



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE  
STATE OF CALIFORNIA

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Order Instituting Rulemaking to Develop )  
Additional Methods to Implement the California )  
Renewables Portfolio Standard Program. )  
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Rulemaking 06-02-012  
(Filed February 16, 2006)

**APPLICATION OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) FOR  
REHEARING OF DECISION 11-01-025**

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Pursuant to Public Utilities Code Section 1731(b) and Rule 16.1 of the California Public Utility Commission’s (the “Commission” or “CPUC”) Rules of Practice and Procedure, Southern California Edison Company (“SCE”) respectfully submits this Application for Rehearing (“Application”) of Decision (“D.”) 11-01-025, entitled “Decision Resolving Petitions for Modification of Decision 10-03-021 Authorizing Use of Renewable Energy Credits for Compliance With the California Renewables Portfolio Standard and Lifting Stay and Moratorium Imposed by Decision 10-05-018” (the “Decision”), issued January 14, 2011.

As explained below, the Decision is contrary to law because it exceeds the Commission’s jurisdiction by attempting to redefine Renewables Portfolio Standard (“RPS”) delivery and eligibility requirements established by the California Energy Commission (“CEC”). The Decision also violates the Commerce Clause of the United States Constitution. Finally, the Decision conflicts with statutes that require all Commission-jurisdictional load-serving entities (“LSEs”) to be subject to the same terms and conditions with respect to the RPS program. Accordingly, the Decision is unlawful and must be modified. SCE hereby reserves the federal claims raised in this Application for decision by a federal court in accordance with *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461 (1964).

## I.

### **BACKGROUND AND SUMMARY**

In D.08-08-28, the Commission defined a renewable energy credit (“REC”) for purposes of the State’s RPS program as:

a certificate of proof, issued through the Western Renewable Generation Information System, that one megawatt-hour of electricity was generated by an RPS-eligible renewable energy resource and delivered for consumption by California end-use retail customers. A REC includes all renewable and environmental attributes associated with the production of electricity from the eligible renewable energy resource, including any avoided emission of pollutants to the air, soil or water; any avoided emissions of carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, or any other greenhouse gases that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, to contribute to the actual or potential threat of global climate change; and the reporting rights to these avoided emissions, such as Green Tag reporting rights. . . .<sup>1</sup>

As the Commission has explained, unbundled RECs enable the renewable attributes of energy produced by eligible renewable technologies to be transferred from the renewable generator to one LSE, while the energy is delivered to another purchaser.<sup>2</sup> However, once this transfer occurs, claim over the attributes may not be resold.<sup>3</sup> Tradable RECs (“TRECs”)<sup>4</sup> are distinguishable from unbundled RECs in that TRECs are not only unbundled from the energy sold, but they may be transferred to any third party, not just an obligated LSE, and they may be resold after the initial sale.<sup>5</sup>

The RPS statute authorizes the Commission to allow the use of RECs for RPS purposes.<sup>6</sup> It also provides the Commission with discretion to “limit the quantity of renewable energy

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<sup>1</sup> D.08-08-028 at 44-45 (OP 1). The RPS legislation also has a definition of a REC. Cal. Pub. Util. Code § 399.12(h).

<sup>2</sup> D.06-10-019 at 33.

<sup>3</sup> *Id.*

<sup>4</sup> This Application refers to unbundled and tradable RECs as either “RECs” or “TRECs.”

<sup>5</sup> D.06-10-019 at 33-34.

<sup>6</sup> Cal. Pub. Util. Code § 399.16.

credits that may be procured unbundled from electricity generation by any retail seller, to meet the requirements of [the RPS statute].”<sup>7</sup> Accordingly, for the past several years, the Commission has considered whether, and to what extent, RECs “may be procured unbundled from electricity generation.”<sup>8</sup>

During the years that the authorization of RECs was pending at the Commission, however, the proceeding veered from that goal. On March 11, 2010, the Commission approved D.10-03-021, which authorizes the procurement and use of TRECs for compliance with California’s RPS program. Unfortunately, instead of authorizing TRECs as contemplated by the RPS statute, contrary to law, D.10-03-021 reclassifies most out-of-state bundled renewable transactions (including existing contracts) as “REC-only” transactions, and imposes a TREC usage limit of 25% of the annual procurement target (“APT”) and a \$50/TREC price cap for the three large investor-owned utilities (“IOUs”), but not electric service providers (“ESPs”), community choice aggregators (“CCAs”), or small utilities.

