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April 16, 2013

California Energy Commission
Dockets Office, MS-4
Docket No. 13-RPS-01
RPS Proceeding
1516 Ninth Street
Sacramento, CA 95814-5512

**Re:** CMUA Comments on Proposed Regulations: Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities

The California Municipal Utilities Association (CMUA) would like to thank the California Energy Commission (CEC) for the opportunity to provide comments on the Proposed Regulations, Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities (Proposed Regulations), issued on March 1, 2013. CMUA appreciates the willingness of the CEC staff and CEC Commissioners to meet with CMUA and CMUA's members throughout this regulatory process. CMUA believes that significant progress has been made since the initial draft of regulations was issued last year. However, CMUA has remaining concerns both with the scope of the Proposed Regulations and with the specific proposal. CMUA provides general comments below, and then specific comments to the draft rule.

## I. GENERAL COMMENTS

### A. The CEC's 33 Percent RPS Regulations Must Show Proper Deference to Local Governments.

It is essential that any regulations adopted by the CEC not overstep the jurisdictional limits set out in SBX1-2 and infringe on the authority of the governing boards of the publicly owned electric utilities (POUs). California's electric utilities are regulated pursuant to a carefully crafted, bifurcated system. As set out in the State Constitution, the California Public Utilities Commission (CPUC) is granted authority to regulate "private persons and Corporations." In contrast, Article XI, Section 7 of the California Constitution provides certain POUs with the authority to make and enforce ordinances and regulations. Section 9 provides these POUs with the general authority to establish public works, and provide for their operation and regulation.

This regulatory structure recognizes the fundamental differences between POUs and the privately-owned entities regulated by the CPUC, primarily the investor owned utilities (IOUs). The for-profit nature of the CPUC-regulated IOUs, combined with the largely monopoly structure of electric utility service, necessitates comprehensive regulation. This regulation is necessary to protect ratepayers from excessive rates and to ensure a reliable system. Accordingly, the CPUC's jurisdiction over IOUs is expansive, including contract approval and rate setting.

POUs are fundamentally different because they are non-profit, governmental agencies. As public agencies, POUs are subject to the open meeting requirement of the Brown Act.[1] These public meetings are held locally, and a POU ratepayer has easy access to participate in the POU decision-making process.

In recognition of this bifurcated system of regulation, legislation commonly directs the CPUC to adopt regulations for the IOUs and for the local governing boards to implement the statutory requirements for the POUs. There are numerous examples of this statutory structure. For example, AB 920 added a requirement to Section 2827 of the Public Utilities Code that directs electric utilities to compensate net metering customers for surplus generation.[2] While the statute directs the CPUC to adopt the valuation methodology for the IOUs, the statute directs the governing boards of the POUs to adopt the valuation methodology for the POUs. Along similar lines, the Public Utilities Code directs the CPUC to adopt resource adequacy requirements for the IOUs, while the governing boards of the POUs are directed to adopt their own planning reserve margins. This structure is utilized for numerous matters including energy efficiency and smart grid deployment.[3]

It is instructive to review this history, because SBX1-2 clearly fits within this existing regulatory structure. Like the statutes listed above, SBX1-2 directs the CPUC to adopt regulations for the IOUs and directs the governing boards of the POUs to implement SBX1-2 for their respective POUs. It is clear that the Legislature did not intend for the CEC to have an equivalent role to POUs as the CPUC does for IOUs. To the extent that the Proposed Regulations assume such a role, they go beyond the statutory requirements. CMUA believes that it is crucial that the Proposed Regulations conform to the statutory language, because the CEC has been given oversight of compliance with the statute, and must make room for the role given POU Governing Boards.

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[1] Cal. Gov. Code §§ 54950-54963.
[2] Cal. Pub. Util. Code § 2827(h)(4)(A).
[3] *See e.g.*, Cal. Pub. Util. Code § 2827(h)(4)(A) (directing the local governing board of each POU and the Commission to adopt their own valuation methodologies to compensate eligible customers for net surplus electricity generated.); Cal. Pub. Util. Code § 9620 (requiring the local governing board of each POU to adopt a planning reserve margin); Cal. Pub. Util. Code § 380 (directing the Commission to adopt resource adequacy requirements for the IOUs); Cal. Pub. Util. Code § 9615(b) (directing the local governing board of each POU to establish annual targets for energy efficiency savings); Cal. Pub. Util. Code § 454.55 (directing the Commission to establish energy efficiency targets for the IOUs); Cal. Pub. Util. Code § 8369 (directing the local governing board of POUs with more than 100,000 service connections to develop a smart grid deployment plan.); Cal. Pub. Util. Code § 8362 (directing the Commission to determine the requirements for the IOU smart grid deployment plans.).

Section 399.30(l) provides that the CEC must "adopt regulations specifying procedures for enforcement of this article." This authority is clarified by Section 399.30(m)(1): "Upon a determination by the Energy Commission that a local publicly owned electric utility has failed to comply with this article . . . ." The key implication of these two statutory provisions is that the CEC's authority under SBX1-2 is to determine whether the POU has complied with the statutory obligations. Where there is discretion to choose between various options, it is left to the governing boards of the POUs to make such a determination, and the CEC lacks the jurisdiction to evaluate the reasonableness of those decisions.

Along these lines, there appears to be an implicit assumption in the Proposed Regulations that absent regulation and oversight by the CEC, the POUs would simply ignore the obligations set forth in the statute. Such an assumption is clearly contrary to the history described above and totally without merit. POUs take statutory mandates seriously and faithfully implement these obligations.

### B. Review of Optional Compliance Rules

A key area of concern with the Proposed Regulations is the requirements surrounding the adoption of optional compliance rules defined in section 399.30(d). The optional compliance measures provide flexibility for entities that must comply with the obligations in order to protect California's ratepayers during the transition to a 33 percent renewables portfolio standard. As discussed above, SBX1-2 follows the historical model of providing the CPUC with the authority to adopt optional compliance rules for the CPUC-jurisdictional entities and provides the POU governing boards with the authority to adopt optional compliance rules for the POUs. In each case, it is the ratemaking authority that has the responsibility for implementing the provisions. This is essential because rules such as cost limitations and delay of timely compliance are fundamentally decisions about rates.

SBX1-2 does specify the steps and findings that must precede the adoption and use of these optional compliance measures. As discussed more thoroughly below, the CEC's role as specified in the statute is to ensure that a POU governing board has properly followed the steps specified in SBX1-2 in adopting an optional compliance rule. The CEC's role is not to strictly limit the actual rules that may be adopted beyond the statutory limitations or to review the reasonability of the rules that are adopted. If the CEC asserts the authority to reject a POU's application of an optional compliance rule, for example a cost limitation, on the grounds that it is too low, the CEC would be usurping the POU's ratemaking authority.

The Proposed Regulations must reflect this clear statutory distinction. The CEC's review of POU optional compliance rules must be limited to the narrow requirements specified in statute.

