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**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 DISTRIBUTING WORKSHOP AGENDA AND PROVIDING QUESTIONS FOR ADDITIONAL POST WORKSHOP COMMENTS

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SUMMARY OF RECOMMENDATIONS

- The overall Provider of Last Resort (POLR) process is not broken; CalCCA agrees with the investor-owned utilities (IOUs) that continuing to provide the POLR a six-month runway to prepare for a return of customers remains reasonable.

- Financial security requirements (FSR) for load-serving entities (LSEs) should be refined to reflect the current market price benchmarks (MPBs) for resource adequacy (RA) and Renewable Portfolio Standard (RPS) products. If the existing FSR is adjusted further to refine the accuracy of the calculation, the Commission must consider the full range of accuracy adjustments proposed by Southern California Edison Company (SCE) and CalCCA.

- The POLR's most urgent role is to provide energy to returning customers. The POLR thus should maintain the existing right to an RA waiver when resources are unavailable at a reasonable price and should receive a deferral of obligations to meet RPS and Integrated Resource Plan (IRP) requirements where circumstances require.

- The POLR should not be required to "hedge" or procure resources in advance of any customer returns. Putting the POLR in the market for these additional resources would only exacerbate resource constraints and increase costs for not only returning LSEs but *all* LSEs.

- To the extent the POLR must advance funds to pay for costs before customer revenues start to cover such costs, the POLR should recover financing cost through balancing account treatment as it does in other circumstances.

- The implementation planning process for new community choice aggregators (CCAs) should be refined to require additional financial projections with standardized assumptions, a milestone plan for implementation, quarterly check-ins with Commission staff to prepare for launch and final financial projection and check-in six months prior to launch.

- Operating CCAs should be subject to a three-tiered reporting rubric with the approach calibrated to the CCA's circumstances.

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The California Community Choice Association[1] (CalCCA) submits these Comments in response to the *Administrative Law Judge's Ruling Distributing Workshop Agenda and Providing Questions for Additional Post Workshop Comments* (Ruling),[2] issued on February 24, 2022.

I. INTRODUCTION

The objective in this proceeding is to implement Senate Bill 520 (SB 520), which established requirements for a POLR -- whether an IOU, another LSE, or a third party. SB 520 rightly directed the California Public Utilities Commission (Commission) to ensure that a POLR is capable of serving its intended role of providing a service to any customer returning to its service without undermining reliability and the state's climate goals or shifting costs to other customers. The tone of the proceeding, however, has been set by a fear of a "Black Swan" event

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

[2] *Administrative Law Judge's Ruling Distributing Workshop Agenda and Providing Questions for Additional Post Workshop Comments,* Rulemaking (R.) 21-03-011 (Feb. 24, 2022) (Ruling).

-- an unpredictable or improbable event with potentially severe consequences. As Energy Division Staff explained during the March 7, 2022 workshop:

> If the LSE fails and the POLR is not readily able to secure the resources needed to serve the returning customers, not only will the procurement costs will spike for returning customers, but the capacity shortfall will continue, impacting the cost for everyone. In a worst-case scenario, the conditions could lead to additional LSE failures. The POLR must be able to perform its responsibilities even in the event of large and/or cascading failures and in extreme market conditions, when the resources are not readily available.[3]

CalCCA does not dismiss these concerns; unpredictable and improbable events can and do occur, and SB 520 does require the Commission to address "potentially large and unplanned" returns.[4] But if the Commission is trying to design structures around extreme events, focusing on CCAs is an unreasonably narrow approach. An extreme event can affect both IOU and Electric Service Provider (ESP) customers. Indeed, the 2021 Texas Black Swan Blackout, which was due to several key factors that could not be repeated in California,[5] involved retail electric service providers – not CCAs -- returning customers.[6] In addition, California's closest experience – the 2000-2001 energy crisis – involved IOUs facing out-of-control prices, and the IOUs had to serve the customers and deal with the costs directly driving one IOU into bankruptcy. An unpredictable, extreme event could wreak havoc on all LSEs and their customers, which SB 520 recognizes by requiring the Commission to develop rules for "all LSEs," not just CCAs.

