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California Energy Commission
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Comments of the Cities of Cerritos, Corona, Moreno Valley, Rancho Cucamonga and Victorville on 33 Percent Renewables Portfolio Standard Publicly Owned Electric Utility Regulations Concept Paper

I. INTRODUCTION

The Cities of Cerritos, Corona, Moreno Valley, Rancho Cucamonga, and Victorville (“Cities”) appreciate the opportunity to submit comments on the 33 Percent Renewables Portfolio Standard Publicly Owned Electric Utility Regulations Concept Paper (“Concept Paper”). The Cities have reviewed the Concept Paper and respectfully submit the following comments.

As a preliminary matter, the Cities support the comments made by the California Municipal Utilities Association (“CMUA”). In particular, the Cities fully support the CMUA discussion of the limits of the CEC’s authority over the publicly owned utilities’ (“POUs”) programs implementing Senate Bill (“SB”) 2 (1X). CMUA is correct in stating that **“SBX1-2 did not change the basic statutory framework of regulation for procurement and ratemaking for either retail sellers or POU; the California Public Utility Commission [(“CPUC”)] maintains those obligations for retail sellers, and the POU governing boards maintain those same obligations for their respective community utilities.”**¹ For the smallest POU, like the Cities, this control is essential insofar as it will allow the Cities’ respective city councils to establish rules that are specific with respect to the unique circumstances facing their municipal electric utility.

As described in the Cities’ opening comments,² the Cities are among a handful of the smallest POU, which currently serve loads of 30 MWs or less (“Smallest POU”). On average, the Cities have annual retail sales of approximately 70,000 MWhs, well below the 200,000 MWhs threshold established by the California Air Resources Board for partial exemption under the Renewable Electricity Standard. The Cities are also unique among the Smallest POU in regard to vintage and scope. Regarding vintage, the Cities are still in a relative state of infancy, having their origin as an outgrowth of and a response to the State’s energy crisis in 2000-2001. The Cities began providing service as a means of self-

¹ CMUA Comments, September 12, 2011, at 2(emphasis in original).

² *Opening Comments of the Cities of Cerritos, Corona, Moreno Valley and Victorville On the Renewables Portfolio Standard Regulations*, July 8, 2011, Docket # 03-RPS-1078.

help, seeking to better protect against the volatility and economic instability that resulted from the energy crisis. Regarding scope, the Cities are unlike traditional POU's, which serve the entirety of the city limits. Instead, the Cities provide so-called "spot" municipal utility service, providing service to developing pockets or portions of the city. In this way, the Cities have sought to serve as an economic development catalyst within their communities.

Because of these unique attributes, the Cities have struggled to catch up with the renewable resource acquisition programs that are well under way by the larger, more-established utilities. Given their size relative to dominant market participants, their late start, and their role as an economic vehicle, the Cities have found it very difficult to compete with large utilities to develop or acquire resources of any kind, much less cost-competitive renewable resources.

II. COMMENTS ON THE CONCEPT PAPER

A. The CEC has the legal authority to make reasonable distinctions in the implementation of its regulations.

In the Opening Comments of the Cities, the Cities put forth arguments that support lighter regulatory treatment and differentiation of the Cities based on their size.³ The Concept Paper takes the position that there is no support in SB 2 (1X) for different treatment based on the size of an entity.⁴ However, administrative agencies adopting rules in a quasi-legislative capacity have broad authority in this regard:

Rule-making bodies have a wide discretion in exercising the power to classify. As long as the rule works uniformly upon all persons in a class and the classification is based upon some natural or reasonable distinction, the classification is not invalid. Classifications will not be overthrown unless plainly arbitrary.⁵

In each rule that the CEC adopts as part of its regulations, the CEC should determine whether there is a natural or reasonable distinction among the POU's, such that certain POU's should be subject to different requirements. This will be particularly true in the areas of reporting and verification, which may be unnecessarily burdensome for the Smallest POU's.

³ *Id.*

⁴ Concept Paper at 10-11 ("[N]o language in the statute indicates that exemptions or variations in the rules are necessary for smaller POU's.").

⁵ *Gen. Elec. Co. v. State Bd. of Equalization*, 111 Cal. App. 2d 180, 187 (1952) (internal citations omitted).

B. In general, the CEC's Concept Paper includes provisions that are overly restrictive and usurp the authority which was clearly given to POU governing boards.

