



ANTONIO R. VILLARAIGOSA
Mayor

Commission
THOMAS S. SAYLES, *President*
ERIC HOLOMAN, *Vice President*
RICHARD F. MOSS
CHRISTINA E. NOONAN
JONATHAN PARFREY
BARBARA E. MOSCHOS, *Secretary*

RONALD O. NICHOLS
General Manager

February 11, 2013



California Energy Commission
Docket Office, MS4
Re: Docket No. 11-RPS-01
Attn: Gabriel Herrera, Kate Zocchetti
1516 9th Street, MS-14
Sacramento, CA 95814-5512

Subject: The Los Angeles Department of Water and Power's (LADWP) Interpretation on the Effective Date of Eligibility for Small Hydroelectric Generation Units that Operate as part of a Water Supply or Conveyance System

This letter is provided in response to the California Energy Commission's (CEC) staff's interpretation excluding the generation of electricity from a "small hydroelectric generation unit" from the beginning of the first compliance period (January 1, 2011) until December 10, 2012, the effective date of SB 2 (1X), which amends the definition of a "renewable electrical generation facility" under Section 25741 of the Public Resources Code (PRC).

1. Issue

The LADWP is concerned with whether the CEC will apply a contemplated interpretation to exclude a "small hydroelectric generation unit" under the Public Utilities Code (PUC) 399.12(e) from the definition of an "eligible renewable energy resource" for the first year of the first compliance period under SB 2 (1X) if a Public Owned Electric Utility (POU) adopted it to satisfy its Renewable Portfolio Standard (RPS) pursuant to former PUC Section 387.

2. Financial Impact to LADWP

The resources at issue are LADWP's hydroelectric generation units at San Francisquito Power Plant (PP) 1, San Francisquito PP2, Upper Gorge, Middle Gorge, and Control Gorge. These generating units have nameplate capacities between 30 and

Water and Power Conservation ... a way of life

111 North Hope Street, Los Angeles, California 90012-2607 Mailing address: Box 51111, Los Angeles 90051-5700
Telephone: (213) 367-4211 Cable address: DEWAPOLA

40 Megawatts (MW). Since 2004 these resources have been a part of the City of Los Angeles Renewables Portfolio Standard list of eligible resources.

Units	Capacity	Actual RPS Generation	Percent Contribution
Small Hydro	(KW)	2011 (KWh)	
Power Plant #1	69,375	271,064,000	34.7%
Power Plant #2	42,000	105,135,841	13.5%
San Fernando Plan #3	5,600	23,793,000	3.0%
Foothill Power Plant #4	11,000	51,610,000	6.6%
Franklin Power Plant #5	2,000	10,681,000	1.4%
Sawtelle Power Plant #6	640	1,081,889	0.1%
Upper Gorge	37,500	100,330,000	12.8%
Middle Gorge	37,500	99,420,000	12.7%
Control Gorge	37,500	65,340,000	8.4%
Pleasant Valley	3,200	7,037,000	0.9%
Big Pine	3,200	8,496,480	1.1%
Division Creek	600	4,913,820	0.6%
Cottonwood #1	750	0	0.0%
Cottonwood #2	750	11,498,520	1.5%
Haiwee #1	2,800	11,069,000	1.4%
Haiwee #2	2,800	9,536,000	1.2%
Total Contribution by Small Hydro		781,006,550	

Total Contribution of units Over 30 MW	641,289,841
---	--------------------

Percent Loss	82.1%
---------------------	--------------

Figure 1: LADWP’s Hydroelectric Resource Loss

If the CEC chooses to preclude LADWP’s hydroelectric generating units that are between 30 and 40 MWs from RPS eligibility for the year 2011 as shown in Figure 1, the **LADWP is facing the loss of approximately 82.1% of its small hydroelectric units, which equates to approximately a \$44 million¹ cost impact to our ratepayers.**