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3 Provider of Last Resort (POLR) Workshop #2, Ruling, Mar. 7, 2022 (POLR Workshop #2 Presentations), at Slide 8.

4 Cal. Pub. Util. Code § 387.

5 Such factors include harsh weather conditions that froze natural gas equipment and caused generator failures and an energy-only market with price caps at $9,000/MWh.

6 *The Timeline and Events of the February 2021 Texas Electric Grid Blackouts*, The University of Texas at Austin Energy Institute, July 2021, at 65: https://energy.utexas.edu/sites/default/files/UTAustin%20%282021%29%20EventsFebruary2021TexasBlackout%2020210714.pdf.

Assuming that these conditions are somehow rooted in the CCA framework ignores the full picture and unfairly disadvantages CCA customers.

Staff's approach also strays from the proceeding's goal by mixing together the current resource constraints in the market with concerns over CCA customer returns. The state's existing resources are without question constrained. But the constraint was not caused by CCAs, but rather a failure of adequate planning for many years. Moreover, the risk that the constraints will drive price spikes exists for a host of reasons independent of CCA financial conditions. Efforts to use the POLR to solve the resource constraint problem are misplaced.

A more reasonable starting place to evaluate POLR procedures and adequacy is a balanced examination of recent, actual experience of customer returns and an evidence-based examination of the actual risks of returns. SCE has real life experience with customer return with the 2021-2022 returns by Western Community Energy and Baldwin Park Resident Owned Utility District. SCE has offered a number of refinements – some of which CalCCA currently supports -- that are relatively modest in comparison with those offered initially by Staff, Pacific Gas & Electric Company (PG&E), and other parties. Attention should be focused on getting a workable return process in place, based on that experience, which can be scaled as needed.

The overall POLR process is not broken. To shore up the existing POLR structure, CalCCA proposes the following measures and looks forward to further collaboration with the Staff and stakeholders to further refine these proposals.

- The overall POLR process is not broken; CalCCA agrees with the IOUs that continuing to provide the POLR a six-month runway to prepare for a return of customers remains reasonable.
- FSRs for LSEs should be refined to reflect the current MPBs for RA and RPS products. If the existing FSR is adjusted further to refine the accuracy of the calculation, the Commission must consider the full range of accuracy adjustments proposed by SCE and CalCCA.

- The POLR's most urgent role is to provide energy to returning customers. The POLR thus should maintain the existing right to an RA waiver when resources are unavailable at a reasonable price and should receive a deferral of obligations to meet RPS and IRP requirements where circumstances require.

- The POLR should not be required to "hedge" or procure resources in advance of any customer returns. Putting the POLR in the market for these additional resources would only exacerbate resource constraints and increase costs for not only returning LSEs but *all* LSEs.

- To the extent the POLR must advance funds to pay for costs before customer revenues start to cover such costs, the POLR should recover financing costs through balancing account treatment as it does in other circumstances.

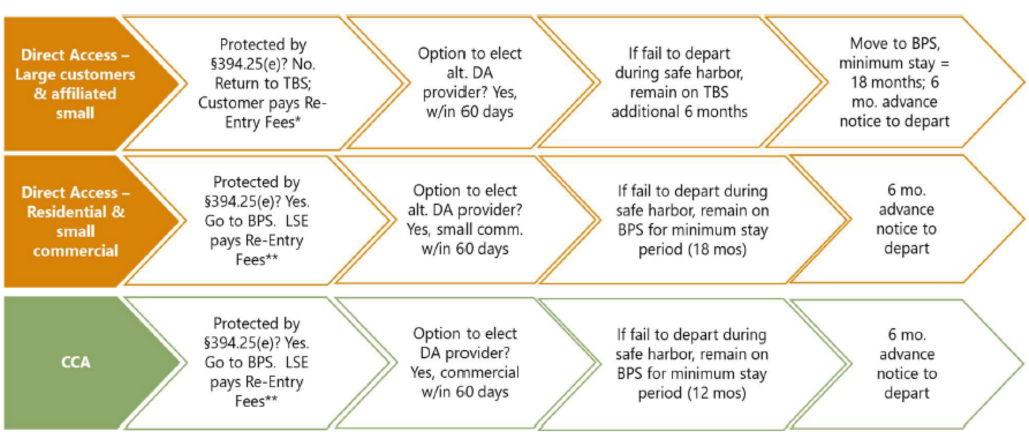
- The implementation planning process for new CCAs should be refined to require additional financial projections with standardized assumptions, a milestone plan for implementation, quarterly check-ins with Commission staff to prepare for launch and final financial projection and check-in six months prior to launch.

