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NCPA Comments on RPS Key Topics Guide and Workshop

NORTHERN CALIFORNIA POWER AGENCY COMMENTS ON KEY TOPICS GUIDE
AND LEAD COMMISSIONER WORKSHOP

Additional submitted attachment is included below.



November 13, 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 Key Topics Guide: Proposed Implementation of RPS Long-Term Procurement Requirement in RPS POU Regulations [CEC Docket #16-RPS-03]

Dear Commissioner Douglas and Commission Staff,

The California Municipal Utilities Association (CMUA), Northern California Power Agency (NCPA), and Southern California Public Power Authority (SCPPA) (collectively the “Joint POU’s”) respectfully submit these comments to the California Energy Commission (Commission) on the *Key Topics Guide: Proposed Implementation of RPS Long-Term Procurement Requirement in RPS POU Regulations* (Key Topics Guide), issued on October 30, 2020 and on the Lead Commissioner Workshop on Proposed Implementation of Renewables Portfolio Standard Long-Term Procurement Requirement for Local Publicly Owned Electric Utilities (November 5 Workshop), held on November 5, 2020.

The Joint POU’s greatly appreciate the Commission’s efforts in developing the updated proposal included as part of the Key Topics Guide and for being responsive to the concerns raised by the publicly owned electric utilities (POU’s) during this process. As described at the November 5 Workshop, the Joint POU’s believe that the relevant statutory provisions only require a simple analysis of the duration of a contract to determine if that contract qualifies to count toward the long term procurement requirement. However, in recognition of the concerns raised by Commission staff and some stakeholders, the Joint POU’s coordinated closely with The Utility Reform Network (TURN) to develop a comprehensive proposal for implementing the long term procurement requirement (Joint Stakeholder Proposal), submitted on October 20, 2020. The Joint Stakeholder Proposal represented a carefully-developed compromise document, where each element was essential to the various parties’ support. The goal of the Joint Stakeholder Proposal was to provide an option for implementing the long term procurement requirement in a manner that would disqualify contract structures that circumvent the requirements of Public Utilities Code § 399.13(b), while at the same time not infringing on POU governing board authority.

The proposed regulatory language included with the Key Topics Guide accepts many parts of the Joint Stakeholder Proposal, however, there are some key differences that raise significant concerns for the Joint POUs. These comments will both identify the areas of the Key Topics Guide that the Joint POUs support, as well as propose modifications to the proposed regulatory language to address the Joint POUs' concerns.

I. RESPONSE TO KEY TOPICS GUIDE

A. Support for Different Treatment for Pre-July 1, 2020 Contracts

As described above, the Joint Stakeholder Proposal was a comprehensive agreement where the different parties compromised on various elements. However, for the POUs, one of the single most important elements of that proposal was ensuring that contracts executed prior to the development of the Commission's RPS regulation amendments would not be subject to the more complex limits on procurement quantity variability, termination clause limits, and requirements for minimum pricing and quantity terms. These prior contracts were executed without the knowledge or reasonable anticipation of these new requirements and thus should not be subject to a retroactive review.

The Joint POUs greatly appreciate and support the proposal in the Key Topics Guide on the treatment of pre-July 1, 2020 contracts.

B. Other Areas of Support

In addition to the treatment of pre-July 1, 2020 contracts, the Joint POUs also support the Key Topics Guide's inclusion of the following:

- **Jointly Negotiated Contracts:** The Key Topics Guide amends the proposed regulatory language to clarify that the treatment for jointly negotiated contracts also applies to POUs that executed separate contracts with the same RPS-certified facility, where the separate contracts reference each other and the ability to reallocate the relative shares of the output of the facility.¹ This change provides useful flexibility and does not unnecessarily limit the contracting structures available to the POUs and renewable project developers.
- **Replacement Energy:** The Key Topics Guide makes an important modification to the proposed regulatory language dealing with the treatment of replacement energy clauses in long term contracts. As modified, a POU only needs to demonstrate that that RPS-eligible facility *did* not perform as guaranteed under the contract, not the more difficult demonstration that the facility *could* not have performed as guaranteed under the contract. This change aligns with the information that the POU is likely to actually have access to.

