BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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01/17/18
04:59 PM

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OPENING COMMENTS OF THE CALIFORNIA COMMUNITY CHOICE ASSOCIATION ON THE PROPOSED DECISION

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January 17, 2018

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In accordance with Rule 14.3 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, the California Community Choice Association ("CalCCA") respectfully submits the following comments on the December 28, 2017 *Proposed Decision of Commissioner Randolph Setting Requirements for Load Serving Entities Filing Integrated Resource Plans* ("Proposed Decision").

I. INTRODUCTION AND SUMMARY

CalCCA and Community Choice Aggregation ("CCA") programs, individually and jointly, have actively participated in this proceeding. CalCCA appreciates the significant efforts of Commission staff in developing the underlying plans and proposals supporting the Proposed Decision. CalCCA and its members wholeheartedly share the Commission's dedication to achieving California's greenhouse gas ("GHG") emissions reduction goals, as well as California's other environmental and system-reliability goals. The Commission can be assured that CCA programs will work collaboratively and cooperatively in fulfilling requirements associated with Integrated Resource Plans ("IRP").

CalCCA is very concerned, however, with the tone and characterizations set forth in the Proposed Decision. As written, the Proposed Decision greatly misconstrues fundamental positions advanced by CalCCA, and in doing so makes conclusions and proposes outcomes that

are more rigid, strident and extensive than necessary. The Proposed Decision characterizes CalCCA as objecting to "any" form of authority by the Commission, and states that CalCCA believes the Commission only has "rubber stamp" authority over CCA IRPs.[1] These characterizations are incorrect, and obscure reasonable outcomes that align with the concurrent jurisdictions and shared responsibilities. To be clear, CalCCA has not advocated for a "hands off" approach, but rather for an approach that recognizes and accommodates meaningful differences, and that applies principles of cooperation.

As CalCCA has stated repeatedly, CalCCA appreciates the important work given to the Commission with respect to IRP matters. The importance of the work and the appeal of central planning, however, do not demand or justify a one-size-fits-all outcome. As a legal matter, certain lines of demarcation and distinction must be acknowledged, and deference accorded to local governing boards as the Commission works to weave CCA programs into the overall fabric of the important IRP process. In this key and principal regard, the Proposed Decision errs by not harmonizing (or even acknowledging) statutory principles and directives supporting local CCA planning and procurement responsibilities. The Proposed Decision can and should be revised to reflect the concurrent jurisdiction and shared responsibilities. This can be accomplished without forsaking the important role the Commission plays with regard to CCA programs' IRPs. Contrary to the Proposed Decision's mischaracterizations, this is *not* an "either/or" proposition, but a "both/and" one.

II. COMMENTS

A. CalCCA Supports Key Aspects Of The Proposed Decision

CalCCA recognizes the significance of the Commission's task in establishing the IRP process, and appreciates the Commission's hard work in the IRP proceeding. CalCCA supports

[1] *See* Proposed Decision at 20-21.

key aspects of the Proposed Decision. For example, CalCCA agrees with the Proposed Decision's conclusion that there is no need to order near-term procurement.[2] As recognized by the Proposed Decision, the cost savings from tax credits are highly uncertain, and there is no general need for additional renewable resource procurement until 2026.[3] Further, CalCCA is encouraged by the Proposed Decision's recognition of the problematic nature of investor-owned utility ("IOU") procurement on behalf of departing load customers.[4] CalCCA strongly believes CCA programs should be allowed to select their own resources to the maximum extent possible, and should not be burdened by IOU procurement on their customers' behalf.

CalCCA also views several elements of the Proposed Decision's treatment of GHG targets as steps in the right direction.[5] As a general matter, CalCCA supports allowing load-serving entities ("LSE") the flexibility to choose between using a GHG benchmark or a GHG planning price in developing their individual IRPs.[6] However, a number of implementation issues need to be resolved. For instance, CalCCA is concerned that under the proposal, compliance will be judged based on the GHG planning price regardless of whether the benchmark or the planning price is used. CalCCA also believes that efficiency would be best-served if the CPUC revised the LSE-Specific GHG Emissions Benchmark Table to express the benchmarks in million metric tons ("MMT") CO2e / MWh, as opposed to MMT. In other words, the Commission should use an emissions intensity benchmark, not an emissions benchmark. CalCCA also supports the Proposed Decision's downward revision of the GHG planning price in the early years of IRP to better align with actual California Air Resources

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2 Proposed Decision at 81-83, 122-123 (Finding of Fact 10), 126 (Conclusion of Law 20).