- Operating CCAs should be subject to a three-tiered reporting rubric with the approach calibrated to the CCA's circumstances.

II. DEFINITION OF POLR SERVICE

CalCCA does not propose any change in the existing definition of or general process for POLR service. POLR service today can be defined as a service provided by the IOU for a specified period when customers are involuntarily returned to the IOU by their LSE. Today, customers are returned consistent with the process shown in Figure 1 below.

Figure 1: Existing Return Process Presented at the March 7, 2022 Working Group



The "POLR period" for most CCA customers, who do not have Direct Access (DA) options, is six months, beginning on the date the customers are returned. A DA customer with a 60-day safe harbor period for switching ESPs is effectively eight months: the two months of safe harbor plus the six months of additional POLR service.

Two important dynamics define the POLR period for an involuntary return of customers. First, during the six-month period, the POLR must step into the compliance obligations (RPS, RA, and IRP) for the returned customers, a process that is described in Section IV below. Second, the POLR procurement for the returned customers during this period is supported by financial security provided by the returning LSE, which is discussed in Section III below.

While CalCCA proposes changes to these and other dynamics, there is no need to modify the definition or process for an involuntary return of customers to the POLR. The IOUs appear aligned, with no proposals for modification of this process.

III. POLR LIQUIDITY NEEDS

As discussed above, a central goal in this proceeding is ensuring the POLR has the financial capability of meeting its procurement requirements on behalf of the returned customers during the six-month POLR period. Ensuring the POLR is financially capable involves considering two dimensions of the problem: the amount of needed financial security and the timing of this security. Proposals have been offered in this proceeding to address both the amount and timing.

The Ruling attempts to separate these two closely related issues. It seeks comments on "POLR liquidity" with a specific focus on PG&E's proposed insurance pool. The Ruling defers consideration of changes to the existing FSR to a future workshop.[7] POLR liquidity, the PG&E

[7] Ruling at 2.

insurance pool proposal, and the FSR cannot be discussed in isolation. Because the insurance pool is effectively a substitute for the FSR, the two must be examined in concert. For this reason, CalCCA comments first, on changes that could be made to the FSR to improve the accuracy of the calculation. Second, CalCCA comments on the PG&E pool proposal and offers an alternative to address PG&E's apparent concern around POLR liquidity.

A. FSR Modifications

In the workshop, CalCCA presented several modifications to the cost and revenue estimates used in the FSR calculation that, if adopted, would improve the accuracy of the FSR calculation.[8] Some modifications would increase the required level of FSR posting while others would decrease the required level of FSR posting. SCE and PG&E, likewise, have proposed changes to the calculation of the amount of a security posting.

If the Commission adjusts the FSR calculation, then *all elements* of the FSR should be adjusted to ensure that cost and revenue forecasts are equally informed for all elements. In other words, the Commission should either choose to uniformly improve the accuracy of the FSR or not and should not pick and choose the modifications made to the FSR calculation.

CalCCA discusses below its recommendations for the proposed modifications to the FSR calculation in the context of the FSR formula: *Forecast RA Cost + Forecast RPS Cost + Forecast Energy Cost + Administrative Fee – Forecast Revenue*.

1. Forecast Costs

Three proposals have been presented to modify the calculation of the Forecast RA and RPS Cost component of the FSR.

