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on the Proposed Revision to the Load Management Standards

Additional submitted attachment is included below.

**STATE OF CALIFORNIA ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION**

In the Matter of:

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**CALIFORNIA COMMUNITY CHOICE ASSOCIATION'S COMMENTS
ON THE PROPOSED REVISIONS TO THE LOAD MANAGEMENT STANDARDS
(NOTICE OF SECOND 15-DAY PUBLIC COMMENT PERIOD)**

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The California Community Choice Association¹ (CalCCA) submits these Comments pursuant to the Notice of Proposed Action (NOPA) with proposed amendments to the Load Management Standards (LMS), California Code of Regulations (CCR), Title 20, Division 2, Chapter 4, Article 5, dated December 24, 2021; and Notice of Second 15-Day Public Comment Period, Proposed Revisions to the Load Management Standards, dated July 8, 2022 (Second Notice).

I. INTRODUCTION

CalCCA appreciates the continued efforts of the California Energy Commission (Commission) to address stakeholder concerns set forth in comments on the proposed Load Management Standard (LMS) regulations. Of particular concern, however, is that the core jurisdictional issues raised by CalCCA in its comments have not been addressed.² Specifically, the

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 See *Comments of the California Community Choice Association to the California Energy Commission on the Draft Staff Report*, Docket 19-OIR-01 (June 4, 2021) (CalCCA June 4, 2021 Comments); *California Community Choice Association’s Comments on the Proposed Amendments to the Load Management Standards Contained in the California Code of Regulations, Title 20*, Docket 21-OIR-03 (Feb. 7, 2022) (CalCCA Feb. 7, 2022 Comments); *California Community Choice Association’s*

Commission lacks jurisdiction: (1) to mandate community choice aggregator (CCA) participation in the LMS, and (2) to require CCAs to adopt the prescribed marginal cost rates. While the Commission claims jurisdiction to mandate CCA participation in the LMS pursuant to Public Resources Code (PRC) section 25403.5, the explicit and clear language of the statute, as well as the legislative history, confirm that the Legislature did not intend for CCAs to be included.³ In addition, the Commission concedes that it lacks authority to mandate CCA rates given Assembly Bill (AB) 117’s grant of exclusive authority to CCA local governing boards to approve rates.⁴ However, the Final Staff Report states that the LMS does not mandate rate design but rather prescribes “overarching structural features” of rates for which the Commission claims it has the authority to mandate.⁵ To the contrary, nothing could be closer to rate design than, as the Commission proposes, requiring CCAs to implement *hourly variable* rates based not only on marginal costs, but *specific marginal costs*. Mandating these detailed elements of rate design encroaches on the ratemaking authority of CCA governing boards.

The Commission’s beneficial goals for its regulations do not justify this unlawful encroachment. The regulations aim to “form the foundation for a statewide system of granular time and local dependent signals that can be used by automation-enabled loads to provide real-time load flexibility on the electric grid.”⁶ The Commission has set its sights on adoption by certain load-

Comments on the Proposed Revisions to the Load Management Standards, Docket 21-OIR-03 (Apr. 20, 2022) (CalCCA Apr. 20, 2022 Comments).

³ See Herter, Karen and Gabin Situ, 2021. *Analysis of Potential Amendments to the Load Management Standards: Load Management Rulemaking, Docket Number 19-OIR-01*. California Energy Commission, Publication Number: CEC-400-2021-003-SF (Final Staff Report) at 16-17.

⁴ *Id.* at 17.

⁵ *Id.*

⁶ *Id.*, Abstract at iii.

serving entities (LSEs), including CCAs, of hourly locational marginal cost rates.⁷ A beneficial goal, however, does not justify an overreach of jurisdictional authority. Moreover, the Commission has another option – a voluntary program that allows local governing boards to determine how they will address real-time rates – but has rejected this approach. For the reasons set forth below, the Commission should either remove CCAs from the application of the LMS regulations, or make CCA participation voluntary:

- The Commission lacks statutory authority, under Public Resource Code section 25403.5 or any other statute, to mandate CCA participation in the LMS program;
- The Commission’s requirement that CCAs adopt its prescription rate design for hourly locational marginal cost rates infringes on CCA exclusive ratemaking authority established in 2002 by AB 117; and
- Even if the Commission modifies the LMS to allow CCA participation on a voluntary basis, CCAs cannot implement an hourly locational marginal cost-based rate until the IOUs develop the data and billing systems to incorporate that rate.

