BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	Rulemaking 11-05-005 (Filed May 5, 2011)

COMMENTS OF THE ALLIANCE FOR RETAIL ENERGY MARKETS ON ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING COMMENTS ON PRELIMINARY STAFF PROPOSAL TO CLARIFY AND IMPROVE CONFIDENTIALITY RULES FOR THE RENEWABLES PORTFOLIO STANDARD PROGRAM

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Pursuant to the July 1, 2013 *Administrative Law Judge's Ruling Requesting Comments on Preliminary Staff Proposal to Clarify and Improve Confidentiality Rules for the Renewables Portfolio Standard Program* ("ALJ Ruling") and the July 16, 2013 email from Administrative Law Judge Simon granting in part the request for extension of time to file comments and reply comments on the ALJ Ruling, the Alliance for Retail Energy Markets ("AReM")[1] provides the following comments on the ALJ Ruling and the proposal ("Staff Proposal") of California Public Utilities Commission ("Commission" or "CPUC") staff to modify the confidentiality rules of the renewables portfolio standard ("RPS") program.

I. Introduction and Background.

Staff is considering rules that would, for the first time, allow it to obtain and disclose to the public information about the RPS supply arrangements of electric service providers ("ESPs") such as the AReM members, and specifically including collection of commercially sensitive

[1] AReM is a California mutual benefit corporation formed by electric service providers that are active in California's direct access market. The positions taken in this filing represent the views of AReM but not necessarily those of individual members or affiliates of its members with respect to the issues addressed herein.

pricing information that the Commission has no statutory authority to collect or regulate.[2] For the reasons explained in these comments, the Commission should reject those portions of the Staff Proposal because: (1) There is no authority to collect or review the specified ESP price and cost information; (2) The disclosure of the ESP price and cost information that Staff seeks to collect would violate the statutory exceptions applicable to ESPs under the California Public Records Act ("CPRA")[3]; (3) the collection and potential disclosure of this confidential information interferes with existing contracts in violation of the Contract Clause; (4) the collection and potential disclosure of this confidential information violates sanctity of contract principals; (5) the Staff Proposal is discriminatory under the Commerce Clause; and (6) the California State Constitutional Privacy Protections apply to the ESP pricing and cost information Staff would like to collect and disclose.

Before delving into the reasons why collecting and releasing information on ESP's RPS supply arrangements is not permitted by law, it is important for the Commission to remember several important facts about the limited jurisdiction the Commission has with respect to ESP operations and its review of RPS contracting to determine RPS compliance:

- Unlike the Investor Owned Utilities ("IOUs"), the Commission does not regulate retail transactions by ESPs, nor does the Commission oversee their procurement activities undertaken to serve the ESPs' retail transactions.
- The sale of an RPS-qualified product represents a wholesale rather than retail transaction.
- Due to the nature of the California RPS rules, there currently is not a significant volume of standardized products traded for RPS-qualified products. ESPs typically enter into structured, rather than standardized, RPS contracts that are designed for the specific ESP, as well as the needs and capabilities of the specific supplier.

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[2] *See* Staff Proposal at §§ 5.D-F.

[3] *See* Government Code § 6250 *et seq.*, as implemented under GO 66-C.

- ESPs and their suppliers have executed contracts that were negotiated with existing law in mind, which would not necessarily contemplate the release to the Commission of the type of contract pricing information that is typically associated with rate regulation of utilities.

- ESPs typically do not secure supply to meet all their RPS compliance period needs at once – they can have net long or short positions prior to meeting the requirements of a compliance period and take positions that may carry volumes over for delivery into another compliance period.

- ESPs depend on wholesale renewable energy from a regionally diverse set of suppliers throughout the Western Electricity Coordinating Council ("WECC"), including those in California and out of state.

At present, the California RPS-eligible wholesale market is not robust, as is evident by the lack of liquidity and standardization in the RPS products currently available in the marketplace. This is due, in part, to the way California's rules on RPS eligibility have continued to evolve. AReM is concerned that there is a real risk that the result of the Staff Proposals seeking "transparency" of ESP data that will perversely lead to fewer supply choices and higher consumer prices. Imposition of yet more RPS program rule changes will now cause ESP contract detail disclosures which, in turn, would permit market participants to reverse engineer the buyers' and sellers' respective market positions and willingness to pay. Such an outcome is antithetical to the State's goal of promoting affordable and plentiful renewable energy supply for California loads. Adopting policy changes simply on an ideological preference for transparency—purely for its own sake—is the foundation for why the Staff Proposal exceeds the statutory authority.

To date, the ESP RPS procurement contract terms regarding pricing and other terms and conditions not directly related to showing compliance have been, and should continue to be, protected pursuant to the Commission's recognition of its limited role with respect to ESPs and under its implementation of the CPRA that protects non-regulated entities' trade secrets.

II. Portions of the Staff Proposal, Including Proposals to Publicly Disclose Price Information (Staff Proposal 5.D.4.), Cost Information (Staff Proposals 5.E.2. and 5.E.3.), and Contract Terms (Staff Proposal 5.F.8.), are Unlawful.

AReM is providing its initial thinking on the types of legal infirmities that the Commission is faced with by the preliminary Staff Proposal. Because there have been very limited legal discussions of the rationale underlying the Staff Proposal on the collection and release of ESP RPS contract data for transactions between an ESP and its suppliers, and because the references to Senate Bill ("SB") 695[4] conflict with both the Commission's prior interpretation of the law and other statutory provisions, AReM is unable to fully assess the legal ramifications of any of the proposed rules. AReM expressly reserves its right to update or alter its position with respect to the Staff Proposals as more information concerning the scope of and reasons for the Staff Proposals become available or are revised.

To be clear: AReM objects to the issuance of a Staff Proposal that contains blatantly unlawful provisions. Parties should not be required to expend time and resources reviewing, commenting on, attending workshops, or otherwise addressing proposals that clearly exceed the Commission's jurisdiction. AReM raised these issues along with Shell Energy North America (US), L.P. in a joint motion to strike portions of the Proposal.[5] However, that joint motion was summarily denied. In denying the joint motion, ALJ DeAngelis stated that the Staff Proposal "is preliminary and will be followed by a formal staff proposal, on which parties will also have the opportunity to comment."[6] Again, by failing to remove those portions of the Staff Proposal that are unlawful on their face, parties have been forced to address proposals that are legally improper

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[4] Stats. 2009, ch. 337.

[5] *See* Joint Motion of Shell Energy North America (US), L.P. and the Alliance for Retail Energy Markets to Strike Portions of the Preliminary Staff Proposal on Confidentiality Rules for RPS Procurement, submitted on July 26, 2013, available at http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M073/K726/73726596.PDF.

[6] *See* July 29, 2013 email from ALJ DeAngelis denying the joint motion. Emphasis in original.

as they cannot be squared with the limited Commission statutory authority with respect to ESP wholesale procurement and retail contracting. The fact that the proposals are "preliminary" still requires parties to address them substantively in comments (and likely reply comments, workshops, and briefs). Furthermore, if the preliminary proposals are adopted, these proposals will be challenged in court if need be, further requiring the expenditure of resources of stakeholders and the Commission alike. These steps should have been avoided by fully considering the legal implications of the Staff Proposal prior to it being issued in the ALJ Ruling. Taking into account that the agency proffered a preliminary proposal that does not square with the Commission's prior recognition of its limited jurisdiction with respect to ESP procurement and retail contracting, the purpose of these comments is to provide initial observations on why those portions of the Staff Proposal calling for disclosure of ESP data are unlawful and should not have been proposed at all.

A. The Staff Proposal Is Erroneous Because It Ignores Prior Commission Determinations That the Commission Lacks Jurisdiction Over ESP Wholesale Procurement and Retail Transactions.

Staff commits serious legal error in its reading of the RPS statute in light of the clear legislative limits on the Commission's regulatory oversight of ESPs' business dealings with their customers. Furthermore, it ignores the Commission's own decisions with respect to its limited regulatory role as to ESPs. For these reasons, those parts of the Staff Proposal that now seek to collect and distributed ESP contract cost, price, and terms and conditions that are not directly relevant to RPS compliance must be eliminated.