3. LADWP’s Interpretation Provides for a Seamless Transition to SB2 (1X)

Interpreting the transition to SB 2 (1X) from the voluntary RPS program for POUs, found in PUC Section 387, for LADWP’s hydroelectric generation units that have a nameplate capacity between 30 and 40 MW is fairly straight forward. Applying a general principal

¹ Based on the market price for Portfolio Content Category 1 Renewable Energy Credits of \$41.00/REC.

of statutory interpretation to “reasonably harmonize two statutes dealing with the same subject” and “maintain the integrity of both statutes if the two may stand together,” is simply a matter of transition.²

However, the CEC’s contemplated interpretation is that LADWP’s small hydroelectric generation units are eligible renewable energy resources only after the effective date of SB 2 (1X). Such interpretation not only truncates all of LADWP’s 2011 hydroelectric generation from these units, but also circumvents harmonization between the voluntary Section 387 program and the current SB 2 (1X) mandates. Further, it is fundamentally flawed to apply an entire compliance period under SB 2 (1X) against LADWP, which includes renewable compliance obligations for all of 2011, while only allowing LADWP to count its renewable hydroelectric generation of 40MW (valid under the still in effect PUC Section 387) for just the last three week period of 2011.

Since SB 2 (1X) became effective in the middle of the first compliance period, we must harmonize the former law applicable to POUs, under the authority of their governing boards as a voluntary program pursuant to Section 387, with the new law applicable to POUs as a mandatory program. Under the law prior to SB 2 (1X), LADWP validly included its small hydroelectric generation units as eligible renewable energy resources for its RPS program.

Therefore, a reasonable way to provide a seamless transition from the old law to the new law would be to include the resources that the POU incorporated as part of its RPS program up until the time that the former law was repealed and the new law became effective: The legislature simultaneously repealed PUC Section 387 when SB 2 (1X) became effective on December 10, 2011. To count the small hydroelectric units as eligible resources up to the date of the former law, and then count the small hydroelectric units from that effective time under the new law is a seamless transition that harmonizes the old and new laws.

4. CEC’s Interpretation Splits the First Compliance Period to Exclude Renewable Generation

The CEC expressed what was represented as its current thinking: to exclude the generation of electricity from a “small hydroelectric generation unit,” with a nameplate capacity between 30 and 40 MW, from part of the first compliance period, before SB 2 (1X) became effective on December 10, 2011. Thus, under this interpretation, the CEC would only allow LADWP to count three weeks of renewable energy production for 2011 while simultaneously applying an entire year compliance period (2011) against LADWP. The purported reason for this unequal exclusion/inclusion in the first

² See *In re Greg F.* (2012) 55 Cal.4th 393, 407, internal quotes and citations omitted.

compliance period, with the effective date of the law on December 10, 2011, as the dividing time-period, is because of their interpretation of a conditional clause found within PUC Section 399.12(e)(1)(C). The CEC claims that the phrase “if the facility is a renewable electrical generation facility as defined in Section 25741 of the Public Resources Code” excludes a “small hydroelectric generation unit” from the definition of a “renewable electrical generation facility” under Section 25741 of the PRC. The CEC is adding the timing of the effectiveness of SB 2 (1X) into the law, with which LADWP disagrees.

Under this reasoning, this exclusion applies because under the predecessor law an “eligible renewable energy resource” included a “renewable electrical generation facility” whose definition did not include a “small hydroelectric generation unit” greater than 30 MW. Therefore, the alleged interpretation is only able to include a “small hydroelectric generation unit” as an “eligible renewable energy resource” for the remainder of the first compliance period when SB 2 (1X) became effective. According to the CEC, there is a gap in time, where there is allegedly no reasonable way to harmonize the two laws. However, as stated above, it is not reasonable to apply a renewable obligation for all of 2011, without the corresponding grandfathering provisions in SB2 (1X) for small hydroelectric units of 40MW.

As a result of this interpretation, all of LADWP’s hydroelectric generation from its small hydroelectric generation units prior to December 10, 2011, for the first compliance period would not be included in the definition of an “eligible renewable energy resource.”