3 Proposed Decision at 82.

4 Proposed Decision at 82-83.

5 All further statutory references are to the Public Utilities Code, unless otherwise noted.

6 Proposed Decision at 95, 123 (Finding of Fact 13), 127 (Conclusion of Law 23).

Board ("CARB") cap-and-trade prices.[7] In addition, CalCCA supports the Proposed Decision's preservation of LSEs' ability to use banked RPS procurement.[8] However, as discussed below, CalCCA has concerns regarding the Proposed Decision's treatment of Portfolio Content Category ("PCC")-2 renewable energy credits ("REC").

Finally, CalCCA supports using the upcoming IRP cycle as a test year. CalCCA looks forward to working with the Commission and stakeholders to refine the IRP process, and develop an appropriate way for the Commission to certify CCA IRPs in concert with local authority. In this regard, CalCCA asks the Commission to expressly state that the test year will be used to refine the IRP process so that it more accurately reflects principles of cooperation between the Commission and local CCA governing boards on various matters of concurrent jurisdiction and shared responsibilities.

B. The Proposed Decision Errs With Respect to Characterizing And Applying Concurrent Jurisdiction Principles

CalCCA shares the Commission's dedication to achieving California's GHG reduction and renewable energy goals. However, CalCCA believes that these goals must be achieved in a manner that is consistent with statute and respects the principle of CCA planning and procurement autonomy. CalCCA believes the Proposed Decision, as currently written, includes errors of law that unnecessarily obscure reasonable ways of accommodating and implementing concurrent jurisdictions. As noted above, this is not an either/or proposition, but a both/and one.

As a threshold matter, CalCCA urges the Commission to consider principles of comity and cooperation when interpreting its IRP jurisdiction over CCAs.[9] CalCCA recognizes that the

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[7] Proposed Decision at 95-96.

[8] Proposed Decision at 34.

[9] As highlighted above, while CalCCA has taken strong positions on certain jurisdictional positions, the Proposed Decision errs in finding that the sum and substance of CalCCA's arguments advocate for "rubber stamp" authority by the Commission. (*See* Proposed Decision at

Commission may be concerned about its ability to fulfill its duties with respect to GHG reduction goals. It appears that these concerns may be causing the Commission to assert jurisdictional statements that, while helpful for ensuring central planning and control, are at odds with the IRP statute and principles of comity and cooperation.

CalCCA requests that the Proposed Decision be revised to remove erroneous and unnecessary statements about the Commission's jurisdiction. Concurrent jurisdiction is involved, and CCA programs have repeatedly stated that they will fully cooperate with the Commission to *jointly* achieve GHG reduction goals in a positive, collaborative manner. This approach is consistent with principles of comity and cooperation – principles that are attendant in situations involving concurrent jurisdiction and shared responsibilities between public agencies. As such, the Proposed Decision should be revised to reflect these principles. Moreover, the Commission should use the test year to tease out and refine how these principles apply to specific CCA IRP submittals.

As required by Rule 14.3(c), CalCCA specifically addresses below certain legal errors in the current version of the Proposed Decision. In doing so, it is not CalCCA's intent to reargue or restate past arguments, and these comments are necessarily summary in nature. These legal errors flow from a common problem: a failure by the Commission to acknowleldge and accommodate the general jurisdiction that the Legislature has given CCA governing boards by the Legislature. Issues relating to how this general jurisdiction intersects with the Commission's jurisdiction are understandable, and should be addressed. But, the Proposed Decision's failure to properly recognize the general jurisdiction of local CCA governing boards and the failure to accommodate this general jurisdiction constitute legal error.

22.) The tone of these and other statements in the Proposed Decision are unfortunate, and do not reflect CalCCA's views regarding the Commission's important role with respect to CCA IRPs.

