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on the 2nd 15-Day Language Modifications to Proposed Amendments to the RPS Regulations for POUs

Additional submitted attachment is included below.

September 2, 2020 | Submitted Electronically

Docket Unit
California Energy Commission
Docket No. 16-RPS-03
1516 Ninth Street, MS-4
Sacramento, CA 95814

RE: Comments of the Joint Publicly Owned Utilities on the Second 15-Day Language Modifications to Proposed Amendments to the Renewables Portfolio Standard (RPS) Regulations for Publicly Owned Utilities (POUs) [CEC Docket #16-RPS-03]

Dear Commissioner Douglas and Commission Staff,

The California Municipal Utilities Association (CMUA), Lassen Municipal Utility District (LMUD), Modesto Irrigation District (MID), M-S-R Public Power Agency (M-S-R), Northern California Power Agency (NCPA), and Southern California Public Power Authority (SCPPA) (collectively the "Joint POUs") respectfully submit these comments to the California Energy Commission (Commission) on the Second 15-Day Language Modification of Regulations Specifying Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities (2nd 15-Day Language), issued on August 18, 2020.

The Joint POUs are deeply troubled by the expansive new proposed changes included in the 2nd 15-Day Language, which seek to introduce major new proposals never previously raised or considered in the prior four years in which this proceeding has been open. Given the complex legal and policy issues raised by these proposals, the 15-day comment period provides an inadequate opportunity for the entities that will be subject to these regulations to have a full and fair opportunity to adequately raise their concerns. In particular, the Joint POUs strongly oppose the 2nd 15-Day Language proposal that creates new and vague requirements for a contract to qualify as long term and creates a secondary review phase where Commission staff are authorized to define additional requirements for long term contracts. The Commission must issue modified regulations that, at a minimum, deletes in its entirety Sections 3204(d)(2)(A)3. and 3207(c)(5) of the 2nd 15-Day Language. As described below, these new proposed provisions (1) create an unacceptable level of regulatory risk for POUs; (2) impose requirements not

based on or authorized by the relevant statutory language and are thus beyond the regulatory authority of the Commission; (3) fail to meet minimal standards of clarity for a regulation; and (4) would necessarily lead to the creation of underground regulations in violation of the Administrative Procedures Act.[1] The Joint POUs urge the Commission to reconsider the proposals included in the 2nd 15-Day Language.

I. The Proposed CEC Staff Process for the Review of Long Term Contracts Must Be Deleted From the Regulations.

A. The Implementation of SB 350's Long Term Procurement Requirement has been substantially delayed and it is inappropriate to introduce major new proposals at this late stage in the process.

SB 350 was signed by Governor Brown on October 7, 2015, almost five full years ago. The long term procurement requirement, as set forth in Public Utilities Code section 399.13(b) and 399.30(d)(2)(A), remains unchanged since 2015. During this time, there has been no impediment to the Commission implementing these requirements in order to provide regulatory certainty to the POUs. As a comparison, the California Public Utilities Commission (CPUC) implemented these long term procurement requirements for the retail sellers through Decision 17-06-026, which was adopted on June 29, 2017. Compliance with the long term procurement requirement can be done on a voluntary basis during the third compliance period (spanning January 1, 2017 to December 31, 2020), and is mandatory for the fourth compliance period (starting January 1, 2021). In this proceeding, the Commission is considering and still making major changes to contracting requirements that will be mandatory as of the fourth compliance period, which starts in just a few months.

The purchase of a new renewable generating facility or the negotiation of a long term contract for a new renewable generating facility is typically a lengthy process. Contract negotiations can often last 6 months or longer, depending on the nature of the transaction and the project being developed. The process for design, permitting, interconnection, construction, and initiation of operations typically takes 2-3 years. This means that for a POU to secure a long term contract that is delivering by 2021, that POU needed to execute that contract in the 2017-2018 time period. Because the CPUC implemented these requirements back in 2017, the investor-owned utilities (IOUs), community choice aggregators (CCAs), and electric service providers (ESPs) have been able to execute long term contracts with a high degree of certainty that the contracts qualify as long term. In contrast, the POUs have been forced to rely solely on the statutory language as guidance for determining what will qualify as long term.