The CPUC was granted broad authority by law to regulate retail "public utilities," which are investor-owned electric, natural gas, telecommunications, and water utilities.[7] Unlike IOUs, ESPs are not regulated as "public utilities" and the Commission has previously recognized its limited scope of oversight over ESPs.[8] ESPs have no captive customer base, no franchised service territory, no mechanism by which they are guaranteed cost recovery through rates or a rate of return for shareholders, and undergo no pre-approval or other review of their procurement activities, including wholesale energy purchases. There is no dispute over the Commission's role ensuring that ESPs meet certain fitness requirements to participate in California's competitive retail markets to verify ESPs' compliance with the volume and types of RPS-eligible procurement claims for the applicable compliance period. However, the pricing and cost data sought in the Staff Proposal is unrelated to either the ESP licensing role or EPS RPS compliance verification. The Commission has no authority to review the pricing and other terms pursuant to which an ESP has acquired power in general or RPS products in particular, other than verifying limited "mandatory" contract provisions with respect to timing, duration and product definition.[9]

Indeed, Public Utilities Code Section 394(f) unequivocally circumscribes the scope of the Commission's authority over ESPs:

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[7] The Public Utilities Code gives the CPUC authority that it "may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." (§ 701). The term "public utility" "includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, …where the service is performed for, or the commodity is delivered to, the public or any portion thereof." (§216(a)).

[8] *See* Pub. Util. Code § 218.3 (defining an ESP as an "entity that offers electrical service to customers within the service territory of an electrical corporation and includes the unregulated affiliates and subsidiaries of an electrical corporation...and does not include an electrical corporation"); *see, e.g.,* CPUC Decision 05-11-025 (Nov. 18, 2005; posted at http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/51414.PDF) (explaining that "[a]lthough [ESPs] are each subject to certain requirements of this Commission as assigned by the Legislature, neither is regulated as a 'public utility' as defined by the Public Utilities Code, nor are they subject to Commission regulatory authority as a matter of course. Instead, the Commission is granted specific regulatory authority over these entities for particular issues, in this case, RPS.") (D.05-11-025, p. 12.)).

[9] *See* Pub. Util. Code § 394(f).

> Registration with the commission [by an ESP] is an exercise of the licensing function of the commission, and does not constitute regulation of the rates or terms and conditions of service offered by electric service providers. Nothing in this part authorizes the commission to regulate the rates or terms and conditions of service offered by electric service providers.

The CPUC's legislative mandate clearly limits its jurisdiction over ESPs and expressly differentiates the level of regulation permitted over ESPs versus IOUs. While the Commission has express authority over IOU rates, the Commission does not approve the "reasonableness" of ESPs' rates or procurement costs, whether RPS related or otherwise. Similarly, the Commission does not guarantee the pass-through of ESPs' RPS procurement costs in the prices charged to direct access customers.

These limitations have been explicitly recognized by the Commission. In Decision 11-01-026, the "*Decision Revising Rules for the Renewables Portfolio Standard Pursuant to Senate Bill 695*", the Commission found that it "has no responsibility for the price reasonableness of ESP procurement (whether conventional or RPS-eligible), and has no regulatory authority over ESP rates."[10] Similarly, the Commission concluded that "simply because the Commission has authority over ESPs participation in the RPS program" it is not required to impose on ESPs the "procurement practices of the utilities it regulates with respect to procurement and rates."[11]

In light of the fact that the agency lacks authority to review or in any way act on an ESP's RPS power purchases (*e.g.*, by approving or denying a wholesale purchase or the manner that an ESP passes costs to a customer through its retail arrangements), it clearly also lacks authority to collect and disclose information relating to the details of such purchases.

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[10] D.11-01-026, *Decision Revising Rules for the Renewables Portfolio Standard Pursuant to Senate Bill 695*, in CPUC Docket R.08-08-009 (January,13, 2011) p. 22; posted at http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/129578.PDF.

[11] *Id.* at 22-23.

B. The Data Release Contemplated in the Staff Proposal Would Violate the Protection of Statutory Exceptions to the CPRA.

The prior discussion explained how the new contract detail information sought by the Staff Proposal is outside the scope of information legitimately collected by the Commission. In this section, AReM discusses why other confidential, market sensitive data that is collected from ESPs should not be subjected to reduced confidentiality protections. The information that Staff seeks to collect and potentially disclose more quickly is commercially sensitive contract and compliance position information that constitute "trade secrets" under the CPRA. The CPRA was enacted to give members of the public increased access to information that public agencies possess.[12] However, the CPRA is subject to several exceptions.[13] Assuming for the sake of argument only that the Commission could find some basis for establishing jurisdiction over the ESP contract-specific data it seeks to collect (and it cannot as explained in the preceding sections), the CPUC still could not disclose that information due to the trade secret protections afforded to that data. If the Commission elects to proceed with the collection and release notwithstanding the fact that it is not authorized to do so, the parties to each contract could seek judicial action to stop or limit the release under a three-part test that balances the alleged public right to access the information, the government's need (or lack thereof) to preserve confidentiality, and the contracting party's right to privacy.[14]

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[12] *BRV, Inc. v. Superior Court,* 49 Cal.Rptr.3d 519 (App. 3 Dist. 2006).

[13] *County of Los Angeles v. Superior Court,* 149 Cal.Rptr.3d 324 (App. 2 Dist. 2012); *see also American Civil Liberties Union of Northern Cal. v. Superior Court,* 134 Cal.Rptr.3d 472, 478 (App. 1 Dist. 2011) (finding that all public records are subject to disclosure unless the Public Records Act expressly provides otherwise, but "[d]espite the strong legislative policy favoring access, the public's right to disclosure of public records under the PRA is not absolute") (internal quotations omitted).

[14] *See Copley Press, Inc. v. Superior Court* 141 P.3d 288 (2006) (citing *American-Civil Liberties Union Foundation v. Deukmejian,* 32 Cal.3d 440-447 (1982).

1. Contract and Compliance Position Data Constitute Trade Secrets.

The information in the ESP RPS supply contracts that Staff seeks to collect and disclose are trade secrets that may not be disclosed under the CPRA:[15]

> [T]rade secrets are not public records under this section. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.[16]

The compiled contract data sought by Staff presents information that is known only to the ESP, which deems the information to be a trade secret and treats it as such by guarding who has access to it. The fact is that this data provides not only the ESP's position for energy and renewable attributes, but also its economic position and in many instances its hedges used to manage risk associated with its participation in the wholesale and retail markets. The ESP's control over and use of this data gives it a business advantage over others in the market. No single ESP can know for certain what benefits other market participants derive from their control over comparable information. However, as its members participate in the wholesale markets facing other participants that routinely seek to protect disclosure of their commercial dealings, AReM believes it is qualified to make a reasonable assertion that the compliance position and contract-specific data of any ESP's portfolio of RPS-qualified products typically is known only to that ESP and its exclusive access to that information provides it with a distinct business advantages

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[15] This provision is analogous to § 552(b)4 of the Freedom of Information Act ("FOIA"), exempting "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

[16] Government Code § 6254.7(d). *See also* Evidence Code § 1060, Civil Code § 3426.1(d).

that would be lost if competitors or potential counterparties (i.e., potential sellers or buyers of wholesale power or RPS-eligible energy) were able to access such data.

The courts agree with this characterization of trade secrets. For example, a California appeals court found that a school district's contract with a private corporation, which contained a confidentiality provision permitting disclosure of confidential material on the condition that the person receiving it agreed not to publish or sell it, was exempt from CPRA disclosure under § 6254(k).[17] The court explained that this exception is broad enough to include trade secrets, and that one of the parties to the contract is the owner of a trade secret, and is thus "privileged to refuse to disclose and to prevent another from disclosing it."[18] This type of precedent would apply to Staff's proposed collection and release of ESP compliance position and contract-specific data, and the strength of the argument would be bolstered by the fact that the Commission is not a party to the ESP supply contracts. Two parties would own the trade secret associated with each contract, and the contracts do not necessarily include provisions that would allow the ESP to turn all the contract-specific data over to the agency or for the agency to release that data to the public while it retains value from its non-disclosure.

2. Blanket Release of Trade Secret Data is Not Permitted.

The framework in the Staff Proposal would appear to allow the Commission to disclose the RPS compliance position and contract-specific information to the public on a mass basis without regard to the individual harm that would result from each such disclosure. This approach fails to give each party to each contract – the legally recognized owners of the trade secret – the right to challenge the release of that information based on their unique facts and

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[17] *California Sch. Employees Assn. v. Sunnyvale Elementary Sch. Dist.*, 36 Cal.App.3d 46 (1973).

[18] *See id.* at 66.

circumstances and for any order supporting release to include the segregation and/or redactions that the courts could foreseeably deem to be appropriate as a condition of release.[19] Again, Staff has not demonstrated how this is lawful under the CPRA or under its limited regulatory authority over ESPs and its complete lack of authority over the wholesale transactions or ESPs' retail arrangements.