¹ Key Topics Guide at A-1.

- **Western Area Power Administration:** The Key Topics Guide accepts the element of Joint Stakeholder Proposal that provided a clarification on the long term treatment of certain extensions of POU contracts with the Western Area Power Administration (WAPA). This clarification provides a beneficial assurance that, despite the structure of the termination provisions in those contracts, those extensions will continue to qualify as long term contracts.

C. Conditions to Demonstrate Reasonably Consistent Procurement Quantities

One of the POU's primary concerns with more complex and prescriptive regulatory requirements for long term contracts is ensuring regulatory certainty. Each POU is committing substantial amounts of its ratepayers' funds to these projects and these commitments are at least ten years in length, but commonly extend to 20-30 years. For public agencies to make these types of commitments, the associated regulations need to be absolutely clear to both parties to the contract, such that they have a high degree of certainty at the time of contracting that the agreement will qualify as long term.

As proposed in the Joint Stakeholder Proposal, the Joint POU's agreed to a requirement where if a POU's contracted-for quantities deviated beyond a certain threshold, that contract would still qualify as long term if the contract met one of the enumerated justifications. This would be an automatic process, so that the POU would have certainty at the time of contracting that a contract exceeding the threshold would still qualify. This automatic treatment is essential because there are many legitimate contract structures that will greatly exceed the deviation threshold proposed in the Key Topics Guide. For example, a POU may procure increasing shares of a renewable facility throughout the contract term. It would not be uncommon for a POU to increase its share by a factor of several hundred percent throughout the term. Such a contract structure provides clear benefits to a renewable developer that wants to ensure that as one buyer drops out of the project other buyers will take over the departing buyer's output. However, despite being a reasonable and valuable contract structure, this example would require the POU to demonstrate that the contract meets one of the justifications for exceeding the deviation threshold.

Section 3204(d)(2)(C)1.iv. of the Key Topics Guide, differs significantly from the proposed structure in the Joint Stakeholder Proposal. Rather than a justification automatically meaning that the contract qualifies as long term, the proposal would instead require the POU to demonstrate that the contract meets the purposes of the long term procurement requirement, which includes market stability, long term planning, investments in new construction, and/or improvements to existing resources. As proposed, the enumerated justifications just become a list of information that *might* support the finding that the contract meets the purposes of the long term procurement requirement.

The Joint POU's have significant concerns with this proposal. This leads to substantial regulatory uncertainty because it would be left to the Commission staff's discretion to determine what meets the purpose of the long term procurement requirement. There is no direct guidance in the statute or legislative history, so it is not clear what would guide the Commission staff's evaluation. In the example above, where a POU's contract provides for increasing shares of the output of a facility over the term of

the agreement, the contracting parties lose the regulatory certainty because now, it will be up to Commission staff to determine if this structure supports the purposes of the long term procurement requirement. The result may simply be to discourage contracts that would otherwise support the development of new projects and the financial viability of existing projects.

Additionally, the inclusion of “market stability” as an express purpose of the long term procurement requirement is troubling because this term can be interpreted in a variety of ways. Of particular concern is that different technology types have different effects on market conditions. It is possible that Commission staff in the future could find that contracts with a certain renewable technology type do not support market stability because they increase the frequency of curtailment and thus would not qualify as long term. The inclusion of this term only serves to exacerbate the lack of regulatory certainty, and should be deleted.