The CEC's proposed regulations were issued on May 7, 2020, almost five years after the adoption of SB 350 and almost three years after the CPUC implemented their long term procurement requirements. The proposed regulations include numerous prescriptive limitations that go far beyond anything contained in statute or necessary to effectuate the statute's purpose, and further, go beyond the requirements adopted by the CPUC. These proposals include limitations on project expansions, substitutions, excess energy,

[1] Cal. Gov. Code § 11340 *et. seq.*

and contract extensions, all of which are in conflict with normal standardized contract terms. Now, in addition to this list, the 2nd 15-Day Language for the first time proposes to allow Commission staff to develop new requirements outside of any regulatory process.

This is all highly problematic because the POUs have been negotiating and executing contracts for years at this point in order to ensure that they will be in compliance with the long term procurement requirements for the fourth compliance period. It is simply too late for the Commission to seek to propose new and highly restrictive limits on long term contracts. These regulations will punish the POUs that took the necessary steps to faithfully meet the requirements and purpose of the RPS Program.

B. <u>There is no demonstrated need for any of the proposed limitations on long term contracting included in the 2nd 15-Day Language.</u>

The need for highly prescriptive limitations on normal contracting provisions is also unclear. The 2nd 15-Day Language creates vague new requirements that POUs may need to demonstrate that their contracts support "financing and development of new eligible renewable energy resources, major capital investments in existing eligible renewable energy resources, or long-term planning and market stability."[2] Further, POUs will need to justify any variance in quantities over the term of the agreement[3] and justify any terms (such as pricing) that are not clearly defined or are subject to renegotiation throughout the term of the agreement.[4] As discussed below, these proposals have no basis in statute, and in addition, there is no justification for these restrictive limitations.

One set of stakeholder comments raised concerns about the potential for "sham" contracts where a POU would evade long term contracting rules through complex and unrealistic scenarios.[5] As evidence of the risk of these types of sham contracts, the stakeholder comments cite a single example of a Pacific Gas and Electric Company contract from 2013. Concerns about contracting practices of the IOUs should be directed to the CPUC's RPS Proceeding and should not be a primary driver for changes to the Commission's regulations applicable to POUs.

As POUs are public agencies that are subject to the oversight of their local governing boards, the risks of deceptive contracting practices are limited. Virtually all POU long term power purchase agreements will be publicly presented and approved at a public meeting of the POU's governing board. These long term commitments will receive the input of the POU's local community and the elected officials serving on these boards. It is therefore highly unlikely that a POU will be party to a sham agreement meant to evade the requirements of SB 350. As currently proposed, the Commission is asserting an approval role

[2] 2nd 15-Day Language, Section 3204(d)(2)(A)3.
[3] Section 3207(c)(5)(A)1.
[4] Section 3207(c)(5)(A)2.
[5] *See* Comments of The Utility Reform Network and the Coalition of California Utility Employees on Proposed Modifications to the Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities, June 22, 2020, at 3.

over POU contracting by requiring the POU to justify any term that Commission staff deems relevant. This proposal goes far beyond the Commission's authority and infringes on the role of the POU governing boards.

C. Sections 3204(d)(2)(A)3. and 3207(c)(5) are impermissibly vague and delegate the rulemaking function to Commission staff.

All regulations should be clear such that any entity subject to the regulations can reasonably understand and comply with the regulations. However, in the case of regulations that require the construction of major infrastructure projects, where millions of dollars and years of work are being committed, it is even more essential that the regulations not be vague or subject to after-the-fact changes in interpretation.

Under the structure proposed in the 2nd 15-Day Language, Commission staff are authorized to privately develop new regulatory requirements relating to any element of a long term contract that the staff, in their sole discretion, determines is relevant to achieving the presumed statutory intent of the long term contracting requirement of SB 350. Section 3204(d)(2)(A)3. requires a POU "to demonstrate that a long-term contract represents a long-term commitment . . . ." The proposed regulation then lists requirements that are not in statute or based on statute, including supporting "financing and development of new projects," "capital improvements" in existing projects, and "long-term planning and market stability." By including this example list, the 2nd 15-Day Language opens the door to after-the-fact requirements being created outside of any regulatory process. Further, Section 3207(c)(5) authorized Commission staff to create new requirements for core contract elements, including changes in quantity over the term of the contract and any provisions that are not "clearly defined" or "subject to renegotiation."