3. The Test for Disclosure is Likely Unsatisfied.

Application of the balancing test that the Commission would have to apply each time it seeks to release contract information highlights not only the impracticality of the Staff Proposal from a procedural perspective, but also that such release would be unlawful and contrary to the public interest. For the CPUC to release an ESP's or their wholesale supplier counterparty's trade secrets, the CPUC must show that (a) the public has a right to access the information, (b) the government's need (or lack thereof) to preserve confidentiality, and (c) the individual's right to maintain its confidentiality.[20] The Commission likely would be unable to show that the disclosure of the ESP and its wholesale counterparty supplier's rights to confidentiality of trade secrets is justified.

At best, the Staff Proposal attempts to justify the proposed data collection and disclosures based on unsupported conclusions about a "general public interest in RPS costs overall and the Commission's obligations to report to the Legislature about the RPS program" and that "disclosure of prices of all RPS procurement contracts provides information that the Commission and market participants could use to make more effective and accurate cost comparisons among

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[19] "If a record contains exempt information, the agency generally must segregate or redact the exempt information and disclose the remainder of the record." (California Office of Attorney General "Summary of the California Public Records Act 2004" < http://ag.ca.gov/publications/summary_public_records_act.pdf> (August, 2004), at 2).

[20] *See Copley Press, Inc.* 141 P.3d 288, *supra.*

different types of resources and project designs."[21] Without addressing how the agency in the first instance believes it has a right to collect price information for ESP supply contracts that are not subject to prudency review or otherwise acknowledging departure from established Commission policy regarding the real differences in the regulatory regime applicable to IOUs as compared to ESPs and their suppliers, Staff jumps to the conclusion that "[s]ince ESPs and CCAs are part of the statewide RPS market, it is important for information about their RPS procurement to be publicly available in ways roughly analogous to that of IOUs."[22] Conflation of all participants in the California RPS program is no basis for disregarding prior Commission determinations on the statutory structure applicable to ESPs.

Contrary to how the Staff Proposal may want to portray the public interest, arguing in favor of transparency for transparency's sake alone is entirely insufficient to overcome the clear interests set forth in these comments regarding the contracting parties' expectation in preserving the confidentiality of their proprietary business activities as well as disregarding prior Commission determinations on the differences between its oversight of IOU procurement for the RPS program and its very limited role in verifying ESP RPS procurement volumes. Reasons why this "one size fits all" approach to data transparency is not logical here include:

- The information Staff seeks to collect and release is commercially sensitive data that does not belong to the CPUC in any way and "that would be vulnerable to appropriation by a competitor", and "the chilling effect [that disclosure] could have on the future development of such plans."[23] Because the "trade secrets and commercial or financial information obtained from a person are privileged or confidential ...," ESPs and their suppliers would face "competition with businesses offering similar goods and services both within and outside"

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[21] Staff Proposal at 25.

[22] Staff Proposal at 37.

[23] *San Gabriel Tribune v. Superior Court of the State of California*, 143 Cal.App.3d at 776 (discussing 58 Ops.Cal.Atty.Gen. 371 (1975)).

California.[24] Thus, the proposed disclosure of RPS contract-specific details would cause direct competitive injury to ESPs and their suppliers and, therefore, should not be released.[25] In short, the CPUC should not be able to require disclosure of trade secret information that the agency is aware could be used in an anti-competitive manner to the detriment of ESPs and their suppliers.

- Staff concludes that transparency is in the public interest but this appears to be based on a misunderstanding of what information consumers eligible for service from ESPs need to choose the retail provider that best suits their particular needs. Under the narrow retail market structure currently in place in California, ESPs compete against one another based on the terms of the retail products and services they offer. Customers that participate in retail choice have over twenty supplier options.[26] Those customers can already ask and receive the price and other terms of service directly from the offering ESPs, thus allowing the customer to meaningfully compare all of their options from these suppliers before they negotiate their service contract. Unlike IOU ratepayers whose prices under tariffs are uniform and are directly calculated by their fully loaded costs and the terms of service approved by the Commission, what matters in California's limited competitive retail market is the price that the ESP charges the customers under their contract. This market structure drives competition between ESPs to offer prices they think will best attract customers and incentivizes the ESPs to keep their own costs competitive. Forcing transparency to one element of an ESP's cost structure is not going to provide any new or meaningful benefits to ESP consumers that already directly get that information when they negotiate with suppliers. Nor are non-ESP customers that are not permitted to change suppliers going to benefit since they are precluded from the direct access market.

- The Commission, each ESP, and the suppliers would incur significant costs associated with reviewing the CPRA exemption status of each contract individually and defending the plethora of challenges the CPUC would encounter from each contracting party, which also weighs in favor of maintaining confidentiality.

Finally, the information Staff proposes to collect and release is not apt to provide the public benefit Staff envisions because of the non-standardized nature of both the ESP RPS supply arrangements and the non-uniform nature of many direct access service contracts. Trying

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[24] *National Parks and Conservation Ass'n. v. Kleppe*, 547 F.2d 673, 675 n.3, 681 (D.C.1976) (finding that park concessioners faced meaningful competition with businesses offering similar goods and services both within and outside the national parks," and that evidence sustained a finding that disclosure of documents would cause substantial competitive injury to the concessioners).

[25] *See id.* at 679.

[26] *See* CPUC website, available at: https://ia.cpuc.ca.gov/esp_lists/esp_udc.htm.

to gain insight into why any single structured RPS wholesale supply contract is priced the way it is by comparing its price to the prices in another structured contract is a fruitless effort. Such an "apples to oranges" comparison will not yield the kind of data that Staff believes would help consumers or the legislature. In fact, AReM is very concerned that the broadly released contract-specific data could actually end up misleading these entities into believing that any pricing differences at any point it time is the result of some flaw in the larger RPS program versus legitimate commercial differences in the supply arrangements.

While there are many potential examples to explain the analytical complexity and supporting this proposition, the following example is sufficiently illustrative for purposes of these comments. The price for a 5-year load-following contract with high credit risk counterparty A for delivery of wind power in Northern California cannot be compared meaningfully to a 1-year contract with medium credit risk counterparty Z for 5 MWh of solar power delivered to Southern California during super peak hours. The differences between these contracts will reflect a host of facts and risks, such as the delivery term, fixed versus flexible delivery volume, delivery period, delivery region, complexity of delivery requirements (i.e., import arrangements and potential for curtailments), counterparty creditworthiness and other attributes that inform the allocation of risk between the parties that ultimately translate into different terms, conditions and contract prices. Even contracts with very similar attributes can vary significantly in price for any number of legitimate reasons such as the prevailing market fundamentals at the time of contracting, the appetite of the supplier to get out of a long position, a purchaser's need to secure additional volumes due to increased loads, or perceived regulatory or credit risk associated with the particular transaction. Because today's RPS market is a bilateral market with little in the way of liquidity or standardized products from a broader,

regional market, there is nothing to be gained from trying to collect and disclose prices from a particular set of LSE contracts to benchmark against the prices of others.

C. The Contract Clause of the U. S. Constitution Prohibits Impairment of Contract and Involuntary Disclosure.

Staff's Proposal to apply CPRA disclosure to preexisting contracts violates the Contract Clause (U.S. Const. Art. I, § 10, cl. 1) because it retroactively impairs existing contractual relationships. Whether a regulation violates the Contract Clause is determined by a three-step inquiry: (1) whether the State law has, in fact, substantially impaired a contractual relationship; (2) whether the State, in justification, has a significant and legitimate public purpose behind the regulation; and (3) whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.[27]

With regard to the first step, while some courts have concluded that a minimal alteration of contractual obligations by a State may end a contract clause inquiry at its first stage,[28] the Commission would not be able to argue that ESPs and their suppliers would minimally suffer from the collection and disclosure of their market sensitive contract-specific information. As shown in greater detail in these comments, the Staff Proposal would subject ESPs and their suppliers to unlawful retroactive regulation, the ESP could face breach of contact claims if it unilaterally discloses contract price or other terms to the Commission that it is committed to keep confidential, and the ESP and its suppliers could suffer from anticompetitive harm that would

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[27] *See RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004); *see also Donlan v. Weaver*, 173 Cal.Rptr. 566 (1981) (taking into consideration the nature and extent of impairment, nature, importance and urgency of the interest to be served by the challenged legislation, and whether legislation was appropriately tailored and limited to the situation necessitating its enactment).

[28] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

come from the release of their commercially sensitive compliance or market position data. These are significant legal issues wholly ignored by the Staff Proposal's departure from the existing confidentiality structure. Moreover, other precedent warns that while minimal impairment may not be sufficient to successfully challenge government action, this is not a license for a State to impair a contract so long as it is only "a little bit."[29] Particularly in light of the fact of the Commission's very limited jurisdiction over ESPs with respect to their procurement and retail contracting efforts and the complete absence of any nexus between contract-specific price or other terms and conditions, as well as previously described harm associated with the collection and release of the confidential data, it is difficult to imagine how the Commission could justify interfering with any existing wholesale supply contract arrangements.

