BEFORE THE
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE
STATE OF CALIFORNIA

In the Matter of: Rulemaking to Consider Modification of Regulations Establishing a Greenhouse Gases Emission Performance Standard For Baseload Generation of Local Publicly Owned Electric Utilities

Docket No. 12-OIR-1

M-S-R PUBLIC POWER AGENCY AND SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY SAN JUAN PARTICIPANTS REPLY COMMENTS

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In accordance with the Notice of Rulemaking Workshop dated March 6, 2012, in the captioned proceeding, the M-S-R Public Power Agency ("M-S-R")[1] and the Southern California Public Power Authority ("SCPPA")[2] San Juan Participants (jointly, "M-S-R and SCPPA") jointly respond to opening comments submitted jointly by the Natural Resources Defense Council ("NRDC") and the Sierra Club (jointly "Petitioners") on March 26, 2012.

M-S-R, SCPPA, and Petitioners share several common goals. All want to see California's greenhouse gas ("GHG") reduction efforts succeed, all are interested in seeing GHG emissions reduced across the state, and all want to ensure that the mandates of the Commission's GHG Emission Performance Standard ("EPS") regulation are followed. To that end,

[1] M-S-R is a joint powers agency whose members include the City of Santa Clara, the City of Roseville, and the Modesto Irrigation District.

[2] SCPPA is a joint powers authority. The members are Anaheim, Azusa, Banning, Burbank, Cerritos, Colton, Glendale, Los Angeles Department of Water and Power, Imperial Irrigation District, Pasadena, Riverside, and Vernon. This comment is sponsored by Anaheim, Azusa, Banning, Colton, Glendale, and Imperial Irrigation District ("SCPPA San Juan Participants").

representatives from M-S-R, SCPPA, and other publicly owned utility ("POU") representatives met with representatives from NRDC and the Sierra Club to discuss the scope and proposed outcome for this Rulemaking process. Although the parties did not come to consensus on all matters to be addressed within the scope of this proceeding, there was a commitment to continue the dialogue in an effort to fine-tune the issues that all the parties believe should be the focus of potential regulatory action.

I. INTRODUCTION

Five opening comments were filed on March 26, 2012, in this proceeding.

A. POU OPENING COMMENTS.

In addition to the opening comments from NRDC and the Sierra Club, opening comments were filed by the Imperial Irrigation District ("IID"), the Los Angeles Department of Water and Power ("LADWP"), M-S-R, and the SCPPA San Juan Participants. The comments from IID, LADWP, M-S-R, and the SCPPA San Juan Participants made a number of points in common.

First, they explain that Public Utilities Code ("PUC") section 8341(f) requires reevaluation of the EPS regulation and that, upon reevaluation, the EPS regulation should be revised to include a sunset provision that terminates the regulation when the California Air Resources Board ("CARB") cap-and-trade declining cap starts to be enforced on January 1, 2013.[3] They also explain that there is no need to wait for the CARB to evaluate the efficacy of the declining cap insofar as the decline in emissions will be enforced through the cap-and-trade program as a matter of law.

Second, IID, LADWP, M-S-R, and the SCPPA San Juan Participants explain that POUs that have interests in non-EPS compliant powerplants have complied with the requirements of the EPS regulation. Since implementation of the regulation in 2007, in compliance with the EPS

[3] 20 California Code of Regulations ("CCR") §§2900-2913.

regulation, they have not participated in covered procurements or new ownership investments in non-EPS compliant powerplants, although they have participated in the maintenance of the plants, consistent with the Commission's express intent that nothing in the EPS regulation requires POUs to allow non-EPS compliant plants to atrophy. The POUs have not sought "guidance" from the Commission about maintenance expenditures because no such guidance has been necessary, given the plain meaning of the term "routine maintenance" in the EPS regulation and the express interpretations of the regulation by the Commission. Accordingly, there is no need for submitting information about "all" expenditures made at non-EPS compliant powerplants as proposed by the Petitioners. Requiring the submission of such a large volume of information would be unnecessary, overly broad, unduly burdensome, and beyond the scope of both Senate Bill ("SB") 1368[4] and the EPS regulation.

Third, IID, LADWP, M-S-R, and the SCPPA San Juan Participants explain that there is no need to revise the EPS regulation to require reports about all planned expenditures in the non-EPS-compliant powerplants. Imposing a prospective burden on POUs to report all planned expenditures at the powerplants would be just as unnecessary, unduly burdensome, overly broad, and beyond the scope of the EPS regulation as any requirement to submit information about past expenditures.