The Joint POUs propose modifying the language in the Key Topics Guide to keep the same basic structure, but to clarify that meeting one of the listed justifications means that the contract is deemed to qualify as long term:

Redline to Key Topics Guide
iv. Notwithstanding subparagraphs i.-ii., reasonably consistent contracted-for quantities include procurement quantities that vary by more than [33 or 40] percent, or procurement quantities specified on a compliance period basis, if the POU demonstrates the contract represents a procurement commitment consistent with the purposes of the long-term procurement requirement, including supporting long-term planning and market stability, and investments in the development of new eligible renewable energy resources or improvements to existing eligible renewable energy resources. In making this demonstration, a POU may provide information to show that <u>The contract shall be deemed to be consistent with the purposes of the long-term procurement requirement if</u> the contracted-for procurement quantities are associated with one of the following:

D. Zero Contracted-For Output or Percent Within a Continuous 10-Year Term

The Key Topics Guide asked if there are circumstances where a contract could qualify as long term even if the contracted-for output or percentage is zero during any year within the continuous 10-year term. The Joint POUs propose clarifying that if there is a year of zero contracted-for procurement (either on an output or percentage share basis) after the initial year of the contract, then the contract should be evaluated on the basis of the reasonable consistency standard in Section 3204 (d)(2)(C)1. If the contract meets one of the conditions specified in Section 3204 (d)(2)(C)1.iv., then the contract should qualify as long term even if there is a year of zero contracted-for procurement. The Joint POUs note that this is likely to be a rare occurrence and would require clear documentation by the POU supporting why there is a zero year during the initial 10 year term of the contract. As described during the November 5 Workshop, these reasons could include a massive construction project at the generating facility or the replacement of a major transmission line.

Further, no justification should be necessary for zero years that occur prior to or after a 10 year term. For example, if a POU executed a 20 year contract, and in year 12, the contracted-for procurement was zero, the contract should not need to meet one of the justifications in Section 3204 (d)(2)(C)1.iv. because the contract includes a continuous 10-year term.

To provide this clarification, the Joint POU's recommend adding the following language as a new Section 3204(d)(2)(C)1.v.:

Redline to Key Topics Guide

v. Notwithstanding the requirements specified in paragraphs (A)-(C), a contract that specifies a zero quantity during any year of the initial 10-year term of a contract may still qualify as long term procurement if the POU demonstrates that the contract meets one of the conditions specified in subparagraph iv.

E. Third Party Marketers

The Key Topics Guide proposes that the requirements for reasonable consistency of procurement quantities, limits on certain types of termination clauses, and the requirement to have minimum pricing and quantity terms (as specified in Sections 3204(d)(2)(C)1.-3.) would apply equally to the underlying contracts of third party marketers. The POU's were not considering the underlying contracts of third party marketers in the POU feedback and recommendations on the list of justifications specified in Section 3204 (d)(2)(C)1.iv. for exceeding the threshold for reasonable consistency and the list of exceptions to a no-cost early termination clause in a contract specified in Section 3204 (d)(2)(C)2.ii.. Instead, these recommendations were developed exclusively considering POU contracts and thus, likely do not address all circumstances applicable to third party marketer contracts.

Further, these requirements are far more complex than a simple duration analysis and would potentially be burdensome to track in all underlying contracts used by third party marketers. These underlying contracts are very likely to be confidential and not accessible to the POU.

The Joint POU's recommend not applying these requirements to the underlying contracts of third party marketers.

F. Voluntary Early Review of Long Term Contracts.

The Joint POU's greatly appreciate the willingness of the Commission to consider and propose a voluntary early review process. The nature of long term contracts means that POU's will be committing large amounts of their ratepayers' funds toward these agreements for long periods of time. If a POU were to find out, years into the term of the contract, that the contract does not qualify as long term, it could have disastrous financial consequences for the POU. Further, because of the amount of time that it typically takes between starting contract negotiations and actually receiving deliveries from a long term contract (often several years), it is extremely difficult for a POU to replace a long term contract. If the

POU were to discover that a contract did not qualify as long term near the end of a compliance period, that POU may have no viable options to meet its procurement requirements.