II. THE COMMISSION DOES NOT HAVE STATUTORY AUTHORITY TO MANDATE CCA PARTICIPATION IN ITS LOAD MANAGEMENT STANDARDS

As explained in detail in CalCCA’s prior comments, the Commission’s interpretation of PRC section 25403.5 to include CCAs in the LMS constitutes legal error.⁸ Section 25403.5 provides that “[t]he commission shall . . . adopt standards by regulation for a program of electrical load management for each utility service area.”⁹ “Service Area” is defined as “any contiguous geographic area serviced by the same electric utility.”¹⁰

⁷ On the other hand, electric service providers (ESPs) and publicly owned utilities (POUs) other than LAWDP and SMUD are not mandated to comply with the LMS, despite their serving a substantial portion of the load. *See* CalCCA April 20, 2022 Comments, at 9.

⁸ *See* CalCCA June 4, 2021 Comments at 3-5; CalCCA Feb. 7, 2022 Comments at 5-8; CalCCA Apr. 20, 2022 Comments at 2-4.

⁹ Cal. Pub. Res. Code § 25403.5(a).

¹⁰ *Id.* § 25118.

The Final Staff Report cites as support for its inclusion of CCAs that:

1. CCAs operate within the geographical service territories of electric utilities, and therefore the load management standards apply to CCAs that provide electricity to customers within these service areas;
2. For the load management standards to function in a manner that meets the intent of the statute, the standards must apply to most electric customers; and
3. To the extent CCA service is the default provider and continues to expand in California, any other interpretation would diminish the effectiveness of the proposed amendments . . . and defeat the purpose of the statute.¹¹

As set forth more fully below, the Commission’s interpretation of section 25403.5 is inconsistent with the laws of statutory construction.

Any final interpretation of a statute is a question of law and rests with the courts.¹² In fact, a California court has specifically found that a Commission decision construing PRC sections 25500 and 25123 issued many years after the passage of the statute is *not* entitled to great weight.¹³ Accordingly, proper statutory construction requires a review of methods utilized by courts to determine statutory meaning.

First, the California Supreme Court requires courts to look to “ascertain the intent of the Legislature so as to effectuate the purpose of the law.”¹⁴ A court must look first to the *explicit language*, explained as:

the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose,

¹¹ Final Staff Report at 17.

¹² *Department of Water and Power, City of Los Angeles v. Energy Resources Conservation and Development Commission*, 2 Cal.App.4th 206, 296-297(1992) (rejecting the Commission’s contention that the appellate court must defer to its administrative interpretation of Public Resources Code sections 25500 and 25123 when although its interpretation was a case of first impression, the decision was issued in 1990 interpreting a 1974 statute and therefore was not a “contemporaneous construction of a new enactment by the administrative agency charged with its enforcement” which would be entitled to “great weight”) (citing *Dyna-Med, Inc. v. Fair Employment & Housing Commission* (1987) 43 Cal.3d 1379, 1388)).

¹³ *Ibid.*

¹⁴ *Dyna-Med, Inc.*, 43 Cal.3d at 1386.

and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.¹⁵

Here, the Commission's expansive interpretation of PRC section 25403.5 to include CCAs based on its hopes for success with the Market Informed Demand Automation Server (MIDAS) system and the proposed amendments places the cart before the horse. The explicit statutory language specifically allows the Commission to adopt LMS for each "utility service area," and the definition of "utility" does *not* expressly incorporate CCAs.¹⁶

In addition, the *context* of section 25403.5's adoption in 1976, when the LMS were adopted as a requirement for a utility prior to siting a new power plant, demonstrates that the LMS are intended to apply only to utilities.¹⁷ CCAs were not created until 2002, and therefore the original enactment of PRC section 25403.5 did not include CCAs. The context has also changed dramatically, from all generation being built by regulated utilities (as was the case in 1976), to a generation market where the utilities, other LSEs, and developers procure, build, and own generation. Perhaps most importantly, CCAs have never been added as an entity subject to its requirements.