As a preliminary matter, CCA programs are not subject to the Commission's general jurisdiction. This statement is not intended to be dogmatic or inflammatory, but foundational insofar as it helps to support a proper understanding of how the concurrent jurisdictions are intended to coexist. The Commission has expressly stated that its jurisdiction over CCA programs is circumscribed and limited, attaching only to express statutory mandates applicable to CCA programs and to matters that would necessarily compromise or impact the IOU's service or rates to bundled customers.[10] With regard to CCA energy procurement activities, this principle is explicitly stated in Section 366.2(a)(5), which provides that: "a community choice aggregator shall be solely responsible for all generation procurement activities on behalf of the community choice aggregator's customers except where other generation procurement arrangements are expressly authorized by statute." Under this statute, each CCA program has full authority over its own procurement and procurement "activities" (including procurement planning) except where the Commission has been *expressly* granted jurisdiction over CCA procurement activities by statute.

These statutory foundations help interpret Sections 454.51 and 454.52. The Proposed Decision claims that the Commission's authority over CCA IRPs is, as a practical matter, the same as the Commission's broad authority to appove, deny, or modify IOU IRPs. In effect, the Proposed Decision states that there should not be any difference between IOU and CCA IRPs. The Proposed Decision also asserts that Section 454.52(b)(3) merely adds CCA board approval as an *additional* step to the IRP process, a step that does not "subjugate the Commission's

[10] *See, e.g.,* D.05-12-041 at 8-12. *See also Los Angeles Met. Transit Authority v. Public Utilities Com,* (1959). 52 Cal. 2d 655, 661 ("[I]n the absence of legislation otherwise providing, the PUC's jurisdiction to regulate public utilities extends only to the regulation of privately owned utilities.").

authority to that of the CCA governing boards."[11] Moreover, the Proposed Decision goes further by stating, with respect to CCA IRPs, that "it is well within the authority of the Commission to require IRP filings, in *any manner* it determines…."[12] As set forth briefly below, CalCCA provides two responses: (1) these conclusions are erroneous and inconsistent with SB 350's basic structure and plain language and (2) even if these conclusions were legally sustainable, the conclusions are incompatible with principles of comity and cooperation as to matters of concurrent jurisdiction. Taken together, CalCCA urges the Commission to remove these overbroad statements, and, more importantly, to modify the Proposed Decision so that it accommodates meaningful differences and distinctions among jurisdictional LSEs.

As to the first response, CalCCA will not restate or reargue past legal positions.[13] The Proposed Decision's position is contradicted by the plain language of Section 454.52(b)(3). In this section, the Legislature vested the authority to approve a CCA program's IRP in that CCA program's governing board, and uniquely defined the Commission's role as *certifying* CCA IRPs. The Proposed Decision does not sufficiently analyze this distinction. Had the Legislature intended to give the Commission the authority to approve, deny, or modify a CCA program's IRP, or if the Legislature had intended (as the Proposed Decision claims) a two-step process in which both the Commission and CCA boards have the authority to approve, deny, or modify a CCA program's IRP, it would have clearly stated as such. The Legislature could have easily included language explicitly requiring that CCA programs "file" their IRPs with the Commission "for approval." Instead, the Legislature used two different terms to define the roles of the Commission and the CCA boards – clearly signaling that the Legislature did not intend the

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11 Proposed Decision at 22.

12 Proposed Decision at 24 (emphasis added).

Commission to have the same authority to approve or deny a CCA programs' IRP.[14] The same applies to the terms "certification" and "approval." The Legislature was certainly aware of the term of art "certify" when it decided to define the Commission's role.[15] In addition, the Proposed Decision's assertion that the Commission's certification authority is substantive in nature is incompatable with the plain language of Section 454.52(b)(3), which vests the substantive authority to approve a CCA's IRP in that CCA programs' board. The Proposed Decision's failure to give these distinctions sufficient weight, analysis or relevance is legal error. It is a fundamental principle of statutory interpretation that, in interptreting apparently conflicting statutory provisions, specific exceptions are controlling over general rules.[16] The Section 454.52(a)(1) language authorizing the Commission to adopt requirements to "ensure that load-serving entities" meet the eight Section 454.52(a)(1)(A-H) criteria is inconsistent with Section 454.52(b)(3), which makes clear that CCA programs' governing boards have authority to approve their programs IRPs based, in part, on whether the IRPs "achieve results consistent

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[13] CalCCA provided a detailed legal analysis of the Commission's authority over CCA programs' IRPs in its October 26, 2017 Comments on the Proposed Reference System Plan (at 4-10). These arguments are incorporated herein by reference.

