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RPS Proceeding
1516 Ninth Street
Sacramento, CA 95814-5512



Re: KMPUD Comments on the 33 Percent Renewables Portfolio Standard Pre-Rulemaking Draft Regulations for Publicly Owned Electric Utilities

The Kirkwood Meadows Public Utility District (“KMPUD”) appreciates the opportunity to provide comments on the *Proposed Regulations, Enforcement Procedures for the Renewables Portfolio standard for Local Publicly Owned Electric Utilities* (“Proposed RPS Regulations”), issued on March 1, 2013. KMPUD’s comments are limited to the issue of the applicability of California Public Utilities Code section 399.18¹ to KMPUD. Specifically, these comments will demonstrate that: (1) Mountain Utilities met the conditions of section 399.18(a)(2); (2) KMPUD is the “successor” to Mountain Utilities; and (3) the plain language of 399.18 and clear legislative intent demonstrate that, pursuant to section 399.18(b), KMPUD may comply with the requirements of the California Renewable Standard Program (“RPS”)² “notwithstanding any procurement content limitation in Section 399.16”

I. INTRODUCTION

KMPUD is a non-profit public utility district formed in 1985 pursuant to the California Public Utilities Code³ and is governed by a publicly elected, five-member board of directors. KMPUD currently provides electric, water, sewer, fire department, recreation, cable television, refuse collection, snow removal, employee housing, and vector control services to the Kirkwood community. KMPUD’s electric service territory is approximately 2.5 miles by 0.75 miles and is located southwest of Lake Tahoe, in the Sierra Nevada Mountains at an elevation of approximately 8,000 feet. KMPUD is not connected to the transmission grid or to any natural gas or diesel fuel backbone pipelines.

Until 2011, Mountain Utilities provided electric service to the Kirkwood community. In recent years, Mountain Utilities faced increasing challenges, including a fire that destroyed the utility’s single utility-grade diesel generator.⁴ As described by the California Public Utilities Commission (“CPUC”):

¹ Unless otherwise noted, all code references are to the California Public Utilities Code.

² Cal. Pub. Util. Code Div. 1, Pt. 1, Ch. 2.3, Art. 16 (commencing with section 399.11).

³ Cal. Pub. Util. Code § 15701 *et seq.*

⁴ D.11-06-032 at 5.

[Mountain Utilities'] geographic location combined with its isolation from the transmission grid and limited generation options have historically made it difficult for [Mountain Utilities] to provide low cost, reliable service or to meet the State's environmental goals. [Mountain Utilities'] historical reliance on diesel-fuel generation means that the price of electricity is heavily dependent on the price of diesel fuel. The powerhouse fire has necessitated a significant near-term capital investment to construct a replacement powerhouse and [Mountain Utilities] does not believe it can cost-effectively raise the necessary funds in the debt markets. Furthermore, for the past four years, [Mountain Utilities] has experienced net losses before income taxes for its electric service.⁵

KMPUD had been evaluating the feasibility of providing retail electric service to its community since 2006. In light of its unsustainable situation, Mountain Utilities entered negotiations to turn over control the utility to KMPUD. Pursuant to the requirements of the Public Utilities Code, Mountain Utilities and KMPUD jointly submitted an application for approval of this transfer of control to the CPUC. On July 1, 2011, the CPUC issued Decision ("D.") 11-06-032 approving the transfer of control of Mountain Utilities' service territory and assets to KMPUD. KMPUD immediately took steps to improve the situation, including building a new powerhouse to house new diesel generators. However, KMPUD still faces significant challenges.

II. DISCUSSION OF APPLICABILITY OF SECTION 399.18 TO KMPUD

Senate Bill ("SB") 1X-2 imposes an ambitious requirement of a 33 percent RPS by 2020. It also created portfolio content categories ("PCCs"), which specify minimum and maximum limitations on procurement from specific PCCs. In adopting these requirements, the legislature recognized that full compliance would be virtually impossible or unreasonable for some obligated entities, and thus many specific exemptions were included.⁶ In recognition of the unique challenges facing Mountain Utilities, the Legislature granted it a specific exemption from the PCC balance requirements. This exemption is found in section 399.18.

Section 399.18 is divided into two parts. Subdivision (a) addresses eligibility for the exemption and subdivision (b) addresses the application of the exemption. This section will demonstrate that Mountain utilities met the eligibility requirements of subdivision (a) and that KMPUD is a "successor" that qualifies for the exemption under subdivision (b).

