BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement Senate Bill 520 and Address Other Matters Related to Provider of Last Resort.	R.21-03-011

CALIFORNIA COMMUNITY CHOICE ASSOCIATION'S COMMENTS ON ADMINISTRATIVE LAW JUDGE'S RULING DIRECTING FURTHER PARTY COMMENT, REQUESTING PARTY PROPOSALS, AND AMENDING PROCEDURAL SCHEDULE

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December 17, 2021

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SUMMARY OF RECOMMENDATIONS

- ✓ The Provider of Last Resort (POLR) service should be limited to 60 days to allow returned customers to transition from the returning load-serving entity (LSE) to the customer's chosen LSE, consistent with the existing "safe harbor" provision for Direct Access (DA) switching;

- ✓ Given the limited term and scope of service and the need to avoid unnecessary costs, the POLR should not engage in advance procurement or hedging;

- ✓ Renewable Portfolio Standard (RPS) and Integrated Resource Planning (IRP) responsibility for returned customers should shift directly from the returning LSE to the customer's new LSE, with a waiver of these obligations for the POLR consistent with the existing waiver for Resource Adequacy (RA) obligations adopted in Decision (D.) 20-06-031;

- ✓ The Commission should compare Reentry Fees and actual costs for Western Community Energy's (WCE) customer return to determine whether the current formulation provides sufficient precision to ensure a reasonable outcome;

- ✓ A POLR right of first refusal (ROFR) of procurement contracts held by the returning LSE raises legal and commercial issues and should not be considered;

- ✓ To minimize the risk of LSE default by newly launched community choice aggregators (CCA), Implementation Plan requirements should be modified to incorporate a milestone procedure to be administered by the CCA's governing board, quarterly updates to Energy Division on the status of milestone achievement, transparency through the use of a publicly available information portal available, and feasibility studies provided to the local governing board built on transparent and standardized referents; and

- ✓ Financial service requirements (FSR) should vary with the financial health of an LSE, limiting FSRs for LSEs maintaining investment-grade credit ratings and LSEs voluntarily providing limited metrics to the Commission for review; all other LSEs should bear responsibility for the currently formulated FSR.

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The California Community Choice Association[1] (CalCCA) submits these Comments in response to the *Administrative Law Judge's Ruling Directing Further Party Comment, Requesting Party Proposals, And Amending Procedural Schedule* (Ruling), issued on November 23, 2021.

I. INTRODUCTION

Senate Bill (SB) 520[2] establishes requirements for the California Public Utilities Commission (Commission) and the POLR, whether the POLR is an investor-owned utility (IOU) or a non-IOU party. In this phase, the Commission is reviewing and considering revisions to the POLR rules as they apply to the IOUs. The Ruling thus seeks comments on specific features of

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

2 Cal. Pub. Util. Code § 387.

the existing framework for the involuntary return of customers to the IOU, such as deregistration, financial security requirements, and reentry fees. CalCCA provides comments on these specific features below in response to the questions posed in the Ruling. The Commission's efforts to resolve these and other questions, however, are best served by grounding the discussion in a clear definition of POLR and guiding policy principles.

The Commission should consider the POLR definition proposed by Southern California Edison Company's (SCE) in its comments in this Order Instituting Rulemaking (OIR). SCE equates the POLR function to the "safe harbor" service the IOUs provide today for returning DA customers. Adopting this definition limits the amount of planning and procurement the POLR must undertake to fulfill its role. As discussed below, however, it raises other issues, such as the separate needs of the default service provider (DP), the length, scope, and purpose of the FSR, and the rules for customer return to utility bundled service when no POLR service is required.

In addition to refining the POLR definition, the Commission should adopt guiding policy principles to shape the stakeholder discussion. CalCCA proposes the following principles:

- All customers – bundled and unbundled alike – should be protected from unnecessary or duplicative costs when a LSE involuntarily returns customers to the IOU for POLR service;
- The POLR should provide only a short-term service bridging any transition of the returned customers to DP service or the service of another LSE;
- All customers that have an alternative LSE to the DP should be able to exercise that alternative before or during the term of POLR service;
- As a short-term service provider, the POLR should not bear responsibility for meeting the state's longer term goals; and
- The rules adopted in this phase of the OIR should be sufficiently durable to accommodate consistency of POLR requirements across both phases regardless of the identity of the POLR.

With the proposed POLR definition and principles in mind, CalCCA offers the following proposals in these comments:

- ✓ POLR service should be limited to 60 days to allow returned customers to transition from the returning LSE to the customer's chosen LSE, consistent with the existing "safe harbor" provision for DA switching;
- ✓ Given the limited term and scope of service and the need to avoid unnecessary costs, the POLR should not engage in advance procurement or hedging;
- ✓ RPS and IRP responsibility for returned customers should shift directly from the returning LSE to the customer's new LSE, with a waiver of these obligations for the POLR consistent with the existing waiver for RA obligations adopted in D.20 06-031;
- ✓ The Commission should compare Reentry Fees and actual costs for WCE's customer return to determine whether the current formulation provides sufficient precision to ensure a reasonable outcome;
- ✓ A POLR right of first refusal (ROFR) of procurement contracts held by the returning LSE raises legal and commercial issues and should not be considered;
- ✓ To minimize the risk of LSE default by newly launched CCAs, Implementation Plan requirements should be modified to incorporate a milestone procedure to be administered by the CCA's governing board, quarterly updates to Energy Division on the status of milestone achievement, transparency through the use of a publicly available information portal available, and feasibility studies provided to the local governing board built on transparent and standardized referents; and
- ✓ FSR requirements should vary with the financial health of an LSE, limiting FSRs for LSEs maintaining investment-grade credit ratings and LSEs voluntarily providing limited metrics to the Commission for review; all other LSEs should bear responsibility for the currently formulated FSR.