More troubling to AReM is that the Staff Proposal has completely failed to address step 2 and articulate adequate justification for why impairment of existing contracts between ESPs and their wholesale suppliers is warranted. In cases where courts have permitted the impairment of vested contract rights, the rationale for state action was to protect basic interests of society, that there is an emergency justifying the action, the enactment is tailored appropriately for the emergency and designed as a temporary measure during which time the vested contract rights are not lost but merely deferred for a brief period, and that the State interest continues during the temporary deferment period.[30] As discussed elsewhere in these comments, the Staff Proposal fails to meaningfully articulate its public purpose, particularly given the circumscribed nature of the Commission's jurisdiction over ESPs. The vague interest in promoting "transparency" by

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[29] *California Teachers Assn. v. Cory*, 202 Cal.Rptr. 611, 622 (1984).

[30] *Olson v. Cory*, 636 P.2d 532 (1980).

collecting and disclosing market sensitive ESP contract information is not legitimate under any of the Commerce Clause factors nor is the Staff Proposal appropriately tailored in light of the fact that the agency lacks jurisdiction to regulate ESP procurement or retail contracts.

D. Sanctity of Contracts.

The Staff Proposal would alter existing wholesale supply contracts, leaving contracting parties without notice contemporaneous to signing that the terms and conditions of their contracts would become public or that their supply arrangement would be regulated by the State. The sanctity of contract is a basic tenet of commerce long supported by the courts. In the wholesale energy industry, the concept relies upon the *Mobile-Sierra* doctrine, under which FERC must presume that the rates, terms and conditions in a freely negotiated wholesale energy contract are "just and reasonable" under the FPA. This presumption may be overcome (*i.e.*, the contract can be modified or abrogated) only if FERC, not the CPUC, concludes that the contract terms in question seriously harm the public interest.[31]

The Staff Proposal effectively seeks to impose new terms on freely negotiated wholesale supply contracts without any evidence that the status quo seriously harms the public interest. The contracts could be affected if the CPUC does something as drastic as making them public. Overriding express or implied confidentiality provisions robs the contracting parties of the benefit of their existing bargain and of the ability to negotiate those provisions and decide on price and other provisions to reflect confidentiality risks. In addition, as shown previously, the

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[31] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *Federal Power Comm'n. v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (establishing the *Mobile-Sierra* doctrine); *as clarified by Morgan Stanley Capital Grp., Inc. v. Pub. Util. District No. 1 of Snohomish County*, 554 U.S. 527 (2008), *as further clarified by NRG Power Mktg. v. Maine Pub. Utils. Comm'n*, 558 U.S. 165 (2010); *see also Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968).

CPUC cannot prove that "serious harm to the public interest" will come about if it does not collect or maintain the confidentiality of this sensitive commercial information.

The Commission would also need to consider the tremendous burden that would be placed on its staff, ESPs and wholesale suppliers when the Commission attempts to collect or release contract information. This is likely to trigger a legal dispute in which either or both contract parties could file complaints on whether it is appropriate to disclose its terms and equitable actions to prevent each such release, all of which are costly to defend and could occur for hundreds of contracts.

More valuable in this balancing is the fact that protecting the sanctity of contracts is crucial for maintaining a stable legal framework for wholesale renewable energy supply, particularly when the CPUC lacks jurisdiction over the information it is seeking to collect and release.

E. The Commerce Clause of the U.S. Constitution Prevents Disclosure.

The Staff Proposal to apply CPRA disclosure to preexisting contracts directly regulates interstate commerce in contravention of the Commerce Clause because it seeks to control out-of-state entities that have entered, or will enter, renewable energy contracts with ESPs.[32] As a threshold matter, the Commerce Clause applies to the RPS supply contracts because the wholesale sale of renewable energy involves and affects interstate commerce such that Congress could and actually does regulate it.[33]

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[32] *See Oregon Waste Sys., Inc. v. Dep't of Env. Quality*, 511 U.S. 93, 98 (1994) (explaining that the Commerce Clause "has long been understood to have a 'negative' aspect" that denies states the ability to regulate interstate commerce).

[33] *See Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 524 (9th Cir. 2009) ("The dormant Commerce Clause is implicated if state laws regulate an activity that 'has a substantial effect' on interstate commerce such that Congress could regulate the activity.") (citation omitted).

The Staff Proposal is *per se* invalid under the Commerce Clause because it controls conduct beyond California's boundaries facially, purposefully and practically.[34] The Staff Proposal facially regulates interstate commerce by threatening to collect and disclose out-of-state entities' commercially sensitive information in their wholesale market activity. It purposefully regulates interstate transactions and their counterparties under the auspices of its authorizing statute,[35] and its practical effect is to control conduct beyond the boundaries of the state by burdening out-of-state renewable energy suppliers that enter into supply arrangements with California ESPs with collection and disclosure-related obligations.[36]

On first glance, the Staff Proposal appears to be harmonizing the contemplated reporting and disclosure requirements across all types of market participants, thereby reducing discrimination. Thus, Staff might argue that its Proposal does not treat similarly situated in-state

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[34] *Id.* at 525 ("A statutory scheme 'can discriminate against out-of state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect.'") (citing *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 802 (6th Cir. 2005)); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-79 (1986) ("When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statue without further inquiry."); *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989) ("Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First the "Commerce Clause…precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State; and specifically, a State may not adopt legislation that has the practical effect of establishing 'a scale of prices for use in other states.' Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.") (citations omitted).

[35] *See Nat'l Ass'n of Optometrists*, 567 U.S. at 525, *supra* (distinguishing between economic protection from out-of-state interests versus a profession being taken over by large business interests).

[36] In evaluating the practical effect of the Proposal, the court also would consider that the publication of out-of-state entities' sensitive commercial information may directly contradict protections other states afford to their renewable energy supply. *Healy*, 491 U.S. at 336, *supra*.

entities differently from out-of-state entities.[37] This comparison is not necessary for purposes of applying the Commerce Clause analysis because the Staff Proposal exercises extraterritorial control or regulates commerce outside its boundaries.[38] Moreover, the Staff Proposal actually discriminates against ESPs and their wholesale suppliers by attempting to impose unlawful State-level rate regulation under the auspices of RPS transparency. And it does so in a manner that would appear to give a competitive advantage to the State, which would gain insight into the wholesale markets that is not otherwise lawfully available.

Moreover, the Staff Proposal is indefensible. In this case, the Commission would have to "demonstrate, under rigorous scrutiny, that it has no other means to advance [its] legitimate local interest."[39] The Commission could not satisfy this burden because it has not articulated with any degree of specificity what that interest is, why it believes it has a lawful basis for promoting that interest, or why that interest cannot be achieved through other, non-discriminatory options. Additionally, if a court were to determine that the Staff Proposal only indirectly affects interstate commerce and/or regulates evenhandedly, the Staff Proposal still violates the dormant Commerce Clause.[40] Under the *Pike* balancing test, the Staff Proposal's burden on interstate commerce is "clearly excessive relative to the putative local benefits" because, for the reasons described above, the Commission is acting unlawfully and could promote whatever local

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[37] *Nat'l Ass'n of Optometrists*, 567 F.3d at 525 ("To determine whether laws have a discriminatory effect it is necessary to compare LensCrafters with a similarly situated in-state entity.").

[38] *Healy*, 491 U.S. at 336; *see also Brown-Forman Distillers Corp.*, 476 U.S. at 578-79 ("When a state statute directly regulates … interstate commerce … we have generally struck down the statue without further inquiry.").

[39] *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) (citing *Maine v. Taylor*, 477 U.S. 131 (1986)).

[40] *Brown-Forman Distillers Corp.*, 476 U.S. at 579 ("When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the

interests it might have in its RPS program without unduly burdening or discriminating against interstate commerce.[41] What's more, the effect of the Staff Proposal could actually be to discourage out-of-state renewable energy supply from entering contracts with California parties out of fear that the CPUC will publicly disclose their sensitive commercial information. Alternatively, out-of-state entities that sell renewable energy to California ESPs may have to demand higher compensation to cover the cost of fighting or living with public disclosure of their sensitive business information. Either way, because California ESPs depend on renewable energy from out-of-state suppliers, California consumers could be harmed due to fewer renewable energy options or higher energy prices. To the extent the Staff moves forward with its proposed confidentiality rule revisions, there may well also be a need to review any such proposals to ensure that they do not also impermissibly intrude on FERC's exclusive jurisdiction over wholesale transactions under the Federal Power Act.