A. Mountain Utilities Met the Statutory Requirements of Section 399.18(a)(2)

Section 399.18(a) addresses which utilities were eligible for the treatment provided in subdivision (b). Section 399.18(a) provides:

⁵ D.11-06-032 at 6-7.

⁶ *See, e.g.*, Cal. Pub. Util. § 399.30(g) ("A public utility district that receives all of its electricity pursuant to a preference right adopted and authorized by the United States Congress pursuant to Section 4 of the Trinity River Division Act of August 12, 1955 (Public Law 84-386) shall be in compliance with the renewable energy procurement requirements of this article.")

This section applies to an electrical corporation that as of January 1, 2010, met either of the following conditions:

- (1) Served 30,000 or fewer customer accounts in California and had issued at least four solicitations for eligible renewable energy resources prior to June 1, 2010.
- (2) Had 1,000 or fewer customer accounts in California and was not connected to any transmission system or to the California Independent System Operator.

On January 1, 2010, Mountain Utilities had fewer than 1000 customer accounts and was “not connected to any transmission system or to the California Independent System Operator.” The California Public Utilities Commission (“CPUC”) has recognized that Mountain Utilities met the requirements of section 399.18(a)(2):

[Section 399.18(b)] applies to utilities that either have 30,000 or fewer customer accounts and have issued a certain number of RPS solicitations, or have 1,000 or fewer customer accounts and are not connected to any transmission system or CAISO. The first condition applies to the Bear Valley Electric Service unit of Golden State Water Company. **The second applied to Mountain Utilities.** Mountain Utilities has since been acquired by the Kirkwood Meadows Public Utility District. (D.11-06-032.) Mountain Utilities is therefore no longer a retail seller for RPS purposes.⁷

It is, therefore, indisputable that Mountain Utilities met the conditions specified in section 399.18(a)(2) as of January 1, 2010.

B. KMPUD is the Successor to Mountain Utilities

The exemption provided by section 399.18 is specified in subdivision (b). However, subdivision (b) does not *only* apply to a utility meeting the conditions specified in subdivision (a). It also applies to a “successor” of such a utility. Section 399.18(b) provides:

For an electrical corporation **or its successor**, electricity products from eligible renewable energy resources may be used for compliance with this article, notwithstanding any procurement content limitation in Section 399.16⁸

The term “successor” is not defined in the California Public Utilities Code. However, this term is also used in section 399.17, which provides the similar relief from the PCC balance requirements for multi-jurisdictional IOUs. Parallel to section 399.18(a), section 399.17(a)(1) provides:

⁷ D.11-12-052 at 63 (emphasis added).

⁸ (emphasis added).

Subject to this section, the requirements of this article apply to an electrical corporation that as of January 1, 2010, had 60,000 or fewer customer accounts in California and met either of the following requirements:

- (A) Served retail end-use customers outside California.
- (B) Was located in a control area that is not under the operational balancing authority of the Independent System Operator or other California balancing authority and receives the majority of its electrical requirements from generating facilities located outside of California.

Parallel to section 399.18(b), section 399.17(b) specifies the impact of meeting this statute:

For an electrical corporation **or qualifying successor entity** meeting the requirements of subdivision (a), electricity products from eligible renewable energy resources may be used for compliance with the renewables portfolio standard procurement requirements notwithstanding any procurement content limitation in Section 399.16⁹

The CPUC has already had opportunity to issue a Decision designating such a successor. In D.10-10-017, the CPUC approved the transfer of control of the California electric distribution facilities of Sierra Pacific Power Company (“Sierra”) to California Pacific Electric Company (“CalPECO”). The CPUC reviewed this transaction subject to California Public Utilities Code section 854,¹⁰ which governs the transfer of control of a public utility.¹¹ D.10-10-017 described the transaction as the transfer of ownership and operation of Sierra’s California service territory and all distribution assets, which the parties described as “functionally the sale of Sierra’s entire Commission-jurisdictional utility.”¹²

Subsequent to the approval of this transaction, the CPUC recognized that CalPECO was the “successor” to Sierra for purposes of section 399.17: “[Section 399.17] applies to California Pacific Energy Company, the **successor** to the California assets of Sierra Pacific Power Company.”¹³ Therefore, the CPUC has recognized that a transfer of control of a public utility to a new entity pursuant to section 854 meets the definition of a “successor.”