In addition, consideration of *all* of the language in PRC section 25403.5 suggests that the Commission's ability to consider any adjustments to rate structure as a load management technique applies *only* to entities subject to rate jurisdiction of the California Public Utilities Commission (CPUC).¹⁸ CCA rates are not approved or regulated by the CPUC, but rather by CCA local

¹⁵ *Id.* at 1386-87 (citations omitted).

¹⁶ Cal. Pub. Res. Code §§ 25108 (definition of "electric utility"), 25118 (definition of "service area").

¹⁷ AB 4195 (1976).

¹⁸ *See, e.g.*, Cal. Pub. Res. Code § 25403.5(a)(1) (allowing the Commission to consider adjustments in rate structure as a load management technique, but stating that "[c]ompliance with those adjustments in rate structure shall be subject to the approval of the Public Utilities Commission in a proceeding to change rates or service"); *see also* Cal. Pub. Res. Code 25403.5(b) (requiring that the LMS be "cost-effective when compared with the costs for new electrical capacity" and that "[a]ny expense or any capital

governing bodies.¹⁹ Therefore, harmonizing the statutory language clearly demonstrates that CCAs, not subject to CPUC ratemaking authority, were not meant to be included within the reach of PRC section 25403.5.

Second, even if the explicit meaning of a statute remains uncertain, the Court requires a review of the legislative history to determine the legislative intent.²⁰ Here, the explicit language is *not* uncertain, as described above. However, a review of the legislative history of PRC section 25403.5, which includes amendments up through 2002, further demonstrates that the Legislature *did not intend* for CCAs to be included within the statute’s reach. In fact, the legislative history suggests that amendments to the load management standards program over time narrowed the LMS program’s scope: (1) to *remove* authority from the CEC regarding penalties and requirements under the LMS; and (2) to *consolidate reporting requirements*, including those involving CCAs, in the IEPR process while removing those reporting requirements from section 25403.5.²¹ Therefore, while the Legislature *could have* added CCAs to the entities subject to the Commission’s LMS while it

investment required of a utility by the standards shall be an allowable expense or an allowable item in the utility rate base and shall be treated by the Public Utilities Commission as allowable in a rate proceeding”).

¹⁹ See *Decision Resolving Phase 2 Issues on Implementation of Community Choice Aggregation Program and Related Matters*, R.03-10-003 (Oct. 2, 2003) at 9, 42 (the legislature did “not require the [CPUC] to set CCA rates or regulate the quality of its services,” and has “consistently treated CCAs as stand-alone operations with ratemaking discretion”).

²⁰ *Dyna-med, Inc.*, 43 Cal.3d at 1327.

²¹ Cal. Pub. Res. Code § 25403.5 was originally enacted to require a utility to certify that it was in compliance with the LMS before the Commission would approve sites for a new power plant to effectively coordinate new capacity with load needs. Cal. Pub. Res. Code § 25403.5(e) (1976) (amended in 1980 through AB 3062 (stats. 1980) to eliminate a penalty clause, and to add a forecast reporting requirement for electric utilities). Senate Bill (SB) 1389 (stats. 2002) shifted forecast reporting requirements to the Integrated Energy Policy Report (IEPR). Notably, the direction for electric utilities to report on load management standards was eliminated, but PRC section 25302.5(a) did allow the Commission to require in the IEPR “submission of demand forecasts, resource plans, market assessments, and related outlooks from electric . . . utilities, . . . and other market participants,” including CCAs. Therefore, the IEPR process established in 2002 expressly includes CCAs, but the load management standards (adopted before the creation of CCAs) were never amended to include CCAs.

amended section 25403.5, *or* while it incorporated requirements for CCAs in other sections of the PRC, it did not.²²

In addition, to reflect changing market structures, the Legislature has routinely updated both the PRC and Public Utilities Code to reflect and include new market participants. This includes but is not limited to the Legislature’s creation of the new categories of “load-serving entities” for Resource Adequacy and “retail supplier” for the Power Content Label requirements enforced by the CEC.²³ Most recently, the Legislature adopted AB 205 which provides a specific list of entities, which include CCAs, eligible for the Demand Side Grid Support Program, administered by the Commission.²⁴ The Legislature has taken no similar action adding CCAs to the application of the 1976 load management standards.

