

DOCKETED	
Docket Number:	18-RPS-01
Project Title:	Complaint Against the Stockton Port District re: RPS Program Compliance
TN #:	227607
Document Title:	Final Commission Decision
Description:	Complaint Against Stockton Port District for Noncompliance with the Renewables Portfolio Standard
Filer:	Liza Lopez
Organization:	California Energy Commission
Submitter Role:	Committee
Submission Date:	4/10/2019 4:29:46 PM
Docketed Date:	4/10/2019

COMPLAINT AGAINST STOCKTON PORT DISTRICT FOR NONCOMPLIANCE WITH THE RENEWABLES PORTFOLIO STANDARD

FINAL COMMISSION DECISION

APRIL 2019



**CALIFORNIA
ENERGY COMMISSION**

Gavin Newsom, Governor

DOCKET NUMBER 18-RPS-01

**CALIFORNIA
ENERGY COMMISSION**

1516 Ninth Street
Sacramento, CA 95814

<https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=18-RPS-01>

COMMISSIONERS-

DAVID HOCHSCHILD
Chair

JANEA A. SCOTT
Vice Chair

KAREN DOUGLAS
Commissioner

ANDREW MCALLISTER
Commissioner

JENNIFER MARTIN-GALLARDO
Hearing Officer



**Before the Energy Resources Conservation and Development
Commission of the State of California**
1516 Ninth Street, Sacramento, CA 95814
1-800-822-6228 – www.energy.ca.gov

IN THE MATTER OF:

***COMPLAINT AGAINST STOCKTON PORT
DISTRICT FOR NONCOMPLIANCE WITH THE
RENEWABLES PORTFOLIO STANDARD***

Docket No. 18-RPS-01

Order No. 19-0410-3

COMMISSION ADOPTION ORDER

This Commission Order adopts the Commission Decision for the Complaint Against Stockton Port District for Noncompliance with the Renewable Portfolio Standard. The Commission Decision consists of the Committee Proposed Decision¹ (CPD) as modified by the Commission during the April 10, 2019 Business Meeting. The Commission Decision is based upon the record of these proceedings and considers the comments received prior to and at the April 10, 2019 Business Meeting. The Commission Decision contains a summary of the proceedings, the evidence presented, and the rationale for the findings and conclusions it reaches.

FINDINGS

The Commission hereby adopts, pursuant to the Warren-Alquist Act (California Public Resources Code section 25000 et seq.) and Public Utilities Code section 399.11 et seq., the findings and conclusions contained in the Commission Decision:

ORDER

Therefore, the Commission Orders the following:

1. The CPD filed on March 29, 2019, as modified by the Commission during the April 10, 2019 Business Meeting, is hereby adopted as the Commission Decision and incorporated by reference into this Order.
2. This Order is adopted, issued, effective, and final on the date that it is filed in the Docket of this proceeding.
3. Judicial review of this Order is governed by Public Resources Code section 25901.

¹ TN 227456

4. The Docket file for this proceeding shall be closed and this proceeding shall terminate effective after filing of the compilation described in paragraph 5, below.
5. The Hearing Officer shall incorporate the CPD and any modifications made during the April 10, 2019 Business Meeting into a single document, removing the markings showing additions and text marked for deletion. Publication of that compilation shall not affect the adoption, effective, issuance, or final dates of this Order established in paragraph 2, above.

IT IS SO ORDERED

CERTIFICATION

The undersigned Secretariat to the Commission does hereby certify that the foregoing is a full, true, and correct copy of an Order duly and regularly adopted at a meeting of the California Energy Commission held on April 10, 2019.

AYE: Hochschild, Scott, Douglas, McAllister

NAY: None

ABSENT: None

ABSTAIN: None

Original signed by:

Cody Goldthrite
Secretariat



**Before the Energy Resources Conservation and Development
Commission of the State of California**
1516 Ninth Street, Sacramento, CA 95814
1-800-822-6228 – www.energy.ca.gov

IN THE MATTER OF:

**COMPLAINT AGAINST STOCKTON PORT
DISTRICT FOR NONCOMPLIANCE WITH THE
RENEWABLES PORTFOLIO STANDARD**

Docket No. 18-RPS-01

FINAL COMMISSION DECISION

SUMMARY

This Proposed Decision arises out of a Complaint by the California Energy Commission Executive Director Against the Stockton Port District for Noncompliance with the Renewables Portfolio Standard (Complaint) filed on January 8, 2018 pursuant to Public Utilities Code § 399.30 and Title 20, California Code of Regulations, § 1240.^{1,2} The matter was assigned to a committee comprised of two Commissioners.³

The Complaint alleges that the Stockton Port District (Port) failed to comply with the Renewables Portfolio Standard (RPS) Program for the 2011-2013 compliance period. Specifically, the Complaint alleges that the Port failed to meet its “procurement target” requirement and its “portfolio balance” requirement. The Complaint also alleges that the Port was not excused from satisfying these requirements by the application of optional compliance measures because the Port failed to adopt optional compliance measures and describe these measures in an adopted RPS Procurement Plan before the end of the

¹ The Complaint was docketed as TN# 222161-1, with the accompanying Exhibits docketed as TN# 222161-2 - 222161-9. In order to provide page numbers for the Exhibits, they were re-docketed with sequential Bates stamps on September 12, 2018 as TN# 224687-224694.

Accompanying the Complaint was a motion to bifurcate the proceeding into two phases (Motion to Bifurcate). (TN# 222162.) Specifically, Staff requested the Energy Commission consider mitigating circumstances that may excuse the Port’s alleged RPS noncompliance separate, and in advance of, Energy Commission consideration of the alleged RPS noncompliance allegations in the Complaint. The Port filed a response to the Motion to Bifurcate on January 31, 2018, supporting the Motion to Bifurcate. (TN# 222406.) On May 29, 2018, the Committee issued a Denial of Staff Motion to Bifurcate. (TN# 223607.)

² All statutory references are to the Public Utilities Code and all regulatory references are to Title 20, California Code of Regulations.

³ TN# 222672.

2011-2013 compliance period. Even so, the Complaint requests that the Energy Commission find that mitigating circumstances excuse the alleged violations.

The Port admits that it failed to meet its procurement target and portfolio balance requirements, but disputes the allegation that it failed to adopt optional compliance measures. The Port asserts that its actions either directly or substantially met the relevant statutory and regulatory requirements to adopt optional compliance measures.

It is undisputed that the Port was noncompliant with its procurement target and portfolio balance requirements. Therefore, the issues presented for the Committee to decide are 1) whether the Port's governing board adopted optional compliance measures, which would excuse its noncompliance with its procurement obligations; 2) if the Port failed to adopt optional compliance measures, whether mitigating circumstances waive the Port's noncompliance with its procurement obligations; and 3) if mitigating circumstances do not waive noncompliance, what penalty, if any, the Committee suggests.