5. Statute’s Provisions at Issue

The CEC based its interpretation on PUC Section 399.12 (e)(1)(C). To provide additional context and legislative intent, Section 399.12(e)(1)(A) is provided below as well.

“For purposes of this article, the following terms have the following meanings:

... .

(e) “‘Eligible renewable energy resource’ means an electrical generating facility that meets the definition of a ‘renewable electrical generation facility’ in Section 25741 of the Public Resources Code, subject to the following:

(1)

(A) An existing small hydroelectric generation facility of 30 megawatts or less shall be eligible only if a retail seller or local publicly owned electric utility procured the electricity from the facility as of December 31, 2005. A small hydroelectric generation unit with a nameplate capacity not exceeding 40 megawatts that is operated as part of a water supply or conveyance system is an eligible renewable energy resource if the retail seller or local publicly owned electric utility procured the electricity from the facility as of December 31, 2005. A new hydroelectric facility that commences generation of electricity after December 31, 2005, is not an eligible renewable energy resource if it will cause an adverse impact on instream beneficial uses or cause a change in the volume or timing of streamflow.

(C) A facility approved by the governing board of a local publicly owned electric utility prior to June 1, 2010, for procurement to satisfy renewable energy procurement obligations adopted pursuant to former Section 387, shall be certified as an eligible renewable energy resource by the Energy Commission pursuant to this article, if the facility is a “renewable electrical generation facility” as defined in Section 25741 of the Public Resources Code.”

6. Legislative Intent

Including the hydroelectric generation units at issue is part of the grandfathering provisions of SB 2 (1X). The California Senate assessing the bill identified existing “grandfathered” renewable resources by stating:

“[t]his bill [SB 2 (1X)] grandfathers all contracts consummated by an IOU, ESP, or POU prior to June 1, 2010,” includes LADWP’s hydroelectric generation units.³

³ Bill Analysis of SB2 (1X) found in the Analysis section of the Third Reading for the Senate Rules Committee. (emphasis added).

Further, in reviewing SB2 (1X), the California Assembly clearly stated that the state-mandated RPS program of SB2 (1X):

“increases eligibility for existing small hydroelectric generation units from 30 MW to 40 MW, if the unit is operated as part of a water supply or conveyance system.”⁴

Per PUC Section 387 as part of SB 1078,⁵ the Legislature knew that POUs were given

“flexibility in developing utility-specific targets, timelines, and resource eligibility rules”

This is precisely why grandfathering language was provided in SB2 (1X) and why eligibility under the state mandated RPS program was increased for existing small hydroelectric generation units from 30 MW to 40 MW, so long as such units are operated as part of a water supply or conveyance system.

Furthermore, the Legislature intended to apply the new law to POUs for **all** the compliance periods, including all of calendar year 2011 of the first compliance period. For the CEC to apply its interpretation amounts to an application of an old law to POUs and does not take into account, nor give LADWP full credit for, the grandfathering provisions for these units (PUC 399.12(e)(1)(A) cited above). Further, it is important to note that the old law mandated compliance by Investor Owned Electric Utilities (“IOUs”), not POUs. POUs were under the voluntary compliance program essentially set forth in PUC Section 387. The application of a “new law of today to the conduct of yesterday” is not permissible, unless the legislation expressly provided for it.⁶ Here, there is no express provision for the CEC’s retroactive application.

In 2002, California SB 1078 added Sections 387, 390.1 and 399.25, and Article 16 (commencing with Section 399.11) to Chapter 2.3 of Part I of Division 1 of the PUC, establishing a 20 percent RPS for California IOUs. PUC Section 387, as enacted within SB 1078, primarily provided the voluntary nature of the law for POUs. The previous “law exempt[ed] local publicly owned utilities from the state RPS program.”⁷ The prior law encouraged each governing board of a local POU to be responsible for implementing and enforcing a RPS program that recognized the goals of the

⁴ Bill Analysis of SB2 (1X) found in the Hearing for the Assembly Committee on Natural Resources on March 7, 2011, subpart (11).