⁹ (emphasis added). Section 399.17 uses the term “qualifying successor entity” because section 399.17(a)(2) places an additional restriction on a successor: “This section applies to a successor entity to all or a portion of the service territory of an electrical corporation meeting the requirements of paragraph (1), but only to the extent that the successor entity will have 60,000 or fewer customer accounts in California.”

¹⁰ D.10-10-017 at 10-11.

¹¹ Cal. Pub. Util. Code § 854(a) (“No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission. The commission may establish by order or rule the definitions of what constitute merger, acquisition, or control activities which are subject to this section. Any merger, acquisition, or control without that prior authorization shall be void and of no effect. No public utility organized and doing business under the laws of this state, and no subsidiary or affiliate of, or corporation holding a controlling interest in a public utility, shall aid or abet any violation of this section.”).

¹² D.10-10-017 at 9.

¹³ D.11-12-052 at 63 (emphasis added).

The transfer of control of Mountain Utilities’ assets and service territory is functionally indistinguishable from the transfer of Sierra to CalPECO. The CPUC decision approving the transfer of Mountain Utilities to KMPUD described the transaction as follows:

The Joint Applicants propose that KMPUD purchase all the electric generation and distribution assets and the propane distribution assets of [Mountain Utilities] and assume operation of these assets to provide retail electric and propane service to the Kirkwood community. Upon close of the sale and transfer of [Mountain Utilities]’s electric and propane assets, [Mountain Utilities] requests to be relieved of its obligation to provide public utility electric service to customers within its service territory.¹⁴

As with the CalPECO transfer, the CPUC recognized that the relevant statutory authority was section 854:

[Mountain Utilities] is requesting permission from this Commission to transfer all of its public utility operations in California to KMPUD, thus relieving [Mountain Utilities] of its obligation to provide public utility electric service to customers within its service territory. We find it prudent to apply § 854 to this application.¹⁵

The CPUC has already found that a transaction identical to the transfer of Mountain Utilities to KMPUD meets the definition of a “successor” for purposes of the RPS. Therefore, KMPUD is the successor to Mountain Utilities.

C. KMPUD is Eligible For the Section 399.18 Exemption

1. The Statutory Language Clearly Supports Applying Section 399.18 to KMPUD

The first step in interpreting a statute is to begin with the plain language:

[i]f the statutory language is clear and unambiguous, then [the court] go[es] no further. If, however, the language is susceptible to more than one reasonable interpretation, then [the court] look[s] to ‘extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.’¹⁶

In the case of section 399.18, the plain language clearly supports its application to KMPUD. The plain language of section 399.18 requires that an electrical corporation must have met the conditions of subdivision (a) as of January 1, 2010. If this threshold requirement is met, then that electric corporation “or its successor” is eligible for the exemption from PCC balance

¹⁴ D.11-06-032 at 6.

¹⁵ D.11-06-032 at 14.

¹⁶ *Hoechst Celanese Corp. v. Franchise Tax Bd.*, 25 Cal. 4th 508, 519 (Cal. 2001) (internal citations removed).

requirements. Section 399.18 does not contain any other restrictions on what types of entities are eligible for this exemption and none may be read into it.

It would be wholly inaccurate to read section 399.18 to be inapplicable to a publicly owned electric utility (“POU”) that otherwise met the definition of a successor. While section 399.18(a) does begin with: “This section applies to an electrical corporation . . . ,” this phrase does not stand in isolation but rather must be read as a whole: “This section applies to an electrical corporation *that as of January 1, 2010, met either of the following conditions*” KMPUD is not claiming that it is an electric corporation. Instead, KMPUD is claiming that Mountain Utilities met the conditions of section 399.18(a) as of January 1, 2010. Indeed, subdivision (a) does not define the scope of the applicability of subdivision (b)’s PCC balance requirement exemption. This is because any successor to an electric corporation (even a successor that was itself an electric corporation) would fail to meet the January 1, 2010 requirement. Thus the term “successor” is not limited by the language of subdivision (a).

Section 399.18 does not specify any limitations on what type of entity a “successor” must be, and none should be read into the statute. By the plain language of the section 399.18, KMPUD qualifies for the PCC exemption provided by subdivision (b).