After considering the RPS Program legal requirements and the evidence presented, the Committee concludes that:

- 1) The Port's governing board did not comply or substantially comply with the requirement to adopt optional compliance measures, but as discussed herein, had it done so, the optional compliance measures the Port submitted to the Energy Commission would have excused noncompliance with its procurement obligations;
- 2) Significant mitigating factors exist. But under the RPS Program, mitigating factors do not, as a matter of law, operate to excuse the Port's noncompliance; instead, they are properly considered by the California Air Resources Board (ARB) at the penalty phase; and
- 3) The Committee suggests that no penalty be imposed by the ARB.

THE CALIFORNIA RENEWABLES PORTFOLIO STANDARD PROGRAM (RPS PROGRAM)

The RPS Program was initially enacted in 2002 and became effective January 1, 2003. (Stats. 2002, ch. 516, § 3.) The RPS Program requirements applied only to retail sellers, which, by statutory definition, excluded local publicly owned electric utilities (POUs). (*Id.*)

POUs were required to develop and enforce their own RPS programs that "recognize[d] the intent of the Legislature to encourage renewable resources, while taking into consideration the effect of the standard on rates, reliability, and financial resources and the goal of environmental improvement." (Stats. 2002, ch. 516, § 1.) POUs were also subject to specific reporting requirements. (*Id.*)

The statutes implementing the RPS Program were changed several times, but the most significant changes occurred in 2011, with the enactment of SBX1-2. (Stats. 2011, ch. 1, §§ 1-35.)

SBX1-2

SBX1-2 took effect on December 10, 2011 and made major changes to the provisions governing POU RPS responsibilities. Generally, the requirements of the RPS program previously applicable only to retail sellers were now applicable to POUs, and the mandate directing POUs to develop their own renewable portfolio standard was repealed. As a result, POUs were now obligated to implement plans and adopt policies reflecting minimum quantities of renewable energy resources for each of three compliance periods.

Specifically, “each local publicly owned electric utility shall adopt and implement a renewable resources procurement plan that requires the utility to procure a minimum quantity of electricity products from eligible renewable energy resources, including renewable energy credits, as a specified percentage of total kilowatthours sold to the utility’s retail end-use customers.” (399.30 subd. (a))⁴ For Compliance Period 1 (January 1, 2011 to December 31, 2013) (CP1), the governing board of a POU was required to procure quantities of eligible renewable energy resources “equal to an average of 20 percent of retail sales. (§ 399.30, subd. (c)(1)) That procurement was to be balanced between three distinct portfolio content categories. (§ 399.16.)

The statute allowed the governing board of each POU to adopt certain measures, commonly referred to as “optional compliance measures.” (399.30 subd. (d).) If adopted in conformance with legal requirements, these optional compliance measures would allow a POU to comply with the RPS Program, even if it was unable to procure the required quantity of eligible renewable energy resources. The optional compliance measures relevant to this proceeding include: (1) conditions that allow for delaying timely compliance consistent with subdivision (b) of Section 399.15 (delay of timely compliance); and (2) cost limitations for procurement expenditures consistent with subdivision (c) of Section 399.15 (cost limitation). (§ 399.30, subd. (d)(2) and (3).)

As part of SBX1-2, the Energy Commission was directed to adopt regulations on or before July 1, 2011, a date prior to the effective date of the legislation itself, “specifying procedures for enforcement of [the RPS. . . including] a public process under which the Energy Commission may issue a notice of violation and correction against a local publicly owned electric utility for failure to comply with this article, and for referral of violations to the State Air Resources Board.” (Former § 399.30, subd. (n), added by Stats. 2011, ch. 1, § 29.)

⁴ § 399.30 was amended during CP1, but none of the amendments alter the requirements discussed in this Decision.

Energy Commission Regulations

On October 1, 2013, three months before the end of CP1, the Energy Commission regulations became operative. Section 1240 establishes an RPS enforcement-specific complaint process, and Sections 3200 through 3208 interpret and make specific statutory RPS requirements, including those applicable to adoption of a POU's RPS procurement plan and enforcement program and the application of optional compliance measures.

Under the regulations, each POU was required to adopt a renewable energy resources procurement plan on or before November 30, 2013 (§ 3205 subd. (a)(1)). If a POU's governing board chose to adopt any optional compliance measures, it was to be done subject to open meeting rules, and the optional compliance measures were to 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." (§ 3206, subd. (a), (b).)

To claim the delay of timely compliance optional compliance measure, a POU was required to adopt rules permitting it to make a finding that conditions beyond the control of the POU existed to delay the timely compliance with RPS procurement requirements. (§ 3206, subd. (a)(2).) Among other acceptable causes for delay of timely compliance, a POU could claim that permitting, interconnection, or other circumstances delayed procured eligible renewable energy resource projects if the POU made findings that it prudently managed portfolio risks, sought to develop its own renewable energy resources, procured an appropriate minimum margin of procurement above the level necessary to comply with the RPS, and that the POU had taken reasonable measures to procure cost-effective distributed generation and allowable unbundled RECs. (§3206, subd. (a)(2)(A)(2).)

To claim the cost limitation optional compliance measure, a POU was required to adopt rules for cost limitation on the procurement expenditures used to comply with RPS procurement requirements. (§ 3206, subd. (a)(3).) The rules would ensure that the limitation is set at a level that prevents disproportionate rate impacts, the costs of all procurement credited toward achieving the RPS are counted toward the limitation, and that procurement expenditures do not include any indirect expenses. (§ 3206, subd. (a)(3)(B).)

Enforcement

Once the Energy Commission's Executive Director brings a Complaint, the Energy Commission must issue a decision with its findings. (§1240 subd. (b) and (g).) If the Energy Commission determines that a POU has failed to comply with the RPS Program, it has no discretion: it *shall* refer the failure to comply to the ARB. (§ 399.30 subd. (o)(1).) The ARB has discretion to impose penalties or not. (*Id.*)

In its decision, the Energy Commission must include findings regarding mitigating and aggravating factors related to noncompliance, and the ARB may rely on those findings in

assessing a penalty against a POU. (§ 1240 subd. (g).) The Energy Commission *may* include suggested penalties for the ARB to consider. (*Id.*) Any suggested penalties shall be comparable to penalties adopted by the California Public Utilities Commission (CPUC) for noncompliance with a RPS requirement for retail sellers. (*Id.*)

DISCUSSION

The Port is a public corporation created for municipal purposes pursuant to Section 6290 of the California Harbors and Navigation Code. (Ex. 2005, p. 138.) The Port became a municipal utility in 2003. (Ex. 2005, p. 128.)⁵ It is a small POU, with annual retail sales of less than 15,000 MWh in each of the 3 years of CP 1 and only 3 tariffs. (Ex. 2000, p. 8; Ex. 2005, p. 152.) The Port's retail sales represent less than 0.01% of California's total retail sales of electricity in 2011-2013. (Ex. 2005, p. 128.)