- CalCCA has agreed with SCE's proposal to update the proxies used for RA price and RPS prices.

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[8] POLR Workshop #2 Presentations, at Slides 46-48.

- CalCCA has proposed adjustment of the quantity of RA to which the proxy prices would be applied to reflect the availability of resources in the IOU portfolio to serve the returned customers.

CalCCA addresses these changes below.

a. Rely on Energy Resource Recovery Account (ERRA) Market Price Benchmarks

The current calculation draws the price of RA from Energy Division's most recent RA report. These prices lag behind current market prices, meaning they are out of date when used for this purpose. This lag could be reduced by relying on recent ERRA market price benchmarks as proxies for forecast RA costs. CalCCA has agreed with SCE that this change should be made to improve the accuracy of the FSR calculation.

The RPS price in the FSR calculation should likewise rely on the ERRA MPB for RPS.[9] The 2022 calculated RPS forecast price is $13.70 per megawatt-hour (MWh)[10] and does represent the most current Market Price Benchmark. The prior calculation of this benchmark was adopted by the Commission in Resolution E-5170, authorizing all three IOUs to use the Forecast RPS adder of $14.49/MWh.[11]

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[9] Rule 23 for all three utilities states, "In the absence of a robust index, a forward quote, or durable methodology for regularly estimating the value of a Renewable Energy Credit (REC), [IOU] will use the $10/MWh REC value adopted by the Commission in D.16-05-006 as an estimate of the incremental cost of satisfying the Renewable Portfolio Standard (RPS) requirement for the involuntarily returned CCA load." Since D.16-05-006, the Commission has issued annually a PCIA MPB that has been used as a more robust methodology.

[10] *See* November 1, 2021 Energy Division values for the Power Charge Indifference Adjustment (PCIA) Forecast and True Up. https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/energy-division/documents/community-choice-aggregation-and-direct-access/calculation-of-the-market-price-benchmarks-20212022.docx.

[11] The Energy Division PCIA Forecast and True Up November 2, 2020 https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/energy-division/documents/community-choice-aggregation-and-direct-access/2020-calculation-of-the-market-price-benchmarks.pdf.

b. Account for Resources Readily Available to the POLR

While using a more current benchmark may provide for a more accurate calculation, the calculation should also deduct costs for any resources the returned customers will pay for through a separate rate mechanism. Cost Allocation Mechanism (CAM) resources provide RA for all customers through a charge recovered in distribution rates. Whether a customer is served by another LSE or the IOU, the customer will pay for and receive its proportional share of RA associated with the CAM resources. The cost should not be duplicated through the FSR. To avoid duplication, CAM RA quantities should be netted out of the RA quantity priced by the calculation; alternatively, the IOU could price this quantity of RA at zero for the FSR calculation.

2. Forecast Revenues

During the March 7, 2022 workshop, CalCCA presented a number of additional changes to the FSR calculation that could improve the ability of the FSR to more accurately depict costs and revenues resulting in a better FSR calculation.

a. Forecast Generation Rate Revenue

CalCCA recommends several modifications to the calculation of forecasted revenue offset to costs to ensure the FSR calculation correctly estimates anticipated revenues resulting from customer returns. First, today the revenue offset of the FSR is calculated using the IOU's *system* average rates. The rate thus reflects the IOU's blend of customer classes. A CCA's mix of customers, however, may vary significantly from the IOU's mix; using the system average thus could materially overstate or understate the expected revenues. It is generally the case for all three IOUs that the average rates within the CPUC defined rate classes are; residential > commercial and industrial > agricultural > street lighting. If a CCA serves a higher proportion of residential customers than the IOU system average, then the returning load would be expected to generate higher revenues than that of the IOU system average rate. Consequently, CalCCA recommends the Commission reflect average customer rates *by class* for each CCA to better reflect anticipated revenues for any individual CCA return.