On April 12, 2010, SCE, Pacific Gas and Electric Company, and San Diego Gas & Electric Company (collectively, the “Joint Utilities”) filed a Joint Petition for Modification of D.10-03-021. On April 15, 2010, the Independent Energy Producers Association (“IEP”) also filed a Petition for Modification of D.10-03-021. That same day, the Joint Utilities filed a timely Application for Rehearing of D.10-03-021. That Application for Rehearing of D.10-03-021 argues that D.10-03-021 is unlawful because it exceeds the Commission’s jurisdiction by attempting to redefine RPS delivery and eligibility requirements established by the CEC, violates the Commerce Clause of the United States Constitution, and conflicts with statutes that require all Commission-jurisdictional LSEs to be subject to the same terms and conditions with respect to the RPS program. Timely Applications for Rehearing of D.10-03-021 were also filed on April 15, 2010 by the Center for Energy Efficiency and Renewable Technologies (“CEERT”), TransAlta Corporation (“TransAlta”), and NaturEner USA, LLC (“NaturEner”).

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<sup>7</sup> *Id.* § 399.16(a)(7).

<sup>8</sup> *Id.*

On May 6, 2010, the Commission stayed D.10-03-021 pending resolution of the Petitions for Modification of that decision filed by the Joint Utilities and IEP.<sup>9</sup> The Commission also placed a temporary moratorium on Commission approval of any future contracts that would be defined under D.10-03-021 as REC-only transactions.<sup>10</sup>

In the Decision, the Commission ruled on the Petitions for Modification of D.10-03-021 filed by the Joint Utilities and IEP. Except for one technical correction to D.10-03-021, the Commission denied the Petitions for Modification.<sup>11</sup> The Decision retains D.10-03-021's reclassification of most out-of-state bundled renewable transactions as "REC-only" transactions.<sup>12</sup> The Decision also maintains the 25% TREC usage limit and \$50/TREC price cap for the IOUs, and extends the expiration dates for such usage limit and price cap from December 31, 2011 to December 31, 2013.<sup>13</sup> Moreover, the Decision does not impose the same TREC usage limit and price cap applied to the IOUs on ESPs, CCAs, or small utilities. The Decision states that the assigned Commissioner in R.08-08-009 should take up the task of filling in the RPS rules for CCAs, including whether the TREC usage limit and price cap should be applied to CCAs.<sup>14</sup> Through a separate decision, the Commission also imposed the 25% TREC usage limit, but not the \$50/TREC price cap, on ESPs.<sup>15</sup> Finally, the Decision dissolves the stay of D.10-03-021 and the temporary moratorium on Commission approval of certain REC-only transactions imposed by D.10-05-018.<sup>16</sup>

The Commission has not yet ruled on the Applications for Rehearing of D.10-03-021 filed by the Joint Utilities, CEERT, TransAlta, and NaturEner. SCE files this Application to reiterate that the legal defects of D.10-03-021 are not remedied by the Decision. Accordingly, like D.10-03-021, the Decision is unlawful and must be corrected.

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<sup>9</sup> D.10-05-018 at 8 (OP 1).

<sup>10</sup> *Id.* at 8 (OP 2).

<sup>11</sup> Decision at 35 (OP 1-2).

<sup>12</sup> *Id.*, Appendix A at 11 (OP 6-7).

<sup>13</sup> *Id.* at 44 (OP 4.L-4.M).

<sup>14</sup> *Id.* at 32.

<sup>15</sup> *See* D.11-01-026.

<sup>16</sup> Decision at 48 (OP 6-7).