The Port became subject to the RPS Program's procurement requirements upon the enactment of SBX1-2. The Port's procurement efforts for CP1 were reported to Energy Commission staff (Staff). (Ex. 2001.) The Commission Final Report on the Port's RPS verification results for CP1 was adopted by the Energy Commission on January 25, 2017. (Ex. 2000.)

It Is Undisputed That the Port Was Noncompliant with Its Compliance Period 1 Procurement Obligations

As concluded in the final verification report, and as alleged in the Complaint, the Port failed to satisfy two separate RPS procurement requirements for CP1: 1) the procurement target requirement; and 2) the portfolio balance requirement. (Ex. 2000, p. 8; Complaint, pg. 3.) In its Complaint, Staff summarized the violations as follows:

1. Violation of 20 CCR section 3204(a)(1). The Port had an RPS procurement requirement of 7,357 MWhs⁶ of electricity products for CP1 and procured only 152 MWhs of electricity products towards satisfying this requirement for CP1. Therefore, the Port had a procurement target deficit of 7,205 MWhs for CP1.
2. Violation of 20 CCR section 3204(c). The Port had an RPS portfolio balance requirement of 304 MWhs of electricity products from Portfolio Content Category 1 for CP1, but procured no electricity products from Portfolio Content Category 1.

⁵ PUC § 224.3, "Local publicly owned electric utility" means a municipality or municipal corporation operating as a "public utility" furnishing electric service as provided in Section 10001." PUC § 10001, "Public utility" as used in this article, means the supply of a municipal corporation alone or together with its inhabitants, or any portion thereof, with water, light, heat, power, sewage collection, treatment, or disposal for sanitary or drainage purposes, transportation of persons or property, means of communication, or means of promoting the public convenience.

⁶ The Parties are largely in agreement about the Port's procurement obligations for Compliance Period 1, with Staff identifying a procurement target of 7,357 MWh for Compliance Period 1 for the Port, whereas the Port identified a procurement target of 7,297.8 MWh. (Ex. 2000, p. 8 and Ex. 2001, p. 28.) It is not necessary to resolve this discrepancy, as both Parties agree that the only issue is whether the Port's actions constitute substantial or actual compliance with optional compliance measures and if not, whether there are mitigating factors affecting the resolution of the Complaint.

Therefore, the Port had a portfolio balance deficit of 304 MWhs of electricity products from Portfolio Content Category 1. (Complaint, p. 13.)

The Port does not deny these allegations. (Port of Stockton Response to Order for Additional Information, TN# 223100, pg. 2.)

The Port Claimed Optional Compliance Measures to Excuse Procurement Deficits

On December 29, 2017, Staff completed its Evaluation of the Port of Stockton's Applied Optional Compliance Measures (Evaluation). (Ex. 2005, pp. 128-136.) In its Evaluation, Staff analyzed the Port's compliance with each of the requirements set out in section 3206.⁷ (*Id.* at 129-136.) For both optional compliance measures, Staff determined that the Port failed to meet the requirements of the first requirement: to *adopt* the optional compliance measures. (*Id.* at 129, 133.) Staff analyzed each of the other requirements and found that but for the Port governing board's failure to adopt, the other requirements were met. (*Id.* at 130-136.)

The Complaint essentially states that the Port would have been excused from its failure to satisfy both its procurement target and portfolio balance requirements for CP1 if the Port's governing board had formally adopted its cost limitation and delay of timely optional compliance measures. (Complaint, p. 11.)

The Port disagrees that it did not meet the adoption requirements. (Port of Stockton Response to Order for Additional Information, pg. 3.) The Port asserts that its actions either complied with the relevant statutory and regulatory requirements to adopt both the cost limitation and delay of timely compliance or, alternatively, that the Port's actions constitute substantial compliance with the relevant statutory and regulatory requirements. (Port of Stockton Response to Order for Additional Information, TN# 223100, pp. 3-4.)

The Port Did Not Comply or Substantially Comply with the Statutory and Regulatory Requirements to Adopt Optional Compliance Measures

The issue before the Committee is whether or not the Port complied or substantially complied with the statutory and regulatory requirements to adopt optional compliance measures which would operate to excuse the Port from satisfying its procurement requirements.

The requirements applicable to description and adoption of optional compliance measures are found in both statute and regulations.

With regard to optional compliance measures, "the *governing board* of a local publicly owned electric utility may adopt" conditions that allow for delaying timely compliance consistent with subdivision (b) of Section 399.15, and cost limitations for procurement expenditures consistent with subdivision (c) of Section 399.15. (PUC § 399.30 subd. (d). Emphasis added.) The Energy Commission's regulations add procedural requirements to the statutory provisions, including the requirement that optional compliance measures

⁷ These requirements are listed in the Energy Commission Regulations section above.

must be included in a POU's RPS Plan in order to be relied upon for compliance purposes. (§ 3206, subd. (b).)⁸

The statute requires the *governing board* of a local publicly owned utility to *adopt* a POU's RPS Plan and permits the *governing board* to *adopt* optional compliance measures. The statute does not indicate that the legislature intended to authorize any other person or entity to satisfy the requirements it imposed on a POU's governing board.⁹

While Public Utilities Code does not define the term “adopt” or otherwise explain how a POU must satisfy the requirement to adopt, other sources indicate a collective, affirmative act of the governing board is required. Black's Law Dictionary defines “adoption” as “[a] deliberative assembly's act of agreeing to a motion or the text of a resolution, order, rule, or other paper or proposal, or of endorsing as its own statement the complete contents of a report.” The Port's authorizing statute states that “[t]he powers of a district established pursuant to this part shall be exercised by the board, by ordinance or resolution passed by a majority vote of the board. (Harb. & Nav. Code, § 6270. Underline added.) These sources indicate that a collective, affirmative act of the governing board, such as a vote or resolution, is necessary to satisfy the requirement to “adopt.”

The following facts are undisputed:

- The Port's governing board never took formal action to adopt its RPS Plan. (Ex. 2011, Stipulated Facts 2.c. and 3.d.)
- The Port's governing board never took formal action to adopt optional compliance measures. (*Id.*, Stipulated Facts 7 and 8.)
- The Port's RPS Plan did not describe or otherwise include optional compliance measures such as a delay of timely compliance or a cost limitation. (*Id.*, Stipulated Facts 5 and 6.)
- The Port's governing board never took formal action to delegate its authority, specifically related to the RPS Program, to its Port Director. (*Id.*, Stipulated Facts 1 and 4.b.)¹⁰

⁸ Section 399.30 requires adoption of both a POU's RPS Plan and its optional compliance measures, but does not require the optional compliance measures to be included in a specific document. Prior to the Energy Commission's regulations, there was no statutory requirement that the optional compliance measures be included in a POU's RPS Plan. Therefore, the Committee would not require a POU to have included those optional compliance measures in its RPS Plan if a POU had otherwise adopted optional compliance measures prior to the effective date of the regulations.