### C. Uncertainty of Portfolio Content Category Status

The Proposed Regulations create too much uncertainty regarding the portfolio content category (PCC) status of procurement, particularly for "scheduled in" PCC1 electricity products and electricity products from biomethane contracts. CMUA and many other parties have requested that the CEC take actions to provide greater upfront certainty on the PCC status of a

particular contract. POUs are uniquely disadvantaged in this regard because the IOUs typically receive this type of upfront confirmation when their contracts are approved by the CPUC. The CEC should take actions, including adopting a formal PCC "checklist," to provide greater certainty to utilities and developers. Additionally, the CEC should provide guidance on PCC status upon request by a POU or IOU for clarification.

### D. CEC Regulatory Process

The Proposed Regulations have been significantly influenced by the CPUC's Rulemaking 11-05-005, implementing SBX1-2. Where the CPUC has acted first, the CEC has almost without exception, adopted identical requirements for the POUs. This includes some substantial and controversial decisions, such as the requirement that PCC1 and PCC2 electricity products must be purchased as bundled. The CPUC process is not a substitute for careful deliberation by the CEC on issues with specific application to POUs.

The CPUC process has been extensive and CMUA has taken the opportunity to participate by submitting comments on several substantive matters. However, as CMUA's members are not regulated by the CPUC, CMUA's comments are necessarily limited and cannot address the myriad of implementation details the CPUC must adopt for the CPUC-jurisdictional entities. Furthermore, many of the CPUC's final determinations are based on application of provisions of the enabling legislation that do not apply to the POUs.

The *Initial Statement of Reasons For Enforcement Procedures for the Renewables Portfolio Standard For Local Publicly Owned Electric Utilities* (ISOR) states that "[i]n developing the proposed regulations, the Energy Commission worked with the CPUC to ensure the proposed regulations were consistent with the rules developed by the CPUC for the retail sellers."[4] POUs were not given the opportunity to directly participate in this collaborative process between the CEC and CPUC. This process has unfairly limited the POU's ability to influence the decision making process for regulations that will be specifically applicable to them.

One of the primary reasons expressed for why CEC staff worked with the CPUC and ultimately followed the CPUC's decisions is the policy of uniformity in regulations between the CPUC-jurisdictional utilities and the POUs.[5] However, the CPUC's role for implementing the new RPS requirements for the IOUs is substantially different from the CEC's role regarding the POUs, and the enabling legislation does not contemplate consistent RPS rules for retail sellers and POUs in all respects. Additionally, uniformity for the sake of uniformity is not a valid reason for adopting these regulations, nor is it consistent with the mandates of SBX1-2. As is demonstrated by the bifurcated structure of SBX1-2, the Legislature clearly did not seek to impose uniform regulatory requirements between the IOUs and the POUs.

[4] ISOR at 6.
[5] ISOR at 6 ("POUs are now subject to many of the same or similar RPS requirements as retail sellers under SB X1-2, so it was and is appropriate to work with the CPUC to ensure a consistent application of the RPS rules for retail sellers and POUs.").

### E. Cost Impacts

The CEC's POU Cost Analysis prepared in this regulatory process focused exclusively on the administrative burden associated with the RPS Regulations. However, there is significant cost impacts associated with the RPS Regulations beyond the administrative burden, such as cost associated with the uncertainty of PCC status and with the requirements of the RPS Eligibility Guidebook. The CEC's cost analysis should take a broader and more thorough look at the cost impacts for POUs.

## II. COMMENTS ON THE PROPOSED REGULATIONS

### A. Procurement Quantity Requirements

CMUA supports the proposed renewable portfolio standard (RPS) procurement requirements for compliance periods two and three as provided in Section 3204 of the Proposed Regulations. The relevant statutory language for these two compliance periods is found in California Public Utilities Code[6] section 399.30(c)(2):

> The quantities of eligible renewable energy resources to be procured for all other compliance periods reflect reasonable progress in each of the intervening years sufficient to ensure that the procurement of electricity products from eligible renewable energy resources achieves 25 percent of retail sales by December 31, 2016, and 33 percent of retail sales by December 31, 2020. . . .

The approach proposed in the Proposed Regulations is a reasonable interpretation of this statutory provision. Additionally, the proposed methodology is consistent with the procurement practices of POUs, which will involve a significant amount of utility developed and owned generation. The methodology proposed in the Proposed Regulations accommodates the time needed to develop and bring new projects on line.

While the proposed methodology in the Proposed Regulations differs from the procurement requirements adopted by the CPUC in Decision (D.) 11-12-020, such a difference is consistent with the bifurcated structure of SBX1-2. The CEC's authority to adopt "regulations specifying procedures for enforcement" of the RPS is strictly limited to the statutory language of Article 16 (commencing with section 399.11) of Chapter 2.3 of Part 1 of the Public Utilities Code. In contrast, the CPUC has broad authority over the entities falling within its jurisdiction, including the authority to "do all things . . . which are necessary and convenient in the exercise of such power and jurisdiction."[7] Unlike the CPUC, the CEC lacks the authority to develop procurement requirements according to its own determination of the most sensible option, and is instead limited to the strict wording of the statute. The Proposed Regulations properly interpret the relevant statutory provisions consistent with the CEC's limited role.

### B. Historical Carryover

[6] Unless otherwise specified, all statutory references are to the California Public Utilities Code.
[7] Cal. Pub. Util. Code § 701.

The Proposed Regulations permit a POU to adopt an optional compliance measure allowing pre-January 1, 2011, procurement that is in excess of 2004-2011 procurement targets to be applied to the POU's SBX1-2 procurement requirements in Compliance Period 1 or any subsequent Compliance Period. CMUA supports the incorporation of historic carryover into the Proposed Regulations.

However, the Proposed Regulations include a new Section 3206(a)(5)(E), which provides "Any REC qualifying as historic carryover shall be retired within 36 months of the month in which the REC was generated." This requirement will dramatically reduce the amount of historic carryover available to a number of CMUA's members, and will serve as a substantial penalty to those POUs that took early actions. There is no corresponding benefit that justifies this penalty.

According to CEC staff, the 36-month requirement is based on section 399.21(a):

> The commission, by rule, shall authorize the use of renewable energy credits to satisfy the renewables portfolio standard procurement requirements established pursuant to this article, subject to the following conditions:
>
> . . .
>
> (6) A renewable energy credit shall not be eligible for compliance with a renewables portfolio standard procurement requirement unless it is retired in the tracking system established pursuant to subdivision (c) of Section 399.25 by the retail seller or local publicly owned electric utility within 36 months from the initial date of generation of the associated electricity.

Staff has also indicated that the only actions that meet the requirement to "retire" is either through the Western Renewable Energy Generation Information System (WREGIS) or through the CEC's Interim Tracking System (ITS). Applying this obligation to POUs for the 2004-2010 is not reasonable, considering that there was no requirement for POUs to join or track their generation through WREGIS until October of 2012. Further, there was no requirement for POUs to complete the relevant ITS forms or any indication that a POU should "voluntarily" complete and submit such a form. Indeed, the POU ITS form has still not been adopted by the CEC.