Despite the Legislature’s explicit delegation of authority in the RPS statute between the Commission and the CEC, and despite the Commission’s own recognition of the CEC’s exclusive jurisdiction over the determination of RPS eligibility and delivery,<sup>17</sup> the Decision reclassifies most out-of-state *bundled* procurement as “REC-only,”<sup>18</sup> declares that the energy the CEC deems “delivered” does not actually serve California load,<sup>19</sup> and overrules the CEC’s determination that such bundled purchases are RPS-eligible if the “REC-only” transactions exceed a certain percentage of sales. Importantly, the Decision’s limitations on the use of REC-only transactions apply only to IOUs and ESPs, and not to any other LSEs.<sup>20</sup> The Commission further adopts a price cap of \$50 per TREC, which is applicable only to IOUs.<sup>21</sup> All of these aspects of the Decision violate applicable state law.

The Decision’s counterintuitive definition of a REC-only transaction stands in stark contrast to the Commission’s prior decisions and practice, in which a REC-only transaction was one in which the LSE purchased solely the renewable attributes of energy produced by an eligible generator, and not the energy.<sup>22</sup> A bundled transaction was previously one in which the LSE purchased both the renewable attributes and the energy.<sup>23</sup> These definitions are straightforward and consistent with both the RPS statute and the CEC’s implementation of that statute.

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<sup>17</sup> D.10-03-021 at 15, 24 n.47, 30.

<sup>18</sup> Decision, Appendix A at 5 (COL 10) (“In order to maximize the benefit California consumers receive from the procurement of RPS-eligible energy and of TRECs, all procurement that does not meet the Commission’s criteria for classification as bundled RPS transactions should be classified as REC-only transactions. Transactions in which RECs and energy are procured from RPS-eligible generators for which the first point of interconnection with the WECC interconnected transmission system is in a California balancing authority area, or transactions using dynamic transfer arrangements with a California balancing authority, should be considered bundled procurement for RPS compliance purposes. All other RPS procurement transactions should be considered REC-only at this time.”).

<sup>19</sup> Compare CEC Renewables Portfolio Standard Eligibility Guidebook (“CEC Eligibility Guidebook”), CEC-300-2010-007-CMF, at 36-40 (Fourth Edition, January 2011) with Decision, Appendix A at 11 (OP 6-7).

<sup>20</sup> Decision, Appendix A at 14 (OP 17); D.11-01-026 at 28 (OP 3).

<sup>21</sup> *Id.*, Appendix A 16 (OP 20).

<sup>22</sup> As noted above, the Commission previously defined an “unbundled REC” as one in which a generator sells energy to one LSE and the RECs to another. D.06-10-019 at 33-34.

<sup>23</sup> See, e.g., Res. E-4128, Res. E-4192, Res. E-4204, Res. E-4216, Res. E-4244, Res. E-4253, Res. E-4262, Res. E-4264, and Res. E-4293.

The Decision up-ends the existing regulatory structure with no justification for its strained and novel definition of REC-only procurement. By limiting the availability of most out-of-state RPS procurement, the Decision significantly narrows the diversity of procurement options available to IOUs and ESPs. This discriminatory burden on interstate commerce violates the Commerce Clause of the United States Constitution.

In adopting the Decision, the Commission usurped the CEC's exclusive jurisdiction over the deliverability requirements for RPS-eligible transactions, violated the Commerce Clause, and contravened statutory requirements that all LSEs be subject to the same conditions under the RPS program. Therefore, the Decision must be modified to correct these legal errors.

## II.

### **THE DECISION EXCEEDS THE SCOPE OF THE COMMISSION'S JURISDICTION**

Public Utilities Code Section 399.13 provides that the CEC shall certify eligible renewable energy resources that it determines meet the criteria for delivery of electricity into California.<sup>24</sup> The CEC has exercised its jurisdiction under this statute by issuing guidance to determine whether a generation facility is an "eligible renewable energy resource" and whether energy from such a resource is "delivered" into the California grid.<sup>25</sup> More specifically, the CEC determined that bundled out-of-state procurement in which the energy is firmed and shaped using specified structures and within specified timeframes is properly "delivered" for purposes of RPS eligibility.<sup>26</sup>

The Commission acknowledged that the RPS statute gives the CEC, and not the Commission, "the responsibility to determine RPS eligibility, including establishing the criteria for delivery of RPS-eligible electricity."<sup>27</sup> Nevertheless, in the Decision, the Commission invaded the CEC's jurisdiction over the determination of delivery requirements for RPS-eligible

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<sup>24</sup> Cal. Pub. Util. Code § 399.13(a). *See also* Cal. Pub. Res. Code § 25741(a).