[14] *See California Teachers Assn. v. Governing Bd. of Rialto Unified Sch. Dist.* (1997) 14 Cal. 4th 627, 633 (courts have no power to rewrite a statute so as to make it conform to a presumed intention which is not expressed by the legislature). *See also Jones v. Lodge at Torrey Pines P'ship* (2008) 42 Cal. 4th 1158, 1166 ("We believe that if the Legislature intended to place all supervisory employees in California in such a conflict of interest, the Legislature would have done so by language much clearer than that used here"); *Moore v. California State Bd. of Accountancy* (1992) 2 Cal. 4th 999, 1031 ("Had the Legislature meant to prohibit use of the unmodified term 'accountant,' it simply would have said so").

[15] *See Ste. Marie v. Riverside County Regional Park & Open-Space Dist. (2009) 46 Cal.4th 282, 288-289; People v. Dillon (1983) 34 Cal.3d 441, 468* (when the same word appears in different places within a statutory scheme, courts generally presume the Legislature intended the word to have the same meaning each time it is used). CalCCA provided background and analysis on the meaning of "certification" in the context of Commission regulation of CCA programs in its October 26, 2017 Comments on the Proposed Reference System Plan (at 6).

[16] *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal. 4th 1193, 1199–1200. *See also Hopkins v. Superior Court* (2016) 2 Cal. App. 5th 1275, 1283.

with" the eight criteria. In light of this conflict, Section 454.52(a)(1) *must* be interpreted as a general rule, modified, in the case of CCA programs, by the CCA-specific exception established in Section 454.52(b)(3).

On a related matter, the Proposed Decision appears to unnecessarily and erroneously extend the Commission's short-term Resource Adequacy ("RA") planning authority to long-term procurement planning. The RA statute (Section 380), which gives the Commission authority with respect to reliability and RA matters, is not independent of statutory authority pertaining to CCA programs. The various statutory provisions must be read in harmony; this is where the Proposed Decision appears to repeatedly go astray. Section 380(b)(5) requires that the Commision's RA program "maximize the ability of community choice aggregators to determine the generation resources used to serve their customers." Similarly, Section 380(h)(5) requires that the Commission "ensur[e] that community choice aggregators can determine the generation resources used to serve their customers." In light of these provisions, which clearly require that the Commission use its RA authority to preserve and respect CCA procurement autonomy, the RA statute cannot reasonably be interpreted as giving the Commission the kind of central planning authority over CCA programs envisioned by the Proposed Decision.

As to the second response, even if the Proposed Decision's legal conclusions were correct, they are incompatible with priniciples of comity and cooperation as to matters of concurrent jurisdiction. To be clear, SB 350 vests in CCA local governing boards key jurisdiction with respect to CCA IRPs. The Proposed Decision gives fleeting legal significance to this undeniable point. More importantly, the Proposed Decision fails, as a practical matter, to accommodate this point. The absence of reasonable, practical accommodations stands in contrast to the Proposed Decision's willingness to accommodate special provisions for other LSEs. For example, the Proposed Decision would provide special accommodations for

PacifCorp.[17] While noting that CalCCA had proposed "a separate process for CCAs, designed to accomplish 'certification'",[18] the Proposed Decision fails to discuss or accommodate this proposal. There is no reasonable basis for denying this proposal, particularly since the first year is a test year and can be used to refine and shape the nature and fluidity of the IRP process. More importantly, accommodating this proposal would give practical effect to legal principles of comity and cooperation. Therefore, CalCCA urges the Commission to modify the Proposed Decision to expressly describe how the test year will be used to refine the IRP process to employ principles of cooperation vis-à-vis local CCA governing boards.