Modifying the POLR consistent with these recommendations will protect bundled customers from cost shifts while avoiding unnecessary, duplicative costs.

Finally, CalCCA seeks clarification of a key issue for CCAs. In some cases, the need for POLR service to returned CCA customers could be averted if another LSE is willing to step in to serve the customers. For example, there may be opportunities for a CCA Joint Powers Authority (JPA) to absorb a financially challenged CCA before the latter resorts to returning customers to the POLR. Enabling these types of transitions gives CCA customers, like DA customers, an opportunity to select a non-IOU to provide ongoing service. CalCCA thus seeks clarification that no advance Commission certification is required, assuming local governing board approvals and notices (1) for an existing JPA to absorb an existing CCA, or (2) for two existing CCAs to form a new JPA. As discussed below, the current implementation plan procedures are built around mitigating the impacts of CCA customer departure on bundled customers, and neither of these transactions risk bundled customer impacts.

II. POLR SERVICE SHOULD BE DEFINED AS A 60-DAY "SAFE HARBOR" SERVICE CONSISTENT WITH EXISTING DA SWITCHING RULES

California Public Utilities Code § 387(a)(3) defines "provider of last resort" as follows:

> a load-serving entity that the commission determines meets the minimum requirements of this article and designates to provide electrical service to any retail customer whose service is transferred to the designated load-serving entity because the customer's load-serving entity failed to provide, or denied, service to the customer or otherwise failed to meet its obligations.

While the statute provides a starting point, the Commission should establish a clear boundary between the roles of the IOU as POLR and the IOU as a DP. Although the safe harbor was conceived in the context of DA voluntary switching rules, SCE's recommendation to look to the existing 60-day "safe harbor" service as the demarcation point between POLR and DP service merits consideration. Adopting this approach, however, raises a number of additional questions that must be answered related to the application of the FSR between the two services and the terms and conditions of DP service.

SCE "finds no justification for expanding the IOU POLR safe harbor beyond its current 60 days."[3] SCE explains "how thoughtful the Commission was in resolving the question of the 'temporary' safe harbor's duration"[4] in D.03-05-034. In that case, long before the first CCA launched, the Commission's thoughts centered on providing the DA customer enough time to switch Electric Service Providers (ESPs).[5] In most cases, as SCE notes, 60 days gives those customers sufficient time to switch to a new ESP or elect to return to bundled service.

The same concept should work for CCAs and could, in some circumstance, defer the need for POLR service for a financially challenged CCA ***if*** another CCA JPA wishes to absorb the challenged CCA. CalCCA thus seeks Commission clarification of its rules as they apply to CCAs' "switching" opportunities. If the existing CCA implementation plan process of a year or more applied to CCA-switching, the safe-harbor DA switching rules may not be suited; it would be infeasible under those circumstances to transition either to defer POLR service or within the 60-day safe harbor period to follow POLR service. CalCCA submits, however, that the existing implementation plan process does not apply to circumstances in which a CCA JPA absorbs a financially challenged CCA. Assembly Bill (AB) 117 required implementation plans to mitigate potential effects on IOU bundled customers when a community decides to aggregate load and form a CCA to provide service.[6] CalCCA thus requests clarification that absorption of a

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3 *Reply Comments of Southern California Edison Company (U 338-E) on the Proposed Order Instituting Rulemaking to Implement Senate Bill 520 and Address Other Matters Related to the Provider of Last Resort* (SCE Reply Comments) at 5.

4 SCE Reply Comments at 3.

5 *Id.* at 2 (*quoting* D.03-05-034 at 22-23 ("The safe harbor is not intended as a place to be used to shop around among different ESPs while taking bundled service and delaying submission of a DASR. The safe harbor provision is intended to facilitate an already contemplated switch to a new ESP.")).

6 *See* California Public Utilities Code § 366.2(c)(3) (requiring an implementation plan for CCA formation); *see also* California Public Utilities Code § 366.2(c)(5) requiring an implementation plan to determine cost responsibility to avoid cost shifts to bundled customers).

financially challenged CCA by an existing CCA JPA and other transactions that do not involve IOU departing load are ***not*** subject to the one-year implementation planning process. With this clarification, CalCCA supports SCE's proposed 60-day POLR service.

III. GUIDING PRINCIPLES

To guide the stakeholder discussion and Commission decision-making, CalCCA recommends adoption of several guiding principles.

1. *All customers – bundled and unbundled alike -- should be protected from unnecessary or duplicative costs when an LSE involuntarily returns customers to the IOU for POLR service.*

Affordability is one of the Commission's top priorities, currently being addressed in Rulemaking (R.) 18-07-006. Mitigating the costs of involuntary customer returns likewise should minimize impacts on affordability. An involuntary return of customers should not shift costs to IOU bundled customers. The Commission must also consider, however, potential rate impacts on unbundled customers. POLR rules must be designed to minimize unnecessary or duplicative costs that could fall on unbundled customers.