<sup>25</sup> *See* CEC Eligibility Guidebook.

<sup>26</sup> *Id.* at 36-40 (defining delivery for purposes of the RPS Program to include firming and shaping structures).

<sup>27</sup> D.10-03-021 at 30 (citing Cal. Pub. Util. Code § 399.13) (these portions of D.10-03-021 were retained in the Decision).

electricity by reclassifying out-of-state bundled transactions that meet the CEC's lawfully-adopted eligibility and deliverability requirements as REC-only transactions.

In particular, the RPS legislation specifically defines "delivery" for RPS purposes to mean that the electrical output of an RPS-eligible facility "is used to serve end-use retail customers located within the state."<sup>28</sup> Thus, the determination as to whether RPS-eligible energy serves California load is part of the definition of "delivery," and is therefore a determination that rests within the jurisdiction of the CEC. As noted above, the CEC determined that out-of-state renewable energy that is firmed and shaped using structures compliant with the CEC Eligibility Guidebook serves California load, and is accordingly "delivered" for RPS purposes.

The Decision usurps the CEC's authority, however, and finds that these same transactions are REC-only transactions that do not serve California load.<sup>29</sup> When coupled with the Commission's adoption of a 25% usage limit imposed on such transactions, the Decision effectively negates the CEC's statutorily-authorized determination that certain bundled transactions with out-of-state RPS-eligible generators meet RPS deliverability requirements.<sup>30</sup> The Decision renders those bundled out-of-state transactions in excess of the 25% cap ineligible for RPS purposes. This action violates the RPS statute and exceeds the jurisdiction of the Commission.<sup>31</sup>

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<sup>28</sup> Cal. Pub. Res. Code § 25741(a).

<sup>29</sup> Decision, Appendix A at 11 (OP 6-7). *See also* D.10-03-021 at 26-38 (these portions of D.10-03-021 were retained in the Decision).

<sup>30</sup> The Commission's assertion that the transactions it calls REC-only do not serve California load is itself legal error requiring modification of the Decision since it fails to defer to the CEC's prior determination, acknowledged by the Commission, that firming and shaping transactions that meet the CEC's definition of delivery do, in fact, result in valid imports of electricity onto the California grid. *See* D.10-03-021 at 27-29 (these portions of D.10-03-021 were retained in the Decision).

<sup>31</sup> In addition to usurping the CEC's jurisdiction under the RPS law, by limiting out-of-state bundled transactions for RECs and energy, the Decision exceeds the Commission's authority to limit RECs under the RPS statute. The RPS statute gives the Commission discretion to "limit the quantity of renewable energy credits that may be procured *unbundled from electricity generation*." Cal. Pub. Util. Code § 399.16(a)(7) (emphasis added). The Commission's limitation on procurement of out-of-state RECs that *are not* unbundled from electricity generation is contrary to the RPS statute.

### III.

#### **THE COMMISSION’S RECLASSIFICATION OF OUT-OF-STATE BUNDLED TRANSACTIONS AS REC-ONLY, MARRIED WITH A 25% LIMITATION AND PRICE CAP, VIOLATES THE COMMERCE CLAUSE**

The Commerce Clause provides that “Congress shall have the Power . . . to regulate Commerce . . . among the several States.”<sup>32</sup> “Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a ‘negative’ aspect that denies the States the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce.”<sup>33</sup> “This ‘negative’ aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”<sup>34</sup> Therefore, the Supreme Court has “interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.”<sup>35</sup>

The first step in analyzing whether a law violates the Commerce Clause is to determine whether it “regulates evenhandedly with only ‘incidental’ effects on interstate commerce, or discriminates against interstate commerce.”<sup>36</sup> Discrimination “simply means differential treatment of in-state and out-of-state economic interests that benefit the former and burden the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid.”<sup>37</sup> A law that does not discriminate “on its face” may nonetheless discriminate “in practical effect.”<sup>38</sup>

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<sup>32</sup> U.S. Constitution, Art. I, § 8, cl. 3.