Second, although IOU generation rates are seasonally differentiated, the FSR revenue offset does not reflect that seasonality instead using an annual average. While the forward Intercontinental Exchange (ICE) energy price forecast component of the FSR/re-entry fee will reflect the season differences in costs of energy, the use of a system annual average rate will not. The result then is an estimation of generation rate revenues in the summer that is lower than what rates will recover and higher in the winter. At the same time, the ICE cost estimate is reflecting the expected costs for a seasonally representative period which will create an FSR/re-entry fee calculation that is artificially high in the summer and artificially low in the winter. Therefore, CalCCA recommends the Commission seasonally differentiate average generation rate revenues to match seasonal differentiation of forecast energy costs. Third, the FSR calculation should consider approved IOU rate changes that will take effect during the FSR posting period. For example, the November 10, 2021 advice letter filed by the IOUs should reflect Commission authorized rate changes from a general rate case or ERRA case to bundled rates that will be in effect the first six months of the next year to reduce the likelihood of a discrepancy between a posted FSR and a calculated reentry fee. This should occur in the May FSR update as well.

b. Power Charge Indifference Adjustment (PCIA) Netting

SCE has proposed a reduction in the PCIA revenue credit that would be applied in calculating FSR; CalCCA in response has pointed out that the PCIA component should not be adjusted unless other PCIA-related influences on the formula are modified. The PCIA is a complex instrument. SCE has proposed that the credit of generation rate revenues from returning customers be netted against the PCIA component that they will pay as a bundled load customer so that the generation revenues reflect incremental revenues. Such an adjustment requires further vetting to ensure that the interaction of PCIA, bundled rates, and ERRA true-ups work in concert and do not shift costs. In addition, if changes are to be made to the FSR to reflect the PCIA net revenues, then other changes should also be considered that will better reflect the costs and revenues of customers receiving POLR service.

B. Balancing Accounts With Interests Should be Used to Address PG&E's Liquidity Concern Rather Than PG&E's Pool Proposal

PG&E proposes to replace the current FSR process with a sort of insurance or credit "pool" to address liquidity. This proposal increases the amount of security that would be required to have two months of liquidity readily at hand. PG&E suggests that each CCA would contribute to the pool a forecast two months of POLR service[12] *without* offsetting anticipated revenues from the returned customers. While risk pooling in theory could lower the overall cost of security, PG&E's proposal does not achieve such cost reductions. CalCCA calculates the amount of security PG&E proposes at roughly $1.4 billion pool for all CCAs – an outsized impact driven primarily by PG&E's proposal to remove the revenue offset from the FSR calculation.[13]

Beyond the magnitude of impact, PG&E's proposal suffers from other problems. PG&E appears to assume that CCAs would contribute to the pool cash or some other instrument, such as a letter of credit. While this may be one way to prevent a cost shift to bundled customers, it has the potential to shift costs among CCAs instead. As mentioned by Peninsula Clean Energy during the March 7, 2022 Workshop, the mechanism would allow the POLR to take cash or a financial instrument from one LSE to support the return of customers from another LSE. Allowing the POLR to draw upon a pool to address the returning customers which may include

[12] March 7, 2022 POLR Workshop Presentation, at Slide 38.
[13] *Id.,* at Slide 45.

CCAs with returning customers and CCAs who are not returning customers may address the shifting of costs from CCA customers and bundled load customers but it does not address cost shifting among CCA customers being served by different CCAs.

Further, PG&E's pool proposal would only apply to CCAs, not ESPs. Parties at the workshop suggested that ESP customers should not be subject to PG&E's pool proposal or other changes to enhance liquidity because they can elect to go to another ESP in the event of a failure of their existing ESP. As discussed above, however, if the Commission's worry is a Black Swan type of event, neither ESPs nor IOUs will be exempt from the impacts. If prices were driven beyond a sustainable level, ESPs could choose to return customers to the IOUs rather than continuing to procure at the high prices. For these reasons, ESPs should be included in any adopted modifications to the FSR.

If PG&E's concern is "liquidity" – having funds available when needed – CalCCA submits that there is a less expensive approach to address liquidity than what PG&E has proposed. The Commission could, as it has done for years, use a balancing account with financing charges for the required liquidity. The benefit of this approach is that costs to provide liquidity are incurred only if customers are actually returned to the IOU.