2. *The POLR should provide only a short-term service bridging any transition of the returned customers to default provider service or the service of another LSE.*

The POLR should not be viewed as an LSE but rather a short-term transitional role for customers returned to the IOU by a financially challenged LSE, consistent with the current DA switching rules.[7] The focus should be on transitioning customers to a default provider or an alternate LSE, as quickly as possible so that the latter may assume full responsibility for meeting reliability and climate obligations on the customer's behalf.

[7] *See* D.03-05-034

3. *All customers that have an alternative LSE to the DP should be able to exercise that alternative before or during the term of POLR service.*

All customers returned to the IOU for POLR service by another LSE should have comparable options to "switch" providers before or during the POLR period. The nature of the returning LSE should not foreclose a customer's opportunity to switch.

4. *As a short-term service provider, the POLR should not bear responsibility for meeting the state's longer term goals; the responsibility should remain with LSEs.*

All LSEs have the primary responsibility for serving the needs of their customers. This includes the provision of energy, capacity for reliability (including both RA and resources necessary to meet the IRP-identified needs), renewable attributes, and green-house gas reduction. The POLR rules should not change this dynamic nor interfere with or complicate existing programs. Retaining these obligations in the non-POLR LSEs will help limit unnecessary or duplicative costs to returned customers.

5. *The rules adopted in this phase of the OIR should be sufficiently durable to accommodate consistency of POLR requirements regardless of the identity of the POLR.*

Phase 2 of this proceeding will consider, consistent with SB 520, allowing entities other than the IOUs to serve as POLR. The Commission thus should avoid any decisions in this Phase that would inhibit another entity from serving as the POLR at the outcome of Phase 2. Likewise, the requirements for the IOU should be no less stringent than would be required for a non-IOU serving in this regulated role.

IV. BUNDLED AND UNBUNDLED CUSTOMERS ALIKE SHOULD BE PROTECTED FROM COST SHIFTS AND UNREASONABLE COSTS

The POLR rules should protect all customers from unnecessary costs – both bundled and unbundled customers alike. The Commission has sufficiently addressed the need to avoid cost shifts from returned customers to IOU bundled customers through the FSR and Reentry Fees. It should equally focus on avoiding unnecessary and duplicative charges to returning customers in the POLR process.

Returning customers would be at risk for unnecessary or duplicative costs if a POLR were required to engage in advanced procurement, as discussed below in response to question D.2. By shortening the term of POLR service and limiting the scope of POLR procurement, as proposed in these comments, the Commission will help ensure all POLR costs are reasonable.

As will be further discussed in section VI, question B.1, while hedging as considered in this proceeding (*i.e.* FSR and POLR procurement of resources in anticipation of an LSE failure) are viewed as desirable to protect bundled load from the unanticipated return of customers when market prices may be high, the discussion should also consider how such hedging mechanisms work with other mechanisms and the costs that POLR actions would entail as well as who will pay for such costs. It is not just the protection of bundled customers that should be considered but the protection and fair treatment of all customers including the risks and costs of all mechanisms considered. In fact, if the POLR is hedging with instruments used only when a default by an LSE occurs, that hedge does nothing for the LSE to avoid a default and will mean that the LSE will hedge that risk as well. With the cost of the POLR hedge likely to be borne by the CCA customer as well as the hedge put in place to prevent the risk of failure by the CCA, the CCA customers will hedge and pay twice. Once to mitigate the market price risk and a second time to mitigate the risk to bundled load customers. However, these hedges are duplicative since the hedge entered by the CCA to mitigate market price risk is designed also to mitigate the risk that the CCA itself fails. It is this same market risk of failure that the POLR hedge is designed to address and is therefore duplicative.

With respect to Guiding Principle #1 in section III, the Commission should evaluate the need for, methods of, and equity of hedging currently in place to protect all customers given the cost of hedging. Hedging in this sense is primarily considered as an energy product. Energy hedging can take a number of forms but most commonly includes call option contracts, fixed price energy, and tolling agreements. In both the call option and fixed price energy arrangements, a buyer will receive energy at a specified price. With the call option, the buyer has the option to strike the agreed upon price or not, at the buyer's discretion. The fixed price energy arrangements provide no option and will simply deliver during the agreed upon time period at the agreed upon price. Tolling agreements, on the other hand, effectively allow a buyer to lease a facility and operate it at their discretion while absorbing the costs as well as obtaining market revenues. When viewed from the buyer side, these mechanisms can mitigate exposure to high energy costs in the CAISO market. From the supplier side, they limit the ability to profit from those same market events. Therefore, in selling such an instrument, the seller must be convinced that the loss of potential market revenue is accounted for in the cost of the hedging product. This payment is generally referred to as a "premium" which is paid regardless of the use of the resource or the provision of energy. Hedging comes with a cost.

All LSEs have an incentive to hedge to protect their customers and mitigate their own financial exposure over time. The IOUs are regulated in their hedging strategies and implementation by the Commission. Each CCA's hedging strategy is appropriately determined by their Board of Directors as a procurement responsibility on behalf of their served communities.