<sup>33</sup> *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, 98, 114 S. Ct. 1345 (1994) (striking down as unconstitutionally burdensome on interstate commerce a surcharge on waste disposal that applied only to waste generated outside the state).

<sup>34</sup> *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 273, 108 S. Ct. 1803 (1988) (striking down an Ohio statute that provided a tax credit to fuel dealers for ethanol produced in Ohio or that came from states that grant reciprocal tax credit, exemption, or refund of Ohio-produced ethanol).

<sup>35</sup> *C&A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 390, 114 S. Ct. 1677 (1994).

<sup>36</sup> *Oregon Waste Systems, supra*, 511 U.S. at 99.

<sup>37</sup> *Id.*

<sup>38</sup> *Maine v. Taylor*, 477 U.S. 131, 138, 106 S. Ct. 2440 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 332, 336, 99 S. Ct. 1727 (1979)). See also *C&A Carbone, supra*, 511 U.S. at 394 (striking down a law that does not explicitly seek to regulate interstate commerce since it nonetheless does so by its practical effect).

The practical effect of the Decision is to discriminate against out-of-state production of renewable energy. Although the Commission contends that it has not used state-based classifications in defining bundled procurement,<sup>39</sup> the fact remains that a fungible product – the bundled purchase of RECs and energy from a CEC-certified generator in which the energy is delivered in accordance with both statutory law and the CEC’s implementing guidelines<sup>40</sup> – will now be treated differently based solely on whether that product is generated in or outside of California.<sup>41</sup> If energy from a bundled transaction is generated in California, it is preferentially included within the Commission’s definition of “bundled” transactions because it will almost certainly have its first point of interconnection with a “California balancing authority.”<sup>42</sup> Having automatically met the definition of a “bundled” transaction, all in-state generation will be eligible toward the RPS goals of LSEs without limitation or cap. If, on the other hand, energy from a bundled transaction is generated outside the state, it is automatically reclassified under the Commission’s definition of a “REC-only” transaction unless it is located so close to a California balancing authority border that it can tie in directly or the generator can “dynamically transfer” its energy into California.<sup>43</sup> Anything not deemed a “bundled” transaction is automatically reclassified as “REC-only,” and is discriminatorily subject to both the usage and price caps discussed above.<sup>44</sup>

Since the vast majority of out-of-state facilities will be unable to connect directly to the California grid, and because the Commission itself admits that dynamic transfers of intermittent renewable resources are not even available today,<sup>45</sup> these provisions result in one set of favorable

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<sup>39</sup> D.10-03-021 at 86 (these portions of D.10-03-021 were retained in the Decision).

<sup>40</sup> See Cal. Pub. Res. Code § 25741(a) (“Subject to criteria adopted by the [CEC], electricity generated by an eligible renewable energy resource may be considered ‘delivered’ regardless of whether the electricity is generated at a different time from consumption by a California end-use customer”); CEC Eligibility Guidebook at 36-40.

<sup>41</sup> As noted above, this redefinition of RPS eligibility and delivery is in direct conflict with state law and the CEC’s implementation of the RPS statute. Not only does the Decision unconstitutionally interfere with interstate commerce, but it exceeds the jurisdiction of the Commission in doing so.

<sup>42</sup> Decision, Appendix A at 11 (OP 7).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, Appendix A at 11 (OP 6-7), 14 (OP 17), 16 (OP 20).

<sup>45</sup> D.10-03-021 at 33.

rules for in-state producers and a second set of disincentives for out-of-state producers. Behind the window-dressing lies patent economic protectionism of in-state interests that manifests as discrimination against interstate commerce.

In anticipation of a Commerce Clause challenge, the Commission argued that it has not discriminated against interstate commerce because some out-of-state generators will likely be able to connect directly to a California balancing authority.<sup>46</sup> Contrary to the Commission's apparent misapprehension, however, a state law that is otherwise discriminatory does not survive strict scrutiny merely because it may benefit some out-of-state producers.<sup>47</sup> Moreover, to the extent the Commission implied that the magnitude of its discrimination may be reduced because some out-of-state producers will be able to tie in directly to the California grid, it again misreads the doctrine: "The volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination of whether a State has discriminated against interstate commerce."<sup>48</sup> Even the far-fetched argument that an in-state generator could theoretically connect to the grid outside of a California balancing authority and therefore be subject to the same caps does not justify discrimination since incidental burdens to in-state producers do not negate substantial obstructions to interstate commerce.<sup>49</sup> The simple fact remains that virtually *every* in-state renewable energy producer will be free from any price or usage cap, while *nearly all* out-of-state producers will be subject to those caps. The practical outcome of the Decision is discrimination against interstate commerce.<sup>50</sup>

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<sup>46</sup> *Id.* at 86-87 (these portion of D.10-03-021 were retained in the Decision).