This structure necessarily delegates the rulemaking function to staff and makes it impossible for a POU to reasonably predict what that actual long term procurement requirements are. For example, Commission staff could determine that a contract where a POU takes 100 percent of the output of a generating facility for the first 8 years of a 10 year contract and then takes 20 percent of the output of the facility for the final 2 years of the 10 year term does not demonstrate a sufficient long term commitment. Commission staff could, on this basis, determine that the contract does not qualify as long term, despite nothing in the statute or the regulations prohibiting such a contract structure. Further, the proposed regulations place no limitations on when such a determination would be made. It is likely that such a determination would occur years after the contract had been executed and began delivering electricity products to the POU. The sequencing of this process would mean that Commission staff's determination that a contract is short term could push the POU into noncompliance and the POU would have no opportunity to mitigate this noncompliance through alternate procurement or amending the contract because the compliance period may have ended.

The regulatory structure envisioned by the 2nd 15-Day Language change is simply unacceptable given the nature of this compliance requirement. Potentially affected contract terms, such as quantity, pricing,

duration, and delivery are core elements of a long term power purchase agreement. Rather than adopting clear, predictable, and feasible regulations, this proposal would have the Commission abandon its role in setting regulations and delegate this function to Commission staff.

D. The elements listed in Section 3204 (d)(2)(A)3. are not included in or necessary for any statutory provision and the Commission lacks the jurisdiction to impose such requirements.

Section 3204 (d)(2)(A)3. of the 2nd 15-Day Language creates a new requirement that a POU may be required to provide information to the Commission demonstrating that a relevant contract "represents a long-term procurement commitment . . . ." This demonstration may need to address how the long-term contract supports the "financing and development of new eligible renewable energy resources, major capital investments in existing eligible renewable energy resources, or long-term planning and market stability." This proposal goes far beyond any requirement included in statute, is unworkably vague, and is outside the scope of the Commission's authority. Section 399.13(b) provides, in its entirety, the following:

> A retail seller may enter into a combination of long- and short-term contracts for electricity and associated renewable energy credits. Beginning January 1, 2021, at least 65 percent of the procurement a retail seller counts toward the renewables portfolio standard requirement of each compliance period shall be from its contracts of 10 years or more in duration or in its ownership or ownership agreements for eligible renewable energy resources.

There is absolutely no requirement that long term contracts be with newly-developed resources or that long term contracts with existing resources involve capital improvements. There is simply no basis for such a requirement and it represents a fundamental misapplication of the rulemaking process.

As the Joint POUs have raised many times before, the rules of statutory construction require the Commission to implement the relevant RPS legislation in a manner that gives a reasonable and commonsense interpretation that is consistent with the Legislature's purpose.[6] This implementation should be practical rather than overly technical and should seek to harmonize individual provisions with the overall statutory structure.[7] **To be clear, there is absolutely no expressly-stated legislative intent for the long term procurement requirement.[8]** However, the Joint POUs have supported making

[6] Hubbard v. California Coastal Com. 38 Cal.App.5th 119, 135-136 (2019).
[7] *Id.*
[8] The CPUC agrees with this assessment. As stated in D.17-06-026, the CPUC concluded:

> Both new Section 399.13(a)(4)(B) and new Section 399.13(b) were put into their current form by amendments made in the Assembly on September 4, 2015. None of the bill analyses in the Assembly and the Senate that were produced between September 4 and September 11, 2015, the date the bill was enacted, address the impact of the new LT requirement. The most relevant statements in both the Assembly Utilities and Commerce Committee analysis of September 4 and the Assembly Natural Resources Committee

reasonable assumptions about the Legislature's ***presumed intent*** based on the relevant regulatory history and overall structure of the RPS Program. On that basis, the Joint POUs supported the characterization in the Initial Statement of Reasons that the primary purpose of the long term procurement requirement is to support the financing of new projects. The value of identifying this purpose is to guide the Commission as it implements the regulations based on the statutory requirements as a check to confirm that its proposed implementation is consistent with the actual goals of the statute. However, this presumed legislative purpose is not an independent mandate that can be imposed on POUs and doing so stands the regulatory process on its head.