In addition to hedging that a CCA will employ for its own needs, the CCA energy costs are also hedged though actions taken by the IOU. This comes in the form of the Power Charge

Indifference Amount (PCIA) and the Cost Allocation Mechanism (CAM). With regard to PCIA, the amount charged serves much like a fixed price energy contract in which the CCA customers will pay the cost of the IOU historical procurement less the revenues from the market. As such, the CCA will always pay no more than the total PCIA cost. When market prices go up, the PCIA that the CCA pays will go down and vice versa. This counteraction of the costs serves as a hedge to the total generation costs that will be paid by a CCA customer and therefore must be considered when a CCA enters into its own hedges. CAM similarly requires a CCA customer to pay for the cost of utility procurement and is offset by the market revenues of the energy the resource provides. CAM also allocates the RA and RPS (if applicable) to all customers while the PCIA establishes a value to credit against the costs. Both CAM and PCIA hedge the costs of CCA customers and are outside of the control of the CCA whose customers are impacted.

The FSR also hedges risk and while it has been theorized to hedge against volatile market prices, it is fundamentally a hedge for bundled load customers against the risk of returning load and how costs from those returning customers may impact the bundled customers rates. The risk of volatile energy prices is exacerbated for a CCA under the existing FSR rules. At a time of rapidly increasing market prices, a CCA will need to both serve customers in a more expensive environment and post an FSR that could increase to tens of millions of dollars to cover the same above market costs a second time. Such financial security has an associated cost and will be paid for by CCA customers even if the CCA never fails. The additional exposure created by the FSR has the potential to be the actual cause of a CCA failure at a time of high market prices. Thus, while the FSR protects bundled customers from price volatility, it exacerbates that same risk for unbundled customers. The Commission must consider the probability of a CCA default in the context of the FSR rules, rather than simply assuming 100 percent likelihood of failure and exacerbating the risk of market price volatility for all CCAs. As discussed further in section VI, question B.1, the Commission should employ a process where the use of hedging instruments by the POLR (e.g., FSR) is dependent upon the financial status of the retail access LSE. In addition, as discussed in section VI, question D.2, the POLR should not procure energy, renewable attributes, or capacity in anticipation of a potential failure as this is may include redundant procurement of energy, RPS, and RA resources. Doing so would place competition in the market for those resources which may end up being held by the POLR without any compliance obligations and unavailable for other LSEs with compliance obligations. Adding more competition to the market will increase prices, especially in constrained markets (e.g., RA).

In addition to such a mechanism adding upward pressure on market prices, the costs of such procurement would also need to be allocated and create a significant risk of undermining competition. Given the current designation of IOUs as POLRs, it appears reasonably certain that the IOU will not be sending their customers to POLR service for quite some time. California is unlikely to allow the entity serving as a POLR to cease to operate. This is supported and partly substantiated by the history of allowing PG&E or a replacement entity to continue service for bundled customers if PG&E becomes insolvent (*i.e.* recent PG&E bankruptcy proceeding including the enhanced oversight and enforcement process and SB 350 (2020) allowing for the creation of Golden State Energy). It will likely take years before another entity serves as the POLR. Thus, it is unlikely the POLR would need to provide service to bundled customers in the near-term. Therefore, the cost of procurement performed by the POLR in anticipation of an LSE failure is likely to fall only on unbundled customers, including those whose LSEs may be at *lower* risk of failure than the IOU. In favoring the IOU customers by virtue of the IOUs' status as the POLR, these costs will have a direct anticompetitive impact.

Consideration of actions from the POLR, including hedging, FSR, PCIA, and CAM, must be considered holistically since the impact of each element differs for each entity and could place burdens and obligations that are inappropriate without full consideration.

V. COMMENTS ON WORKSHOP 1

1. Please provide any additions, clarifications, or corrections to the October 29, 2021, Staff Workshop (Workshop 1) notes submitted by California Community Choice Association.

CalCCA supports the suggestion made in Workshop 1 to examine the affiliate transaction rules for applicability to avoid the risk of the POLR service artificially subsidizing bundled utility service.

2. Please provide any additional comments on issues raised in Workshop 1.

CalCCA does not offer any additional comments on the issues raised in Workshop 1.

VI. QUESTIONS REGARDING POLR FRAMEWORK

A. Registration, Deregistration, and Regulatory Compliance

1. Regarding California Public Utilities Commission (CPUC) procurement requirements, what if any changes or clarifications to the responsibilities of the Investor-Owned Utility (IOU) as Provider of Last Resort (POLR) and the deregistering Load Serving Entity (LSE) should be considered? How should any recommended changes or clarifications to the requirements be applied in the scenarios of both a sudden deregistration (ex: abrupt bankruptcy) and a planned de-registration with a long notice period (ex: 1 year)? For any proposed changes or clarifications, please address how they also maintain the integrity of the underlying procurement program and statutory objectives. Please address:

a. Resource Adequacy
b. Integrated Resource Plan (IRP)
c. Renewable Portfolio Standard
d. Any other procurement obligations?

Consistent with CalCCA's proposed guiding principle #4, the POLR should not bear responsibility for meeting the state's long-term goals, including IRP and RPS requirements.

