

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



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Order Instituting Rulemaking to Continue  
Electric Integrated Resource Planning and  
Related Procurement Processes.

R.20-05-003

**CALIFORNIA COMMUNITY CHOICE ASSOCIATION'S  
COMMENTS ON SECTION 2 OF THE ADMINISTRATIVE LAW JUDGE'S  
RULING SEEKING COMMENTS ON POTENTIAL NEAR-TERM ACTIONS TO  
ENCOURAGE ADDITIONAL PROCUREMENT**

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## SUMMARY OF RECOMMENDATIONS

CalCCA takes no position on the Ruling’s proposal on reframing of the “baseline” resources. However, the following alternative solutions are provided in response to the Ruling Section 2.1, Question 3, to ensure projects remain viable and additional procurement remains feasible despite challenging market conditions and project delays:

- The factors to be considered by the Commission in assessing penalties should be clarified and the potential for penalty waivers strengthened to provide greater certainty to market participants;
  - The Commission should clarify requirements concerning MTR backstop procurement and the calculation of net CONE for MTR penalties;
  - The Commission should clarify that LSEs can trade compliance obligations to encourage LSEs to collectively meet procurement mandates; and
  - Projects without a CAISO deliverability study should temporarily count toward MTR requirements under certain conditions.
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ENCOURAGE ADDITIONAL PROCUREMENT**

The California Community Choice Association<sup>1</sup> (CalCCA) submits these Comments in response to the Administrative Law Judge's Ruling Seeking Comments on Staff Paper on Procurement Program and Potential Near-Term Actions to Encourage Additional Procurement (Ruling), issued on September 8, 2022. Specifically, the Comments respond to Section 2 of the Ruling seeking input on near-term actions the California Public Utilities Commission (Commission) can take to encourage immediate additional electricity procurement between now and 2026 or beyond, and to ensure that the requirements of Decision (D.) 19-11-016<sup>2</sup> and D.21-06-035<sup>3</sup> are met.

**I. INTRODUCTION**

A confluence of events – the COVID pandemic, climate change, governmental investigations and geopolitical conflicts, regulatory and statutory changes, as well as significant supply chain

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<sup>1</sup> California Community Choice Association represents the interests of 23 community choice electricity providers in California: Apple Valley Choice Energy, Central Coast Community Energy, Clean Energy Alliance, Clean Power Alliance, CleanPowerSF, Desert Community Energy, East Bay Community Energy, Lancaster Choice Energy, Marin Clean Energy, Orange County Power Authority, Peninsula Clean Energy, Pico Rivera Innovative Municipal Energy, Pioneer Community Energy, Pomona Choice Energy, Rancho Mirage Energy Authority, Redwood Coast Energy Authority, San Diego Community Power, San Jacinto Power, San José Clean Energy, Santa Barbara Clean Energy, Silicon Valley Clean Energy, Sonoma Clean Power, and Valley Clean Energy.

<sup>2</sup> D.19-11-016, *Decision Requiring Electric System Reliability Procurement for 2021-2023*, Rulemaking (R.) 16-02-007 (Nov. 7, 2019) (2019 Order).

<sup>3</sup> D.21-06-035, *Decision Requiring Procurement to Address Mid-Term Reliability (2023-2026)*, R.20-05-003 (June 24, 2021) (MTR Order).

delays – all impact the ability of load serving entities (LSEs), including community choice aggregators (CCAs), to procure sufficient resources to comply with Integrated Resource Planning (IRP) procurement mandates. As noted by the Ruling, LSEs are contracting for resources to comply with the 2019 Order and the MTR Order, but various factors are impacting and delaying actual planned online dates of resources.

Compounding the resulting market constraints, increased prices, and demands of suppliers to renegotiate contractual terms and/or terminate contracts based on claims of force majeure, are potential penalties faced by LSEs for failure to meet MTR compliance obligations. In addition, LSEs face potential additional penalties for failure to meet both resource adequacy (RA) and renewables portfolio standard (RPS) obligations given the project delays. The looming penalties impact the market, and place LSEs in tenuous negotiating positions with suppliers aware of the penalty potential.

CalCCA appreciates the Ruling’s attempts to address the difficulties faced by LSEs in the near-term regarding project delays, as well as the reliability needs of the system overall. CalCCA takes no position on the Ruling proposal to reframe the “baseline” resources. However, the following alternative solutions are provided in response to the Ruling Section 2.1, Question 3 to ensure projects remain viable and additional procurement remains feasible despite the challenging market conditions and resulting project delays:

- The factors to be considered by the Commission in assessing penalties should be clarified and the potential for penalty waivers strengthened to provide greater certainty to market participants;
- The Commission should clarify requirements concerning MTR backstop procurement and the calculation of net cost of new entry (net CONE) for MTR penalties;
- The Commission should clarify that LSEs can trade compliance obligations to encourage LSEs to collectively meet procurement mandates; and

- Projects without a California Independent System Operator Corporation (CAISO) deliverability study should temporarily count toward MTR requirements under certain conditions.