All of the POU's in California have governing boards which consist of elected representatives who are bound to conduct processes that are subject to open meeting rules and related requirements.⁶ They are given authority under SB 2 (1X) to adopt and implement an enforcement program and adopt periodic procurement plans.⁷ If they adopt cost limitations and other processes that are specifically delegated to them under SB 2 (1X), they will be required under their own processes and the new legislation to hold public hearings.⁸ Such proceedings will be conducted in a public forum. Decisions and policies adopted in such a public process should be given substantial deference and presumed correct.⁹

During the September 1, 2011, CEC staff meeting on the Concept Paper ("CEC Staff Meeting"), CEC staff suggested that the CEC's role could be viewed as that of an appellate court. The Cities believe that this analogy goes beyond the limited role designated by SB 2 (1X). However, even accepting such an analogy as correct, the proposals supported in the Concept Paper would still exceed an appellate role. Under an appellate-style review, the CEC's role would be to review each POU governing board's actions and decisions to determine whether they were in compliance with the procedures required by SB 2 (1X) and supported by findings, which in turn are supported by substantial evidence in the decision-making records of the governing board.¹⁰ In that role, the CEC should not be substituting its views for the views of the elected governing boards which are closest to the issues and most able to balance the interests of the Cities.¹¹ This is contrary to the proposals of the Concept Paper, which would have the CEC evaluate the "reasonableness" of the cost limitations and waiver conditions adopted by the POU's.¹²

Regulations adopted by the CEC under SB 2 (1X) should be limited to "specifying *procedures* for enforcement," defined as 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 . . ." ¹³ Given this role, the CEC should not be interpreting or adding to the provisions of SB 2 (1X), as CEC staff recommends in the

⁶ See Cal. Gov. Code § 54950 et seq.

⁷ Cal. Pub. Util. Code § 399.30(a).

⁸ Cal. Pub. Util. Code § 399.30(d), (f).

⁹ See *Generally Save our Peninsula Comm. v. Monterey County Bd. of Supervisors*, 87 Cal. App. 4th 99, 142 (2001) (discussing deference to local governments in reviewing a local governmental agency's decision under the California Environmental Quality Act for consistency with its general plan).

¹⁰ See Cal. Pub. Res. Code § 21167.3; *Laurel Heights Improvement Assn. v. Regents of Univ. of California*, 47 Cal. 3d 376, 393 (1988).

¹¹ Cal Code Civ. Proc. § 1094.5(d).

¹² Concept Paper at 10-11.

¹³ Cal. Pub. Util. Code § 399.30(n).

Concept Paper. If there is a need for interpretation with respect to a particular provision of SB 2 (1X), such interpretation is within the scope of the responsibilities delegated to the governing boards of the POU's, not the CEC. If, as is indicated in the Concept Paper, the CEC intends to delve into the details and reasonableness of findings of elected representatives executing their responsibilities as members of governing boards, then the CEC will not only be acting contrary to the intent of the legislation, it will be assuming an overwhelming oversight role that is unnecessary, given the inherent safeguards of a public and open process.

It would be particularly burdensome for the Smallest POU's if the CEC seeks to play such a comprehensive oversight role. The small administrative staff at each of the Cities already struggle with the current CEC reporting requirements. It would be excessively burdensome if the Cities were required to not only follow the public process laid out in SB 2 (1X), but also make detailed showings of the reasonableness of their actions to CEC staff. As discussed above, the cost limitations and waiver conditions adopted by the Cities will be adopted in public and open processes. It is unnecessary for the Commission to insert itself into this process.

C. SB 2 (1X) clearly establishes two distinct regulatory schemes for POU's and CPUC-jurisdictional entities and the CEC has no authority or direction to "assurance consistency" between these classes of entities.

During the CEC Staff Meeting, a participant suggested that the CEC should assure consistency between POU's and retail sellers. Such an argument lacks merit. It would be extremely difficult, given the varying organizational structures, rate designs, and resource mixes of the POU's, to even assure consistency among the POU's. More importantly, there is no requirement in SB 2 (1X) that there be a "level playing field between all entities" as described by the Pacific Gas and Electric Company ("PG&E") in the CEC Staff Meeting. Even if such were a goal of SB 2 (1X), establishment of a true level playing field would require some way to assure that entities with less market dominance than PG&E and less ability to assume risk compared to the guaranteed rate of return accorded to PG&E, would have equivalent opportunity to acquire the same resources. The Cities do not have either the administrative or financial resources to compete with the larger utilities for the most cost effective renewable resources.