The particular situation that many POUs find themselves in is that they are finding out, as of March of 2013 that there were actions they should have taken starting in 2004, because of a statute that became effective in December of 2011. For much of this 2004-2010 timeframe, these required actions were literally impossible because WREGIS was not active and there was no ITS reporting process or requirement for POUs. Compounding the situation was the confusing direction in the Fifth and Sixth Editions RPS Eligibility Guidebooks for POUs to not require RECs in WREGIS until the Seventh Edition of the Guidebook was adopted.[8] Many

[8] CEC RPS Eligibility Guidebook (6th ed.) at 70 ("RPS Procurement for 2011 should not be retired or reported until a future version of the RPS Eligibility Guidebook is finalized, which will provide instructions on reporting 2011 and later data.").

POUs that intend to utilize historic carryover have not been retiring RECs associated with the 2004-2010 timeframe in WREGIS because of this confusion. Additionally, POUs have been essentially unable to retire RECs through the ITS because no such forms applicable to POUs currently exist.

This means that many POUs will be limited to counting as historic carryover only RECs associated with generation during April, 2010 through December 31, 2010, a substantial reduction from the entire 2004-2010 time period that should be available to POUs. The delay in finalizing the CEC's RPS Regulations has made this penalty significantly worse because it has significantly narrowed the window of available historic carryover.

Section 399.21 simply cannot be interpreted to inflict such an arbitrary penalty. The 36-month provision of section 399.21 was added with the adoption of SBX1-2 (effective in December of 2011). The key problem with applying this 399.21 requirement to actions that occurred during the 2004-2010 timeframe is that it would violate the rule of statutory construction that presumes that laws do not apply retroactively:

> A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so. **A statute has retrospective effect when it substantially changes the legal consequences of past events**. A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment. Of course, when the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us.[9]

Therefore, when 36-month requirement was added to the section 399.21 it should not be interpreted as applying retroactively unless the legislature clearly states this intent. Arguably, the structure of SBX1-2 suggests that generation occurring during Compliance Period 1 (January 1, 2011-December 31, 2013) must meet the 36-month retirement requirement. Such an interpretation has limited negative consequences because the 36-month buffer would easily allow generation from the pre-effective date of SBX1-2 (generation occurring in the first 11 months of 2011) to still be retired and not lose eligibility. However, applying the 36-month requirement retroactively to 2004 would essentially undo the ability to carry forward much of the generation from the 2004 timeframe because the 36-month period has already expired. This would fundamentally alter the legal consequence of past events.

CMUA believes the most rational approach that is consistent with the intent of SBX1-2 is to simply delete Section 3206(a)(5)(E). This is not to advocate for treatment inconsistent with the options that were available to the retail sellers. Conversely, it is actually required to give POUs the same treatment. CMUA believes that the purpose of historic carryover is to provide a POU that complied with the requirements applicable to the retail sellers with the same ability to carry

[9] Western Security Bank v. Superior Court, 15 Cal. 4th 232, 243 (1997) (emphasis added) (internal citation omitted).

generation forward in the same manner than a retail seller would. To meet this purpose, there are three fundamental requirements that the POU must have met:

(1) The POU procured generation from resources that were or would have been eligible under the RPS Eligibility Guidebook in place on the effective date of execution of the contract or ownership agreement;
(2) The POU procured electricity products in amount that exceeded the procurement requirements applicable to a retail seller during the 2004-2010 time period; and
(3) The POU is able to provide documentation verifying that this procurement was committed for use by the POU and was not double counted by another entity.

CMUA does not dispute any of these requirements, and is certain that its members are committed to working with the CEC to demonstrate that only generation that meets these requirements is counted as historic carryover. What is not acceptable is to arbitrarily apply a purely administrative requirement that would substantially punish early actions. This type of treatment sends a powerful signal that discourages utilities from taking early actions.

Consistent with these principles, the CEC should delete Section 3206(a)(5)(E) and then work with the POUs to ensure that the POUs provide adequate assurance that only RECs that should count as historic carryover are actually being counted and that no double counting is occurring.

### C. Unbundled RECs

Renewable Energy Credits (RECs) that initially qualify as either PCC1 or PCC2 resources should not lose that status if the underlying REC is subsequently transferred to a different entity. The CEC cannot solely rely on the CPUC's Decision classifying all unbundled renewable energy credits (RECs) as PCC 3 resources but must fully and openly consider this issue in this proceeding. First, under the Administrative Procedures Act, the CEC must develop its own record to support its conclusions. Second, as noted in our introductory comments, the CPUC's decision applies solely to the IOUs. The CEC cannot just adopt the CPUC's decision because such an action denies parties who were not part of that proceeding the opportunity to participate and comment on this issue. Third, and equally importantly, the CEC is tasked under SBX1-2 to interpret a different section of the Public Utilities Code than the CPUC.

This issue is primarily one of statutory construction, supported by reviewing the legislative history of SBX1-2 and its predecessor SB722. "As always, we begin with the words of a statute and give these words their ordinary meaning."[10] If the statutory language is clear and unambiguous, then we need go no further.[11] Section 399.16 clearly contemplates that RECs may be associated with multiple PCCs. Section 399.16(b)(3) includes in PCC 3 "eligible renewable energy resource electricity products, or any fraction of the electricity generated, including unbundled renewable energy credits, that do not qualify under the criteria of

[10] Hoechst Celanese Corp. v. Franchise Tax Bd., 25 Cal. 4th 508, 519 (2001) (citing Wilcox *v. Birtwhistle,* 21 Cal.4th 973, 977 (1999)).
[11] *Id.* (citing Lungren v. Deukmejian, 45 Cal.3d 727, 735 (1988)).

paragraphs (1) and (2)." This last phrase, "*that do not qualify under the criteria of paragraphs (1) and (2),*" applies to the entirety of the foregoing language "eligible renewable energy resource electricity products, or any fraction of the electricity generated, including unbundled renewable energy credits," and modifies it as such. It also clearly contemplates that there are types of unbundled renewable energy credits that ***do*** qualify for PCCs 1 and 2, otherwise the final phrase would be superfluous. An interpretation of statutory language the renders a key phrase of the directly applicable statutory provision irrelevant is not favored by settled rules of statutory construction.[12]

In order to determine and differentiate the types of unbundled renewable energy credits that do qualify for PCCs 1 and 2, versus those that qualify for portfolio content category 3, it is necessary to review the CPUC decision and how it reached its conclusion. It is noteworthy that even among the CPUC Commissioners, there was disagreement on this issue. As, CPUC Commissioner Peevey stated in his concurrence to Decision 11-12-052, "the statute is ambiguous as to whether all unbundled RECs must be placed in Category 3, and prohibiting the use of any unbundled RECs for Category 1 will increase compliance costs for no discernable purpose."[13] As discussed below, the underlying record does not support the CPUC's conclusion.

The CPUC determined that all unbundled RECs should be assigned to PCC3 by incorrectly concluding that there is only one type of "unbundled REC" and that throughout the RPS program the term "unbundled RECs" has consistently been understood to mean "RECs procured separately from the RPS-eligible generation originally associated with the RECs." (D.11-12-052, p. 28 emphasis added).

To support its conclusion that there is only one type of "unbundled REC" the CPUC cites to a series of previous decisions dating back to 2003. (D.11-12-052, p. 31, footnote 55). A review of these decisions shows that the CPUC's conclusion is both factually and legally incorrect. In each of these decisions, the Commission distinctly found that there are two different types of unbundled REC transactions.