Just because a statute has an ultimate goal for the impact that it will have in the aggregate, that does not mean that a regulatory agency can ignore the clear and plain language of the statute to mandate the ultimate goal on an individual basis. Here, the presumed goal is that by requiring all retail sellers and all POUs to meet 65 percent of their RPS procurement requirements with electricity products from owned resources or long term contracts, that the ultimate impact will be to increase the likelihood that a party seeking to develop a new renewable project will have sufficient utility counter-parties willing to commit to a 10-year term. The long term procurement requirement does not mandate that all POUs or retail sellers must exclusively execute contracts with new facilities. There are many examples of the Legislature ordering procurement from specific types of resources, and when doing so, the Legislature is fully capable of making itself clear. It did not do so here, and if the Commission were to mandate that long term contracts be with new resources or result in capital improvements in existing resources, the Commission would be exceeding its jurisdiction under Public Utilities Code § 399.30.

The Administrative Procedures Act provides that:

> Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.[9]

As stated above, Public Utilities Code § 399.13(b) ***only*** requires that the long term procurement be from "contracts of 10 years or more in duration" or from owned resources.[10] Requiring that a POU demonstrate that the contract resulted in financing a new project, a capital improvement to an existing resource, or supports long-term planning or market stability is not an express or implied requirement of Public Utilities Code § 399.13(b). Further, it is not in any sense reasonably necessary to effectuate the purpose of the statute. Proposed Section 3204 (d)(2)(A)3. exceeds the Commission's authority and is not a valid regulation.

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analysis of September 10 indicate that the two provisions have been discussed by stakeholders and are considered to be connected. (D.17-06-026 at 14-15)

[9] Cal. Gov. Code § 11342.2.

[10] Cal. Pub. Util. Code § 399.13(b).

E. The proposed Commission staff contract review structure provided by Section 3207(c)(5) violates the Administrative Procedures Act.

As described above, Section 3207(c)(5) of the 2nd 15-Day Language would create a new structure where Commission staff are authorized to develop new requirements for long term contracts. While a list of four potential topics is included, the proposed language is clear that Commission staff's determination is not limited to the items on that list. Further, the items that are included are core elements of a long term contract, including quantity and the ability to renegotiate certain terms. As proposed, Commission staff is delegated the authority to develop specific requirements for the limitations on how much a POU's share of the quantity output of a facility can vary throughout the contract term. The proposed regulation provides no boundaries or limitations to this determination. Any POU looking to these regulations will have absolutely no ability to predict whether a specific quantity reduction will lead to the disqualification of a contract. Further, when Commission staff does develop these limitations, it will be done privately with no input from the POUs or the public. A POU's only recourse will be to petition the full Commission.

The requirements that will be created by Commission staff through this process are clearly regulations subject to the requirements of the Administrative Procedures Act. As clarified by the courts:

> A regulation is defined by statute as: "[E]very rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) A regulation has two principal identifying characteristics: (1) it is intended to apply generally, rather than in a specific case; and (2) it must "'implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure.'" [citation] A regulation that is adopted without complying with the APA procedures is known as an underground regulation. [citation] Failure to comply with the APA procedures nullifies the regulation.[11]

Here, the Commission staff would be implementing the limits on core elements of a long term contract, such as how much the quantity can change over time or the extent to which a term can be subject to renegotiation. Any such standards adopted by Commission staff are of a nature that they should be applied generally and would not be appropriate for differing treatment in different contexts. For example, Commission staff could not determine that an 80 percent reduction in year 8 disqualifies one contract but would be allowable for a different contract. Further, the regulatory nature of this requirement is demonstrated by the fact that the 1st 15-Day Language actually did propose to provide generally applicable regulatory language. Rather than modifying this initial proposal, the 2nd 15-Day Language creates an underground regulatory process.

[11] Missionary Guadalupanas of Holy Spirit Inc. v. Rouillard, 38 Cal. App. 5th 421, 432, 2019) (internal citations omitted).