⁵ Senate Energy, Utilities and Communications Committee, Background in the Bill Analysis for SB2 (1X), February 15, 2011.

⁶ *Elsner v. Uveges* (2004) 34 Cal. 4th 915, 938 citing *Fox v. Alexis* (1985) 38 Cal.3d 621, 626 [214 Cal. Rptr. 132, 699 P.2d 309], quoting *Pitts v. Perluss* (1962) 58 Cal.2d 824, 836.

⁷ See Senate Energy, Utilities and Communications Committee Description in the Bill Analysis for SB2 (1X), February 15, 2011.

Legislature: to encourage renewable resources.⁸ LADWP successfully met the goals it established under its voluntary program by achieving a 20 percent RPS in 2010.

The CEC's proposed unequal exclusion/inclusion of eligible renewable energy resources for the first compliance period timing, and particularly for the 2011 year, is not what the California Legislature intended. If one looks at the language of the current legislation and its predecessor legislation, SB 722, which was introduced into the Legislature before the first compliance period, the plan was to have a smooth transition from the voluntary program for POUs, to SB 2 (1X), a mandatory program for POUs. This was intended to be accomplished before the first compliance period.

The fact that the language in SB 2 (1X) did not substantially change from SB 722, especially the compliance dates, highly suggests that the Legislature intended its law to be passed before the beginning of the first compliance period of January 1, 2011.⁹ The time period for the first compliance period did not change.¹⁰ In particular, the grandfathering language for a "small hydroelectric generation unit" under 399.12(e)(1)(A) did not change (the 40MW grandfathering).¹¹ Further, the same author for SB 2 (1X), Simitian, introduced SB 722 into the legislature in February 2010.¹²

At least three basic rules of statutory interpretation apply here:

1. To examine the statute itself to ascertain the Legislature's commonsense meaning;
2. To reasonably harmonize two statutes so as to maintain their integrity; and
3. "A special statute dealing with a particular subject constitutes an exception so as to control and take precedence over a conflicting general statute on the same subject."¹³

These three rules of statutory interpretation, combined with fundamental fairness, lead to only one reasonable conclusion: LADWP should have the ability to apply the

⁸ Id.

⁹ See CPUC decision 12-06-038 for Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program, Rulemaking 11-05-005, Decision issued 6/27/2012, page 6, fn 10.

¹⁰ See Complete Bill History of Bill Number S.B. No. 722, available at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_722&sess=0910&house=B&author=simitian

¹¹ Id, comparing 399.12(e)(1) in both SB722 and in SB2(1X).

¹² See Complete Bill History of Bill Number S.B. No. 722, available at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_722&sess=0910&house=B&author=simitian

¹³ [Citations.] This is the case regardless of whether the special provision is enacted before or after the general one [citation], and notwithstanding that the general provision, standing alone, would be broad enough to include the subject to which the more particular one relates.' [Citations.]" *Turlock Irrigation Dist. v. Hetrick* (1999) 71 Cal.App.4th 948, 953.

grandfathering clause in SB 2 (1X) for 40MW hydroelectric units, if LADWP is to be held responsible for the 2011 compliance year set forth in that same legislative action.

a. The Statute Itself has Commonsense Meaning

Looking at the statute itself engages a “fundamental task in interpreting a statute [which] is to determine the Legislature’s intent so as to effectuate the law’s purpose.”¹⁴ To accomplish this fundamental task

“We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute’s purpose, legislative history, and public policy.”¹⁵

Here, the statutory language has a plain and commonsense meaning. The grandfathering provisions of 399.12(e) with its subsections (1) and (A) reads that an

“‘eligible renewable energy resource’ means “[a] small hydroelectric generation unit with a nameplate capacity not exceeding 40 MWs that is operated as part of a water supply or conveyance system is an eligible renewable energy resource if the retail seller or local publicly owned electric utility procured the electricity from the facility as of December 31, 2005.” (emphasis added).