For example, as the Commission stated in D.10-03-021:

> We conclude, as explained more fully below, that for RPS procurement purposes we will treat as REC-only transactions those deals that:
>
> 1. Expressly convey only RECs and not energy; or
> 2. Transfer both energy and RECs, but the energy associated with the RECs cannot serve California customer load.[14]

[12] Kulshrestha v. First Union Commercial Corp., 33 Cal. 4th 601, 611 (2004). "[C]ourts may not excise words from statutes. . . . We assume each term has meaning and appears for a reason." *Id.* (citing Delaney v. Superior Court, 50 Cal. 3d 785, 798 (1990)).
[13] Concurrence of Commissioner Michael R. Peevey on Item 47, Decision 11-12-052, at 3.
[14] D.10-03-021 at 26 (emphasis added).

The CEC, in both its ISOR and draft regulations, also recognizes these same two categories of unbundled RECs.

The use of "or" by the CPUC confirms that it considered these as two different types of "REC-only transactions" and not as differing shades of the same type of transaction. Thus, an "unbundled REC" transaction, contrary to the CPUC's conclusion, can include the transfer of both energy and RECs. The CEC reaches a similar conclusion in its ISOR. What qualifies this second type of transaction as "unbundled" is not the separation of the RECs from the energy, but instead the qualification that the "energy associated with the RECs cannot serve California customer load." Thus, this type of "unbundled REC" is not associated with any energy that is either physically generated in, or delivered to California.

The CPUC's incorrect characterization that there is only one type of "unbundled REC" undermines the CPUC's conclusion that "it is clear that the portfolio content categories have fixed boundaries" and that the percentage "prescriptions for the use of procurement in each category for RPS compliance do not make sense, and could not be administered, unless there are bright lines separating the portfolio content categories."[15] Instead, as discussed above, the presence of two different types of unbundled RECs provides the "bright line" needed for distinguishing which unbundled RECs "do not otherwise qualify" for inclusion in Section 399.16(b)(3) and which ones do. Unbundled RECs associated with the second type of unbundled REC transaction, by definition, "cannot serve California load," which prior to SBX1-2 related to the issue of deliverability. Post SBX1-2, these would be RECs that are not firmed and shaped and are not scheduled into a California BA, and therefore, must be assigned to Section 399.16(b)(3). Unbundled RECs associated with the first type of unbundled REC are either generated or scheduling into a California BA or firmed and shaped. Thus, they are eligible for inclusion in Sections 399.16(b)(1) or (b)(2) if they meet the other applicable requirements.

The legislative history of SBX1-2, and its predecessor SB722, also supports the conclusion that the Legislature was considering only this second type of REC in determining which "unbundled RECs" should be assigned to PCC3. For example, in the CPUC's proceeding, San Diego Gas & Electric (SDG&E) specifically cites to the Senate Energy Committee's February 15, 2011 legislative analysis to support its position that is the connection to California that distinguishes which of the three categories unbundled RECs should be assigned to:

> The important point is that if unbundled RECs that are not directly connected to a California Balancing Authority (CBA) can be considered Category 2, as the bill analysis suggests, then unbundled RECs that are directly connected to a CBA must necessarily be considered as a Category 1 product.[16]

The legislative analysis referenced by SDG&E identifies that SBX1-2:

> [E]stablishes procurement requirements for three product categories (or "buckets") as follows . . . :

[15] D.11-12-052 at 30.
[16] SDG&E Reply Comments to the CPUC's Proposed Decision.

> Bucket #2 - Unbundled RECs from generators not directly connected to a California Balancing Authority. Retail sellers and POUs can secure no more than 25% through 2013; 15% through 2016, and 10% thereafter. (emphasis added)
>
> Bucket #3 - Energy not directly connected to a California Balancing Authority or delivered in real time yet still providing electricity to the state. If unbundled RECs from Bucket #2 are not used then as much as 50% of generation can fill this bucket through 2013; 35% through 2016 and 25% thereafter. If Bucket #2 is full then the remaining generation needed to comply with the RPS could be applied to the criteria in this bucket.

Although it appears that the Committee analysis inadvertently juxtaposed Buckets 2 and Bucket 3, the legislative analysis' description reasonably follows and parallels the form in which SBX1-2 was both introduced and finally passed. Bucket #3 (here transposed as Bucket #2) is defined as "Unbundled RECs from generators not directly connected to a California Balancing Authority" and subject to the same percentage limitations (25% declining to 10%) that were adopted for Bucket #3 in SBX1-2.

The Senate Third Reading Analysis of SB722 (as amended August 16, 2010) also supports the categorization of out-of-state resources that are not scheduled into a California BA or firmed and shaped as PCC3 resources stating that:

> SB 722 restricts the ability for utilities to use out-of-state renewable energy credits (RECs) to not more than 10% of its procurement target.

Once again, this percentage restriction matches the same limit applied to Bucket 3 resources in SBX1-2.

Perhaps the clearest distinction made by the Legislature in its consideration of the two different types of unbundled RECs is contained in the Assembly Committee on Natural Resources' legislative analysis of SB722 on June 30, 2010 (right after it was amended to address RPS issues) where it defined the use of the term "unbundled RECs" as:

> c) Renewable energy products not meeting either condition above, including unbundled RECs (i.e., the original source of renewable energy must be located within the western grid, but otherwise need not have a physical connection to California). Not more than 10 percent of the portfolio may fall into this category.[17]

The legislature's focus on this second category of unbundled RECs can be understood by reference to the market conditions that existed when the Legislature was considering SB722 and SBX1-2. Although the CPUC authorized the use of the first type of unbundled RECs (a REC-only transaction) for the IOUs in D.10-03-021, that decision was stayed by the CPUC less

[17] (emphasis added)

than two months later in D.10-05-018. Thus the IOUs were able to engage in only a few, if any unbundled REC transactions.

Instead, the major, and perhaps only unbundled REC transactions that IOUs could engage in were the second type of transaction where the energy and REC were simultaneously purchased out-of-state and then the underlying energy sold off to a third-party. It is this type of unbundled REC transaction that the Legislature would have seen occurring in the marketplace, and as noted in the legislative history cited above, sought to limit by establishing limits on this type of transaction.

A further distinction between the use of "renewable energy credits" and "unbundled renewable energy credits" can be discerned by looking at the different requirements applicable to the CEC, in its oversight of the POUs, and the CPUC in its oversight of the IOUs. For the CPUC, SBX1-2 requires that:

> 399.15. (a) In order to fulfill unmet long-term resource needs, the commission shall establish a renewables portfolio standard requiring all retail sellers to procure a minimum quantity of electricity products from eligible renewable energy resources.

As the term "electricity products" was not defined in SBX1-2, the CPUC interpreted this term, incorrectly CMUA believes, to define an "electricity product" similar to the CEC's proposed definition (Draft Regulations, p. 2). Under this definition, an "electricity product" consists of "either (1) Electricity and the associated renewable energy credit generated by an eligible renewable energy resource or 2) an unbundled REC."