2. Legislative Intent Clearly Supports the Application of Section 399.18 to KMPUD

Even looking beyond the plain language of section 399.18, it is exceedingly clear that section 399.18 applies to KMPUD. “The guiding star of statutory construction is the intention of the Legislature, and to the end that it be correctly ascertained the statute is to be read in the light of its historical background and evident objectives.”¹⁷

The PCC balance requirements mandate that an obligated entity must procure a minimum percentage of electricity products meeting PCC1. To be eligible for PCC1, electricity products must: (1) “have a first point of interconnection with a California Balancing Authority” (“BA”); (2) “have a first point of interconnection with distribution facilities used to serve end users within” a California BA; (3) be scheduled into a California BA “without substituting electricity from another source”; or (4) be dynamically transferred into a California BA.¹⁸ The legislature recognized that this requirement posed a problem to those utilities in California that have service territories that are not within a California BA. Any generation from facilities located in such a utility’s service territory would not meet the definition of a PCC1 electricity product without some prohibitively expensive scheduling or dynamic transfer agreements.

To address this problem, the Legislature created an exemption from the PCC balance requirements for *every* California utility that faced this limitation. As discussed above, the multi-jurisdictional IOUs were provided relief by section 399.17. Additionally, Mountain Utilities was provided relief by Section 399.18, and the City of Needles and the Truckee Donner Public Utilities District were provided relief by section 399.30(h). The Energy Commission’s *Initial Statement of Reasons For Enforcement Procedures for the Renewables Portfolio Standard For*

¹⁷ Bank of America Nat’l Trust & Sav. Asso. v. Cranston, 252 Cal. App. 2d 208, 217 (Cal. App. 1st Dist., 1967).

¹⁸ Cal. Pub. Util. Code § 399.16(b)(1).

Local Publicly Owned Electric Utilities (“ISOR”) provided the following insightful discussion regarding section 399.30(h):

A POU that meets the criteria of Public Utilities Code section 399.30 (h) is not interconnected to a California balancing authority, so it would be both impractical and prohibitively expensive to require such a POU to obtain at least 50 percent of its newer procurement from PCC 1. Subjecting a POU that meets the criteria of Public Utilities Code section 399.30 (h) to the portfolio balance requirements of section 3204 (c)(1)- (9) of the regulations would result in bundled electricity products from a resource located within the POU’s own balancing authority area being labeled as PCC 3 and would subject that procurement to the PCC 3 maximum limits of Public Utilities Code section 399.16 (c)(2). **Such a result is not consistent with intent of SBX1-2.**¹⁹

KMPUD is in precisely this same situation. As described above, KMPUD is not connected to any transmission system, so any generating facilities located within KMPUD’s service territory would not meet the requirements of PCC1. The legislature recognized this limitation and specifically crafted an exemption for the Kirkwood community in Section 399.18(a)(2). Thus, this exemption was provided, not because of Mountain Utilities’ status as an electric corporation, but because of the challenges facing the Kirkwood community, including the limitation on the ability to locate renewable generation within its service territory.

Excluding KMPUD from this exemption simply because KMPUD is publicly owned rather than privately owned would violate the legislature’s clear intent to provide all similarly situated utilities an exemption from the PCC balance requirements. Indeed, the only impact of denying KMPUD the section 399.18 exemption would be to punish a community for choosing a publicly owned utility rather than a privately owned utility. The legislature has never expressed such a preference, and it should not be read into the statute.

Therefore, the legislative intent is clear: utilities in situations similar to KMPUD must be provided an exemption from the PCC balance requirements. With this purpose in mind, as a successor to Mountain Utilities, KMPUD clearly is entitled to the treatment provided by section 399.18(b).

III. RECOMMENDED AMENDMENT TO RPS REGULATIONS

Pursuant to the foregoing discussion, KMPUD recommends that the following language be added as a new Section 3204(a)(9) of the RPS Regulations:

A POU that meets the criteria of Public Utilities Code section 399.18 shall not be subject to the requirements in section 3204 (c)(1)- (9). A POU shall demonstrate that it meets the criteria listed in Public Utilities Code section 399.18 by providing the Commission documentation showing the POU is a successor to an electric corporation that, as of January 1, 2010, had 1,000 or fewer customer accounts in

¹⁹ ISOR at 23.

California and was not connected to any transmission system or to the California Independent System Operator.

IV. CONCLUSION

KMPUD appreciates the opportunity to provide comments on the Proposed RPS Regulations. KMPUD asks that the Energy Commission consider KMPUD's recommendations.

Respectfully submitted,



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