The timing for the first compliance period is clearly stated in the new law. It is from January 1, 2011, to December 31, 2013.¹⁶ The first compliance period under SB 2 (1X) is not bifurcated: It is one complete compliance period. And it includes all of calendar year 2011.

The language in the new law shows that the Legislature intended to have this law passed before the beginning of the first compliance period. This can be seen by the prospective language throughout the new law, including in 399.30 (a) and (b); also by

¹⁴ *Coalition of Concerned Communities, Inc. v. City of Los Angeles*, (2004) 34 Cal. 4th 733, 736

¹⁵ *Coalition of Concerned Communities, Inc. v. City of Los Angeles*, (2004) 34 Cal. 4th 733, 737, citing *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003 [111 Cal. Rptr. 2d 564, 30 P.3d 57]; *People v. Murphy* (2001) 25 Cal.4th 136, 142 [105 Cal. Rptr. 2d 387, 19 P.3d 1129]; *People v. Ledesma* (1997) 16 Cal.4th 90, 95 [65 Cal. Rptr. 2d 610, 939 P.2d 1310].)

¹⁶ PUC Section 399.30(b).

the language stating that the CEC was to have adopted regulations “on or before January 1, 2011.”¹⁷ Moreover, the language in 399.12(e)(1)(C) that the CEC is relying on for its constrained view, shows this early timing very clearly. The language states “prior to June 1, 2010” and “adopted pursuant to former Section 387” in the same sentence.¹⁸

The CEC’s interpretation of 399.12(e)(1)(C) splits a compliance period in two, which prevents including the grandfathered “small hydroelectric unit” for part of the first compliance period (nearly all of 2011). Simply because the Legislature didn’t pass the law before the commencement of the first compliance period is no reason to form a “literal interpretation” that results in “absurd consequences the Legislature did not intend.”¹⁹

If the CEC chooses to preclude LADWP’s hydroelectric generating units that are between 30 and 40 MWs from RPS eligibility for the year 2011, the **LADWP is facing the loss of approximately 83% of its small hydroelectric units, which equates to approximately a \$44 million²⁰ cost impact to our ratepayers.**

b. Harmonizing the Law Makes Sense as well

Harmonizing SB 2 (1X) with the actual time that it became effective provides additional context for the law and helps solidify LADWP’s interpretation. Since SB 2 (1X) became effective in the middle of the first compliance period, the inclusion of resources that LADWP incorporated as part of its RPS program up until the time that SB 2 (1X) became effective follows Section 387 and SB 2 (1X). When SB 2 (1X) became effective on December 10, 2011, the Legislature simultaneously repealed PUC Section 387. It would be unfair to deprive, for no reason, LADWP of the output of a validly-included (and thereafter grandfathered) hydroelectric generation unit for 2011. To count the small hydroelectric units as eligible resources up to the date of repealing the former law, and then count the small hydroelectric units from that effective time under the new law is a seamless transition and harmonizes the old and new laws.

c. Specific Controls the General: The Term “Unit” controls the General Term “Facility.”

In addition, “in accord with general rules of statutory construction” specific statutory language prevails over general statutory language.²¹ This general rule of statutory

¹⁷ PUC Section 399.30(n).

¹⁸ PUC Section 399.12(e)(1)(C).Emphasis added.

¹⁹ *Coalition of Concerned Communities, Inc. v. City of Los Angeles*, 34 Cal. 4th at 737.

²¹ *Vander Lind v. Superior Court* (1983) 146 Cal. App. 3d 358, 367-368

²¹ *Vander Lind v. Superior Court* (1983) 146 Cal. App. 3d 358, 367-368

construction provides for yet another reason to include the hydroelectric energy from the units at issue as part of LADWP's eligible renewable energy portfolio for the entire first compliance period.