⁹ If a governing board's authorizing statutes permit a delegation of its authority to adopt and implement its RPS program, a specific delegation of such authority may substantially comply with this requirement. However, the Committee declines to consider this in depth, since no such specific delegation of the Port's responsibilities under the RPS Program occurred.

¹⁰ We do not consider whether the Port, under its authorizing statute, is authorized to delegate the administration of its RPS Program to the Port Director.

Because the Port's governing board took no collective, affirmative action to adopt its optional compliance measures, either within an RPS Plan or independent of the RPS Plan, the Committee finds that the Port did not directly meet the relevant statutory or regulatory requirements to adopt optional compliance measures for CP1.

However, the Committee must also consider the Port's assertion that certain actions it did take nevertheless constitute substantial compliance with the statutory and regulatory requirements to adopt an RPS Plan and optional compliance measures. (Port of Stockton Response to Order for Additional Information, TN# 223100, p. 3-4.)

The Port asserts the following actions constitute substantial compliance:

- (1) The Port Board of Commissioners' delegation of authority to the Port Director via Resolution 7681;
- (2) The Port's noticed meeting of December 20, 2012 for presenting the RPS Plan to Port customers and its Board;
- (3) The content of the Port's RPS Procurement Plan, including elements of optional compliance measures, a comparison to PG&E rates, and clarification about the Port's delegation of RPS authority to the Port Director;
- (4) Discussion of the RPS program and compliance options at the meeting of the Port Board to discuss the 2013/2014 budget;
- (5) Adoption of a budget for 2013/14 that is consistent with optional compliance measures.

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. (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1332–1333.) The doctrine of substantial compliance does *not* apply at all when a statute's requirements are *mandatory*, instead of merely directory. (*Id.* at 1333.) A mandatory statute “is one that is essential to the promotion of the overall statutory design and thus does not permit substantial compliance.” (*Id.*)

The issue before the Committee is whether the statutory requirement that the governing board adopt optional compliance measures is mandatory – that is, whether the Port's obligation to adopt optional compliance measures is essential to the promotion of the overall statutory design. If mandatory, substantial compliance is not available.

SBX1-2 “generally ma[d]e the requirements of the RPS program applicable to local publicly owned electric utilities, except that the utility's governing board would be responsible for implementation of those requirements, instead of the PUC.” (SBX1-2 Legislative Counsel's Digest, subsection (3). Underline added.)¹¹ The State RPS

¹¹ https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120121SB2

Program, as applied to POU's, is fundamentally dependent upon the governing board of each POU developing and implementing an RPS Plan. An RPS Plan is the document that establishes a POU's procurement requirements, and as made clear by the Energy Commission regulations, it is the document which must contain the optional compliance measures a POU will rely on to excuse any noncompliance with its procurement requirements. Whereas retail sellers RPS Plans are subject to review and approval by the CPUC, a POU's governing board is the sole entity that has the authority to approve its RPS Plan – neither the Energy Commission nor the CPUC has review and approval authority. It is therefore *essential* that a POU's governing board take those affirmative actions required by statute to adopt an RPS Plan and optional compliance measures.

The Committee finds 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. The governing board of a POU must adopt, by some type of collective, affirmative action – such as a resolution passed by a majority vote of the governing board – a Renewables Portfolio Standard Procurement Plan which includes optional compliance measures that meet the requirements of the Public Utilities Code and the Energy Commission regulations if it intends to rely upon them to excuse noncompliance with its procurement or balanced portfolio requirements.

Despite this finding, and the undisputed fact that the Port did not adopt its RPS Plan or optional compliance measures, the Committee has considered the actions that were taken by the Port's governing board and director:

- (1) The Port Board of Commissioners' delegation of authority to the Port Director via Resolution 7681;

The Port states that it delegated operation of the utility to the Port director via Resolution 7681 adopted in 2010. (Ex. 2007, p. 543.) The Resolution predates the effective date of SBX1-2 and does not include any items related to a renewable energy resource procurement plan or enforcement program, the Renewables Portfolio Standard, or RPS optional compliance measures such as a delay of timely compliance or a cost limitation. The Resolution does authorize the Port Director to "enter into an Electrical Service Provision Agreement" and to "establish, set and charge rates for the delivery of power to tenants on Rough and Ready Island." (Ex. 2005, pp. 133-139.)

The Committee finds that Resolution 7681 does not satisfy the requirement that the governing board adopt an RPS Plan and optional compliance measures. Even if the Port Board does have authority to delegate actions related to the RPS Program to the Port Director, which we decline to consider, this Resolution predates SBX1-2, and thus the governing board could not have contemplated those requirements for delegation. The Port's reliance on its 2010 delegation to the Port Director to enter into an Electrical Service Provision Agreement" and to "establish, set and charge rates for the delivery of power to tenants on Rough and Ready Island" is insufficient to support a finding that the Port delegated its obligations under the RPS Program to its Port Director.

- (2) The Port's noticed meeting of December 20, 2012 for presenting the RPS Plan to Port customers and its Board;

The Port held a public meeting on December 20, 2012 for purposes of discussing its RPS Plan, and provided notice of that meeting to each customer as a bill insert for a billing cycle preceding the December 20, 2012 meeting. (Ex. 1004, p. 1.) The Notice stated that "The Port of Stockton has prepared a draft plan for the procurement of renewable electric energy generating assets and other assets necessary to meet the State of California's Renewable Portfolio Standard. This Standard requires the Port to provide 33% of its electricity supply for retail sales from renewable resources such as biomass, solar, wind, and geothermal generating resources by 2020. The Renewable Resource Procurement Plan has been developed to establish a strategy and schedule, consistent with the Renewable Resources Standard for its implementation. This public meeting will provide the Port's customers with an opportunity to ask questions and provide comments." (Ex. 1004, p. 1.)

The Port admits that the meeting was not a meeting of the Port Board of Commissioners, and the Port Board of Commissioners did not take any action in the form of an adopted resolution, ordinance or otherwise take formal action related to the RPS Plan. (Ex. 2011, p. 2.) There are no facts to indicate whether or not a quorum of the Port Board was in attendance. There are no minutes to indicate any vote taken or comments made by members of the Port Board regarding the RPS Plan or optional compliance measures during the meeting.

The Committee acknowledges the Port's effort to partially comply with the requirements by providing the Port's clients with notice of the meeting regarding the RPS Plan, but finds that because this was not a meeting of the Port Board, and because there is no evidence related to the governing board members' participation at this meeting, and because no ordinance or resolution adopting the RPS Plan followed, this action is not sufficient to satisfy the requirement that the governing board adopt an RPS Plan and optional compliance measures.