## **II. RESPONSES TO QUESTIONS IN SECTION 2.1 OF THE RULING**

- 1. For LSEs: Identify resources and their capacity amounts that were listed in the D.19-11-016 baseline but that are not yet online.**

Not applicable to CalCCA.

- 2. Describe why you support or oppose the proposal described in Section 2 above to modify the approach to “baseline” for purposes of procurement in compliance with D.19-11-016 and D.21-06-035 requirements to be based on actual online date for new resources. If you prefer a different change to D.19-11-016 and/or D.21-06-035 baseline requirements, describe it in detail.**

CalCCA takes no position on the proposal described in Section 2 to reframe the “baseline” resources.

- 3. Are there other modifications to prior decisions that the Commission should make to facilitate continued procurement by LSEs subject to the IRP process and the requirements of D.19-11-016 and D.21-06-035? If so, describe your proposal in detail.**

See Section III., below.

## **III. PREEMPTIVE SOLUTIONS WILL ENSURE PROJECTS REMAIN VIABLE AND ADDITIONAL PROCUREMENT REMAINS FEASIBLE DESPITE CHALLENGING MARKET CONDITIONS AND PROJECT DELAYS**

Preemptive solutions can be adopted by the Commission to address the current market constraints and potential project delays, and to ensure projects in the pipeline remain viable and additional procurement of resources continues. As set forth below, CalCCA proposes that the Commission institute the following in the near term: (1) clarify the factors to assess penalties and strengthen the potential for waivers under the MTR Order for failure to bring projects online; (2) provide clarity on backstop procurement and the calculation of net CONE for MTR penalties; (3)



clarify that LSEs can trade compliance obligations; and (4) allow projects without a CAISO deliverability study to temporarily count toward MTR Requirements under certain conditions.

**A. The Factors to be Considered in Assessing Penalties Should be Clarified and the Potential for Penalty Waivers Strengthened to Provide Greater Certainty to Market Participants**

The Commission should provide greater certainty and clarification around the potential for penalties and penalty waivers in light of the current difficult market conditions and supply chain constraints. The MTR Order provides for Commission assessment of penalties and potential waivers based on its Resolution M-4846 and consideration of “good faith efforts.”<sup>4</sup> However, the identification by the Commission of additional indicators regarding its assessment of penalties and its willingness to waive penalties due to the current exigent circumstances can “calm” the market and level the playing field among suppliers and LSEs. Furthermore, the Commission should consider the potential exposure of LSEs to multiple layers of penalties (in IRP, RA, and RPS) for project delays.

**1. The Uncertainties Regarding MTR Penalties and Waivers Impact Market Transactions**

The ambiguities built into the MTR Order regarding the potential assessment of penalties and the availability of penalty waivers for missing MTR compliance obligations can impact the negotiating positions of suppliers and LSEs in contracting for resources. Penalty and waiver potential can also impact post-contracting demands by suppliers for renegotiation of contract terms (both pricing and delivery dates) and/or declarations of force majeure for failure to perform under power supply contracts due to market conditions and supply chain delays. Greater certainty, and strengthening the potential for penalty waivers, will therefore “calm” the market and allow market participants to negotiate with additional information regarding potential project costs.

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<sup>4</sup> *Id.*, Conclusion of Law (COL) 27 at 93.

The MTR Order provides that assessment of penalties for non-compliance will “follow the process outlined in Resolution M-4846 and may take into consideration good faith efforts to procure the required capacity.”<sup>5</sup> Penalties accrue at the time of backstop procurement (first backstop may occur on December 1, 2023).<sup>6</sup> Penalties will be set at “Net-Cost of New Entry (net Cone)” “included in the Avoided Cost Calculator,” assessed once after the June 1, 2025 compliance date for non-compliance with procurement and reporting deadlines throughout 2023-2025.<sup>7</sup>