D. The Cities' adoption of cost limitations will prevent disproportionate rate impacts.

SB 2 (1X) provides that the governing boards of the POU's can adopt cost limitations for procurement expenditures consistent with section 399.15(c).¹⁴ The author of SB 2 (1X), Senator Simitian clearly thought that the cost limitations included in SB 2 (1X) were a significant improvement to the State's RPS policies. "The new law will stimulate the

¹⁴ Cal. Pub. Util. Code § 399.30(d)(3).

economy and improve the environment, while protecting ratepayers from excessive costs.”¹⁵

SB 2 (1X) provides the governing boards of the Cities with the authority to interpret the cost limitation provisions of the legislation, as they may apply to the Cities. Since the language on cost limitations is ambiguous, the Cities can use the rules of statutory construction to determine how to assure that their policies are consistent with the intent of the legislation. A key rule of statutory construction is that: “All consistent statutes which can stand together, if related to the same subject, shall be construed together, and with reference to whole system of which they form part, and shall be harmonized, and effect given to all, if this can consistently be done, so as to make the law consistent in all its parts and uniform in its application and results.”¹⁶ Therefore, in order to properly interpret section 399.15(c), it is instructive to look at all other related statutory sections, particularly those sections that cross reference 399.15(c). The primary example is section 399.15(d), which cross references section 399.15(c). Section 399.15(d) provides in part that cost limitations should be “set at a level that prevents disproportionate rate impacts.” The Cities believe that even though section 399.15(d) is not expressly applicable to POU’s, it should clearly be construed together with 399.15(c) and interpreted as applicable to POU’s.

Due to their unique history and current organization, preventing disproportionate rate impacts is particularly important for the Cities. The Cities were carved out of the service area of the Southern California Edison Company (“SCE”) and because they are so new, their costs of energy and related services are very close to SCE and in some cases exceed the SCE rates. The size difference between SCE and the Cities is so great, that SCE will have a significant advantage in developing and procuring eligible renewable resources. As a result, the ratepayers in the service territories of the Cities may be subject to rate increases disproportionate to ratepayers in the surrounding service areas. Such considerations will be essential to the Cities in developing and setting their cost limitations.

Within the broad discretion granted to POU’s in developing cost limitations, there may be novel approaches that would support the various renewable energy goals of California. One such important goal is the Governor’s goal of 12,000 MWs of localized renewable energy by 2020, as part of his *Clean Energy Jobs Plan*.¹⁷ The Cities may support both the RPS and the Governor’s goal by focusing on developing local renewable energy projects. The unique posture of the individual Cities means that it is essential to provide additional benefits to ratepayers by keeping the renewable energy expenditures within the relevant

¹⁵ Patrick McGreevy, *Gov. Brown Signs Law Requiring 33% of Energy Be Renewable by 2020*, Los Angeles Times, April 13, 2011, available at <http://articles.latimes.com/2011/apr/13/local/la-me-renewable-energy-20110413>.

¹⁶ *In re First Nat. Bank in Oakland*, 96 Cal. App. 107, 111 (1928) (citing *Cohn v. Isensee*, 45 Cal. App, 531, 537 (1920)).

¹⁷ *Clean Energy Jobs Plan*, available at http://www.jerrybrown.org/sites/default/files/6-15%20Clean_Energy%20Plan.pdf.

communities. This will not only lessen the impacts of increased rates, but will also help to combat the state's high unemployment rates, while providing local benefits. It is important that, as the Cities evaluate and develop their cost limitations, they develop procurement plans that focus on developing local renewable projects. It would be reasonable and consistent with the purposes of SB 2 (1X) for the Cities to adopt policies that favor using financial resources that would otherwise have been spent on tradable renewable energy credits ("RECs") imported from out of state to develop local renewable resource projects, even if such projects do not meet the energy (MWh) targets established under SB 2 (1X).

E. The governing boards of the Cities may rely on renewable energy credits to meet their RPS requirements.

Although the Cities are in the process of structuring a procurement process, it is highly unlikely that the Cities will be able to meet the targets in the first compliance period with anything other than tradable RECs.¹⁸ The Cities are in the unenviable position of having to compete with enormous market dominant utilities for the most economic renewable opportunities. The Cities, on average, are comparatively .05% of the load of SCE. There is little likelihood that this can be accomplished at all, or even if it could be accomplished it would be with great economic hardship to their customers. Although the Cities intend to act in good faith to meet the intent of the legislation, their ability to do so is very limited, particularly given the time constraints of the initial compliance periods. As a result, each of the cities will likely need to determine to what degree a condition for waiver of timely compliance exists. Alternatively, a city may find that partial compliance is possible subject to its adopted cost limitations.