<sup>47</sup> *New Energy, supra*, 486 U.S. at 274.

<sup>48</sup> *Wyoming v. Oklahoma*, 502 U.S. 437, 455, 112 S. Ct. 789 (1992) (emphasis in original).

<sup>49</sup> *C&A Carbone, supra*, 511 U.S. at 391.

<sup>50</sup> It is worth noting that even in the unlikely event that a court was to conclude that the Decision does not substantially discriminate against interstate commerce in effect, the incidental effects on interstate trade would still require reversal of the Decision if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Oregon Waste Systems, supra*, 511 U.S. at 99 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844 (1970)). In this regard, the Commission failed to identify any local benefits that accompany in-state bundled purchases that clearly exceed the burden imposed on interstate commerce. Rather, the Commission's purported rationale for its discrimination is to focus on energy that "serves California load," and it described the benefits that come from such services, but it did not adequately explain why energy that is firmed and shaped to meet the CEC's delivery definition does not similarly serve

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Once a state law is shown to discriminate against interstate commerce, the burden falls on the State to demonstrate that the law’s means and ends pass the “strictest scrutiny.”<sup>51</sup> Under this test, a discriminatory state law will survive only if the State demonstrates both that the statute “serves a legitimate local purpose,’ and that this purpose could not be served as well by available nondiscriminatory means.”<sup>52</sup> Thus, state regulations that “clearly discriminate against interstate commerce are routinely struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.”<sup>53</sup> For example, a discriminatory law adopted by Oklahoma to promote the state’s interest in ensuring a diverse fuel supply for its energy utilities was struck down by the Supreme Court as “an illegitimate means of isolating the State from the national economy.”<sup>54</sup>

The Decision cannot pass strict scrutiny. The Commission expressed three general reasons for a 25% limitation on out-of-state bundled transactions. First, the Commission raised concerns regarding the impact of such transactions on incentives for new renewable generation.<sup>55</sup> However, that rationale is belied by the fact that bundled procurement from *existing* in-state generators is unlimited while *new* out-of-state generation resulting from bundled procurement would be limited. Second, the Commission cited the goal of ensuring “meaningful diversification of the utilities’ energy portfolios.”<sup>56</sup> Since the Commission actually reduced the portfolio of RPS-eligible sources that may be used to meet the State’s RPS goal, this rationale is similarly illogical and has already been rejected by the courts as a justification for discrimination.<sup>57</sup> Finally, the Commission pointed to the value of the RPS program to California

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California load and provide the same benefits. See D.10-03-021 at 26-38 (these portions of D.10-03-021 were retained in the Decision).

<sup>51</sup> *Oregon Waste Systems, supra*, 511 U.S. at 101.

<sup>52</sup> *Maine v. Taylor, supra*, 477 U.S. at 138 (quoting *Hughes v. Oklahoma, supra*, 441 U.S. at 336).

<sup>53</sup> *New Energy, supra*, 486 U.S. at 274.

<sup>54</sup> *Wyoming v. Oklahoma*, 502 U.S. 437, 456-57, 112 S. Ct. 789 (1992) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627, 98 S. Ct. 2531 (1978)).

<sup>55</sup> D.10-03-021 at 43-44 (these portions of D.10-03-021 were retained in the Decision).

<sup>56</sup> *Id.* at 44 (these portions of D.10-03-021 were retained in the Decision).