F. California Constitutional Privacy Protections Prevent Disclosure.

The Staff Proposal also threatens to violate California's constitutional amendment providing the right to privacy.[42] A major stated purpose of the amendment was "to prevent 'the improper use of information properly obtained for a specific purpose...for another purpose or the disclosure of it to some third party.'"[43] While this right to privacy is not absolute – it is possible

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category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.") (citations omitted).

[41] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.") (citation omitted).

[42] CA Const. article I, § 1.

[43] *Pitman v. City of Oakland*, 197 Cal.App.3d 1037, 1045 (1988), *citing White v. Davis*, 533 P.2d 222.

that an invasion be balanced by public policy supporting transparency – the public policy weighs in favor of nondisclosure, as explained throughout these comments.[44] In the present case, because the CPUC lacks authority to regulate the rates, terms and conditions of wholesale renewable supply agreements with ESPs, it cannot overcome the threshold obligation of demonstrating that it has a right to collect confidential contract information in the first place, let alone authority to breach the privacy of California ESPs by releasing that unlawfully collected information to the public.

G. The Administrative Procedures Act Prevents Disclosure.

If it were applicable to the Commission, and the Commission decided to pursue the collection and disclosure of the confidential contract information, the California Administrative Procedure Act ("APA")[45] would give the affected ESPs and their suppliers the right to judicial review of the Commission's decision analogous to what is commonly presented as a reverse FOIA case under the Federal APA. The reviewing court would examine whether the Commission's determination not to exempt the information from CPRA/FOIA release was "in conflict with substantial evidence in the record."[46] A court would review whether and how the Commission considered statutory exemptions and/or conducted the balancing of interests that led to its determination that the commercially sensitive information owned by ESPs and their

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[44] *See Marken v. Santa Monica-Malibu Unified School Dist.* 136 Cal.Rptr.3d 395, (App. 2 Dist. 2012) (finding that an invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by the strong public policy supporting transparency in government grounded in the California Constitution and the CPRA).

[45] Government Code § 11340 *et seq.*

[46] Gov. Code, § 11350(b)(2); *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000).

suppliers should or should not remain confidential for clear errors.[47] For the reasons set forth in these comments, the Commission should expect that, at a minimum, the contracting parties would seek and likely win judicial review of a blanket decision to release all contract information without assessing the regulatory need and associated risk of such a release on an individual case basis, as well as claims that the agency lacks authority to collect and review the commercially sensitive wholesale contract information in the first place. While the California APA may not be directly applicable to the Commission as a body created under the California Constitution, it must remain cognizant of the APA-based analysis that would serve as an analytical roadmap for assessing the regulatory overreach embodied by the Staff Proposal.

III. Overall Comments on Preliminary Staff Proposal.

AReM has already detailed why Staff Proposals 5.D.4., 5.E.2., 5.E.3., and 5.F.8. are unlawful. But the other Proposals are appropriate subjects for consideration by the Commission. AReM provides limited responses to the specific questions in the ALJ Ruling below, and reserves its right to provide additional comments when the preliminary Staff Proposal is refined to remove the provisions that are clearly outside the proper jurisdiction and unrelated to ESP RPS compliance validation.

A. Would the proposal as a whole (or the component being discussed) promote transparency and the public interest with respect to the RPS program? Why or why not? What changes would improve the proposal with respect to its impact on transparency and the public interest in the RPS program?

As discussed above, disclosure of price, cost, and contract term information will harm competitiveness between ESPs, as well as between other retail sellers, thereby increasing costs

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[47] *See Syngenta Crop Protection, Inc. v. Helliker*, 138 Cal.App.4th 1135, 1171 (2006) (reviewing the application of information to § 6254(k) of the CPRA and concluding that "the regulation provided no basis for a reasonable investment-backed expectation that the Department would limit its use of data submitted to the Department").

for ESP, and other retail seller, customers, and the Commission does not have the authority to require ESPs to make such disclosures. This cannot be viewed as promoting the public interest. Furthermore, as described above, because RPS products are very specific and are not standardized, even with disclosure, transparency may not be promoted due to the nuances and variations between RPS products and contracts.

Other aspects of the Proposal, such as reductions in the current confidentiality window and increased disclosure requirements, will also have negative market implications as renewable sources will be able to extort retail sellers that show a renewable net short. These additional disclosures could also lead to reverse engineering of procurement obligations and hence the compliance position, allowing renewable suppliers to exert market power and distort the RPS market, or potential buyers to know that an ESP may have a long position that could be orphaned if not resold.

For these reasons, the Staff's Proposal to alter the existing confidentiality rules with respect to ESPs as a whole does not promote the public interest and may well result in harm.

B. Would the proposal as a whole (or the component being discussed) contribute to improved decision-making by the Commission? Why or why not? What changes would improve the proposal with respect to its impact on improving decision-making about the RPS program at the Commission?

Because the Commission does not regulate either the procurement activity or the retail service arrangements of ESPs, disclosure of price, cost, and other contract-specific terms cannot help the Commission make any decisions. Indeed, the Staff Proposal itself states that "price disclosure is not a valuable element for Commission decision-making if an RPS contract does not require Commission approval."[48] Because the Commission does not regulate the

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[48] ALJ Ruling, p. 25.

procurement by or retail arrangements of ESPs, there is absolutely no value to disclosing ESP price, cost, or contract-specific terms data. In fact, the only decisions the Commission makes with respect to the RPS program for ESPs is validation during the end of a compliance period that the ESPs have met their procurement compliance period volumetric and mix obligations with RPS-eligible resources subject to the mandatory terms and conditions. As these validation processes are essentially in place, the additional elements of the Staff Proposal with respect to ESP data disclosure do nothing to advance any Commission decision-making.

C. Would the proposal as a whole (or the component being discussed) contribute to improved coordination between the Commission and other agencies and organizations with respect to California's energy policy, procurement planning and/or transmission planning. Why or why not? What changes would improve the proposal with respect to its impact on improving coordination with other agencies about procurement and transmission planning?

Setting aside the scope of data that AReM has shown to be both unnecessary and illegitimate to collect and disclose, AReM would like to see better coordination between the CPUC, California Energy Commission ("CEC") and Western Renewable Energy Generation Information System ("WREGIS") with respect to the mandatory reporting templates to the extent possible used to validate procurement claims under the RPS law. AReM reserves the right to provide additional comments after Staff improves the preliminary materials.

D. Would the proposal as a whole (or the component being discussed) improve the value received by the customers of retail sellers from RPS procurement? Why or why not? What changes would improve the proposal with respect to the value to customers of retail sellers?

AReM believes that those California entities currently eligible to participate in direct access under the limited program already have the competitive retail market tools at their disposal to gain data about their retail supply options, including options related to the

procurement of renewable power. Because the Staff Proposal ignores the fundamental distinctions between the Commission's role with respect to IOUs versus the limited role with respect to ESPs, it appears to presume that the direct access customers are lacking in meaningful data. The correct view on value to customers is the difference between what ESP customers can inquire about and then negotiate with the ESP versus the level of costs to which that customer, while still served by the utility, is "on the hook for" under the departing load rules. In most respects, potential ESP customers who still receive IOU service are not well informed about the timing and costs of utility commitments that are imposed on them by the Commission via departing load charges, particularly where the utilities have found themselves long on supply because of changes to the RPS program.

E. Would the proposal as a whole (or the component being discussed) contribute to the long-term stability of the RPS market? Why or why not? What changes would improve the with respect to the long-term stability of the RPS market?

As discussed thoroughly in these comments, AReM has serious concerns about changing the scope of the existing confidentiality rules, both in term of scope (i.e., requiring disclosure of ESP price, cost, and contract information), and further cutting the duration of those protections to exclude historic or forward data. AReM believes that the Staff Proposal will result in significant harm, at least with respect to the direct access portion of the RPS market. ESPs do not compete in the same RPS market as the IOUs. ESPs bear the risks of their procurement decisions, as opposed to the IOUs that have cost recovery protection bestowed on them from the Commission implementation of statutes. ESP load is fully contestable, whereas only a portion of IOU load is eligible to participate in the direct access market. These differences are important when considering the implications to different types of LSEs under the Staff Proposal.

Collection and disclosure of data that provides market participating insight on an ESPs' current compliance position, change in obligation or willingness to buy or sell at particular price or under particular terms will create an environment more ripe for market distortion and the exercise of leverage and undue market power by renewable suppliers or competitors operating within the narrow direct access-eligible customer base. AReM believes the direct access market would be better served by maintaining the current scope and duration of confidentiality protections, as such protections allow ESPs to protect market sensitive information and avoid the loss of competitive advantage.

F. Would the proposal as a whole (or the component being discussed) provide appropriate protection to information for which there is a legitimate need for confidentiality? Why or why not? What changes would improve the proposal with respect to the protection of information for which there is a need for confidentiality?