For the POUs, in contrast, the CEC must ensure that POUs meet the requirements of Public Utilities Code Section 399.30(a), which is substantively different from Section 399.15(a) in that RECs are specifically mentioned. Section 399.30(a) provides that;

> In order to fulfill unmet long-term generation resource needs, each local publicly owned electric utility shall adopt and implement a renewable energy resources procurement plan that requires the utility to procure a minimum quantity of electricity products from eligible renewable energy resources, **including renewable energy credits** . . .

The CEC, in taking the CPUC's definition of "electricity product" creates semantic problems. Substituting the CEC's definition of electricity product into the language of Section 399.30(a) above would require POUs "To procure a minimum quantity of "(1) Electricity and the associated renewable energy credit generated by an eligible renewable energy resource; 2) an unbundled REC and 3) a renewable energy credit.

In crafting Section 399.30(a) the Legislature specifically identified a renewable energy credit as an electricity product. In this section it did not add the qualifier "unbundled" in front of this designation. In interpreting legislation, it is a well-established principle that when the Legislature uses a term in one place but not in another it does so for a specific reason.

It is clear that the CPUC's determination on RECs is not mandated or even supported by the statutory language of section 399.16(b)(1)(A). Instead, based on the CPUC and CEC's own definitions of unbundled RECs, as well as the legislative history of SBX1-2 and its predecessor SB722, if an RPS-eligible generator has "a first point of interconnection with a California balancing authority, [has] a first point of interconnection with distribution facilities used to serve end users within a California balancing authority area, or [is] scheduled . . . into California without substituting electricity from another source," the generator's product falls within section 399.16(b)(1) without regard for whether the associated REC is subsequently sold with energy on a bundled basis or is sold apart from the energy on an unbundled basis.

There are also clear practical and policy benefits Treating RECs as eligible for PCC1 and PCC2 is consistent with the policy objectives of SBX1-2 to increase renewable generation in the state.[18] Including unbundled as well as bundled RECs within section 399.16(b)(1) would promote the development of generation facilities in California by increasing the options that a California RPS-eligible generator would have for taking full economic advantage of its project. Conversely, excluding the generator's product from section 399.16(b)(1) if the associated REC were sold on an unbundled basis would diminish the economic value of the project. This would thwart the programmatic objective of increasing "the quantity of California's electricity generated by renewable electrical generation facilities located in this state. . ."[19]

Concerns over verifying the PCC of RECs have been greatly overstated. Each REC issued by WREGIS carries information on the name and location of the generating facility that generated the REC.[20] Accordingly, it will be relatively straightforward to confirm whether a particular REC has been generated by a facility that meets the criteria of section 399.16(b)(1). This will pose no additional challenge compared to bundled resources, which will also involve the retirement of a REC in WREGIS.

### D. PCC of Behind-the-Meter Distributed Generation

While not addressed specifically in the Proposed Regulations, the Proposed Regulations' requirement to procure PCC1 as "bundled" means that all generation that is consumed onsite by a customer participating in a net energy metering (NEM) program would be classified as PCC3. This interpretation is contrary to the intent of SBX1-2 and the State policy of encouraging the expansion of DG. The Proposed Regulations should be amended to clarify that RECs associated with generation consumed by NEM customers may qualify as PCC1.

### E. Application of Section 399.16(d) Grandfathering

SBX1-2 includes a grandfathering provision intended to protect contracts and ownership agreements that were executed prior to June 1, 2010, from being penalized for not complying

[18] Ca. Pub. Res. Code § 25740.5(c).
[19] Ca. Pub. Res. Code § 25740.5(c).
[20] *See* Appendix B-1 ("Data Fields on a Certificate") to the WREGIS Operating Rules, December 2010, *available at* http://www.wregis.org/uploads/files/851/WREGIS%20Operating%20Rules%20v%2012%209%2010.pdf.

with the requirements of new portfolio content category structure implemented by section 399.16. The relevant section of the grandfathering provision provides:

> Any contract or ownership agreement originally executed prior to June 1, 2010, shall count in full towards the procurement requirements established pursuant to this article, if all of the following conditions are met:
>
> > (1) The renewable energy resource was eligible under the rules in place as of the date when the contract was executed. . . .[21]

The use of the term "count in full" is clearly intended to provide the broadest possible protection against adverse consequences for early actions. However, the Proposed Regulations have interpreted this phrase to result in a substantial penalty for POUs that took early actions to develop RPS generation. This penalty results because electricity products that should qualify towards a POU's PCC 1 obligations simply net out from the POU's total PCC requirements. This treatment results in a situation where a POU that already has more than 50 percent of its RPS procurement obligations met by generation meeting the requirements of PCC 1 would still need to over procure significant additional PCC 1 electricity products to meet the mandated balancing requirements. Considering the significant price difference between grandfathered resources versus those that are treated as PCC1 and PCC2 electricity products, this treatment also creates a situation where a POU is encouraged to sell off all of its grandfathered resources and contracts that would otherwise qualify for PCC1 or PCC2 because the buyer will obtain a product that can be used to meet the balancing requirement. Such actions would not create new demand for renewable resources but merely help clear regulatory hurdles. This type of incentive should not be read into the SBX1-2.

CMUA recommends that the Proposed Regulations be amended to permit an option to allow electricity products meeting the requirements of Section 399.16(d) to count towards a POU's PCC1 obligations or as PCC2 if the generation would otherwise meet the definition of a PCC1 or PCC2 electricity product.

CMUA also recommends that the "rules in place" language of section 399.16(d)(1), be interpreted to include the eligibility requirements of a POU's pre-SBX1-2 RPS program, so long as the generating facility is eligible under currently applicable statutory requirements and the current RPS-Eligibility Guidebook. This would allow a very narrow set of small hydro resources take advantage of the optionality that CMUA is advocating for. This is also consistent with the broad "rules in place" language used in the SBX1-2.

### F. 10-Year Limitation for Excess Procurement

Section 399.30(d)(1) permits a POU governing board to adopt rules allowing the POU "to apply excess procurement in one compliance period to subsequent compliance periods in the same manner as allowed for retail sellers pursuant to Section 399.13." Section 399.13(a)(6) includes a limitation applicable to IOUs: "contracts of less than 10 years in duration shall be subtracted from the calculation of excess procurement." The Proposed Regulations implement this

[21] Cal. Pub. Util. Code § 399.16(d).

section as follows:

> Electricity products procured under contracts of less than 10 years in duration shall be subtracted from the calculation of excess procurement, unless the electricity product counts in full in accordance with Section 3202 (a)(2).

The 10-year limitation is not applicable to POUs for two reasons. First, contract approval and contract term limitations are both key areas where there is a significant difference between IOUs and POUs. Unlike the CPUC, the CEC does not play a role in approving POU RPS contracts. Second, SBX1-2 places significant limitations on the IOU contract length. Section 399.13(a)(6) provides:

> In soliciting and procuring eligible renewable energy resources, each electrical corporation shall offer contracts of no less than 10 years duration, unless the commission approves of a contract of shorter duration.

Indeed, IOUs may only enter into short-term contracts pursuant to the strict limitations of section 399.13(b):

> A retail seller may enter into a combination of long- and short-term contracts for electricity and associated renewable energy credits. The commission may authorize a retail seller to enter into a contract of less than 10 years' duration with an eligible renewable energy resource, if the commission has established, for each retail seller, minimum quantities of eligible renewable energy resources to be procured through contracts of at least 10 years' duration.