For hydroelectric energy there are three separate and distinct categories found in PUC Section 399.12(e)(1)(A), each with its own sentence. Category 1 is "[a]n **existing** small hydroelectric generation **facility**."²² Category 2 is "[a] small hydroelectric generation **unit**."²³ Category 3 is "[a] **new** hydroelectric **facility**."²⁴ These three categories are basically recognized by the CEC in its application for hydroelectric energy found in the CEC's Guidebook.²⁵

For the second category, the specific term "unit" would take precedence over the term "facility." This allows for including the hydroelectric units as eligible renewable energy resources without regard to the term "facility." The only time the term "facility" is used in the second category is with respect to a time period for deeming the unit as an eligible renewable energy resource. The POU was supposed to have "procured the electricity from the facility as of December 31, 2005." Thus, the focus on the term "unit" would not be controlled by the term "facility" unless it was for evaluating the time period of December 31, 2005; otherwise, the term "unit" controls the second category. Therefore, applying the general rule of statutory construction, here, provides the CEC with yet another firm reason to include the hydroelectric units for not just the second, third and part of the first compliance periods, but for all of the compliance periods.

7. Public Policy

The application of the CEC's interpretation of splitting the first compliance period for an unfair inclusion/exclusion of the grandfathered hydroelectric units appears to be based only on an interpretation and incomplete reading of a subsection of the statute found in PUC Section 399.12 (e)(1)(C). This interpretive reading will create an enormous cost on the LADWP's ratepayers, which the Legislature could not have anticipated or intended, and is not in the interests of the public.

The CEC's interpretation amounts to a retroactive application of a law to LADWP, a POU, for compliance of a law that was voluntary. As discussed above, a retroactive compliance with a mandatory law that only applied to IOUs, without application of the explicit grandfathering clauses in SB2 (1X) specifically intended for 40MW hydroelectric units, is not what the Legislature intended.

²² 1st sentence in 399.30(e)(1)(A)(emphasis added.)

²³ 2nd sentence in 399.30(e)(1)(A) (emphasis added.)

²⁴ 3rd sentence in 399.30(e)(1)(A) (emphasis added.)

²⁵ See form CEC-RPS-1.S2, Commission Guidebook for Renewables Portfolio Standard Eligibility, Sixth Ed., Aug. 2012.

As the CEC may know, hydroelectric energy, like many sources of renewable energy, is a variable source of energy. Wind energy is available when the wind blows. Solar energy is available during the day (without cloud cover). Hydroelectric energy depends on snowfall and rainfall during a year.

The time that the CEC is contemplating to exclude hydroelectric energy because of its interpretation and incomplete read of a sub section of a statute (all but the last three weeks of 2011), happens to be a favorable hydroelectric generation time period (the water runoff season) for the ratepayers of LADWP. LADWP engineers and accountants have estimated **the cost to LADWP's ratepayer's amounts to approximately up to \$44 million**. This is obviously a significant cost that LADWP will need to make up with purchases of Renewable Energy Credits (RECs) for the time period that the CEC is interpreting to exclude.

This type of retroactive cost impact is **not** what the Legislature intended. It was to avoid this possibility that the grandfathering provision in PUC Section 399.12(e)(1)(A) was included in the new law. The reasoning against such a retroactive application of a law may be analogous to a non conforming use of an existing building that is no longer in a zone appropriate for a building or a building that suddenly finds itself not in compliance with new building codes. "Zoning ordinances and other land-use regulations customarily exempt existing uses to avoid questions as to the constitutionality of their application to those uses."²⁶ "The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected."²⁷

In addition, when a new law is passed that impacts an existing use, the governing legislature "may pursue two constitutionally equivalent alternatives: 'It can eliminate the use immediately by payment of just compensation, or it can require removal of the use without compensation following a reasonable amortization period.'²⁸ However, the CEC provides neither of these options. The CEC's interpretation is a bit more bizarre than a simple exclusion or amortization period. Its interpretation excludes a part of a time period, but then includes all prospective compliance periods.

Moreover, here, the Legislature included a time period for when a hydroelectric unit may be included as an eligible renewable energy resource. The POU must have "procured the electricity from the facility as of December 31, 2005." That is the only controlling time period. It is a time period substantially in advance of 2011, a deadline that LADWP validly met with its 40MW small hydroelectric units. The alleged interpretation and

²⁶ *Hansen Bros. Enters. v. Bd. of Supervisors*, (1996) 12 Cal. 4th 533, 552

²⁷ *Edmonds v. County of Los Angeles* (1953) 40 Cal. 2d 642, 651.