- (3) The content of the Port's RPS Procurement Plan, including elements of optional compliance measures, a comparison to PG&E rates, and clarification about the Port's delegation of RPS authority to the Port Director;

The Port's RPS Plan at issue in the proceeding is dated November 20, 2012. (Ex. 2005, pp. 142-152.) The parties agree that the Port did not formally adopt the RPS Plan, nor did it develop an enforcement plan. (Ex. 2011, p. 2.) The parties agree that the RPS Plan does not describe or otherwise include optional compliance measures such as a delay of timely compliance or a cost limitation. (Ex. 2011, p. 3.) The Port also acknowledges that it did not formally adopt optional compliance measures, independent of the RPS Plan, prior to the end of CP1. (*Id.*)

The Plan does:

- identify the Port's historic sales and includes a load forecast upon which the Port based its projected RPS obligations. (Ex. 2005, p. 146-149.)

- contain a comparison of the Port's rates to those of Pacific Gas and Electric Company (PG&E). (Ex. 2005, 147, 152.)
- provide a narrative description of its efforts to obtain eligible renewable energy resources. (Ex. 2005, p. 147-149, 152.)
- authorize the Port director to implement and take necessary steps to meet the RPS. (Ex. 2005, p. 152.)

The Committee finds that the content of the Port's RPS Procurement Plan is not sufficient to satisfy the statutory and regulatory requirements for claiming optional compliance measures. A POU's optional compliance measure requirements must be articulated so that the governing board and the public understand the circumstances under which the POU would be excused from meeting its procurement requirements.¹² Without this description, neither the Port's governing board, nor the public, had an opportunity to review or comment on optional compliance measures the Port later claimed.

The Port argues that its customers were otherwise made aware of important elements of the optional compliance measures. Specifically, the Port's consultant, Chris Kiriakou states that he "regularly met individually with Port Electric Utility customers and discussed the Port's Renewable Resource Procurement Plan, as well as the Port's strategy for complying with [sic] Renewables Portfolio Standard Program....Port Electric Utility customer input was incorporated in to the Port's Renewable Resource Procurement Plan and into the Port's broader strategy for complying with the Renewables Portfolio Standard." (Ex. 1003, pp. 1-2.) The declaration is not sufficient to support a finding that each of the Port's customers knew of or understood the purpose of optional compliance measures.

Finally, while the RPS Plan contains a directive to the Port Executive Director to require Port staff to take "necessary steps to meet the RPS," (*Id.* at p. 152) the Committee finds that this cannot serve as an actual delegation of authority to the Port Director because the RPS Plan was never adopted by the Port's governing board.

(4) Discussion of the RPS program and compliance options at the meeting of the Port Board to discuss the 2013/2014 budget;

Steve Escobar, the Port's Deputy Director, states that at the June 3, 2013 Port Commission Meeting, he described the RPS Program requirements to the Port Commissioners. (Ex. 1004, p. 2.) The Committee finds that this action does nothing to further the Port's argument that it complied with the requirement to adopt its RPS Plan and optional compliance measures.

¹² The regulations are clear that the optional compliance measures must be included in the RPS Plan, but if a POU's RPS Plan was adopted prior to the Energy Commission's regulations, the Committee does not preclude the possibility that compliance may be achieved if the optional compliance measures were otherwise adopted in compliance with statutory requirements in existence at the time the RPS Plan was adopted.

- (5) Adoption of a budget for 2013/14 that is consistent with optional compliance measures.

The Port's governing board adopted the 2013/2014 Port Budget via Resolution 7832 on June 3, 2013. (Ex. 2005, pg. 140.) The only items in the budget related to the RPS Program are: (1) a line item for a solar power plant on Rough & Ready Island (Ex. 1001, p. 15); and (2) a statement that "[u]tility costs will increase as the Port is required to purchase alternative energy at a higher cost due to government regulations." (Ex. 1001, Budget Summary.)

The Committee finds that adopting a budget with a single line item related to the Port's RPS Plan – even if it was consistent with the use of a cost limitation optional compliance measure and even after hearing the Port Deputy Director's description of the Renewable Portfolio Standard Program requirements – is not sufficient to establish that the Port's governing board, or the public, understood the line item for construction of the Rough and Ready Solar Power Plant to be related to an optional compliance measure. Nor is this evidence sufficient to show that the Port adopted any optional compliance measures.

For all of the foregoing reasons, the Committee finds that the Port did not comply, substantially or otherwise, with the requirement to describe and adopt optional compliance measures which would have excused it from its RPS procurement and balanced portfolio requirements for CP1. Because the Port did not adopt optional compliance measures, it remains noncompliant with its RPS procurement requirements. Therefore, for CP1, the Port has a procurement target deficit of 7,205 MWhs and a portfolio balance deficit of 304 MWhs of electricity products from Portfolio Content Category 1.

Mitigating Factors Operate at the Penalty Phase

Staff encourages the Energy Commission to find that mitigating circumstances waive or excuse the Port's noncompliance, eliminating the need to forward a notice of violation to ARB. (Complaint at 14.) The Port agrees. (Port of Stockton Response to Order for Additional Information, TN# 223100, p. 5.)

The Committee disagrees with the parties on this matter of law.

Mitigating factors are not specifically mentioned in the RPS Program statutes. But, under section 399.30 subd. (o)(1), once the Energy Commission determines noncompliance – as the Committee has done here - the Energy Commission is statutorily bound to forward its determination to the ARB for consideration of potential penalties.

Energy Commission regulation section 1240 states that a POU is permitted to include in its answer information relevant to "any mitigating or otherwise pertinent factors related to any alleged violation or possible monetary penalty" that could be imposed as a result of

noncompliance. (§ 1240, subd. (d)(1).)¹³ The Energy Commission is required to include findings regarding mitigating circumstances in its decision and may include such findings “upon which the California Air Resources Board (CARB) may rely in assessing a penalty” for RPS noncompliance. (§ 1240, subd. (g).)

These legal requirements make clear that once the Energy Commission determines noncompliance, only the ARB has the authority to consider mitigating circumstances when determining to assess a penalty or not.¹⁴

Therefore, the Committee will identify and make findings regarding the mitigating factors, and the ARB may use those findings as it determines whether or not to assess penalties.

Mitigating Factors Identified by the Parties Are Significant

Following is a list of Section 1240’s factors to consider, and a summary of the mitigating circumstances that apply to each:

(A) The extent to which the alleged violation has or will cause harm.

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. (Staff Opening Brief, TN# 225002, p. 24-25.)

The Port’s retail sales represent less than 0.01% of California’s total retail sales of electricity in 2011-2013. (Ex. 2005, p. 128.) By failing to procure 20% of its retail sales from renewable energy resources, less than 0.002% of the energy used in California was produced by non-renewable energy resources during CP1 that would have otherwise been produced by renewable energy resources.

The Committee finds that the negative impacts caused by the GHG emissions of less than 0.002% of the State’s energy use during CP1 caused very little additional harm to the State.

¹³ The mitigating factors listed in section 1240 mirror the mitigating factors listed in Health and Safety Code section 42043 (the penalty provisions the ARB would rely on to comply with PUC section 399.30 subd. (o)), but do not include factors that are inapplicable in the RPS program context.