POUs have no comparable limitations on contract length and the CEC does not have authority to limit a POU's contract length. In light of this distinction, it would be consistent with the broad "same manner" language of Section 399.30(d)(1) to not impose the 10-year limitation on POUs.

In addition to the legal arguments, there are significant practical problems with the 10-year limitation for POUs. It is common for POUs to use short-term contracts for both PCC2 and PCC3 procurement. Additionally, SBX1-2 has the unusual complication of setting procurement requirements based on current year retail sales. This will mean that many POUs may need to procure additional PCC1 electricity products at the very end of the compliance period to adjust for any unexpected increase in retail sales. These last minute purchases will often be short-term contracts and thus would not count toward excess procurement. This creates a situation where if a POU guesses incorrectly and over procures and retires PCC1 electricity products, that procurement loses all value.

This limitation also creates an inequitable situation where a POU may lose significant amounts of excess PCC1 procurement. This can be seen in the following example. Assume a POU had a 100 MWh RPS obligation in compliance period 1 and that POU procured: (1) 90 MWh of

long term PCC 1; (2) 25 MWh of short-term PCC 2; and (3) 25 MWh of short-term PCC 3. The POU would reasonably assume that it would be able to carry 40 MWh of excess PCC 1 forward into the next compliance period, however, under the current proposal, this procurement would be lost. If a POU cannot secure long-term PCC 2 and 3 contracts, this limitation will encourage the POU to either sell off its excess procurement or procure less in the first place.

Part of the difficulty in securing these long-term contracts comes from the size of the POUs relative to the size of the large IOUs. It is difficult to structure PCC 2 and PCC 3 contracts for 10-year terms in amounts appropriate for medium and smaller POUs. CMUA notes that this limitation on excess procurement does not impose a significant burden on the small and multi-jurisdictional IOUs because sections 399.17 and 399.18 permit these smaller IOUs to rely on low-cost, PCC3 RECs.

Therefore, CMUA recommends that the CEC delete all references to the 10-year limitation for excess procurement in the Proposed Regulations.

### G. Portfolio Content Category Rebalance

#### 1. Increasing Allowable PCC3 Procurement

Section 399.16(e) provides an optional compliance mechanism that permits a retail seller to apply to the CPUC for a reduction in the procurement content requirements of section 399.15(c). Section 399.30(c)(3) directs POU governing boards to adopt procurement requirements consistent with section 399.16, which includes adapting section 399.16(e) to the POU structure. The Proposed Regulations implement this provision in Section 3206(a)(4). However, the Proposed Regulations incorrectly restrict the application of section 399.16(e) to a reduction of PCC1 but not to allow an increase in the permissible procurement of PCC3.

The CPUC has implicitly recognized the need to allow a corresponding increase in PCC 3 in the event that PCC 1 is reduced. On April 24, 2012, the CPUC released a *Proposed Decision Setting Compliance Rules for the Renewables Portfolio Standard Program* (PD), which adopted a similar interpretation of section 399.16(e) as the CEC's interpretation in the Proposed Regulations:

> As an initial matter, we note that this section addresses "reduction" of a quantitative portfolio content requirement. Although it would have been possible for the legislative language to authorize the Commission to "change" or "alter" a quantitative portfolio content requirement, it did not do so. Therefore, this section allows the Commission to lower the requirement of a minimum level of procurement meeting the criteria of Section 399.16(b)(1), with the limitation on certain reductions expressed in the last sentence of the section. It does not authorize the Commission to *increase* the limit on procurement meeting the criteria of Section 399.16(b)(3).[22]

[22] PD at 74.

On May 14, CMUA filed Comments on the PD, refuting this interpretation. In response, the CPUC's final decision on RPS compliance rules ***removed*** the above the language limiting the applicability of section 399.16(e) to PCC1. The CPUC deferred this issue until a later Decision, but its removal of this language is indicative of its ultimate position. CMUA summarizes its arguments made to the CPUC below.

a. The Statutory Language Permits an Increase in PCC3 Procurement.

The CEC's Proposed Regulations do not provide a rationale for the determination that section 399.16(e) does not permit an increase in the permissible procurement of PCC3 products. The interpretation of the CPUC's PD hinged on the use of the word "reduction." This is an inaccurate reading of section 399.16(e), which uses the terms "reduction" and "reduce" in a very broad sense, providing: "[t]he commission may reduce a procurement content requirement of subdivision (c). . . ." The clear intent and meaning of this phrase is to allow the CPUC to lessen the burden of the procurement content requirements set forth in section 399.16(c).

Interpreting the term "reduction" as strictly limited to ***lowering*** the percentage obligations found in section 399.16(c) is in conflict with the structure of the entirety of the balancing requirements contemplated in section 399.16. There is no percentage obligation associated with PCC 2,[23] so applying this language to this category of electricity product would be meaningless. Section 399.16(c)(2) provides a maximum level of procurement for PCC 3,[24] so a reduction in this numerical amount would serve to penalize the retail sellers. This would lead to the irrational conclusion that this alternate compliance mechanism was intended to provide the CPUC with the authority to make the requirements of SBX1-2 more burdensome.

Such an interpretation is also in conflict with the third sentences of section 399.16(e), which provides: "The [CPUC] shall not, under any circumstance, reduce the obligation specified in paragraph (1) of subdivision (c) below 65 percent for any compliance obligation after December 31, 2016." In this case, the Legislature very clearly did intend to impose a limit specific to only PCC1. Rather than referring generally to the procurement content requirements of subdivision (c), the statute specifically references the portion of subdivision (c) that provides the PCC1 requirements, paragraph 1.[25] This demonstrates that the Legislature knew how to limit section 399.16(e) to PCC1. If the Legislature had intended section 399.16(e) to be restricted to lowering PCC1 obligations, then it would have been written as follows:

[23] Cal. Pub. Util. Code § 399.16(c)(3) ("Any renewable energy resources contracts executed on or after June 1, 2010, not subject to the limitations of paragraph (1) or (2), shall meet the product content requirements of paragraph (2) of subdivision (b).").

[24] *Id.* § 399.16(c)(2) ("Not more than 25 percent for the compliance period ending December 31, 2013, 15 percent for the compliance period ending December 31, 2016, and 10 percent thereafter of the eligible renewable energy resource electricity products associated with contracts executed after June 1, 2010, shall meet the product content requirements of paragraph (3) of subdivision (b).").

[25] *Id.* § 399.16(c)(1) ("Not less than 50 percent for the compliance period ending December 31, 2013, 65 percent for the compliance period ending December 31, 2016, and 75 percent thereafter of the eligible renewable energy resource electricity products associated with contracts executed after June 1, 2010, shall meet the product content requirements of paragraph (1) of subdivision (b).").

> A retail seller may apply to the [CPUC] for a reduction of a procurement content ~~requirement~~obligation specified in paragraph (1) of subdivision (c). The [CPUC] may reduce a procurement content ~~requirement~~obligation specified in paragraph (1) of subdivision (c) to the extent the retail seller demonstrates that it cannot comply with that subdivision because of conditions beyond the control of the retail seller as provided in paragraph (5) of subdivision (b) of Section 399.15. The [CPUC] shall not, under any circumstance, reduce the obligation specified in paragraph (1) of subdivision (c) below 65 percent for any compliance obligation after December 31, 2016.