The Staff Proposal seeks to disclose market sensitive, trade secret information of ESPs to which the Commission does not have a statutory right. As described previously, there are a number of legitimate and legal reasons why ESP data on price, cost, and related contract-specific terms and conditions not related to RPS eligibility verification should remain confidential.

G. What, if any, legal issues might exist with respect to the implementation of the proposal as a whole (or the component being discussed)? What changes if any, would improve the proposal with respect to reducing or eliminating legal issues regarding its implementation? What changes to the existing legal framework, if any, would reduce or eliminate the issues identified?

For the reasons described in detail above in Section II, there are numerous legal flaws with the Staff Proposal addressing contract-specific ESP procurement data that must be rectified before the Staff Proposal may move forward. Specifically, as currently drafted the preliminary Staff Proposal clearly exceeds the narrow jurisdiction of the Commission over ESP, which, by statute, prohibits regulating procurement or the retail rates of ESPs. To correct the legal

infirmities of the Staff Proposal, Staff Proposals D.4., E.2., E.3., and F.8. must be removed from the overall Staff Proposal. AReM reserves comments on other elements until the preliminary Staff Proposal is updated to correct those fundamental flaws.

IV. Comments on Preliminary Staff Proposal Elements.

A. RPS Compliance Reporting.

1. Staff Proposal C.1.

For RPS compliance reports, the Staff Proposal would provide identical confidentiality protections for all retail sellers. This does not recognize the differences between LSEs and justifications that may warrant different protections for different entities. The Commission has recognized the differences between ESPs and IOUs, even in implementing SB 695 which subjects ESPs "to the same terms and conditions applicable to an electrical corporation."[49] When implementing SB 695, the Commission noted that ESPs "are smaller than and different from the utilities in many respects that are relevant to RPS procurement."[50] Accordingly, the Commission found that only "where necessary and feasible" should RPS program "practices and protocols" apply equally to ESPs and IOUs.[51] The Commission also determined that while certain program elements were appropriate for both ESPs and IOUs, some did not apply to ESPs. For example, because the Commission maintained that as "it does not review or approve the procurement contracts of ESPs,"[52] the TREC "price limit is not an RPS program requirement"

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[49] Public Utilities Code § 399.12(j)(3).

[50] D.11-01-026, p. 22.

[51] *Id.* at 25.

[52] *Id.* at 23.

and would not apply to ESPs.[53] Therefore, the preliminary Staff Proposal should be corrected and better tailored to recognize the differences between IOUs and ESPs as previously annunciated by the Commission, and should avoid adopting a "one size fits all" approach via similar confidentiality rules for both entities. Further nuances of the confidentiality protections are described in greater detail below.

2. Staff Proposal C.2.

The preliminary Staff Proposal reduces the allowable duration of confidentiality protections for ESP retail load forecasts to the "front two years." This reduces the current allowed protection by a year. While this change may appear to provide more transparency with minimal detriment to retail sellers, for reasons previously discussed, this new element to the Staff Proposal will have negative market implications and will result in increased costs for customers. The rationale for this Staff Proposal element is that the multi-year compliance periods ensure that "retail sellers are less vulnerable to potentially negative market behavior in the short term because they have a longer time to manage their RPS compliance obligations."[54] While this may seem to be generally true, the multi-year compliance period does not mean that the exercise of market power in a particular year will not impact retail sellers, particularly in light of the long-term contracting obligation, potential shifts in load, and with respect to the closing of a compliance period.

Disclosure of forecasts of future retail sales numbers effectively provides the renewables targets for those future years, and if relatively recent compliance data is also disclosed, allows the public, including potential suppliers, to determine an ESP's general compliance posture.

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[53] *Id.* at 18.

[54] ALJ Ruling, p. 14.

Moreover, forecast customer requirements is information that ESPs otherwise keep confidential to protect their ability to negotiate for the best prices. Conversely, disclosure of data that goes directly to the retail sellers' renewable obligations would allow renewable suppliers to exercise market power and raise prices. This is particularly important for ESPs because their load is fully contestable as between other ESPs. The IOUs, on the other hand, will have a significant portion of load that is not contestable, or has limited contestability from other providers. Accordingly, forecast and recent retail sales information must remain confidential for as long as possible to avoid a loss of competition and increased prices. For this reason, the proposed disclosure element in the preliminary Staff Proposal will harm ESP's and other retail sellers' abilities to optimally negotiate for RPS products, increasing procurement costs and associated customer costs.

3. Staff Proposal C.3.

For the same reasons described in response to Staff Proposal C.2., AReM also opposes this Staff Proposal as it would similarly reduce current confidentiality protections at the expense of retail sellers. Disclosure of a retail seller's RPS net short position (i.e., the ESP's current compliance position) is more harmful than disclosure of retail sales information alone. Taken together, the preliminary Staff Proposal element would, at least for the ESPs competing in the direct access market, completely distort the market by creating an environment almost perfect for the abuse of seller-side market power. Disclosure of near-term renewable net short positions are particularly sensitive as such information allows suppliers to exert leverage over the retail seller once they know precisely the ESP's level of need to procure additional renewable product types and volumes. Accordingly, this element of the Staff Proposal must be rejected and the current confidentiality protections maintained.

4. Staff Proposal C.4.

AReM opposes the Staff Proposal to eliminate confidentiality for prior years. For the reasons stated above in response to Proposals C.2. and C.3., disclosure of prior year procurement and compliance position data will provide substantial information that will result in market distortion and increased costs and prices. Renewable suppliers may use disclosed information to reverse engineer a retail seller's compliance position and need. This is particularly important for compliance reports that are submitted near the final part of a multi-year compliance period, as the Staff Proposal would effectively disclose a retail seller's entire compliance position to date, including the total RPS net short volumes and product mix needed to be procured in the final year of the compliance period. Disclosure of such information provides tremendous leverage to renewable sources and suppliers, allowing such entities to extort enormous market power on procuring entities, and run up prices against the ESPs that have concerns about potential compliance penalties and the likelihood that the Commission would reject any requested compliance waiver. Accordingly, the ability to protect information from the most recent prior year must be retained to enhance competition within the direct access market and to minimize the potential exercise of market power.

AReM also points out that the Staff Proposal to develop a separate report for prior performance may not be a simple task. To date, each iteration of the RPS compliance reporting templates (of which there have been many recently) requires intensive efforts on the part of the Energy Division to develop the templates, and by retail sellers to review and understand the operation of the new templates to ensure their proper functionality.

B. Price Disclosure.

1. Staff Proposals D.1., D.2., and D.3.

The preliminary Staff Proposals D.1., D.2., and D.3. relating to the collection and disclosure of IOU RPS prices run to the heart of the extensive discussion provided above in Section II of these comments. AReM does not reiterate in detail the comments provided above. Put simply, the Staff Proposal has significant and fatal legal flaws that omit the significant differences in Commission jurisdiction between the fully regulated and rate protected IOUs and ESPs that are not subject to Commission procurement and ratemaking oversight, as specified in statute and as previously recognized by the Commission. Indeed, the Commission has found that "because [it] do[es] not regulate ESP rates, there is no need for reasonableness review of ESPs' contracts."[55] Hence AReM strenuously objects to the collection and potential disclosure of these types of data. AReM reserves the right to address these elements of the preliminary Staff Proposals at a later date, particularly if the Staff attempts to provide another basis or justification to its Proposals.

2. Staff Proposal D.4.

As described throughout these comments, Staff Proposal D.4. must be rejected as unlawful. Disclosure of ESP pricing information at any time is unlawful and outside the scope of the Commission's jurisdiction. AReM will not repeat arguments raised throughout these comments as to why the Commission cannot collect and disclose ESP RPS contract prices, but provides more specific comments in response to this particular Proposal.

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[55] D.11-01-026, p. 7.

The Staff Proposal itself provides in its rationale that "the commercial interests of the contracting parties" must be protected.[56] AReM agrees. However, for the reasons enumerated in these comments, disclosure of price information will harm the commercial interests of ESPs and their counterparties.

The Staff claims further justification for the Staff Proposal based on "the Commission's obligations to report to the Legislature about the RPS program, including its costs."[57] The report to the Legislature, however, is designed to report on the IOUs, not the ESPs. Indeed, the 2006 Budget Act Supplemental Report requiring the report provides that the report only address California's IOUs.[58] Moreover, the Legislature, by circumscribing Commission jurisdiction and making clear that it does not oversee the retail contracting arrangements between ESPs and direct access customers, has decided that the rigors of a competitive market for electric supply will discipline costs for that narrow portion of customers currently eligible to participate in direct access. Accordingly, the preliminary Staff Proposal to alter ESP reporting obligations will not advance the goal it articulates.

