifying amendments to the Findings of Fact and Conclusions of Law. These recommended amendments are intended to provide clear and necessary direction to ARB and to avoid the need to readjudicate matters already decided in this proceeding.

A. The Findings of Fact Should Be Amended to Accurately Reflect the Financial Burden to the Port and its Community.

The Port believes that that CPD generally provides an accurate and comprehensive description of the mitigating factors applicable to the Port in this proceeding. Similarly, the Findings of Fact generally provide an adequate summary and restatement of the mitigating factors with one exception. The body of the CPD provides the following statement regarding the broader economic consequences of imposing a penalty on the Port:

[A]ll of the Port's costs are passed through to its customers. Applying a penalty to the Port would increase costs to its customers and diminish the Port's ability to attract new businesses to the region and would therefore result in harm to the broader community served by the Port. The Port serves as an economic driver in an area of the state that faces persistently high levels of poverty and unemployment.¹⁸

However, the relevant Finding of Fact only states: "a financial penalty would reduce the Port's ability to procure renewable energy resources in future Compliance Periods."¹⁹ This Finding of Fact does not adequately capture the full financial impact to both the Port and its community, as was described in the body of the CPD. In order to provide clear direction to the ARB, the Port recommends that the Commission modify Finding of Fact 5(e.) as follows:

a financial penalty would reduce the Port's ability to procure renewable energy resources in future Compliance Periods and would increase costs to the Port's

¹⁸ CPD at 16.

¹⁹ CPD at 21.

customers in an area of the state that faces disproportionately higher rates of unemployment and poverty.

B. The Conclusions of Law Should Be Modified to Include Findings on Comparable Penalties.

Conclusion of Law 9 simply states that the Commission’s regulations authorize the Commission to provide recommended penalties to the ARB.²⁰ This is an incomplete description of the Commission’s obligation. Pursuant to Title 20, California Code of Regulations, § 1240(g), “[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.” If the Commission does include recommended penalties, then it is obligated to determine what penalties would apply to a retail seller under the CPUC’s penalty and waiver process, so that it can ensure that any recommended penalties are comparable. This determination is necessarily a legal conclusion by the Commission because it requires the Commission to apply the legal standard of the relevant RPS statutes and CPUC decisions to the facts in the matter before the Commission. As clearly described in the body of the CPD, the CPD does make this legal determination:

[A] retail seller that is deemed out of compliance with the RPS program’s procurement quantity requirements may file a motion for a waiver request of their procurement quantity requirements [(“PQR”)]. The mandatory reasons for the CPUC to grant a waiver of PQR are set out in Section 399.15 subd. (b)(5). If the CPUC grants a full waiver, no penalty is assessed. A partial waiver reduces the deficiency or shortfall in terms of RECs which would then be subject to penalty.

The CPUC’s waiver process is comparable to the Energy Commission’s process for evaluating a “delay of timely compliance” optional compliance measure. The mandatory reasons for the CPUC to grant a waiver of PQR to a retail seller set forth in section 399.15 subd. (b)(5)(B), are nearly identical to the requirements for the “delay of timely compliance” optional compliance measure found in Energy Commission regulation section 3206 subd. (a)(2)(A)(2). However, “adoption” is not a requirement for retail sellers as it is for POUs. **Because Staff determined**

²⁰ CPD at 22.

that the Port met all of the requirements except for adoption, the Port would have met the section 399.15 subd. (b)(5)(B) standard for waiver.

. . .

Given that the Port met the requirements that a retail seller would need to meet to receive a waiver, and given the substantial mitigating circumstances that were present – particularly as they apply to Compliance Period 1 – the Committee urges the California Air Resources Board to issue no penalty for the Port’s procurement deficiency.²¹

The findings in the above quotation are not merely recommendations based on mitigating factors. These findings are clearly legal conclusions on a core issue affecting the penalties that ultimately may be imposed by ARB. As described above, it is appropriate for the Commission to make these determinations because it exercises the primary adjudicatory role in this complaint proceeding, including on factual and legal issues. Additionally, the Commission has unique RPS expertise because of its role in adopting regulations for POU RPS requirements and because the Commission also works in close coordination with the CPUC on RPS regulations.

The Port recommends that these determinations be reflected in the Conclusions of Law as follows:

10. Title 2, Cal. Code Regs., section 1240 subd. (g) requires that any suggested penalties shall be comparable to the penalties adopted by the California Public Utilities Commission for noncompliance with an RPS requirement for retail sellers.

11. §399.15 subd. (b)(5) specifies the mandatory reasons that the CPUC may grant a waiver to a retail seller.

12. The Port met all requirements for the section 399.15 subd. (b)(5)(B) standard for waiver under the California Public Utilities Commission’s adopted waiver process, and therefore a comparable penalty is a full waiver.

²¹ CPD at 19-20 (internal citations omitted) (emphasis added).

IV. CONCLUSION

The Port appreciates the opportunity to submit these comments.

Dated: April 5, 2019

Respectfully submitted,

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

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