¹⁴ Consideration of mitigating factors by the ARB at the penalty phase is consistent with the treatment of mitigating factors in other areas of law. For example, in criminal law, mitigating factors do not excuse a violation of law, but are considered at the penalty phase and may result in the reduction of a fine or sentence. (See Cal. Rules of Court, 4.405 (4): “Aggravation,” “circumstances in aggravation,” “mitigation,” or “circumstances in mitigation” means factors that the court may consider in its broad sentencing discretion authorized by statute and under these rules.)

(B) The nature and expected persistence of the alleged violation.

As to the nature of the alleged violation, the Port failed to meet the statutory requirement to procure 20% of its electricity from renewable energy resources. However, had the Port's governing board adopted its RPS Plan and its optional compliance measures, the Port would have been able to claim cost limitation and delay of timely compliance to excuse its failure to meet its 20% procurement requirement. With collective, affirmative action, the Port would have been in compliance with the state's RPS Program, yet California would have been no closer to or farther from reaching its goal of 20% renewables for CP1.

As to the expected persistence of the violation, on March 12, 2019, the Energy Commission approved Staff's Draft Renewable Portfolio Standard Verification Results for Compliance Period 2 (2014-2016), in which Staff determined that the Port met its procurement target. (Energy Commission Resolution No: 19-0312-3 and Staff Draft RPS Verification Results Report for Compliance Period 2 (TN# 226534-5).)

The Port anticipates that it will be able to procure sufficient RPS-eligible resources to satisfy its RPS procurement requirements for Compliance Period 3. (Port of Stockton Response to Order for Additional Information, TN# 223100, p. 7)

Also, the Port is now aware of the requirements necessary to claim optional compliance measures, including the requirement to include those optional compliance measures in an adopted RPS Plan.

The Committee finds that it is unlikely the Port will be in violation of the State RPS Program in future Compliance Periods.

(C) The history of past violations.

This is the first compliance period for POUs under the RPS Program.

Therefore, the Committee finds no history of past violations.

(D) Any action taken by the local publicly owned electric utility to mitigate the alleged violation.

The Port met all regulatory requirements for the application of optional compliance measures except adoption by the governing board.

Had the Port's governing board adopted its cost limitation and delay of timely compliance measures and described these measures in an adopted RPS Procurement Plan before the end of CP1, the Port would have met all of the regulatory requirements for the adoption and application of optional compliance measures, thereby satisfying its RPS requirements. (Complaint, p. 11.)

Regarding delay of timely compliance, Staff determined that the Port demonstrated that it would have satisfied its RPS procurement requirements if it had not

encountered the delay in development of two 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. (Complaint, p. 11.)

Regarding cost limitation, Staff determined the Port demonstrated that the cost limitation was 1) set at a level to prevent a disproportionate rate impact and 2) established based on information in its most recent RPS procurement plan, the expected cost of building, owning, and operating eligible renewable energy resources, and the potential that planned resource additions may be delayed or canceled. The Port also reported the dollar amount of its cost limitation, the amount it spent on renewables and the expenditures applied to the cost limitation, and an estimate of the amount it would have needed to spend to meet the full RPS procurement requirements. Lastly, the Port reported actions planned and taken in response to exceeding the cost limitation. (Complaint, p. 12.)

The Committee finds that the Port met all regulatory requirements for the application of optional compliance measures *except* adoption by the Port's governing board.

The Port Took Reasonable Actions in Attempting to Procure Eligible Renewable Energy Resources to Satisfy its RPS Procurement Requirements

The Port reported entering into a development agreement in 2010 to purchase renewable energy from a proposed 20 MW rooftop solar facility located on the Port's warehouse facilities. (Ex. 2005, p. 194.) The proposed project would have sold power to both PG&E and the Port, as the output was more than seven times the size of the Port's total retail load. (*Id.*) The project required a System Impact Study (SIS) to be performed by PG&E in coordination with the California Independent System Operator (CAISO). (*Id.*) In November 2010, the Port initiated the SIS with PG&E. (*Id.*) However, the Port reported that the project "fell into an area of a transmission user not addressed in the CAISO tariff," and CAISO would not include the project in its transmission cluster study because it did not fit the parameters of its transmission tariff. (*Id.* at 196-197.) The Port reported that after multiple cluster study issues with PG&E and overall project cost issues, the developer abandoned the project. (*Id.* at 147, 194, 197.)

After it became apparent that the 20 MW photovoltaic plant was infeasible, the Port investigated a small photovoltaic project in 2012. (*Id.* at 134.) By mid-2012, the Port had completed a design/engineering review of a 1-2 MW ground based solar project to be located on Port property. (*Id.* at 194.) In its RPS Plan, the Port identified the renewable energy generated by such a project, supplemented with renewable energy credits, as the means by which it would meet its RPS obligations. (*Id.* at 150-151.) The Port continued to pursue the smaller project option until May 2014, when a re-evaluation of the benefits of developing a photovoltaic project led the Port to decide to

cancel its participation in a smaller photovoltaics project and rely on renewable energy credits for RPS compliance. (*Id.* at 134-135, 159-161, 163, 180.)¹⁵

The Port spent considerable time and effort toward the development of a local solar resource. Despite the Port's repeated attempts to develop and procure generation from a local solar facility, the many delays it encountered left the Port with few options to procure sufficient electricity products for CP1. (Complaint, pg. 13.)

The Committee finds that the Port took reasonable actions in attempting to procure renewable energy resources to satisfy its RPS procurement requirements.

(E) The financial burden to the local publicly owned electric utility.

If the Port is subjected to a financial penalty, it will have less funding available to procure sufficient resources to meet the procurement requirement and portfolio balance requirements for the third and fourth compliance periods. Given the size of the Port's electric utility, applying a penalty will increase the likelihood that the Port will rely on an optional compliance measure in the third and/or fourth compliance period. Consequently, the application of a penalty could result in the procurement of less renewable generation. This is counter to the primary purpose of the RPS. (Port of Stockton Response to Order for Additional Information, TN# 223100, p. 7.)

Also, all 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. (Port of Stockton Response to Order for Additional Information, TN# 223100, p. 6.)

The Committee finds that a financial penalty would reduce the Port's ability to procure renewable energy resources in future Compliance Periods.

The Committee also considers the following factors to be mitigating circumstances, specifically for CP1.

Timing of Passage of SBX1-2

SBX1-2 was not effective until approximately one year into CP1. Since POUs were not subject to this mandate prior to the enactment of SBX1-2, the timing associated with the enactment of the legislation may have limited the ability for POUs to sufficiently plan for and procure sufficient eligible renewable resources to meet the requirements of CP1. This is especially true as electricity procurement decisions may

¹⁵ The record is unclear about the size of the smaller project or if in fact more than one smaller project was considered. However, it is not necessary to resolve this ambiguity, as both Parties agree that the only issue is whether the Port's actions constitute substantial or actual compliance with optional compliance measures and if not, whether there are mitigating factors affecting the resolution of the Complaint.

require years of upfront planning, particularly for the development of new facilities. (Complaint, p. 13.)