One of the primary purposes of the Administrative Procedures Act is to ensure that the people or entities that will be subject to a regulation are able to participate in the creation of the regulation.[12] By adopting this proposed structure, the Commission will be circumventing the Administrative Procedures Act by allowing staff to create this regulation outside of a formal rulemaking process. The public and POUs will not be guaranteed any ability to help shape and inform the determination made in this underground rulemaking process. The courts have clarified that part of the reason for this public rulemaking process is that "the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny."[13] By shifting the rulemaking responsibility to a Commission staff process, the Commission would be authorizing the creation of these requirements through an impermissible underground regulation.

Another key purpose of the Administrative Procedures Act is to provide the entities that are subject to a regulation with adequate notice of the "law's requirements so that they can conform their conduct accordingly."[14] Here, a POU will have no notice of what the requirements are to qualify as a long term contract and it will be impossible for a POU to conform its contracts to these standards. This challenge is exacerbated by the timing involved because the determination that a contract is not long term will likely come years after execution and potentially after the generation has been relied upon for compliance with the RPS procurement requirements. The proposal thus does not meet the minimum requirements for a valid regulation and must be deleted. If the Commission determines that minimum quantity requirements are necessary in order to implement the statutory long term procurement requirement, the Commission (not its staff) must implement it through a formal rulemaking process.

II. The Definition of Jointly Negotiated Contracts Must Be Expanded

The 2nd 15-Day Language significantly narrows the contracts that qualify as "jointly negotiated" for purposes of allowing the applicable POUs to reallocate their relative percentage shares of the output of the generating facility among themselves without the long term procurement term length requirements being reassessed. The 45-Day Language and the 1st 15-Day Language allowed a POU's contract to be considered "jointly negotiated" even if each of the involved POUs had executed separate contracts. The 1st 15-Day Language added a clarification that a POU could meet this requirement by demonstrating that the contract resulted from joint negotiations. The 2nd 15-Day Language appears to completely eliminate this option, limiting "jointly negotiated" to where there is either a single contract or where a third party or Joint Powers Authority has executed the contract on behalf of multiple POUs.

There is functionally no difference between a single contract executed by multiple POUs and a circumstance where multiple POUs issue a joint solicitation, execute nearly identical but separate

[12] *See, Armistead v. State Personnel Board*, 22 Cal.3d 198, 204-205 (1978).
[13] Tidewater Marine W., Inc. v. Bradshaw, 14 Cal. 4th 557, 568–69 (1996).
[14] *Id.*

contracts, and those separate contracts expressly authorize the reallocation of the output of the facility to the other named POUs. It is unclear, at this very late stage, why the 2nd 15-Day Language would impose such a restriction. In practical terms, the reason why POUs may execute multiple versus a single joint contract will generally relate to internal POU policies and preferences of the Seller.

The Commission must provide this necessary flexibility and not arbitrarily prohibit POUs from having separate contracts.

III. The Proposed Language Describing an Allowable Replacement in 3204(d)(2)(J)3.iii. is too Narrow.

The Joint POUs generally support the clarification provided in Section 3204(d)(2)(J)3.iii. of the 2nd 15-Day Language that the limitations on the substitution of a new renewable generating resource do not apply to replacement energy if it is authorized in the original contract. However, this new provision requires that the POU provide documentation that the replacement energy occurred because the RPS-certified facility was ***unable*** to perform as required in the contract. The Joint POUs are concerned that this is a demonstration that would be complex and may involve information that the POU does not have. If a generating facility fails to generate sufficient electricity products over a measurement period (for example 2 years) and thus provides replacement energy, the POU may not have access to any information that demonstrates that the facility was not capable of producing more. The POU may only know that the replacement product is being provided and may not know whether the resource could have potentially met its obligation through a different curtailment strategy or more limited maintenance activities.

The Joint POUs recommend the following amendment to more reasonably implement this provision:

> Notwithstanding section 3204 (d)(2)(J)3.i-ii., replacement energy procured from another RPS-certified facility, as allowed by the original long-term contract, shall be considered part of the original long-term contract if the POU can submit information demonstrating that the need for replacement energy occurred because the RPS-certified facility specified in the original long-term contract did not~~was unable to~~ perform as the contract required.

IV. CONCLUSION

The Joint POUs appreciate the opportunity to provide these comments to the Commission. Thank you for the time and attention to these comments.