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[56] ALJ Ruling, p. 25.

[57] *Id.*

[58] *See* Legislative Analyst's Office *Supplemental Report of the 2006 Budget Act 2006-07 Fiscal Year* (June 28, 2006), p. 42, available at http://www.lao.ca.gov/2006/supp_report/supp_rpt_2006.pdf:

> In order to evaluate the progress of the state's investor owned electric utilities in complying with the Renewables Portfolio Standard (RPS) pursuant to Public Utilities Code section 387, PUC shall report to the Legislature on or before October 1, 2006, and quarterly thereafter, on the following:
> (a) The progress of each ***investor owned electric utility*** in meeting the RPS goals, as defined in Section 387 or as modified by subsequent commission rulings that accelerate the statutory goals;
> (b) For each ***investor owned electric utility***, an implementation schedule to achieve the RPS goals, including all substantive actions that have been taken or will be taken to achieve the program goals;
> (c) A work plan, schedule, and status report for all substantive procurement, transmission development, and other activities that the commission has undertaken or plans to undertake to ensure that the state's ***investor owned electric utilities*** achieve the goals and requirements of the RPS. (Emphasis added.)

The Staff's rationale for collecting and disclosing these data types continues that "[d]isclosure of prices of all RPS procurement contracts provides information that the Commission and market participants could use to make more effective and accurate cost comparisons among different types of resources and project designs."[59] As described earlier in these comments, with respect to ESP contracting, there simply is insufficient liquidity and standardization of RPS products to provide the type of snapshot that Staff believes it could provide. Therefore, disclosure of information will not allow direct comparison of RPS products. Instead, the collection and disclosure could unintentionally result in greater confusion or misinformation about the RPS program as direct pricing comparisons will be impossible in most cases. And as previously described, ESP customers already have the tools to assess ESP service offerings and to negotiate prices and therefore can make the comparison between competing ESPs when they solicit for their direct access eligible accounts. For these reasons, the additional transparency that Staff believes disclosure will create is illusory.

The rationale for the Staff Proposal also claims that there is only a "slight" chance "that the disclosure of price of any individual contract would have a significant near-term effect on [the large WECC-wide market for RPS-eligible generation]."[60] However, the rationale fails to properly weigh this allegedly "slight" risk to the participants in the much narrower direct access retail market by the public disclosure of ESP price information and fails to explain how disclosure advances the public interest. As previously explained, such disclosure will harm ESPs and their customers by reducing competition, creating an environment ripe for the exercise of market power, and increasing prices to ESPs and their customers over the long run. While ESPs

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[59] ALJ Ruling, p. 25.

[60] *Id.* at 26.

do not have the large load levels that allow them to exert market power on the buyer side like California's IOUs, and disclosure of an individual supply contract may not have an impact on the WECC-wide market that is primarily focused on IOU solicitations, when one considers the disclosure of ***all*** contracts, and particularly all ESP contracts in the significantly smaller direct access market, there is certain to be an impact on market procurement opportunities for ESPs. When viewed from the much smaller direct access market, the rationale advanced in the Staff Proposal fails to properly balance the potential for significant market harm against a minimal public interest benefit for the public eligible to participate in the direct access market.

Lastly, Staff attempts to justify the preliminary Staff Proposal based on SB 695 because "ESPs are now 'subject to the same terms and conditions applicable to an electrical corporation' in the RPS program."[61] As previously discussed, this statement is incorrect and conflicts with prior Commission determinations. Although SB 695 does apply RPS program ***compliance*** requirements equally to ESPs and IOUs, the Commission has previously determined that pricing is ***not*** a term or condition of the RPS program that applies equally. When implementing SB 695, the Commission noted the differences between ESPs and IOUs:

> The Commission also noted some of the differences among the different types of RPS-obligated retail sellers. The Commission observed that it has limited authority over ESPs and CCAs.
>
> This Commission has less overall control over how ESPs and CCAs operate than we do over how utilities operate. Also, to the extent we consider ESP and CCA operations, our concerns about their operations differ somewhat from our concerns about the operations of the investor-owned utilities. In the context of the RPS program, ***our primary concern is to ensure that ESPs and CCAs do in fact reach the goal of 20% renewable energy by 2010***. [footnote omitted]. ***We are, however, somewhat less concerned about the details of how they get there***.

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[61] *Id.* (citation omitted).

> Therefore, we do not believe it is reasonable to require these entities to be subject to the exact same steps for RPS implementation purposes as the utilities we fully regulate. We also do not believe that it is necessarily reasonable to subject ESPs and CCAs to the same RPS process requirements as each other, simply because they are not utilities. . . . . [W]e are sensitive to the particular requirements and pressures of each type of entity and do not necessarily want to impose a 'one size fits all' RPS regulatory scheme.[62]

In the same decision, when implementing the temporary limit on prices for TRECs, the Commission concluded that:

> [T]he temporary price limit is not an RPS program requirement. Rather, it is a method to protect ***IOU ratepayers*** [and the Commission's responsibility] to ensure just and reasonable rates for IOU ratepayers does not extend to the customers of ESPs. (See § 394(f).)[63]

As the Commission has concluded that SB 695 does not authorize the Commission to regulate ESP retail prices, the preliminary Staff Proposal commits legal error by attempting to use SB 695 as a justification for disclosing ESP prices. Accordingly, and for the reasons discussed extensively in Section II, the Commission must remove Staff Proposal D.4 should it decide to move forward with its proposed changes to the confidentiality rules.

C. Costs of RPS Procurement Contracts.

1. Staff Proposal E.1.

AReM opposes Staff Proposal E.1. because disclosing recent procurement volumes from the prior year can be used by market participants to calculate compliance positions in order to exert leverage in the wholesale market. As described above, this is particularly true in the final

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[62] D.11-01-026, p. 6, referencing D.05-11-025, pp. 12-13, emphasis added.

[63] D.11-01-026, p. 18, emphasis added.

year of a compliance period, as disclosure of procurement volumes to date can be compared to procurement targets to determine the RPS compliance position of a retail seller going into the last year, particularly with respect to its long-term contracting requirement and the procurement product mix obligation. If that retail seller has a net short, the renewable supplier could exert market power to the detriment of the procuring entity. Accordingly, this preliminary Staff Proposal should be rejected.

2. Staff Proposal E.2.

As described at length in Section II, this Staff Proposal is unlawful and must be struck out from the preliminary Staff Proposal. AReM will not repeat the arguments regarding legal error here, but instead focuses on the rationale for this Proposal.

First, Staff attempts to justify the Staff Proposal because multi-year compliance periods "make price and cost information from prior years less sensitive than under the former annual compliance regime."[64] This rationale admits that cost information is sensitive, but fails to provide sufficient justification for its disclosure. Although the multi-year compliance periods do provide greater flexibility as compared to a single year compliance obligation, the multi-year compliance period does not justify disclosure of cost information from ESPs. Cost data is relevant only in the context of the Commission ratemaking jurisdiction, which by statute does not extend to ESPs. Moreover, the direct access market is a narrow portion of the total system load subject to the RPS, and its costs are irrelevant to IOU ratemaking.

Staff further justify the Staff Proposal based on the Commission's reporting responsibilities, but here too Staff has completely failed in its attempt to extend rationales potentially valid for the rate-regulated IOUs to ESPs that are not subject to rate regulation. As

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[64] ALJ Ruling, p. 28.

described above, these reporting responsibilities extend to information regarding California's rate-regulated IOUs, not ESPs. The rationale further references the "Section 910 Report", but that report only provides information about electrical corporations, not ESPs.[65] Additionally, the rationale references the "Padilla Report", but that report only includes information from renewable procurement that is "approved by the commission."[66] As the Commission does not approve ESP contracts, there is absolutely no need to seek and disclose ESP cost information. Therefore, there is no legitimate basis to justify the preliminary Staff Proposal's effort to collect and disclose ESP cost information.

Staff also claim that a mature RPS market is unlikely to be impacted by disclosure of historic contract prices.[67] As previously discussed, AReM believes that Staff has not approached the question from the perspective of the marketplace in which ESPs operate. The California RPS supply market may be older, but there is no market design supporting a liquid market with standardized RPS products. Instead, ESPs must tailor their procurement efforts to meet their individual compliance requirements, so any two ESP RPS portfolios are likely to significantly differ. For this reason, disclosure of cost information will not provide transparency about the RPS program, but will likely mislead members of the public due to the simplifying assumptions. Furthermore, as previously discussed, direct access-eligible customers already have the ability to "shop" between ESPs and have access to ESP pricing information. Therefore, Staff has failed to present a valid, rational justification for collecting and disclosing ESP cost information.