Resolution M-4846 includes the Commission Enforcement Policy and a Penalty Assessment Methodology.<sup>8</sup> The Enforcement Policy outlines the tools available to Commission Staff to enforce Commission rules and requirements, while maintaining due process for regulated entities. The Enforcement Policy emphasizes ensuring compliance and providing a meaningful deterrent to violations through progressive enforcement and adequate remedies. Remedies include “refunding or depriving the economic benefit gained by noncompliance,” along with penalties “higher than the amounts required to be refunded or deprived.”<sup>9</sup> Factors to be considered in the Penalty Assessment Methodology include: (a) severity of the offense (including physical harm or harm to the integrity of the regulatory process); (b) conduct of the utility (including previous violations); (c) financial resources of the regulated entity; (d) totality of the circumstances; and (e) the role of precedent.<sup>10</sup> The conduct of the regulated entity includes several factors, including actions taken to detect, prevent, disclose to Commission staff, and rectify a violation.<sup>11</sup> Finally, the totality of the circumstances will be considered, including the need to deter further unlawful conduct, consideration

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<sup>5</sup> *Id.*, COL 27, at 93.

<sup>6</sup> *Id.* at 74.

<sup>7</sup> *Id.*, COL 26, at 93.

<sup>8</sup> Resolution M-4846 (Nov. 5, 2020).

<sup>9</sup> *Id.*, Attachment at 3, Section C, and 4, Section E.

<sup>10</sup> *Id.*, Attachment, Section II.C.2. at 3.

<sup>11</sup> *Id.*, at Appendix I, Section II. at 17-18.

of facts that mitigate or exacerbate the degree of wrongdoing, and consideration of any economic benefit to the regulated entity (and setting the penalty at least 10 percent higher than the benefit amount).<sup>12</sup>

Resolution M-4846 provides multiple factors for the Commission's enforcement and assessment of penalties for non-compliance with MTR obligations. The Commission, however, should further clarify the factors that it will consider, and the potential for penalty waivers, in the context of the current situation. The Ruling provides further clues, but does not go far enough, to provide adequate certainty to market participants:

LSEs should also note that, in the event of a failure to meet one or more the required procurement targets, the Commission will carefully evaluate whether an LSE continued to procure to help meet system reliability and GHG needs, even if the procurement is slightly delayed or otherwise does not meet the letter of the decisions' requirements.<sup>13</sup>

As a result of the ambiguity surrounding potential penalties for delayed projects, suppliers understand the difficult negotiating position of LSEs. Greater clarity in these difficult market conditions of how the Commission will react to such project delays in terms of penalties and waivers may provide the certainty that the market needs to place both suppliers and LSEs on a level playing field.

**2. In Considering the Totality of the Circumstances in Assessing MTR Penalties or Waivers, the Commission Should Recognize the Impact on LSEs of Potential Multiple Layers of Penalties Under the IRP, RA and RPS Regulatory Programs**

In considering the totality of the circumstances in assessing MTR penalties or waivers, the Commission should recognize that LSEs procuring under the IRP program may also be procuring the

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<sup>12</sup> *Id.* at Appendix I, Section IV. at 19-21.

<sup>13</sup> Ruling at 9.

same resources for purposes of RA and RPS compliance. While IRP, as well as ongoing monthly and annual RA compliance, are likely more pressing than RPS compliance as the current RPS compliance period extends through 2024 (and penalties will not be assessed until then), the potential for multiple layers of penalties in IRP, RA and RPS also impacts market conditions and the position of LSEs in their attempts to bring projects online.

As stated above, an LSE with delayed projects could face potential penalties under the MTR Order. However, RA penalties also loom over delayed projects. LSEs are subject to monthly and annual requirements to procure System, Flexible and Local RA. If an LSE cures a deficiency within five business days of a notification from Energy Division, it could face penalties of \$5,000-\$20,000 per incident depending on the MW size of the deficiency and the LSE's number of deficiencies in the same calendar year. For LSEs failing to cure the deficiency within five business days, an LSE must pay:

- \$8.88/kW-month for system RA deficiencies between May-October, and \$4.44/kW-month for system RA deficiencies between November and April (with points accruing for multiple violations resulting in potential higher penalties of up to \$26.24/kW-month);
- \$4.25/kW-month for local RA deficiencies; and
- \$3.33/kW-month for flexible RA deficiencies.

In addition, penalty waivers are only available for Local RA if the LSE can demonstrate that it made every commercially reasonable effort to contract for RA resources. Deficient LSEs are still responsible for backstop procurement costs even if they receive a waiver of penalties. In addition to penalties assessed by the Commission, LSEs may also be subject to CAISO backstop charges, at a likely charge at the soft-offer cap of \$6.31/kW-month.

The same LSE can also be subject to RPS penalties at the end of the current compliance period (2021-2024) if it fails to meet its RPS compliance requirements as a result of project delays.