According to the laws of statutory construction, PRC section 25403.5 does not explicitly or implicitly grant the Commission jurisdictional authority to mandate CCA compliance with its proposed LMS regulations. Therefore, the Commission should either remove CCAs from the regulations, or allow CCA voluntary compliance with the regulations.

III. THE COMMISSION LACKS AUTHORITY TO MANDATE CCA RATES

The Commission also lacks authority to mandate that CCAs adopt a particular rate design. The Commission acknowledges its lack of “exclusive or independent authority” to require CCA adoption of a particular rate. However, it insists that the rate required by the proposed LMS

²² See *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 (citing the maxim of statutory construction, *expressio unius est exclusion alterius* – that “[t]he expression of some things in a statute necessarily means the exclusion of other things not expressed”); see also *Dyna-Med, Inc.*, 43 Cal.3d at 1391 (stating that the *expressio unius* doctrine can be used as a guide when a statute is ambiguous).

²³ See Cal. Pub. Util. Code § 380 (establishing that the California Public Utilities Commission shall establish RA requirements for *all* load-serving entities, including CCAs); see also Cal. Pub. Util. Code § 398.2 (including CCAs within the definition of a “Retail Supplier” subject to the power content label requirements).

²⁴ Cal. Pub. Res. Code § 25792(b).

regulations is simply a “rate structure” and CCA governing boards retain ultimate approval authority.²⁵ However, as discussed in CalCCA’s prior comments, the proposed regulations go far beyond a “rate structure.” A rate “structure” could be, for example, time-differentiated rates, leaving LSEs the flexibility to design rates that meet this objective. What the regulations propose to do -- requiring an hourly variable rate using specific marginal costs – steps into the scope of “rate design.” Furthermore, the Commission retains ultimate enforcement authority for failure to comply with the regulations.²⁶ As a result, even if the Commission has jurisdiction to require CCA compliance with the LMS (which it does not), the proposed regulations constitute an unlawful infringement on CCA ratemaking authority provided by AB 117.

IV. EVEN IF THE COMMISSION SEEKS VOLUNTARY PARTICIPATION BY CCAS IN ITS LOAD MANAGEMENT PROGRAM, THE CURRENT STANDARDS ARE CURRENTLY TECHNOLOGICALLY INFEASIBLE

Finally, if the Commission seeks voluntary CCA participation in its LMS given its lack of statutory authority to mandate CCA participation, implementation of the regulations is currently technologically infeasible for CCAs. As explained in prior CalCCA comments, CCAs cannot implement an hourly locational marginal cost-based rate until the IOUs develop the data and billing systems to incorporate the CCA rate.²⁷ For CCA customer bills, the IOUs receive from the CCAs the generation rate information to incorporate into the bills, and the IOUs then send the bills out incorporating their transmission and distribution rates. Therefore, until the IOUs establish their own data and billing systems to implement the LMS, CCA customers will not be billed for the CCA generation portion and cannot even voluntarily participate in the LMS.

²⁵ Final Staff Report at 17.

²⁶ See CalCCA Feb. 7, 2022 Comments at 8-10.

²⁷ See CalCCA April 20, 2022 Comments at 6-7.

V. CONCLUSION

For the reasons set forth above, CalCCA requests that the Commission either remove CCAs from the proposed LMS regulations or allow voluntary participation in the LMS.

Respectfully submitted,

A handwritten signature in blue ink that reads "Evelyn Kahl". The signature is written in a cursive style with a large initial "E".

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CALIFORNIA COMMUNITY CHOICE
ASSOCIATION

July 21, 2022