All LSEs have the primary responsibility for serving the needs of their customers. This includes the provision of energy, capacity for reliability, and renewable attributes and achievement of targeted GHG emissions reductions. The POLR rules should not change or complicate administration of the already complicated IRP and RPS programs. Consistent with this approach, the Commission should automatically waive the IRP and RPS requirements for the POLR.

The IRP and RPS responsibilities should remain with the non-POLR LSEs. If the returning LSE has failed to meet the requirements of a procurement order or an RPS compliance showing on behalf of the returned customers, the Commission should employ any enforcement mechanisms available under those programs. Any future IRP and RPS requirements for returned customers should then be assumed by the LSE who assumes continuing service following the POLR service.

The POLR's responsibility for RA likewise should be limited considering the 60-day service term. Having the POLR meet any year-ahead RA obligations seems unnecessary since it will serve the returned load for only two of the twelve months. Month-ahead showings may or may not be feasible, depending on the timing of customer return relative to the showing required 45 days in advance of prompt month. Even if there is an ability to make the month-ahead showings, the Commission should maintain the RA waiver for the POLR adopted in D.20-06-031.

2. Panelists in Workshop 1 described challenges in ensuring customers are informed about Community Choice Aggregator (CCA) deregistration. Should the CPUC adopt customer notification requirements, and if so, what should those be? Please address how any proposed requirements would improve and ensure adequate:

a. Timing and frequency of communications

b. Format of communications (ex: mailers, email, call, text, website, other?)

CalCCA encourages the use of on-bill messaging for customer notifications about deregistration of a CCA that actively served customers. The customer bill is regularly used to communicate messages to customers and limits the need to incur additional marketing costs. This proceeding should endeavor to avoid creating additional costs associated with discontinuing an LSE's service. To do otherwise would create additional liabilities that may impair the position of creditors or customers. For example, if the deregistering CCA were required to send mailers to all customers, it may need to utilize limited financial resources that would have otherwise been available to pay a reentry fee, potentially leaving residual costs for customers to absorb. The timing and frequency of communications should allow for an emergency transition that may happen on a short timeline.

CalCCA also observes that customer notifications related to a CCA deregistration where a CCA never initiated service to customers is not needed. In such a case, the need for customer notifications is significantly diminished as the customers' existing service would not be changed. Additionally, the affected customers will continue to benefit from public notices and public meetings associated with local jurisdiction decision making around the CCA service.

3. What changes or updates, if any, are needed in the CCA registration process in light of Senate Bill (SB) 520?

CalCCA provides two recommendations aimed to help CCAs avoid the need for the POLR. First, the Commission should consider enhancing the implementation planning process, whether in this proceeding or another forum. Second, the Commission should clarify that there are no implementation plan requirements for an existing CCA to "absorb" a financially challenged CCA.

To avoid the need for POLR service, enhancement of the existing implementation plan procedures may be required.

- ✓ A milestone process should be developed and administered by the local governing board to ensure a ***new*** CCA is undertaking the due diligence necessary to launch; similar requirements will not be necessary for expansion of existing CCAs.

- ✓ The milestone procedure should require ***new*** CCAs to do a feasibility study employing a standardized set of price referents and should be required to update the study not less than six weeks before launch; other referents may also be used for additional studies at the discretion of the CCA.

- ✓ The Commission should require quarterly updates by the CCA to the Energy Division of milestone progress and an update, including a revised feasibility analysis, not less than six weeks prior to launch; and

- ✓ During the milestone process, the CCA should be required to maintain a standardized information portal available to the Commission in overseeing completion of key milestones.

While these measures may not prevent ill-timed launches, they should reduce the risk of failure upon implementation. The measures also will provide the Commission greater insight into the implementation process and enhance launch best practices. CalCCA has also undertaken the development of these measures internally to provide "best practices" to new CCAs.

In addition to these implementation measures, the Commission should clarify that no advance Commission certification is required, assuming local governing board approvals for an existing JPA to absorb an existing CCA or other similar transactions between existing CCAs. This clarification could enable CCA customers to continue to be served by an LSE rather than to default to POLR service or, possibly, to transition to a new CCA during the POLR service period. Confirming that these transactions may be done without certification will not impact IOU bundled customers, since they will result in no IOU departing load and thus no change in the load the IOU must serve. Indeed, for that reason, an existing DA customer receiving service from a failing ESP could switch to an alternative ESP without needing to get back in line for a DA allocation.

4. **What changes, if any, are needed in the CCA de-registration process in light of SB 520? Please address:**

   a. **How the de-registration process changes would be implemented in the event of a sudden deregistration**

   b. **How the de-registration process changes would be implemented in the event of a planned deregistration**

   c. **Timeline for notification to the CPUC, IOU, and the public of the deregistration**

   d. **Roles and responsibilities between the IOU as POLR and LSE as to de-registration e. Any other issues regarding de-registration**

As noted in the presentation from David Oliver during the October 29, 2021 POLR workshop, there is limited precedent to inform the process of deregistration of a CCA that is serving load. While not explicitly addressed in SB 520, CalCCA supports examining the framework for de-registration in the context of POLR rules. CalCCA has no specific recommendations at this time but looks forward to hearing the insights from SCE gained in the de-registration of WCE and Baldwin Park Resident Owned Utility District (Baldwin Park). Whatever the direction, however, CalCCA encourages the Commission to provide significant flexibility to accommodate the potential need to transition customers on an emergent basis and avoid mandating continued service by an insolvent provider.