B. PETITIONERS' OPENING COMMENTS.

The Petitioners disagree with IID, LADWP, M-S-R, and the SCPPA San Juan Participants. The Petitioners argue that the EPS regulation should be continued even though the statewide declining cap on GHG emissions will become enforceable on January 1, 2013, and they argue that the regulation should be revised to require the submission of even more information than they sought in their November 14, 2011 Joint Petition for Initiation of a

[4] Stats. 2006, Ch. 598 *codified* as Public Utilities Code §§8340-8341.

Rulemaking ("Petition") that resulted in the initiation of this proceeding. Specifically, Petitioner's seek to have POUs provide "information" on:

> 1) All past and planned investments from POUs at non-compliant power plants;
> 2) Any and all information on alternative investment options considered or under consideration, including alternative investments at the non-compliant plants and alternative energy and capacity supply options; and
> (3) A full review of all obligations, options, and opportunities for California POUs under their existing contracts at non-compliant plants should the POUs claim that they are contractually bound to make investments at the non-compliant power plants.[5]

In addition to seeking revisions to the EPS regulation to require POUs to submit information about all past and "planned" investments in non-EPS compliant powerplants, the Petitioners seek to have the regulation amended to require submission of "any and all" information on "alternative investment options" and "alternative energy and capacity supply options." Additionally, Petitioners seek the submission of information about all expenditures that POUs may be contractually bound to make in non-EPS compliant powerplants, apparently regardless of whether the expenditures would be exempt or not under either section 2912 or section 2913 of the EPS regulation. This expansive call for the submission of data goes beyond the scope of the EPS regulation, and beyond the scope of SB 1368. M-S-R and SCPPA are concerned that such an approach is an attempt not only to revise the EPS regulation, but to rewrite the statute itself into something that would not reflect the Legislature's intent when it adopted SB 1368.

The Petitioners' arguments for continuing the EPS regulation after the CARB's declining cap starts to be enforced are based upon a misunderstanding of the nature and purpose of the cap-and-trade regulation as explained by the CARB itself. Likewise, the Petitioners' arguments for

[5] Petioners' Joint Comments, p. 2.

imposing an all-encompassing reporting burden are based upon a misunderstanding of the expenditures the POUs have made in non-EPS compliant powerplants since 2007 and a misconception of the purpose and scope of SB 1368 and the EPS regulation. Accordingly, M-S-R and SCPPA appreciate this opportunity to offer the responses set forth below to the Petitioners' opening comments.

II. RESPONSE TO PETITIONERS.

M-S-R and SCPPA respond below to the Petitioners' opening comments.

A. Petitioners Have Been Guided by EPS Regulation in Deciding Upon Expenditures that Are Non-EPS Compliant Powerplants.

Petitioners claim that POUs have been making "investments" in non-EPS compliant powerplants "without Commission oversight or guidance."[6] This statement is factually incorrect. In fact, the Commission has provided specific guidance to POUs about the expenditures that they can make under the EPS regulation on non-EPS compliant powerplants. The guidance is provided by the EPS regulation itself. The regulation is perfectly clear that expenditures on routine maintenance are permitted. Furthermore, the Commission explained in the Final Statement of Reasons ("FSOR") accompanying the EPS regulation that even though some expenditures can be large and even result in an increase in rated capacity such as expenditures on replacements of turbine blades, such expenditures are permitted as routine maintenance.[7]

In their opening comments, Petitioners state that "POUs have commented in this rulemaking that all of their past and planned investments comply with the EPS *and* that they are bound to make investments at non-compliant powerplants, regardless of their views on EPS compliance."[8] M-S-R and SCPPA take exception to this statement. While M-S-R and SCPPA can

[6] Petitioners' Joint Comments, p. 1.

[7] FSOR, CEC Docket No. 06-OIR-1, Notice File No. Z07-0227-01, OAL File No. 07-0601-04S, p. 17 (August 31, 2007).

[8] Petitioners' Joint Comments, p. 3.

say with certainty that all past investments comply with the EPS regulation, future expenditures are just that – transactions that have not yet occurred. M-S-R and SCPPA would need to review and analyze each of those expenditures as they arise to determine whether or not they are covered procurements.