The Committee finds that the short timeframe the Port had to comply with new requirements, given the complexity inherent with the development and procurement of energy resources, arguably hampered the Port's ability to comply.

Delay in Adopting Regulations

The timing of SBX1-2's enactment impacted the Energy Commission's ability to adopt the RPS POU 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. (Complaint, p. 13.)

While the Committee acknowledges this delay may have led to some level of uncertainty for POU's, the Port's RPS Plan acknowledges the Port was aware of the Energy Commission's rulemaking process and that the "draft regulations were used to specify the detail assumptions of the implementation plan included in this document." (Ex. 2005, p. 145.)

The Committee finds that the delay in adopting regulations did not contribute to the Port's failure to meet its procurement requirements, and the delay did not prevent the Port from properly adopting an RPS Plan or optional compliance measures which would have excused its failure to meet its procurement requirements.

Delay in the Optional Compliance Review Process

CP1 ended December 31, 2013. According to the Port, it submitted its Compliance Period 1 Annual Reports and Compliance Report by applicable deadlines, but Staff did not request specific information on the Port's optional compliance mechanisms until July 15, 2016 and again on July 17, 2017. Given the compliance period was 2011-2013, many years had passed since relevant activities occurred. (Port of Stockton Response to Order for Additional Information, TN# 223100, pp. 5-6.)

The Port claims that the delay makes it more likely that relevant evidence may be lost. It also claims that key Port staff and consultants that were directly involved in events relative to the complaint have retired. The Port states that these factors have limited its ability to effectively respond to the Complaint. (*Id.*)

The Committee finds that the delay in the optional compliance review process did not contribute to the Port's failure to meet its procurement requirements; nor did the delay prevent the Port from properly adopting an RPS Plan or optional compliance measures which would have excused its failure to meet its procurement requirements.

Overall, these mitigating factors paint a picture of a small POU – which operates primarily as a port for the transportation of goods and not an electrical services provider – trying to comply with a new legal requirement that required significant effort in a short period of time. The Port relied on its Port Director and hired a consultant to assist with the

development and implementation of the RPS Plan, and put significant resources toward developing renewable resource projects that would have met its procurement requirements. The Committee acknowledges that while an affirmative act of a governing board to adopt an RPS Plan and optional compliance measures is essential, had the Port's governing board simply taken that affirmative action, it would have been in compliance with the State RPS Program. Indeed, Staff determined that the Port met all other substantive requirements necessary to claim optional compliance measures and urges the Energy Commission to waive the Port's noncompliance. While the Energy Commission was not given that authority by the legislature, the Committee urges the ARB to give these mitigating factors great consideration as it exercises its authority and discretion in regards to penalties.

The Committee Suggests No Penalty

Energy Commission regulations permit, but do not require, the Energy Commission to include suggested penalties for the ARB to consider. The Committee is exercising its discretion to suggest no penalty be assessed against the Port because of the significant mitigating factors discussed above and because the Port would likely not be subject to penalties under the penalty structure established by the CPUC as discussed below.

Section 1240 states that any suggested penalties shall be comparable to penalties adopted by the California Public Utilities Commission (CPUC) for noncompliance with a Renewables Portfolio Standard requirement for retail sellers. Similarly, Section 399.30 directs the ARB to establish a penalty structure similar to CPUC. Therefore, a brief discussion of the CPUC's process for determining noncompliance and its penalty structure for retail sellers follows.

The CPUC has established a penalty structure for retail sellers who have a Procurement Quantity Requirements (PQR) deficiency and/or a Portfolio Balance Requirements (PBR) shortfall.¹⁶ The CPUC has set the penalty at \$50 per REC for the number of RECs the retail seller is deficient. (CPUC Decision Setting Enforcement Rules for the Renewables Portfolio Standard Program, D.14-12-023, p. 81.) If a retail seller has both a PQR deficiency and a PBR shortfall, the penalty will be the larger of the penalty for the PBR

¹⁶ The CPUC also has a citation program under the administration of CPUC staff to enforce compliance with RPS reporting requirements. CPUC Staff is delegated authority to draft and issue citations for specific violations. (Take Official Notice: CPUC Resolution E-4720, available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M154/K308/154308588.PDF>, which updates the citation program established in Resolution E-4257, available at http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_RESOLUTION/109286.PDF.) The citation program creates penalties for noncompliance with the CPUC's requirements for submission of RPS Compliance Reports and non-responsiveness to requests for information by Staff related to the implementation and administration of the RPS Program. The potential fine for both violations is \$500 per incident plus \$500 per day for the first ten days the submission is late and \$1,000 for each day thereafter. (Resolution at pp. 15-16.) The CPUC allows 10 business days from the date Staff notifies a retail seller to remedy an incomplete or incorrect report. If the errors or omissions identified by Staff have not been corrected within 10 days, a fine will be available to be levied. Requests for additional time to remedy errors or omissions may be made by contacting Staff. Granting such requests are solely at Energy Divisions' discretion. (Resolution E-4720, p.6.)

violation alone, or the penalty for the PQR violation alone.¹⁷ (*Id.* at pp. 81-82.) For all retail sellers other than PG&E, SCE, and SDG&E, the CPUC set a penalty cap at fifty-percent of the retail seller's PQR for the compliance period.¹⁸

Using the CPUC penalty calculation approach, fifty-percent of the Port's procurement requirement for CP1, which was 7,357 RECs, would be 3,679 RECs. ($7,357 \times .50 = 3678.5$.) At \$50 per REC, the Port of Stockton penalty cap for its procurement deficiency would be \$183,950. ($\$50 \times 3679 \text{ RECs} = \$183,950$.)

However, the CPUC has established (or is in the process of developing) additional mechanisms that may reduce or eliminate penalties.¹⁹ For example, 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. (*Id.* at p. 10.)²⁰ 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. (*Id.* at pp. 23, 77-78, 81.)

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 that the Port met all of the requirements

¹⁷ D. 14-12-023 available at

<http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M143/K520/143520009.PDF>, affirmed by D.18-05-026 available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M215/K717/215717833.PDF>

¹⁸ Initially, the CPUC set a penalty cap that applied equally to all retail sellers. In later decisions, the CPUC acknowledged that for all but the three large retail sellers, that penalty cap may be larger than the retail sellers total RPS procurement obligation when translated into dollar terms at \$50/REC. Therefore, the CPUC set the penalty cap for all retail sellers other than PG&E, SCE, and SDG&E at 50% of the retail seller's PQR for the compliance period, expressed in dollars, or the penalty cap that applies to the large retail sellers - whichever is smaller. D. 14-12-023 at p. 3, affirmed by D.18-05-026.