Finally, Staff again attempts to use SB 695 as a justification for the Staff Proposal because "ESPs 'shall be subject to the same terms and conditions applicable to an electrical

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[65] *See* Public Utilities Code § 910.

[66] *See* Public Utilities Code § 911.

corporation.'"[68] As previously discussed, Staff's argument is incorrect and contradicts existing Commission decisions. The Commission, in implementing SB 695, found that ESPs are "smaller than and different from the utilities in many respects that are relevant to RPS procurement."[69] Accordingly, and as provided in Section 394(f), the Commission determined that it "has no responsibility for the price reasonableness of ESP procurement (whether conventional or RPS-eligible), and has no regulatory authority over ESP rates."[70] Because the Commission does not regulate ESP rates or prices, there is simply no authority for the Commission Staff to seek and disclose ESP procurement costs. For these reasons, and the reasons described in Section II, the Commission Staff must remove this element from the preliminary Staff Proposal.

3. Staff Proposal E.3.

As described in detail in Section II, this Staff Proposal is unlawful and must be rejected. AReM focuses below on the alleged rationale for this Proposal.

Staff attempt to justify this Staff Proposal based on a need for cost transparency to implement the RPS procurement expenditure limitation ("PEL").[71] However, the Staff Proposal for a methodology to implement the PEL for the RPS program applies solely to the IOUs and relies exclusively on IOU data.[72] On this basis alone, this purported justification fails, as the collection and disclosure of ESP cost information is wholly irrelevant to the operation of a PEL.

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[67] ALJ Ruling, p. 29.

[68] *Id.*

[69] D.11-01-026, p. 22.

[70] *Id.*

[71] ALJ Ruling, p. 29.

[72] *See* July 23, 2013 ALJ Ruling Requesting Comments on Staff Proposal for a Methodology to Implement Procurement Expenditure Limitations for the Renewables Portfolio Standard Program, available at http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M073/K350/73350639.PDF.

Staff also improperly attempt to rely upon reporting requirements to the Legislature as a rationale for disclosing ESP cost data. However, as discussed above, ESP cost data is not included in these reports.

Staff attempt to justify the Staff Proposal because cost information would be aggregated by resource category, thereby not revealing individual contract cost data.[73] As described above, even if aggregated, specific ESP cost information is protected by ESPs as a trade secret, and retention of its confidentiality is vital to the way ESPs are operated to remain competitive. Moreover, disclosure of such information is unnecessary as ESP customers can already shop between ESPs, and disclosure of some "blended value" based on aggregated data will be misleading to customers served under differing contract terms.

Finally, Staff again attempts to use its over-simplified reading of SB 695 as a justification for this Staff Proposal element because "ESPs 'shall be subject to the same terms and conditions applicable to an electrical corporation.'"[74] Again, for the reasons previously stated, this justification is both unfounded and misrepresents prior Commission determinations. The Commission, in implementing SB 695, determined that it "has no responsibility for the price reasonableness of ESP procurement (whether conventional or RPS-eligible), and has no regulatory authority over ESP rates."[75] Because the Commission does not regulate ESP rates or prices, there is simply no authority for the Commission to seek ESP procurement costs. Accordingly, this element of the preliminary Staff Proposal must be removed from any potential modification of the confidentiality rules as unlawful and without the requisite valid legal justification supporting it.

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[73] ALJ Ruling, p. 29.

[74] ALJ Ruling, p. 30.

4. Staff Proposal E.4.

This Staff Proposal element concerns IOU data and is not applicable to ESPs. However, AReM emphasizes that SB 695 does not justify extending this Staff Proposal to ESPs, as it is tailored specifically to IOU RPS solicitations. AReM reserves the right to provide additional comments on this Staff Proposal if Staff attempts to circumvent prior Commission determinations and extend the rationale to ESPs.

D. Commission Review of RPS Procurement Contracts; Planning Requirements.

1. Staff Proposals F.1. – F.7.

Staff Proposals F.1. through F.7. are tailored to IOU RPS solicitations, utility-owned generation, IOU short-lists, IOU renewable net short calculations, and Commission-approved IOU contracts. As these preliminary Staff Proposals are IOU specific, AReM provides no comments on these Staff Proposals at this time.

2. Staff Proposal F.8.

As described in Section II, Staff Proposal F.8. is unlawful and must be rejected. AReM will not reiterate those arguments here, but instead focuses on the purported rationales for the Staff Proposal.

Staff's apparent justification for this Staff Proposal is that "it is important for information about [ESP] RPS procurement to be publicly available in ways roughly analogous to that of IOUs."[76] This "one size fits all" rationale in itself is hardly a justification, but rather a solution to a problem that does not exist. Transparency for transparency's sake is hardly a justification. When disclosure harms the market, however, the interest in confidentiality far outweighs any

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[75] *Id.*

interest in transparency. As described above, ESPs enter into contracts to meet their unique needs in a manner that best suits their overall interests, both near-tern and long-term. Disclosure of ESP contract data would disrupt internal business determinations of the ESPs, harming the ability of an ESP to maintain legitimate trade secrets and will result in a loss of competitive advantage.

Here too, Staff attempts to use SB 695 as a justification for the Staff Proposal because "ESPs 'shall be subject to the same terms and conditions applicable to an electrical corporation.'"[77] As in all the other cases this justification is unfounded and directly conflicts with prior Commission determinations regarding its jurisdiction over ESPs. The Commission, in implementing SB 695, determined that it "has no responsibility for the price reasonableness of ESP procurement (whether conventional or RPS-eligible), and has no regulatory authority over ESP rates."[78] Because the Commission does not regulate ESP procurement, rates or prices, there is simply no authority for the Commission Staff to now seek specific information and terms from ESP procurement contracts.

For these reasons, and the reasons enumerated in Section II, this element must be struck from the Staff Proposal.

3. Staff Proposal F.9. – F.11.

AReM notes that Proposals F.9. through F.11. are tailored to the IOUs and provides only these limited comments with respect to F.10. AReM reserves the right to comment on these Proposals if their applicability extends to non-IOU retail sellers.

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[76] ALJ Ruling, p. 37.

[77] ALJ Ruling, p. 30.

[78] *Id.*

Staff Proposal F.10. needs to be clarified as it is unclear how contract amendments will be treated. The Staff Proposal indicates that contract amendments would not impact the confidentiality protections for the prior version of the contract, but it is unclear how the amended contract would be treated. Any amended contract should restart the clock on any available confidentiality protections from the date of the amendment, not from the date of the initial contract. Therefore, assuming a "front 3 years" confidentiality window, an amendment executed in 2015 should receive confidential protection through 2018.

E. General Planning and Disclosure.

1. Staff Proposal G.1.

AReM does not provide comments on this Staff Proposal as it applies solely to the IOUs.

V. Effective Date.

AReM opposes the Staff Proposal's planned implementation of confidentiality rule changes. The Staff Proposal intends to apply any new rules to "[a]ny RPS compliance report, or other document related to compliance with or enforcement of any RPS obligation, that was submitted to the Commission more than six months before the effective date of the decision."[79] However, the new rules "would apply six months from the effective date of the Commission decision adopting the new rules to: … Any RPS compliance report or other document related to compliance with or enforcement of any RPS obligation, that was submitted to the Commission less than six months before the effective date of the decision."[80] Accordingly, older reports would become subject to the new rules, while reports submitted shortly before the adoption of the new rules would continue to be protected pursuant to the current confidentiality protections.

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[79] ALJ Ruling, p. 42.

For the reasons detailed in Part II, The Commission cannot apply new confidentiality rules retroactively. This would disrupt the market by subjecting contracting parties to new requirements not in effect at the time of contract execution. Furthermore, it could lead to unreasonable administrative burdens to resubmit prior information. Any new adopted confidentiality rules should only apply prospectively, not retroactively.

VI. Conclusion

For the reasons specified in these comments, the Commission Staff must remove the preliminary Proposal elements C.1., C.2., C.3., C.4, D.4., E.1., E.2., E.3., and F.8. Additionally, any changes to the confidentiality rules for the RPS program should only apply prospectively from the date they are adopted and properly conform to the limited jurisdictional role of the Commission with respect to ESP procurement efforts and retail commercial activities.

Dated: August 5, 2013

Respectfully submitted,

/s/

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[80] ALJ Ruling, pp. 42-43.

VERIFICATION

I am the attorney for the Alliance for Retail Energy Markets ("AReM") and am authorized to make this verification on its behalf. AReM is absent from the County of Sacramento, California, where I have my office, and I make this verification for that reason. The statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the forgoing is true and correct.

Executed on August 5, 2013 at Sacramento, California.

/s/

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