Penalties will be assessed at a rate of \$50 per renewable energy credit out of compliance (subject to cap). Waivers are available under certain circumstances, including permitting delays, interconnection issues, and insufficient supply.<sup>14</sup> For example, absent a penalty waiver, if an LSE needs to procure 10,000 MWh of RPS energy and only procures 5,000 MWh, the penalty would equal \$250,000.<sup>15</sup>

Given the multiple penalties that can be assessed from delayed procurement of resources, LSEs face potentially high exposure and costs despite their best efforts to bring resources online. While considering the “totality of the circumstances” in assessing MTR penalties and waivers, the Commission should therefore consider the potential “layering” of penalties due to the multiple regulatory programs in IRP, RA and RPS.

### **3. The Commission Should Provide Clarity on Backstop Procurement**

The Commission should also clarify whether in the event of an order to an IOU to conduct backstop procurement for an LSE deficient on its MTR procurement, such backstop will be required for a full ten-year contract term. In the alternative, will the Commission require backstop only until an LSE can remedy a deficiency? Clarification on this issue will be helpful for LSEs as they navigate through project delays.

### **4. The Commission Should Clarify How Net CONE Is Calculated for Purposes of MTR Penalties Given Modifications to the Avoid Cost Calculator**

The Commission should also clarify how net CONE will be calculated in the event the Commission assesses penalties under the MTR Order. The MTR Order sets the penalty at the level

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<sup>14</sup> See D.14-12-023, *Decision Setting Enforcement Rules for the Renewables Portfolio Standard Program, Implementing Assembly Bill 2187, and Denying Petitions for Modification of Decision 12-06-038*, R.11-05-005 (Dec. 4, 2014) at 22 (regarding RPS waiver considerations).

<sup>15</sup> See Commission “Frequently Asked Questions” regarding RPS Compliance (June 2020), located at [https://www.cpuc.ca.gov/-/media/cpuc-website/industries-and-topics/documents/energy/rps/rps-compliance-faq\\_2020.pdf](https://www.cpuc.ca.gov/-/media/cpuc-website/industries-and-topics/documents/energy/rps/rps-compliance-faq_2020.pdf)

of “net CONE,” based on the cost of a new battery storage facility.<sup>16</sup> The penalty will be set “at the level of net CONE included in the Avoided Cost Calculator (ACC), after assessing compliance after the June 1, 2025 compliance filing date.”<sup>17</sup> The ACC is referred to as the Commission’s ACC “for demand-side resources, which was last updated in D.20-04-010 as part of the integrated distributed energy resource (IDER) proceeding.”<sup>18</sup> However, the IDER proceeding has changed the calculation of ACC to use “Real Economic Carrying Charge” (RECC) (including the lifetime costs and revenues of the asset) instead of net CONE (which only considers the first year costs and revenues of a storage asset). The Commission should clarify what level and vintage of net CONE it will use to calculate penalties in 2025.

**B. The Commission Should Clarify that LSEs can Trade Compliance Obligations**

The Commission can further maximize program flexibility and LSE IRP compliance by clarifying that LSE *procurement obligations* under both the 2019 Order and the MTR Order are “tradable.” Trading *excess incremental resources* above an LSEs’ procurement requirement is allowed under both D.19-11-016 and MTR.<sup>19</sup> However, whether LSEs can trade *procurement obligations* has not been clarified and can provide another tool for LSEs to balance their positions while collectively still meeting the mandated procurement requirements.

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<sup>16</sup> MTR Order at 74.

<sup>17</sup> *Id.*, COL 26 at 93.

<sup>18</sup> *Id.* at 74.

<sup>19</sup> Staff states in “Frequently Asked Questions” regarding D.19-11-016 that the decision “is silent on whether LSEs must directly contract for the resources they procure to meet their incremental resource procurement obligations. Consequently, staff believes that LSEs can use contracts for resources procured from other LSEs to meet their procurement obligations, provided the underlying resource meets the D.19-11-016 definition of incremental resource (and, of course, provided that the LSE from which the resource was purchased backs the sold portion of the resource out of their own compliance showing.” See “IRP Procurement Track Frequently Asked Questions,” at 1-2, Question 3, located at <https://www.cpuc.ca.gov/industries-and-topics/electrical-energy/electric-power-procurement/long-term-procurement-planning/more-information-on-authorizing-procurement/irp-procurement-track>. The Commission also states in the MTR Order that “LSEs will continue to have the ability to transact for excess procurement from another LSE, as long as that procurement has not yet been shown for IRP compliance by the first LSE.” MTR Order at 77.