<sup>57</sup> See *Wyoming v. Oklahoma, supra*, 502 U.S. at 456 (finding that Oklahoma’s goal of ensuring diversification of coal supplies did not justify a requirement that the state’s coal-fired electric generating plants burn a mixture of coal containing at least 10% of coal mined in-state).

ratepayers.<sup>58</sup> This rationale is inconsistent with the fact that out-of-state renewable resources may offer lower RPS costs,<sup>59</sup> as recognized by the Commission’s own staff.<sup>60</sup>

Nevertheless, even if that were not the case, the Commission’s focus on the “secondary” benefits to California ratepayers of in-state renewables development represents economic protectionism in the purest sense. Importantly, each of these goals could not only be met by measures that obstruct interstate commerce less significantly, but in fact, they could be better met by simply removing limits on out-of-state RPS procurement. Because the Decision discriminates substantially against interstate commerce and offers no legitimate interests unrelated to economic protectionism favoring in-state interests, it is invalid under the Commerce Clause.

#### IV.

### **THE COMMISSION’S ADOPTION OF DIFFERENT RPS RULES FOR DIFFERENT LSES VIOLATES CALIFORNIA STATUTES**

The Decision adopts a TREC usage limit and price cap applicable to IOUs, but does not apply the same limits to ESPs, CCAs, or small utilities.<sup>61</sup> In a separate decision, the Commission imposed the TREC usage limit, but not the TREC price cap, on ESPs; however, the Commission did not apply either of these restrictions to CCAs or small utilities.<sup>62</sup> The Commission’s adoption of RPS rules applicable to IOUs, but not other LSEs, violates California law.

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<sup>58</sup> D.10-03-021 at 43-44 (these portions of D.10-03-021 were retained in the Decision).

<sup>59</sup> See Ernest Orlando Lawrence Berkeley National Laboratory, Exploration of Resource and Transmission Expansion Decisions in the Western Renewable Energy Zone Initiative, at 52-53 (February 2010) (available at <http://eetd.lbl.gov/EA/EMP/reports/lbnl-3077e.pdf>) (using Western Renewable Energy Zone model and data to conclude that costs to implement a WECC-wide 33% target can be reduced by \$8 billion through the unrestricted use of unbundled RECs, which translates into an average renewable energy cost reduction of \$6/MWh).

<sup>60</sup> See 33% Renewables Portfolio Standard Implementation Analysis Preliminary Results at 19, 24 (June 2009) (noting that meeting 33% in a high out-of-state delivered case reduces costs of the RPS Program by 3.1% compared to a 33% reference case. Although unbundled RECs were not included in the high out-of-state reference case, that scenario did assume that firming and shaping delivery arrangements would be unlimited. The Decision renders that assumption invalid since it reclassifies shaping and firming deals as REC-only and subjects them to a cap); *id.* at 61 (Table 15) (notes that a focus on “Least-Cost Renewables” requires prioritizing procurement of out-of-state renewables facilitated through RECs).

<sup>61</sup> Decision, Appendix A at 14 (OP 17), 16 (OP 20).

<sup>62</sup> D.11-01-026 at 2, 16-19, 28 (OP 3).

Section 365.1(c) of the Public Utilities Code expressly provides that the Commission shall “[e]nsure that other providers are subjected to the *same requirements* that are applicable to the state’s three largest electrical corporations under any programs or rules adopted by the commission to implement . . . the renewables portfolio standard provisions of Article 16 (commencing with Section 399.11).”<sup>63</sup>

Public Utilities Code Sections 399.12(g)(2)-(3) further provide that:

(2) . . . The commission shall institute a rulemaking to determine the manner in which a community choice aggregator will participate in the renewables portfolio standard program subject to the *same terms and conditions* applicable to an electrical corporation.

(3) . . . The electric service provider shall be subject to the *same terms and conditions* applicable to an electrical corporation pursuant to this article.<sup>64</sup>

Section 380(e) of the Public Utilities Code is equally unambiguous:

Each load serving entity shall be subject to the *same requirements for resource adequacy and the renewables portfolio standard program that are applicable to electrical corporations pursuant to this section, or otherwise required by law, or by order or decision of the commission*. The commission shall exercise its enforcement powers to ensure compliance by all load-serving entities.<sup>65</sup>

Each of these statutory provisions expressly requires that the Commission adopt the *same* regulatory requirements for all LSEs with respect to the RPS program. “Same” is not an

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<sup>63</sup> Cal. Pub. Util. Code § 365.1(c) (emphasis added). The requirements of this section apply “[o]nce the commission has authorized additional direct transactions.” *Id.* The Commission fulfilled that condition and triggered the effectiveness of this provision by authorizing additional direct access transactions on March 11, 2010. Section 365.1(c) applies to ESPs. *See id.* at § 365.1(a).