C. The Commission Can Use Its Existing Authority To Achieve IRP Goals

In its Opening Comments on the Staff Proposal, CalCCA noted that the Commission has the authority to set – and increase – RPS requirements, and explicitly endorsed increasing LSEs' RPS targets in order to achieve the Energy Division's stated IRP GHG reduction goals.[19] Similarly, as noted above, the Commission's existing RA authority is more than adequate to ensure reliability while concurrently respecting CCA programs' right to procure generation. These other programs could intersect with the IRP program, and provide practical means by which the Commission could enforce IRP goals without needing to implement rigid IRP requirements on CCA programs. Specifically, if, through its review process, the Commission identifies long-term reliability issues associated with a CCA program's IRP, it will have ample opportunity to work with that CCA program to remedy those issues, and CCA programs will have a significant incentive to address any shortfalls through the IRP process rather than waiting for shortfalls to become Commission-jurisdictional RA problems.

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17 *See, e.g.,* Proposed Decision at 106 (describing the fact that PacifiCorp can, notwithstanding the filing requirements of other LSEs, simply file what PacifiCorp files in other jurisdictions, supplemented by certain information on disadvantaged communities).

18 *See* Proposed Decision at 105.

D. The Commission Should Not Adopt The Clean Net Short Proposal Without A Formal Evaluation Process

The Proposed Decision, with very little discussion, would adopt Pacific Gas and Electric Company's ("PG&E") Clean Net Short ("CNS") proposal for calculating GHG emissions.[20] This proposal would calculate a LSE's GHG emissions on an hourly, rather than an annual, basis. Adoption of this proposal is premature as it is: (1) inconsistent with the direction of the Governor, (2) would pre-judge the outcome of the California Energy Commission's ("CEC") Assembly Bill ("AB") 1110 rulemaking process (16-OIR-05), (3) unfairly penalizes LSEs that have already made significant investment in GHG reductions, (4) is inconsistent with the annual reporting requirements of the CARB and CEC, and (5) is inconsistent with the statutory requirements of the RPS legislation as implemented by the Commission. For these reasons, CalCCA requests that the CNS proposal be removed from the Proposed Decision.

AB 79, passed last year by the Legislature, would have directed the CARB to examine the feasibility of calculating GHG emissions for the electric sector on an hourly basis. On October 3, 2017, Governor Brown vetoed AB 79. In vetoing AB 79, Governor Brown directed that the calculation of GHG emissions should be done under existing law (AB 1110), which directs the CEC to develop a consistent GHG-reporting regime. To date, over twenty parties, including PG&E, have submitted comments in the CEC's process. The vast majority of these parties support an annual calculation of GHG emissions and not PG&E's hourly CNS proposal. Even the CEC staff's own initial proposal in the AB 1110 pre-rulemaking process proposes the continued use of CARB's default emission factor and use of annual, not hourly, calculations.[21]

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19 *See* CalCCA Comments on the Proposed Reference System Plan at 31-32.

20 Proposed Decision at 97-98, 123 (Finding of Fact 17), 127 (Conclusion of Law 25).

21 *See* Draft Staff Paper at 9 (proposing calculation of GHG emissions on an annual basis) and 16 (proposing that "CARB's default emissions factor would be used for all sources of unspecified power.").

The Commission should not "tip the scales" and pre-judge the outcome of the CEC's statutorily required AB 1110 rulemaking process.

In addition to being procedurally premature, adopting PG&E's CNS proposal is also unfair and would penalize LSEs that provide GHG-free energy to California's electric grid. Key facts remain in dispute as to whether or not PG&E's CNS proposal would unfairly penalize 100% GHG-free/RPS PCC-1 solar resources. This is so because, under PG&E's CNS proposal, the LSE could only claim a fraction of the solar generation that perfectly matched its load profile. Thus, the LSE would receive no GHG reduction credit for generation that did not match its load profile. Under PG&E's CNS proposal, it is unclear that any LSE could claim to be 100% GHG-free unless it was able to exactly match zero-GHG generation to its load during all hours of the year. This result is untenable. It unfairly penalizes LSEs that have made significant investments in renewable and zero-GHG energy by not giving them credit for all of their generation, and in turn assigning the GHG benefit to other LSEs that made no durable financial commitments to sustain zero-GHG energy production.