Because of all of this, a voluntary early review process would be extremely valuable to a POU that is negotiating a non-standard long-term contract. These non-standard long term contracts may be necessary to address unique needs of a POU or to align with the available renewable resources. For example, a POU that knows that a large customer will cease to operate on a certain date in the future, may build into its contract a reduction in quantities in that future year. This structure may be the only option that the POU has to cost-effectively meet the long term procurement requirement. Additionally, the only renewable resource available to a POU may already be partially committed to another utility during the initial years of the contract and so the best option for the POU is to ramp up its share of the output of the facility over the term of the agreement as it becomes available. Given the complex nature of the proposed long term procurement requirements, it is reasonable that a POU governing board may want an additional level of assurance that these types of contract structures will qualify given the severe consequences for disqualification. There is therefore a legitimate need for this type of voluntary review.

A POU is most likely to pursue this type of voluntary review for a contract that has been fully negotiated, but not executed by its governing board. Based on the initial feedback that the individual POU's have provided, it appears that there may often be approximately 1-2 months between the time when a contract is truly finalized and when it is presented to the POU's governing board for approval. To be meaningful, the Commission's review process would allow a POU to receive a determination on a time frame that would allow POU staff to inform the governing board of this determination by the time of the public meeting.

The 180 day period proposed in the Key Topics Guide is simply too long to align with this need. Being mindful of the Commission's concerns for the potential burden associated with these reviews, the Joint POU's proposed a goal of 60 days for receiving a determination, if the request is complete. The Joint POU's would urge the Commission to further reduce the burden on Commission staff by working with the POU's to develop a standard request template (as contemplated in Section 3207(c)(5)(A)3.) in order to ensure that the POU provides all the necessary information and cross references to the relevant portions of the contract.

The Joint POU's' proposed redline to the Key Topics Guide is the following:

Redline to Key Topics Guide
(A) Voluntary requests for early review <ol style="list-style-type: none">1. A POU may request the Executive Director of the Commission to review a contract to determine if the contract qualifies as a long-term contract pursuant to the requirements of section 3204 (d)(2)(A)-(C).

- i. Requests shall be limited to contracts executed on or after July 1, 2020, which require additional information or justification to establish that the contracts meet the requirements of section 3204 (d)(2)(C). For purposes of this subparagraph, a contract includes an agreement that has been fully executed by the parties and an agreement that has been fully negotiated by the contracting parties but not formally approved by the governing board of the POU, as may be necessary.
- ii. Requests shall be limited to contracts that were not previously reported to the Commission during the annual reporting process.

2. A complete request for review shall include the following:

- i. A complete copy of the contract. The request shall also include any relevant upstream contract(s).
- ii. A description of the contract terms corresponding to each of the long-term contract requirements and the associated page number(s) in the contract where the terms can be located.
- iii. An explanation of how the POU has determined that the contract meets the requirements for characterization as long-term.
- iv. Any other information necessary to assess the long-term nature of the contract.

3. The Executive Director may establish a voluntary review request form to facilitate the contract review process.

4. ~~To the extent possible, the~~ Executive Director, or his or her delegate, shall issue the determination within ~~sixtyone hundred and eighty~~ (60~~180~~) days of submission of a complete request by the POU. Failure to meet the ~~60180~~-day deadline does not constitute a determination that the contract qualifies as long-term.

5. The Executive Director, or his or her delegate, may request additional information from the POU, if necessary, to determine if the contract meets the requirements of section 3204 (d)(2)(A)-(C).

G. Minimum Pricing and Quantity Terms

As proposed in the Key Topics Guide, the requirement that long term contracts must have at least some minimum pricing and quantity terms could be read to also prohibit a contract from having a zero quantity in any year within the first 10 years of the contract term. As described above, this should be dealt with through the reasonable consistency provision in Section 3204(d)(2)(C)1. and should not be outright prohibited.

The Joint POU’s proposed redline to the Key Topics Guide to make this clarification is the following:

Redline to Key Topics Guide
3. Notwithstanding paragraphs 1. and 2., a contract that contains no specified output share or quantities of procurement or minimum pricing terms, such that the express intent of the parties to the contract is to individually negotiate the price and quantity terms in any year within the first 10 years

of the contract term, ~~or~~and neither party has an obligation to procure or sell any quantity during any such individual year.