B. Financial Security Requirements and Reentry Fees

1. **Is the current methodology regarding financial security requirements and reentry fees adequate? If not, what changes or additional clarifying language is needed in order to implement the requirements of Public Utilities Code Section 394.25(e) requiring reentry fees to avoid shifting costs to bundled customers?**

CalCCA generally supports the existing methodology for the FSR in that it considers both administrative and procurement costs and looks forward at six months of expected costs. However, CalCCA suggests revisions to the FSR and reentry fees to: (1) account for the new role of POLR as distinct from bundled service; and (2) consider the likelihood of an LSE to discontinue service.

First, the Commission should allocate the benefits of the FSR between the POLR and the LSE that will provide continuing service – whether a DP or another LSE. With the POLR role defined in statute, bundled customers will soon have an intermediary that will provide service to involuntarily returning customers and further shield bundled customers from costs. As such, the FSR should be modified so that it is available to the POLR for its 60-day service; the remaining four months of FSR coverage would inure to the benefit of the LSE that will provide ongoing service to the extent the customer has not provided at least six months' notice of return.

Second, the Commission should gauge the level of FSR required depending upon the risk of default presented by the LSE. The posting of security has a long history in many industries including the energy industry. The posting of credit or collateral is largely based upon the risk of failure of one or both parties to a transaction. The Edison Electric Institute's Standard Power Purchase Agreements indicate different collateral posting requirements based on risk of default and consider credit ratings in doing so. For circumstances in which it is highly unlikely that an entity will fail, it is not useful or logical for their customers to incur the costs associated with posting an FSR. The Commission's current approach strictly calculates the reentry fee to be equal to the FSR under the assumption that the Commission cannot determine when an LSE will fail.

Since this one-size-fits-all FSR was adopted, much has changed with respect to available and well-accepted information indicating financial health of a CCA. Indeed, at this time, six CCAs have obtained investment grade credit ratings:

CCA	Moody's	S&P	Fitch
MCE	Baa2	A	BBB+
Peninsula Clean Energy	Baa2		BBB+
Silicon Valley Clean Energy	Baa2	A	
Central Coast Community Energy		A	
CleanPowerSF	A2		
East Bay Community Energy		A	

While these ratings are not an absolute guarantee that a CCA will not at some time fail, they are a strong indicator of financial health determined by ratings analysts applying a wide range of metrics. CCAs with investment-grade credit rating should not be required to post financial security.

If an CCA does not have an investment-grade credit rating, it should still have an opportunity to avoid posting an FSR provided they are willing to provide certain financial metrics for Commission monitoring. Specific metrics could be set, and a CCA not meeting the metric would be required to post an FSR.

Absent either an investment-grade credit rating or willingness to permit the Commission to monitor metrics, a CCA would be required to post an FSR. CalCCA continues to support the existing FSR methodology for that purpose.

2. What if any alternative to the current FSR and reentry fee methodology should be considered that would achieve the goals of Public Utilities Code Section 394.25(e) more effectively?

In the wake of the WCE and Baldwin Park customer returns, the Commission should review the Reentry Fee calculation. The current Reentry Fee was developed with an eye toward administrative ease using averaged revenues and prices. While the need for a transparent, administratively simple approach is understandable, the recent returns offer an opportunity to examine how the Reentry Fee performed with respect to these customers. CalCCA suggests examining, with SCE's assistance, a comparison of the Reentry Fee with actual costs.

High-level review suggests that the seasonality in rates and costs may result in a Reentry Fee that diverges from actual costs. The difference in market prices across seasons may explain why the Reentry Fee for WCE was nearly $15 million dollars while the reentry for Baldwin Park showed that the combination of expected rate revenues and currently available FSR would fully recover the anticipated costs of the return.

Examining further the re-entry fee calculation, one can use line 34 (energy cost forecast) and line 28 (CCA usage forecast) within the SCE Advice Letters 4541-E (WCE Re-Entry Fee Calculation) and 4648-E (Baldwin Park Re-Entry Fee Calculation) to conclude that the energy price forecast was $79.04/MWh and $61.10/MWh respectively. This represents a 22.7 percent difference in forecast energy costs. At the same time, the average generation rate applied to determine expected revenues were $86.00 for WCE and $86.23 for Baldwin Park, representing only a 0.3 percent difference in expected generation revenues. If the actual retail rates charged reflect a similar split in summer and winter generation charges, the use of an annual system average generation rate while using a forecast of energy costs for the actual period of re-entry fee service will result in a significant discrepancy.

Similarly, the FSR calculation should consider anticipated IOU rate changes that are likely to be in effect during the posting of that FSR. For example, the November 10, 2021 advice letter filed by the IOUs should reflect proposed changes to bundled rates that are likely to be in effect the first six months of the next year. This change will reduce the likelihood of a discrepancy between a posted FSR and a calculated reentry fee.

C. Costs of POLR Service

If the POLR must do advance procurement or a significant level of procurement during a major market event, the POLR may incur costs that exceed the reentry fees paid by the LSE.