²⁸ *Griffin Dev. Co. v. City of Oxnard*, (1985) 39 Cal. 3d 256, 267 citing *Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 881 and *Livingston Rock etc. Co. v. County of L. A.* (1954) 43 Cal.2d 121, 127

incomplete proposed read by the CEC based on the effective date of the statute, simply because the Legislature didn't pass the law when it originally planned, is not a viable interpretation, and is not what the Legislature intended.

If the CEC applied its proposed interpretation, then the consequence would be to strip LADWP of needed RECs and force it to potentially miss successful compliance with the first compliance period. The CEC in such case would then forward the noncompliance to the California Air Resources Board (CARB), in accordance with PUC Section 399.30(o).

As of now, it is still uncertain when the CARB is planning to open a proceeding to address the assignment of penalties to enforce SB 2 (1X) infractions. As we have stated in the past, in the absence of official regulations from both the CEC and the CARB (with regards to penalties), this regulatory uncertainty does not allow utilities to comfortably make final determinations on their procurements.

Furthermore, Justice Sandra Day O'Connor identified the unfairness of retroactive legislation in her due process argument in *General Motors v. Evert*.³⁰ She stated that "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. For this reason, 'the retroactive aspects of economic legislation must meet the test of due process'-a legitimate legislative purpose furthered by rational means." *Id.* Here, no legislative means for the CEC's interpretation are found. It is an interpretation that neither furthers the laws' purpose, nor attempts to harmonize the prior and current laws. To avoid this unfairness, the CEC's course of action would be simple: it need only include and recognize the validly grandfathered 40MW hydroelectric units that the Legislature specifically set forth in PUC Section 399.12(e)(1)(A).

8. Conclusion

Interpreting a gap in the ability to qualify hydroelectric generation for part of the first compliance period because of incorrectly interpreting a sub section of the law and retroactively applying the law to POUs, in conflict with then Section 387 is a constrained and unfair interpretation. To apply the whole of the 2011 compliance year period against LADWP, while only allowing the grandfathering provisions for 40MW units (established in the exact same law as the compliance periods themselves) for the last three weeks of

³⁰ *General Motors Corp. v. Evert* (1992) 503 U.S. 181, 190

2011 would work a fundamental unfairness and an injustice. Looking at a sub-subsection of the law and applying one set of rules for part of the first compliance period and another set of rules for another part of the first compliance period is a disjointed interpretation.

Moreover, the CEC's proposed interpretation has appeared even before the regulations for the first compliance period have been fully developed and adopted by the CEC. This interpretation is not only arbitrary and capricious, in disregard of the Legislature's intent and policy goals, and a substantial financial impact to LADWP's ratepayers, but works against general rules of statutory construction that provide for commonsense meanings and harmonizes laws. The CEC should avail itself of these general rules of statutory interpretation and fairness, and recognize what the Legislature clearly intended, namely, the application of the grandfathering provisions for hydroelectric generation units with a nameplate capacity between 30 and 40 MWs for all compliance periods, including the year 2011.

Sincerely,



Randy S. Howard
Chief Compliance Officer – Power
System
111 North Hope Street, Suite 921
Los Angeles, CA, 90012
Telephone Number: (213) 367 – 0381
Email: Randy.Howard@ladwp.com



JEAN-CLAUDE BERTET
Deputy City Attorney
111 North Hope Street, Suite 340
Los Angeles, CA, 90012
Telephone Number: (213) 367 – 4500
Email: Jean-Claude.Bertet@ladwp.com

JCB/oh:nsh

- c: Mr. Aram Benyamin
- Mr. Michael S. Webster
- Ms. Priscila Castillo
- Mr. Oscar A. Alvarez
- Mr. Bryan Schweickert