H. Treatment of Excess Generation

The Key Topics Guide proposed treating any optional procurement from a long term contract as short term. This would have significant negative consequences for POU's and their ratepayers. Renewable generating facilities are often variable resources, such as wind, solar, or small hydro. The actual generation amounts can vary significantly year to year, which makes it difficult to manage for the POU. This is particularly true for small hydro resources where the differences in output between drought and wet years can be substantial. Dealing with this variability can be challenging because these shifts in generation will almost certainly not align with the load needs of the POU. Optional procurement provisions allow a POU to refuse generation that exceeds what the POU needs to serve load, or alternatively purchase the optional amount if other resources fail to generate or if load exceeds forecasts. These provisions allow the POU to cost-effectively manage its portfolio.

Further, the proposal in the Key Topics Guide would likely be very administratively burdensome. A POU is likely to only purchase optional amounts during very limited periods over the contract term. The POU and Commission staff would need a mechanism to track when these purchases occur and then split the RECs from a single facility into both long and short term.

Instead, the Joint POU's recommend that the Commission amend this provision to only treat as short term, any electricity products that are purchased from a seller where the existing contract provides no authorization for such procurement. For example, if a POU had a contract with a seller to purchase 100,000 MWh per year from generating facility A, and in one year of the contract, the seller offered the POU an additional 30,000 MWh from generating facility B, then those 30,000 MWh should be treated as short term if the contract does not specify the option to purchase this additional amount.

Additionally, the Commission should clarify in the Final Statement of Reasons or other guidance documentation that "expected" quantities identified in contracts where a POU is procuring a percentage from a renewable resource should not be considered a maximum contracted quantity. These values are typically included in contracts as merely estimates based on average conditions and actual deliveries may vary significantly from year to year based on weather conditions.

The Joint POU's propose that the Key Topics Guide should be amended as follows:

Redline to Key Topics Guide

(G) Electricity products procured ~~in excess of the quantity that the POU is obligated to procure~~ under a long-term contract ~~that are not authorized under the contract,~~ shall be ~~classified as short-term treated as a new agreement for the increased quantities or allocation of generation beyond what is authorized under the terms of the contract.~~

I. Define Replacement Energy

While the Joint POU's strongly support the current language regarding the treatment of replacement energy provisions, the Joint POU's are concerned that a lack of a definition for the term "replacement energy" could lead to confusion.

The Joint POU's recommend defining "replacement energy" as follows:

Redline to Key Topics Guide
<p>iii. Notwithstanding section 3204 (d)(2)(L)3.i-ii., Rreplacement Eenergy 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 Rreplacement Eenergy occurred because the RPS-certified facility specified in the original long-term contract did not perform as the contract required.</p> <p><u>Section 3201(x) "Replacement Energy" means electricity products provided by a seller to a POU pursuant to the terms of a long term contract in order to offset the failure of an RPS-certified facility to provide the amount of electricity, renewable attributes, and/or resource adequacy attributes otherwise guaranteed under the contract.</u></p>

J. PCC Clarification

The Key Topics Guide provides a helpful clarification on the requirements of long-term contracts as it relates to contracts with both portfolio content category (PCC) 1 and PCC2 electricity products. However, the current wording could be misinterpreted to unnecessarily limit the options of a POU.

The Joint POU's recommend the following clarification:

Redline to Key Topics Guide
<p>A POU's contract or resale agreement with a third-party supplier where, over the contract term, the electricity products provided can change from one bundled portfolio content category to a different bundled portfolio content category or from one bundled portfolio content category to multiple bundled portfolio content categories, <u>or from multiple bundled portfolio content categories to fewer bundled portfolio content category</u>, as long as the contract satisfies all other applicable requirements of this section.</p>

II. CONCLUSION

The Joint POU's appreciate the opportunity to provide these comments to the Commission on the Key Topics Guide and thank the Commission for its consideration of these comments.