If one LSE develops an eligible resource, it can dedicate any portion or any period of the resource commitment to meet the compliance requirement of another LSE. For example, LSE A has a new resource coming online in 2025 for its own compliance obligation and may only need a two-year bridge to its online date. LSE B may have procured resources in excess of its allocated share for 2023-24. Rather than requiring backstop procurement for LSE A who is short for 2023-24, LSE A can transact the 2023-24 share of its procurement obligation to LSE B. In another example, LSE A may invest in a project that exceeds the share of incremental procurement allocated to LSE A. LSE A should be permitted to dedicate any additional “compliance rights” to LSE B which chooses not to invest in a new resource (or who faces project delays), regardless of whether the capacity is actually sold to LSE B.

By encouraging LSEs to work together in this way to trade compliance obligations when some LSEs are long and some LSEs are facing shortages due to project delays, the Commission can ensure the collective obligations are met, and that LSEs avoid penalties to the extent possible.

**C. Projects Without a CAISO Deliverability Study Should Temporarily Count Toward MTR Requirements**

The Commission should allow projects that have not yet been studied for deliverability, or that are waiting for transmission or interconnection upgrades to be completed to become fully deliverable, to count towards an LSEs’ MTR obligation on a temporary basis. The MTR procurement order requires LSEs to procure fully deliverable projects.<sup>20</sup> The CAISO determines projects’ deliverability status through deliverability studies within the interconnection study process.

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<sup>20</sup> IRP and RA procurement orders require LSEs to meet their obligations with fully deliverable resources. Resources obtain deliverability status through a study performed within the CAISO interconnection study process. If the study finds that a project is not fully deliverable on the existing transmission system and interconnection facilities, transmission system upgrades and/or network upgrades must take place to make the project deliverable. Such upgrades may take many years, and for CCAs often depend on an IOUs’ timing and ability to make those upgrades. CCAs have identified delays in online dates due to both interconnection queue delays as well as IOU interconnection and transmission upgrade delays.

The CAISO interconnection queue has, however, received an unprecedented number of project requests, creating an interconnection backlog delaying interconnection of projects.<sup>21</sup> The severely backlogged CAISO interconnection study process can take many years. Projects not already in the interconnection queue in the current study cluster will not progress through the queue in time to obtain full deliverability by the first MTR compliance year. These timelines, in conjunction with the other drivers of project delays, give projects already in the queue without contracts the ability to inflate prices because they know LSEs need them to meet the MTR Order.

To expand the pool of resources eligible to meet MTR procurement obligations, projects that have not yet been studied for deliverability should be counted towards the MTR Order on a temporary basis. LSEs that use such projects to meet their MTR compliance obligations will: (1) still be required to meet their RA obligations with deliverable resources; and (2) need to commit to having their resources go through the deliverability study process and obtain deliverability. If, after the project goes through the deliverability study process, the study finds the project is not fully deliverable, LSEs will need to commit to having the network upgrades completed to make the project fully deliverable, or to procuring different resources with sufficient deliverable capacity to meet their MTR compliance obligation. This ensures the LSE continues to meet its RA requirements for immediate grid reliability needs while in the process of bringing online new deliverable resources.

There is precedent for allowing resources that are not fully deliverable to count towards previous procurement orders. In D.21-12-015 within the Emergency Reliability proceeding (R.20-

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<sup>21</sup> Overall, the project requests in the CAISO interconnection queue total approximately 605 projects and 236,225 MW, exceeding the 2019 Order and MTR Order procurement requirements by 15 times. *See* CAISO Interconnection Process Enhancements 2021, Phase 2 – Longer Term Enhancements Straw Proposal (June 7, 2022) at 4-5; CAISO Supercluster Interconnection Procedures Final Proposal (June 14, 2021) at 6.



11-003), the Commission allowed energy storage projects that are not fully deliverable to fulfill compliance obligations so long as they provide peak and net peak grid reliability benefits.<sup>22</sup> The Commission recognized the need for resources to come online in an expedited manner to avoid repetition of the reliability challenges faced in the summer of 2020. California is currently facing the culmination of exigent circumstances resulting in supply chain issues and project delays necessitating the ability to expedite project online dates where possible. To expedite procurement, the Commission should therefore defer the requirement for MTR projects to be fully deliverable.

#### IV. CONCLUSION

For all the foregoing reasons, CalCCA respectfully requests consideration of the Comments herein and looks forward to an ongoing dialogue with the Commission and stakeholders.

Respectfully submitted,



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ASSOCIATION

September 26, 2022

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<sup>22</sup> D.21-12-015, *Phase 2 Decision Directing Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company to Take Actions to Prepare for Potential Extreme Weather in the Summers of 2022 and 2023*, R.20-11-003 (Dec. 2, 2021), COL 60 at 159.