IV. RESOURCE AVAILABILITY

A. The POLR Should Assume Energy, RA, RPS, and IRP Compliance Obligations for Returned Customers During the POLR Period

As the POLR assumes responsibility for the returned customers for the future, it must take on all procurement and compliance obligations for those customers. CalCCA proposes that in addition to purchasing energy from the CAISO for these customers, the POLR should assume RA, RPS, and IRP mandate obligations effective upon the date of the customer return, although actual procurement may be delayed. To avoid speculative and unnecessary costs, however, the POLR should not be required to procure any product in advance of a notice of customer return.

The POLR's most urgent role is to provide energy to returning customers. Therefore, during the six months that returning customers are under POLR service, the POLR should procure energy from the CAISO for these customers. This obligation becomes effective upon the date of customer return.

Meeting compliance requirements should be approached more cautiously, considering market conditions and compliance timelines. Compliance requirements for RA, RPS, and IRP procurement mandates should be addressed as follows:

- Depending on the timing of customer return, the POLR may not be able to procure RA for those customers given RA showings are due 45 days prior to the month. The POLR should thus maintain the existing right to an RA waiver when compliance dates have passed or resources are unavailable at a reasonable price.

- While RPS procurement is critical in the long run, it does not wear the same urgency as energy and RA. Thus, while the POLR will assume the obligations upon customer return, it should procure any needed resources in a manner that avoids market power exercise or unnecessary costs. If a return falls close to an upcoming compliance date, the POLR should receive a temporary deferral of the obligation.

- Compliance with IRP mandates, like RPS, may be a longer-term concern and present more complication. The IRP mandates are designed to get new resources built, and if the returning LSE has accomplished some or all of its obligations, the POLR should not duplicate these costs. Its obligations should be limited to fulfilling any shortfalls experienced by the returning LSE and a going forward obligation. Again, the POLR and the Commission should be mindful of market conditions in considering the timing of any "catch up" procurement to avoid unnecessary costs. If necessary, the POLR should receive a deferral of its obligation to the extent the Commission deems reasonable considering current market conditions.

The POLR should not be required to "hedge" or procure resources in advance of any customer returns. <u>First</u>, it would be nearly impossible for the POLR to conduct effective hedging given the speculative nature of customer returns. Asking customers to pay the costs of ineffective hedges to protect against customer returns that may or may not happen is unreasonable. Second, putting the POLR in the market for these additional resources in advance would only exacerbate resource constraints and increase costs for not only customers of returning LSEs but customers of *all* LSEs. Finally, if resources are scarce, and the POLR successfully procures remaining resources in the market, other LSEs could find themselves without sufficient supply to meet requirements, facing penalties. Imposing penalties on deficient LSEs for a deficiency caused by the POLR when the deficiency was caused by the POLR unnecessarily increases costs to any entity required to pay for advance procurement. All procurement and compliance obligations should remain, as they do today, with LSEs actively providing services to their customers.

B. LSE Contract Assignment to POLR

The Ruling asks parties to consider if the POLR should be required to assume resource contracts from the returning LSE through a "right of first refusal" (ROFR) provision within LSE contracts. During the workshop, the Solar Energy Industries Association and the Large-scale Solar Association indicated mandatory contract assignment from the LSE to the POLR would be beneficial, and the SBUA suggested voluntary assignment. However, as discussed in CalCCA's workshop presentation, significant policy and legal concerns arise should the Commission require CCAs or ESPs to provide in their contracts for the assignment of the contract to the POLR in the event of its deregistration.

1. Policy Concerns With Contract Assignability

CalCCA has identified policy or market issues raised by contract assignment to the POLR. First, it is unclear how such a POLR ROFR requirement would affect a generator's or market participant's willingness to transact with the POLR. Second, even if parties were interested in such transactions, all such conditions come at a cost. In this case, the cost would be limited to the CCA or ESP; the IOU and its customers would be unaffected. Third, there are numerous 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 in good faith drawing into question the value of long-term contracting in California's complicated energy space. Fourth, the provision would substantially complicate portfolio management. 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. CalCCA does not support a requirement for the POLR to assume resource contracts from the returning LSE through a "right of first refusal" or as a mandatory assignment provision within LSE contracts.