¹⁹ For Compliance Period 1, the CPUC – in its 2018 Annual Report to the Legislature - states that six retail sellers were non-compliant with their RPS procurement obligations, specifically, their PQR. (CPUC 2018 Annual Report, p. 23.) (Take Official Notice. CPUC 2018 California Renewables Portfolio Standard Annual Report, available at

[http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Utilities_and_Industries/Energy - Electricity and Natural Gas/Renewables%20Portfolio%20Standard%20Annual%20Report%202018.pdf](http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Utilities_and_Industries/Energy_-_Electricity_and_Natural_Gas/Renewables%20Portfolio%20Standard%20Annual%20Report%202018.pdf), at p. 23.)

Four retail sellers accepted the Commission's determination and paid their noncompliance penalties. (*Id.*) (Information regarding these penalties is not readily available to the public on the CPUC website.) Two retail sellers have filed for waivers for their respective RPS penalties under Section 399.15. (*Id.*) The CPUC has determined that the waiver request process should be a formal process, on the record, with a decision made by the Commission. (D.14-12-023 at p. 12.) To date, no such decisions have been issued - the two outstanding requests for waiver are currently pending before the CPUC. (CPUC 2018 Annual Report, p. 23.)

²⁰ Ordering Paragraphs 2 – 13, at p. 75-78, establish a process for retail sellers to file a waiver request.

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

The CPUC is still in the process of establishing its Procurement Expenditure Limitation as required by Section 399.15 subd. (c), which may operate to relieve a retail seller's procurement quantity requirements, similar to its waiver process. When established, this process may be compared to the Energy Commission's "cost limitation" optional compliance measure.

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.

OFFICIAL NOTICE

Pursuant to California Code of Regulations, title 20, section 1212 subd. (b)(1)(C), we take official notice of the following documents:

- CPUC Decision Setting Enforcement Rules for the Renewables Portfolio Standard Program, D.14-12-023, <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M143/K520/143520009.PDF>;
- CPUC Decision Implementing SB350 Provision on Penalties and Waivers in the RPS Program and Denying Petition for Modification of Decision 17-06-026, D.18-05-026, <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M215/K717/215717833.PDF>;
- CPUC 2018 California Renewables Portfolio Standard Annual Report, [http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Utilities_and_Industries/Energy - Electricity and Natural Gas/Renewables%20Portfolio%20Standard%20Annual%20Report%202018.pdf](http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Utilities_and_Industries/Energy_-_Electricity_and_Natural_Gas/Renewables%20Portfolio%20Standard%20Annual%20Report%202018.pdf)
- CPUC Resolution E-4720, available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M154/K308/154308588.PDF>
- CPUC Resolution E-4257, available at http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_RESOLUTION/109286.PDF
- SBX1-2 Legislative Counsel's Digest, available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120121SB2
- Staff Draft RPS Verification Results Report for Compliance Period 2 (TN# 226534-5), available at

https://www.energy.ca.gov/portfolio/documents/verification_results/cp02_2014-2016/pous_reports_staff_draft.php

- California Energy Commission Resolution No: 19-0312-3 (TN# 227327), available at <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=18-RPS-02>

FINDINGS OF FACT

1. The Commission Final Report on the Port's RPS verification results for CP1, adopted by the Energy Commission, identified that the Port had an RPS procurement requirement of 7,357 MWhs of electricity products for CP1. The Port procured 152 MWhs of electricity products towards its procurement requirement for CP1.
2. The Port had an RPS portfolio balance requirement of 304 MWhs of electricity products from Portfolio Content Category 1 for CP1. The Port procured no electricity products from Portfolio Content Category 1.
3. The Port's governing board never took collective, affirmative action to adopt its RPS Plan.
4. The Port's governing board never took collective, affirmative action to adopt its optional compliance measures.
5. Significant mitigating factors exist, including:
 - a. the negative impacts caused by the GHG emissions of less than .002% of the State's energy use during CP1 caused very little additional harm to the State;
 - b. the Port met its procurement target for Compliance Period 2 and it is unlikely the Port will be in violation of the State RPS Program in future Compliance Periods;
 - c. the Port met all regulatory requirements for the application of optional compliance measures *except* adoption;
 - d. the Port took reasonable actions in attempting to procure renewable energy resources to satisfy its RPS procurement requirements;
 - e. 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 customers in an area of the state that faces high levels of unemployment and poverty;
 - f. the short timeframe the Port had to comply with new requirements of SBX1-2, given the complexity inherent with the development and procurement of energy resources, arguably hampered the Port's ability to comply;
6. The Committee suggests that due to the significant mitigating factors, no penalty is warranted.

CONCLUSIONS OF LAW

1. Pursuant to §399.30 subd. (b), the Port was required to procure quantities of eligible renewable energy resources equal to an average of 20 percent of retail sales for CP1.
2. Pursuant to §399.30 subd. (c)(3), that procurement was to be balanced between three portfolio content categories.
3. The Port has failed to meet its RPS procurement requirements for CP1, with a procurement target deficit of 7,205 MWhs and a portfolio balance deficit of 304 MWhs of electricity products from Portfolio Content Category 1.
4. Section 399.30 subd. (d) allowed the governing board of each POU to adopt certain measures, commonly referred to as “optional compliance measures.” If adopted, these optional compliance measures allowed a POU to technically comply with the RPS Program, even if it failed to procure the required quantity of eligible renewable energy resources.
5. The governing board of a POU must adopt, by some type of collective, affirmative action—such as a resolution passed by a majority vote—a Renewables Portfolio Standard Procurement Plan which includes optional compliance measures that meet the requirements of the Public Utilities Code and the Energy Commission regulations if it intends to rely upon them to excuse noncompliance with its procurement or balanced portfolio requirements.
6. The Port failed to adopt the optional compliance measures and is therefore not excused from its failure to meet the RPS procurement requirements for CP1.
7. Title 20, Cal. Code Regs., section 1240 subd. (g) requires this Decision to include findings regarding mitigating and aggravating factors related to noncompliance, upon which the California Air Resources Board may rely in assessing a penalty.
8. Mitigating factors do not operate to excuse the Port’s noncompliance; instead, they are properly considered by the California Air Resources Board at the penalty phase.
9. Title 20, Cal. Code Regs., section 1240 subd. (g) provides that this decision may also include suggested penalties for the California Air Resources Board to consider.
10. Title 20, 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.

**Order on Complaint by the California Energy Commission Executive Director
Against the Stockton Port District for Noncompliance with the Renewables
Portfolio Standard:**

1. The Port failed to comply with the State RPS Program requirements for Compliance Period 1.
2. The Executive Director or a designee shall issue a Notice of Violation based on this Decision and forward to ARB for consideration of penalties pursuant to Public Utilities Code section 399.30 subd. (o)(1), in the manner directed by Title 20, California Code of Regulations section 1240 subd. (h).

IT IS SO ORDERED