The Legislature deliberately used different statutory language than what is provided above. The clear meaning of the statutory language is that the CPUC is empowered to reduce the burden of section 399.16(c). Pursuant to this clear meaning, the CPUC has the authority to increase the allowable procurement of PCC 3 electricity products. Consistent with section 399.30(c)(3), the governing board of a POU is similarly empowered.

b. The Intent of SBX1-2 Supports an Interpretation of Section 399.16(e) that Permits an Increase of PCC 3 Procurement.

There is a clear and broadly used rule of statutory construction, which provides that courts:

> must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.[26]

In determining the Legislature's intent in adopting section 399.16(e), it is important to look at the context of that section. Key to understanding section 399.16(e) is section 399.15(b)(5), which gives the CPUC the authority to waive enforcement of the RPS requirements if a retail seller demonstrates that one of various conditions prevented it from complying and was beyond its control. These conditions include: (1) inadequate transmission capacity; (2) permitting, interconnection, or other problems resulting in delay; (3) lack of adequate supply of eligible RPS resources; or (4) unanticipated curtailment by a balancing authority. This optional compliance mechanism allows the CPUC to ***completely excuse*** a retail seller from its compliance obligations if it met one of these requirements. Section 399.16(e) is directly related to this limitation because relief under section 399.16(e) is available to a retail seller to the extent that one of the conditions in section 399.15(b)(5), highlighted above, prevented the retail seller from complying with section 399.16(c).

It is in this context that the purpose of section 399.16(e) is clear. This section serves as an intermediate optional compliance mechanism for a utility that meets one of the conditions of section 399.15(b)(5) but where the utility wishes to comply to the extent possible, rather than simply seeking a full exemption. Unlike section 399.15(b)(5), section 399.16(e) still requires the utility to fully comply with the procurement quantity requirements of SBX1-2. It is clear then

[26] *See* Torres v. Parkhouse Tire Serv., Inc., 26 Cal. 4th 995, 1003 (2001).

that any significant limitation on a utility's ability to rely on section 399.16(e) would only result in the utility fully relying on section 399.15(b)(5) and, therefore, being excused from any enforcement for noncompliance.

Therefore, this is not a matter of increasing PCC3 procurement at the expense of the other two categories, but rather increasing PCC3 procurement rather than fully waiving enforcement of the compliance requirements. The result of this interpretation could very well mean less procurement of renewable energy, a result clearly at odds with the intent of SBX1-2. In this instance, the CEC's Proposed Regulations should follow the rationale that has been discussed at the CPUC and remove the language limiting the applicability of section 399.16(e) to reducing PCC1 obligations.

### H. Portfolio Content Category Rebalance Due to Cost Limitations

POUs should be able to utilize the provisions of section 3206(a)(4) in conjunction with the delay of timely compliance and exceeding cost limitations for renewable expenditures. The pre-rulemaking drafts of the CEC's draft RPS Regulations specified that a POU may use the PCC rebalance due to procurement expenses exceeding the POU's adopted cost limitations. While this option is not specified for IOUs, it is consistent with the flexibility provided to POU governing boards and also reflects the differing regulatory structures between POUs and IOUs. CMUA supports this flexibility to allow POUs to monitor costs, so they do not become overly burdensome on ratepayers.

### I. Executive Director Review

Throughout this regulatory process, CMUA has advocated for a formal or informal process for a POU to receive early input from the CEC regarding the adopted optional compliance measures. Such an early indication is crucial because of the significant time gap between when a POU would be relying on an optional compliance rule and when a complaint for noncompliance would be issued and acted upon by the CEC. The CPUC-jurisdictional entities are not subject to this substantial delay because the CPUC's process will likely function on a shorter timeframe.

The Proposed Regulations include a process where a POU may submit an adopted optional compliance rule to the CEC Executive Director to review for consistency with the statute. CMUA appreciates this proposal and believes that it is a step in the right direction. However, as proposed, CMUA cannot support this proposal because it presumes a degree of jurisdiction that exceeds the authority granted to the CEC by SBX1-2. The Proposed Regulations provide:

> A POU may request the Executive Director of the Commission to review any rule or rule revision adopted under this section 3206 to determine its consistency with the requirements of Public Utilities Code section 399.30. The Executive Director shall make a determination, to the extent reasonably possible, within 120 days of receipt of a complete request for review. A complete request for review shall include the rule or rule revision and all reports, analyses, findings, and any other information upon which the POU relied in adopting the rule or rule revision. **The**

> **Executive Director may request additional information from the POU or solicit information from the public in order to make a determination.** Failure of the Executive Director to make such determination within 120 days of receipt of the complete request for review shall not be deemed a determination that such rule or rule revision is consistent with the requirements of Public Utilities Code section 399.30.[27]

CMUA and its members are fully committed to an open and public process for the development and adoption of RPS related decisions. Indeed, the POU Procurement Plans and Enforcement Programs have been and will be adopted at public meetings with opportunity for public comments. Further, the governing board members that adopt these Optional Compliance Rules are publicly elected officials that are directly accountable to their ratepayers.

However, as described above, the CEC's role in reviewing a POU's optional compliance rule is solely to determine consistency with the statutory requirements. Where there is discretion, it is fully within the authority of the POU governing board to make its own reasoned decision. No additional information is needed for the Executive Director to make this determination than the process followed by the POU, the ultimate rule adopted, and the information in the POU request for review. The scope of the Executive Director review must be limited to the record presented by the requesting POU. Any discussion of the reasonability of a POU governing board's actions exceeds the statutory role of the CEC.

### J. Application of Section 399.18 to Small POUs

The Proposed Regulations do not apply the section 399.18 exemption to POUs. POUs that are similarly situated to IOUs that meet section 399.18(a)(1) should be eligible for the same exemption from section 399.16 requirements. Section 399.18 provides:

> (a) 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.
>
> (b) 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 399.16, provided that both of the following conditions are met:

[27] (emphasis added).

(1) The electrical corporation or its successor participates in, and complies with, the accounting system administered by the Energy Commission pursuant to subdivision (b) of Section 399.25.

(2) The Energy Commission verifies that the electricity generated by the facility is eligible to meet the requirements of Section 399.15.

Throughout the regulatory process, CMUA has supported an interpretation of SBX1-2 that would apply this section to POUs that are similarly situated to the electrical corporations covered by section 399.18(a)(1). Such an application, would allow these small POUs to adopt procurement requirements consistent with the exemption from section 399.16 found in section 399.18(b). This would provide a reasonable accommodation to the smallest POUs consistent with the relief provided to the small IOUs.

### K. Same Calendar Year Requirement

The Proposed Regulations require that substitute energy in a PCC2 firmed and shaped contract "must be scheduled into the California balancing authority within the same calendar year as the electricity from the RPS-certified facility is generated."[28] This requirement should be amended to accommodate current industry practice, which includes adjustments after a calendar year has passed, because the ultimate obligation of the delivering party is not known until the end of the last hour on December 31.