An additional aspect of the flexible compliance mechanisms permitted by SB 2 (1X) is a governing board's ability to alter the procurement content requirements of section 399.16.¹⁹ While the procurement content categories established in section 399.16 do not direct a REC to be treated as belonging to any specific category on the basis of its nature as an unbundled resource, many RECs will be associated with out-of-state resources. As such, procurement of these out-of-state RECs would may subject to the strict limitations set out in section 399.16.²⁰ In recognition of the hardship that this requirement may impose, section 399.16(e) permits a retail seller to apply to the CPUC for a deviation from the procurement content category percentage requirements. As the governing board of each POU stands in the place of the CPUC under the structure of SB 2 (1X), it is clear that section 399.16(e) grants the governing boards of POU's with the discretion to similarly adjust the percentage requirements for the reasons provided by that section, including inadequate supply. Therefore, if the governing boards of the Cities determine that there is an inadequate supply of eligible renewable resources that fall within procurement content

¹⁸ Section 399.21 directs the CPUC to authorize the use of RECs by retail sellers.

¹⁹ Section 399.30(c)(3) directs the POU's to adopt procurement requirements consistent with section 399.16.

²⁰ See Cal. Pub. Util. Code § 399.16(c)(2). Subdivision (c)(2) limits the use of resources falling in category three to 25 percent in compliance period one, 15 percent in compliance period two, and 10 percent thereafter.

categories 1 or 2, the governing boards of the Cities could permit its POU to meet its RPS requirements through the purchase of category 3 RECs. Such a strategy is permissible because SB 2 (1X) allows the governing boards of the Cities to adopt measures which specify conditions under which timely compliance may be waived consistent with section 399.15(b). In particular, 399.15(b)(5)(B) provides that a City can demonstrate that an insufficient supply of eligible renewable energy resources is available to the City. In 399.15(b)(5)(B)(iv), part of the determination of whether compliance can be waived includes whether the City has “taken reasonable measures . . . to procure cost-effective distributed generation and allowable unbundled renewable energy credits.” These provisions, read together, mean that if a City determines there are not enough cost-effective renewable resources available to the City for compliance period 1, then it can substitute tradable RECs.

SB 2 (1X) provides another significant exemption for the smallest utilities. As discussed above in relation to cost limitations, SB 2 (1X) requires that the legislation be construed as a whole so that all the parts are consistent. This means that in order to adopt procurement requirements “consistent with” section 399.16, the Cities must also look to those statutes that are related to and cross reference section 399.16. The statute most applicable to the Cities is section 399.18, which provides an exemption from the procurement content category requirements of section 399.16 for electric corporations that have 30,000 or fewer customers and issued at least four solicitations for eligible energy resources prior to June 1, 2010. Just as section 399.15(d)’s direction to prevent disproportionate rate impacts is applicable to POUs, so too is section 399.18 applicable to POUs. Clearly the same policy rationales and justifications that would exempt small electric corporations from the procurement content category requirements of section 399.16, would equally apply to small POUs. Further, SB 2 (1X) includes no barrier to applying section 399.18 to POUs.²¹

III. CONCLUSION

The governing boards of the Cities intend to use good faith efforts to meet their obligations under the State’s new RPS mandates. They will consider and adopt cost limitations as allowed under the bill and will determine whether renewable resources are available which meet size, risk, and cost criteria, while meeting their own obligation to protect the financial interests of the Cities and their residents. In this regard, however, it should not be surprising that the determinations of the governing boards of the Cities may differ markedly from determinations made with respect to larger POUs and the retail sellers.

²¹ During the CEC Staff Meeting, an argument was raised that no additional exemptions could be provided under SB 2 (1X) because the legislature had included POU exemptions, specifically section 399.30(k). Such an argument is inapplicable to the discussion of section 399.18. Section 399.30(k) goes well beyond the application of the procurement content category rules and addresses the very specific and unique situation where a certain type of POU is fully or nearly fully resourced with ineligible hydro resources. The fact that the legislature provided an exemption to the “procurement” requirements for POUs in a very specific situation, does not POU governing boards cannot properly adopt procurement content rules “consistent with” section 399.16, including all relevant cross-referenced statutes.

This is allowed under SB 2 (1X) and is reasonable. The role of the CEC is limited to determining whether the Cities have met the procedures required by SB 2 (1X) and, if required, reviewing the record to determine whether the determinations of the governing boards are supported by the evidence.

Respectfully,

A handwritten signature in cursive script, appearing to read "L. Johnson".

Linda Johnson

Justin Wynne

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