PG&E's CNS methodology is also at odds with the Proposed Decision's reliance on CARB's GHG emissions calculation. As the Proposed Decision recognizes, under SB350, it is CARB, and not the Commission, that sets the GHG emissions target for the electric sector and the individual LSEs comprising that sector. CARB's allocation methodology is based on annual GHG emissions for each entity, not hourly. A significant mismatch will occur between the LSE-specific GHG targets to be set in the IRP process and the methodology used to determine compliance if the Commission adopts PG&E's CNS proposal. This is particularly troubling since, as discussed above, PG&E's CNS proposal penalizes LSEs that have high amounts of zero-GHG resources while rewarding LSEs that rely extensively on unspecified system-wide power. Thus, paradoxically, those LSEs that have already reduced their GHG emissions will have a harder time meeting their IRP goals.

PG&E's CNS proposal has other flaws and problems. The proposal is inconsistent with the Power Source Disclosure/Power Content Label requirements. PG&E's CNS proposal cannot be adopted unless the Commission can harmonize or otherwise legally justify these differences. PG&E's CNS proposal also appears at odds with the RPS program. PG&E's CNS proposal would adopt significant new restrictions on the ability of zero-GHG RPS-eligible resources (including PCC-1 resources) to be credited toward a LSE's GHG emissions target. Under the Portfolio Content Category rules, the PCC-1 designation of a RPS resource is based on where and how the energy was generated, not if it was used to serve load. An LSE can purchase PCC-1 RPS-eligible wind or solar energy, retain the associated REC while reselling the underlying energy to another entity and the REC still retains its PCC-1 (and zero-GHG) status. Under PG&E's proposal, this PCC-1 REC would not be allowed to count as a zero-GHG resource, thus creating a significant mismatch between RPS and GHG reporting. Finally, the Proposed Decision provides little or no guidance, beyond a simple illustrative example provided by PG&E, regarding how to implement PG&E's CNS proposal. In less than four months (assuming a February decision), the Proposed Decision contemplates a process by which the zero-GHG eligibility of resources would be determined, emission profiles for non-zero GHG resources developed, an 8,760 hour system-wide emission profile produced, and the results of this analysis provided to all LSEs in time for them to incorporate this methodology into their own IRPs, currently due on June 1, 2018. This is problematic, to say the least.

For these reasons, CalCCA requests that the Commission withdraw the CNS proposal from the final decision, and adopt the final regulations of AB 1110 once those are finalized at the CEC. This approach would respect the authorities set forth in AB 1110. In this regard, it is CalCCA's understanding that, earlier today, the CEC issued a draft staff paper in 16-OIR-05 with respect to a *Revised Assembly Bill 1110 Implementation Proposal For Power Source Disclosure.*

E. The Proposed Decision's Treatment of PCC-2 RECs Should Be Revised

The Proposed Decision would adopt the "Standard LSE Plan" included in Attachment A to the Proposed Decision. Attachment A provides instructions on how LSEs are supposed to prepare their IRPs. As generally described above, Attachment A (as currently written) would require that LSEs account for their GHG emissions using the CNS methodology, which would define PCC-1 RECs as GHG-*free* resources and PCC-2 RECs as GHG-*emitting* resources.[22] In addition to the reasons stated above, use of the CNS in this way is problematic for two additional reasons. First, the decision to treat PCC-2 RECs as GHG-*emitting* resources is not supported by findings of fact, conclusions of law, or ordering paragraphs from the actual decision. Second, the decision to treat PCC 2 RECs as GHG-*emitting* resources is inconsistent with the RPS program, which gives full credit for PCC 2 RECs. Like PCC 1 RECs, PCC 2 RECs represent actual renewable generation with actual GHG reductions. CalCCA requests that the Commission revise Attachment A to include PCC-1 RECs and PCC-2 RECs as GHG-free resources.

III. CONCLUSION

CalCCA thanks the Commission for its consideration of these comments.

Dated: January 17, 2018

Respectfully submitted,

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[22] Proposed Decision Attachment A at 6.