### L. In-State Substitute Electricity

Section 3203(b)(2)(A) of the Proposed Regulations require that, in a firmed and shaped contract, "[t]he first point of interconnection to the WECC transmission grid for both the eligible renewable energy resource and the resource providing the substitute electricity must be located outside the metered boundaries of a California balancing authority area." There is no statutory restriction that requires that the substitute energy must be located outside of a California BA. Therefore, this limitation should be deleted from the regulations.

Additionally, section 3203(b)(2)(C) requires that the contract or ownership agreement for the electricity from the substitute resource is executed by the governing board or other authority, as delegated by the POU governing board, at the same time or after the contract or ownership agreement for electricity products from the eligible renewable energy resource is executed. For consistency with prior sections, this section should be revised to state:

> The contract or ownership agreement for the electricity from the <u>resource providing the</u> substitute <u>electricity</u> ~~resource~~ is executed by the governing board other authority, as delegated by the POU governing board, at the same time or after the or contract or ownership agreement for electricity products from the eligible renewable energy resource is executed.

[28] Proposed Regulations at Section 3203(b)(2)(D).

## M. PCC1 Scheduling Into a California BA

The Proposed Regulations require at least hourly scheduling to claim PCC1 for electricity products from a resource that is scheduled into a California BA without substituting electricity from another source. The Proposed Regulations provide that only renewable generation up to the amount of the hourly schedule would be classified as PCC1. Any renewable generation that exceeds the scheduled quantity would be classified as either PCC2 or PCC3. This requirement of the Proposed Regulations is based on a faulty interpretation of section 399.16(b)(1)(A) and should be deleted.

CMUA is deeply concerned with the Proposed Regulations requirement for at least hourly scheduling to claim PCC1 for electricity products from a resource that is scheduled into a California BA without substituting electricity from another source. The Proposed Regulations provide that only renewable generation up to the amount of the hourly schedule would be classified as PCC1. Any renewable generation that exceeds the scheduled quantity would be classified as either PCC2 or PCC3. This requirement of the Proposed Regulations is based on a faulty interpretation of section 399.16(b)(1)(A) and should be deleted.

### 1. Hourly Tracking is Not Mandated by SBX1-2

Section 399.16(b)(1)(A) describes the requirements for this subcategory of PCC1:

> are scheduled from the eligible renewable energy resource into a California balancing authority without substituting electricity from another source. The use of another source to provide real-time ancillary services required to maintain an hourly or subhourly import schedule into a California balancing authority shall be permitted, but only the fraction of the schedule actually generated by the eligible renewable energy resource shall count toward this portfolio content category.

This statutory provision permits a resource that is located outside of a CBAA to qualify for PCC1 if that resource is scheduled into a CBAA. Unlike a PCC2 resource, which relies on energy from a substitute source, this PCC1 resource cannot use substitute energy. Despite this limitation on substitute energy, the statute does permit ancillary services to be provided by another source, although the ancillary services are not counted as RPS eligible. Accordingly, SBX1-2 creates two essential limitations: (1) no use of substitute energy; and (2) generation beyond the schedule amount associated with ancillary services used to maintain an hourly or subhourly schedule will not qualify as RPS-eligible. Neither of these limitations requires hourly tracking of schedules. In fact, SBX1-2 does not mandate that a utility track and compare metered generation in each individual hour against the schedule and then re-categorize any metered generation exceeding the hourly schedule into PCC2 or PCC3, and the verification process should not require it either. Because it is not clear that such metered generation in excess of an hourly schedule would qualify for PCC2, it is highly likely that such “excess generation” would fall into PCC3, unnecessarily increasing costs to consumers in California.

### 2. Hourly Tracking is Unreasonably Burdensome

The Proposed Regulations require POUs to track each hour of generation would impose a severe administrative burden on this subcategory of PCC1 electricity products because existing software for tracking transactions, both at the utilities and in WREGIS, is not set up for this level of specificity. This burden is not required by statute. Further, it is a burden far in excess of the requirements of any other subcategory of PCC1 procurement, and is a burden that outweighs any potential benefits. CMUA recommends that CEC staff continue to discuss these matters with CMUA's individual members so that these burdens are fully understood.

### N. 10-Day Cure Period

The Proposed Regulations permit a POU to cure incorrect or incomplete reports within 10 business days. CMUA appreciates this new provision and believes that it is a necessary change to the regulations. This is an issue that was not extensively discussed during the regulatory process and CMUA believes that additional consideration is required.

CMUA believes that 10 business days is insufficient under the SBX1-2 structure because the PCC requirements have created a substantially more complicated reporting requirement. It is likely that information that a POU would need to access, review, and correct would be in the possession of a third party. Therefore, the POU may be constrained to ability of a separate entity that is not subject to fines to respond in a timely manner.

CMUA recommends that the CEC allow for a more collaborative process where a POU would work with the CEC to provide an updated report in a timely manner. CMUA recommends the following change be made to the Proposed Regulations:

> If the Executive Director determines a report submitted by a POU pursuant to this section is incorrect or incomplete, he or she shall issue a written notice to the POU specifying what information is missing or needs to be corrected in the report. ~~If a~~ The POU shall contact ~~submits the missing or correct information to~~ the Commission within ten (10) business days of receipt of such notice and provide target date for submitting the missing or corrected information, not to exceed 60 days from the receipt of the notice. If the POU submits the missing or corrected information by the target date, the POU's initial failure to submit a complete and correct report shall not be processed as a separate violation under these regulations. Written notices issued pursuant to this subdivision may include email or written communications.

### O. Definition of Retail Sales

CMUA appreciates the addition of a definition of "retail sales" to the regulations. The proposed definition builds off of, and is consistent with, the common definition of a "retail sale" as a sale from the POU to a third-party under a tariff or specific offer and excludes energy used by the POU and its affiliates such as for its own use and water pumping operations. The proposed definition of retail sales therefore parallels the definition of a POU's retail sales that are reported under the CEC's Power Source Disclosure (PSD) requirements. This will allow POUs to develop consistent data for both RPS and PSD compliance reporting. The definition of

retail sales is also consistent with the CEC's Emissions Performance Standards (EPS) regulations, which only apply to retail sales. If a POUs method for determining retail sales is consistent with the CEC's definition, it should be deemed accepted by the CEC as a reasonable methodology.

### P. Procurement Plan

Section 3205(a)(1) states that, "within 60 calendar days of the effective date of these regulations, each POU shall adopt a renewable energy resources procurement plan detailing how the POU will achieve its RPS procurement requirements for each compliance period . . . ."

The CEC should make it clear that if a POU has already submitted a renewable energy resource procurement plan consistent with SBX1-2, an additional submittal should not be required.

### Q. Compliance Reporting

CMUA recommends that the CEC streamline the reporting process with other mandatory reports (e.g., AB 162), to minimize the various reporting requirements already in place.

## II. CONCLUSION

CMUA appreciates this opportunity to provide these comments to the CEC on the Proposed RPS Regulations. CMUA asks that the CEC consider our recommendations.

Sincerely;

Tony Andreoni, P.E.
Director of Regulatory Affairs