2. Legal Concerns With Contract Assignability

CalCCA has identified serious legal questions raised by a POLR ROFR 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."[14] "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

[14] U.S. Const., art. VI, cl. 2.

interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." [15]

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. [16]

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[17] 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 ….[18]

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 assigned trustee, to "assume," "assume and assign" or "reject" contracts. 11 U.S.C. § 365(a) &

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

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

18 11 U.S.C. § 365(e)(1).

(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.[19]

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.[20]

V. RISK MANAGEMENT AND FINANCIAL MONITORING

Customer return by an LSE should not come as a surprise to the Commission or the POLR. Improving the ability of the Commission and POLR to anticipate customer returns, to the extent reasonably possible, is a reasonable aim. Any improvements, however, must consider each CCA's position (*e.g.*, new/existing, credit-rated/not rated) and, critically, respect the authority of

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[19] *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, 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).

[20] *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).

local governing boards over CCA financial oversight. With these thoughts in mind, CalCCA recommends possible solutions for both new and existing CCAs.

CalCCA continues to work with CCAs to provide publicly available information concerning their financial status and operating policies (*e.g.*, risk management) readily accessible through a portal on the CalCCA website. The financial information accessible through this portal includes data points necessary to calculate days liquidity on hand, data points necessary to calculate debt ratio, risk management policies, and ratemaking policies and changes. This information captures several interacting factors that contribute to the financial health of an LSE. This initiative should improve the Commission's access to CCA information, which today requires combing through each CCA's websites and meeting minutes. Further, the organization is developing best practices guidance for all members expected to be completed mid-year.

Beyond these initiatives, CalCCA offers recommendations to address information access for new and existing CCAs. First, CalCCA recommends the Commission enhance the implementation planning process to ensure the Commission has predictable, standardized information on a timely basis before a new CCA launches. To do this, the Commission should:

- Require new LSEs to submit a Feasibility Study and a pro forma financial statement with the Implementation Plan;
- Establish annual assumptions to be included in the pro forma financial statement submitted with the Implementation Plan;
- Establish milestones for critical implementation action and review progress in the quarterly check-in with Commission staff; and
- Require new LSEs to update its pro forma financial statement six months prior to launch for review with the Commission and presentation to the CCA's governing board.

These requirements would apply to *newly forming* CCAs only, not existing CCAs expanding their service territories.

Second, CalCCA proposes a tiered approach for financial monitoring of existing LSEs. The approach recognizes that no single metric can provide a full picture of an LSE's financial condition. Financial health for CCAs is a function of liquidity, debt, ratesetting policies, and risk management. For example, a lower Days Liquidity on Hand (DLOH) could be offset by a recent material rate increase.

Akin to SCE's proposal at the March 7, 2022 workshop, the approach would require different levels of financial monitoring depending on the LSEs' financial position. The tiers would be structured as follows:

Tier 1: LSE has an investment grade credit rating: No financial monitoring required recognizing that the LSE's financial health is under watch by a ratings agency, which examines a range of financial indicators;

Tier 2: LSE does not have an investment grade credit rating: DLOH reported periodically to the CPUC confidentially; and

Tier 3: LSE's DLOH dips below a designated threshold: LSE consults with Energy Division Staff.

This structure is designed to facilitate conversations between the Commission and LSEs facing challenges to provide some foresight into potential customer returns.

The Commission should ensure a durable approach such that all entities are evaluated for risk similarly and appropriately. Therefore, CalCCA's proposal for financial monitoring would apply to both CCAs and ESPs. This should also include the IOUs if in the future a non-IOU serves as POLR.

VI. CONCLUSION

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

Respectfully submitted,

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CALIFORNIA COMMUNITY CHOICE
ASSOCIATION

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