<sup>64</sup> Pub. Util. Code § 399.12(g)(2)-(3) (emphasis added). Furthermore, small utilities are electrical corporations under the RPS statute, just like the IOUs. *See* Cal. Pub. Util. Code § 399.12(g)(1) (providing that electrical corporations as defined in Public Utilities Code Section 218 are retail sellers under the RPS law). *See also* D.09-09-045 at 25 (listing small utilities as electrical corporations affected by a prior RPS rulemaking); D.07-07-027 at 62 (OP 1) (listing small utilities as electrical corporations required to file tariffs to implement Public Utilities Code Section 399.20).

<sup>65</sup> Cal. Pub. Util. Code § 380(e) (emphasis added) This provision applies to both ESPs and CCAs. *See id.* at 380(j).

ambiguous term, and there is no ambiguity surrounding its use in these statutes.<sup>66</sup> The most basic principle of statutory construction requires that the Commission “must give effect to statutes according to the ordinary import of the language used in framing them. . . . If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.”<sup>67</sup> “It is a prime rule of construction that the legislative intent underlying a statute must be ascertained from its language; if the language is clear, there can be no room for interpretation, and effect must be given to its plain meaning.”<sup>68</sup>

The Commission’s adoption of unique RPS rules for IOUs, including a TREC usage limit that exempts CCAs and small utilities, and a TREC price cap that exempts ESPs, CCAs, and small utilities, violates the express statutory requirements that other LSEs be subject to the *same* RPS regulatory requirements as the State’s IOUs. The Commission’s failure to implement the plain language of the statutes requires reversal of the Decision unless it is modified to impose the same obligations on all LSEs.<sup>69</sup>

## V.

### CONCLUSION

As explained in the Joint Utilities’ Application for Rehearing of D.10-03-021, that decision is unlawful and must be modified. For all the foregoing reasons, the Decision does not cure the legal defects of D.10-03-021. Accordingly, because both D.10-03-021 and the Decision exceed the Commission’s jurisdiction, violate the Commerce Clause of the United States

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<sup>66</sup> Merriam-Webster defines “same” as “**1 a** : resembling in every relevant respect **b** : conforming in every respect —used with *as*, **2 a** : being one without addition, change, or discontinuance : IDENTICAL **b** : being the one under discussion or already referred to **3** : corresponding so closely as to be indistinguishable **4** : equal in size, shape, value, or importance —usually used with *the* or a demonstrative (as *that, those*) in all senses.” See <http://www.merriam-webster.com/dictionary/same>.

<sup>67</sup> *People v. Morris*, 46 Cal. 3d 1, 15, 249 Cal. Rptr. 119 (1988) (disapproved on other grounds in *In re Sassounian*, 9 Cal. 4th 535, 543-44 n.5, 37 Cal. Rptr. 2d 446 (1996)).

<sup>68</sup> *Gilliland v. Medical Bd. of California*, 89 Cal. App. 4th 208, 212, 106 Cal. Rptr. 2d 863 (2001) (quoting *O’Brien v. Dudenhoeffer*, 16 Cal. App. 4th 327, 332, 19 Cal. Rptr. 2d 826 (1993) (brackets omitted)).

<sup>69</sup> It does not save the Decision that the Commission plans to consider application of the TREC usage limit and the price cap to CCAs. Decision at 32. The Commission may not unilaterally delay or temporarily ignore the effectiveness of a statute.

Constitution, and violate California law requiring the same RPS rules for all LSEs, rehearing should be granted and the Decision should be modified.

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**CERTIFICATE OF SERVICE**

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of **APPLICATION OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) FOR REHEARING OF DECISION 11-01-025** on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

Transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

Executed this **14<sup>th</sup> day of February, 2011**, at Rosemead, California.

/s/ Melissa A.S. Hernandez

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