1. **If an electric IOU, as the statutorily designated POLR, incurs such additional costs, should these additional costs be shared and recovered from all ratepayers within the IOU service territory pursuant to Public Utilities Code Section 387(g)? If so, what changes, if any, should be considered to the current regulatory requirements? If not, why not?**

Differences between the FSR/Reentry Fee and actual costs, if any, must be handled in a balanced way. If the POLR incurs costs above the FSR/Reentry Fee, the POLR should look to the returning LSE to the extent funds are available. If the POLR incurs costs below the FSR/Reentry Fee, the POLR should credit the excess fee back to the customers directly.

Reasonable and modest additional costs that cannot be recovered from the FSR/Reentry Fee should be recovered only from the customers taking service from the POLR. Consistent with the principles of cost causation, the customers receiving POLR service should generally be responsible to cover the cost of providing that service. This is particularly true in times of relative market instability. The POLR rules would need to provide, however, that the newly serving LSE would be responsible for collection of those costs from returning customers.

D. Continuity of Service

LSEs play a crucial role in maintaining system reliability. While the IOU s as POLRs may be able to absorb individual or small CCA failures, the failure of larger LSEs, or the possibility of multiple concurrent LSE failures due to a major market shortage may be infeasible for the IOU as POLR to absorb during tight market conditions.

1. **What types of mechanisms or requirements should be considered to ensure that the POLR has access to procurement resources in the event of large or multiple LSE failures? Please address the following:**

    a. **Should a right of first refusal provision in LSE procurement contracts be included to ensure the IOU as POLR can choose to assume such procurement contracts if needed?**

No, a POLR ROFR should not be considered. Providing a ROFR to the POLR for a long-term contract simply does not make sense given the POLR's 60-day service obligation. In addition, a POLR ROFR raises serious legal and commercial concerns.

As discussed above, and posited earlier in the proceeding by SCE, the POLR term of service is the 60-day safe harbor established in D.03-05-034.[8] Giving an entity that needs only 60 days of supply a right to step into the shoes of the CCA under a 10-year contract, for example, is not only unnecessary but is unreasonable. If the contract provides products at prices below market, this will enable the POLR to profit by exercising the right and sell the output beyond 60 days at the prevailing market price. This result steps far beyond the bounds of simply enabling the POLR to have the supply needed to serve customers in the safe harbor period.

In addition, a POLR ROFR presents serious legal questions in the context of bankruptcy, where the provision would have its greatest value. A POLR ROFR provision likely would be unenforceable in a bankruptcy since it would undermine the court's jurisdiction in distributing the estate's assets or reorganizing its obligations. The Supremacy Clause of the Constitution mandates that federal laws, such as those concerning bankruptcy, "shall be the supreme Law of the Land; . . . [the] Laws of any State to the Contrary notwithstanding."[9] "Congress' intent to supersede state law altogether may be found from a "'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so

8 D.03-05-034, Conclusion of Law 10.

9 U.S. Const., art. VI, cl. 2.

dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[10]

In describing preemption in the context of federal bankruptcy law, the Ninth Circuit has stated that:

> There can be no doubt that federal bankruptcy law is 'pervasive' and involves a federal interest 'so dominant' as to 'preclude enforcement of state laws on the same subject'--much like many other areas of congressional power listed in Article I, Section 8, of the Constitution, such as patents, copyrights, currency, national defense and immigration. The Bankruptcy Clause, which grants Congress the power to make bankruptcy laws, *U.S. Const. art. I, § 8, cl. 4*, stresses that such rules must be 'uniform.' Bankruptcy law occupies a full title of the United States Code. It provides a comprehensive system of rights, obligations and procedures, as well as a complex administrative machinery that includes a special system of federal courts and United States Trustees. [11]

A POLR ROFR likely would be preempted under this scheme as an *ipso facto* provision. The Bankruptcy Code makes a provision terminating or modifying an executory contract upon the commencement of a bankruptcy case generally inoperative:

> Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on …the commencement of a case under this title ….[12]

The reasoning underlying this rule goes to the very heart of bankruptcy's purpose. Complementary sections of the Bankruptcy Code empower a debtor in bankruptcy, or the

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[10] *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 203-04 (1983) (internal citations omitted).

[11] *Sherwood Partners, Inc., v. Lycos Inc.*, 394 F.3d 1198, 1201 (9th Cir. 2005) (internal citations omitted).

[12] 11 U.S.C. § 365(e)(1).

assigned trustee, to "assume," "assume and assign" or "reject" contracts. 11 U.S.C. § 365(a) and (c). The power to assume, and to assume and assign, valuable contracts is one of the principal benefits of a bankruptcy filing. As the Ninth Circuit court of Appeal explained:

> By invalidating such [*ipso facto*] clauses, § 365(e)(1) promotes the rehabilitation of the debtor by enabling the bankruptcy trustee to assume (and thus continue in force) beneficial contracts that otherwise would have terminated automatically or would have been terminated by the other contracting party. See H.R. Rep. No. 95-595, at 348-49, reprinted in 1978 U.S.C.C.A.N. 5963, 6304-05 (noting that enforcement of ipso facto clauses "frequently hampers rehabilitation efforts"). In short, the purpose of § 365(e)(1) is to protect the debtor from the enforcement of unfavorable insolvency-triggered clauses in executory contracts.[13]

A POLR ROFR thus faces strong legal headwinds. While courts have found in some cases that the Bankruptcy Code is not preempted by a particular state law, those rulings typically conclude that there is no conflict between the state law and the Bankruptcy Code, either because both are capable of being performed or because the *ipso facto* prohibition is not triggered.[14]

Not only does a POLR ROFR raise preemption concerns, it likely would also raise the price of contracting for CCAs and inhibit sales of excess resources by a CCA. First, it is unclear whether any generator or market participant would actually transact with the POLR ROFR as a

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13 *Spieker Props., L.P. v. MFM The SPFC Liquidating Trust (In re Southern Pac. Funding Corp.)*, 268 F.3d 712, 715-716, (9th Cir. 2001). *See also In re Peaches Records and Tapes, Inc.*, 51 B.R. 583, 587, n.6 (B.A.P. 9th Cir. 1985) (Section 365(e)(1) makes ipso facto clauses which result in a breach solely due to a bankruptcy filing of a party unenforceable subject to certain exceptions); *In re Eastman Kodak Co.*, 495 B.R. 618, 623 (Bankr. S.D.N.Y. 2013) ("Section 365 thus advances one of the Code's central purposes, the maximization of the value of the bankruptcy estate for the benefit of creditors.") (internal citations omitted); *In re Enron Corp.*, 306 B.R. 465, 473 (S.D.N.Y. 2004).

14 *See, e.g., Northwest Wholesale, Inc. v. Pac Organic Fruit, LLC*, 357 P.3d 650 (2015) (holding that Wash. Rev. Code § 25.15.130(1)(d)(ii), which provided for automatic disassociation of LLC members upon a bankruptcy filing, was not preempted by the Bankruptcy Code because the partnership contract was not executory); *Robinson v. Michigan Consolidated Gas Co., Inc.* 918 F.2d 579 (6th Cir. 1990) (Detroit utility termination procedures do not conflict with Bankruptcy Code Section 366 and therefore are not preempted).

contractual condition. Second, even if they were willing, all such conditions come at a cost and, in this case, a cost only to the CCA or ESP; the IOU and its customers would be unaffected. The contract will be priced based upon the risk of not only the buyer but of the third-party entity as well. Third, there are existing contracts that do not contain these provisions with some of those being long-term contracts to meet RPS requirements. To implement a new requirement would potentially mean the re-negotiation of contracts whose terms and conditions may have been set years prior. Any such renegotiation will result in one party or the other seeking additional changes to a contract entered into in good faith drawing into question the value of long-term contracting in California's complicated energy space. Fourth, serious questions arise whether and under what terms and conditions the CCA could resell the output under the contract if it is burdened by a POLR ROFR.

b. Are there any other recommended changes to the established rules for all load-serving entities in preparation for any potentially large and unplanned customer migration, pursuant to Section 387 (h)1?

CalCCA does not have any comments on this question at this time.

2. To fulfill POLR service duties, can the POLR rely on purchasing energy on the CAISO market, or should the POLR be ordered to do some advance procurement/hedging?

The POLR should be required to purchase energy from the California Independent System Operator (CAISO) market. Because it is impossible to predict if, when, and to what extent customers may be returned, effective hedging would be very challenging, if even feasible. Only two things are certain: (1) the POLR will over-hedge or under-hedge and (2) hedging comes at a cost. The latter reality raises the additional question of who pays these costs. CalCCA submits that it would be unreasonable to ask customers of LSEs who did not return their customers – whether bundled IOU or other LSEs' customers – to bear these costs. To avoid unnecessary costs, CalCCA recommends that the POLR procure energy from the CAISO market without hedging.

E. Notice and Monitoring of LSE Financial Status

The CPUC has little direct insight as to CCA operations. While the CCAs do have public meetings and disclosures, there are no requirements to make the CPUC or the IOU informed of the financial or energy positions of the CCAs (apart from the RA filings). While CCAs have rate-making authority, the CPUC is ultimately responsible for making sure that the ratepayers are protected.

1. **SB 520 requires that the CPUC establish rules for all load-serving entities in preparation of any potentially large and unplanned customer migration. Abrupt dissolution of a CCA is a challenge to ensuring continuity of service. What changes to current rules and requirements could address this risk in advance of POLR service being needed?**

CalCCA represents public entities and supports transparency, including providing the Commission insight to the financial health of CCAs. CalCCA recommends enhanced implementation planning to ensure the Commission has predictable, standardized information on a timely basis before a new CCA launches. [15] CalCCA is working with members to make their already publicly available financial information and policies easier to locate and review. CalCCA proposes to consider limited financial reporting to the Commission in exchange for a waiver of the FSR under some circumstances. [16]

The nature, type, and depth of information necessary to make an informed decision about the financial health of an entity is a matter of debate and should be discussed further in this proceeding. The Commission should ensure a durable approach such that all entities are

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15 *See supra*, at 14-15.
16 *See supra*, at 17-18.

evaluated for risk similarly and appropriately, including the IOUs in the future if a non-IOU serves as POLR.

2. How much advance notice should the CPUC receive from an LSE about their financial status if it is causing them to fall short of meeting their procurement obligations?

CalCCA looks forward to proposals from the Commission regarding this question. The question should be considered in coordination with CalCCA's response to section V1, question B.1 above.

VII. CONCLUSION

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

Respectfully submitted,

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December 17, 2021