B. Petitioners Should Not Be Permitted to Turn this Rulemaking Proceeding into a Counterproductive Investigation.

The Petitioners argue that the Commission should require POUs to produce an enormous swath of information in order to determine whether there would be any cause for revising the EPS regulation. **First**, the Petitioners ask the Commission to require POUs to produce information about "all" past expenditures at non-EPS compliant powerplants.[9] Presumably, the Petitioners do not mean to have the Commission seek information about expenditures that were made prior to the effectiveness of the EPS regulation in 2007. However, even assuming that the Petitioners' request is limited to information about expenditures that occurred after the effective date of the EPS regulation, the proposal for the Commission to require the production of information about "all" post-2007 expenditures is unjustified.

M-S-R and SCPPA do not believe that this proceeding should include a review of any past investments. There is no value in reviewing past transactions, especially when the POUs' approvals and processes regarding those transactions have already been documented. These transactions were in many cases subject to public review at the M-S-R or SCPPA board meetings, and in some instances, at the individual members' local level. If there is a need to revise the EPS, such revisions should be forward-looking, and any additional guidance should apply to prospective investments only.

Petitioners have not identified a single instance of a POU investment since 2007 in a non-EPS compliant powerplant that is not permitted under the EPS regulation. In their Petition, the

[9] Petitioners' Joint Comments, p. 2.

Petitioners attempted to produce some examples of investments that allegedly violate the EPS regulation such as the investment in turbine blades at San Juan.[10] However, the Commission itself has already looked at that particular expenditure and determined that the replacement of turbine blades constitutes routine investment.[11] The Petitioners have not produced any examples of expenditures that would provide cause for effectively turning this rulemaking into an investigation by requiring POUs to produce information about all past investments.

Granting the Petitioners' request to require POUs to produce information about "all" past expenditures at non-EPS compliant powerplants would do nothing more than turn this investigation into an unjustified fishing expedition that would distract POUs from the important work they are undertaking to meet California's renewable portfolio standards, to reduce GHG emissions, and to meet other mandates as imposed both by the Legislature as well as the governing boards of POUs themselves.[12]

Second, the Petitioners seek to have the Commission require POUs to produce "complete information" about "all…. planned investments" at non-EPS compliant powerplants.[13] Information about "all" expenditures that are "planned" for the future would be unmanageably open-ended and necessarily incomplete. Routine maintenance, by its nature, occurs routinely at periodic intervals. There are innumerable instances of minor and even major expenditures that occur periodically extending into the future. Requiring POUs to produce information about all those investments would result in forcing them to try to project expenditures that would extend until the end of the use of life of a powerplant, which could extend many years. Thus, in

[10] November 2011 Joint Petition, pp. 6-7.

[11] FSOR, *Ibid.*

[12] It is especially important to avoid turning this proceeding into an unjustified distraction given that the mandated review of the EPS regulation has yet to be conducted and may result in a finding that the EPS should sunset in just a few months.

[13] Petitioners' Joint Comments, p. 2.

addition to being wholly outside the scope of the mandates set forth in SB 1368 and the EPS regulation itself, the Petitioners' request that the Commission require POUs to produce in this proceeding information about "all" expenditures that are "planned" for the future would be unmanageably overbroad and should be rejected.

Third, the Petitioners urge the Commission to require that POUs provide "any and all information" about "alternative investment options" that were considered in the past or might be considered in the future as alternatives to expenditures at non-EPS compliant powerplants. Thus, not only would POUs be required to report on all past (presumably, back to 2007) and future expenditures at the powerplants; the report would be expanded to cover all *alternatives* to the actual expenditures made in the past or which are foreseen for the indefinite future. This would expand exponentially the unwieldy and unreasonable reporting burden that the Petitioners would impose on POUs.

Furthermore, POU procurement activities are varied, depend upon numerous contingencies at any given time, and incorporate their entire resource plan. Such deliberations must take into account a myriad of factors and multiple facilities, not just the EPS regulation. Accordingly, review and analysis of the POU's integrated resource planning deliberations goes far beyond the scope of the EPS regulation, and its relationship to this proceeding is entirely unclear. POUs have the sole discretion in determining what investment options to pursue. Attempting to bring a reasonableness review of POU procurement options within the ambit of a proceeding applicable to only one factor is inappropriate.

Fourth, the Petitioners propose that the Commission require POUs to file information about "all obligations, options, and opportunities for California POUs under their existing contracts" in the event that "the POUs claim that they are contractually bound to make

investments at the non-compliant powerplants."[14] This proposal by the Petitioners goes beyond turning this rulemaking into an investigation. It would turn this rulemaking proceeding into a forum for determining whether or not POUs should be found to be exempt under section 2913 of the EPS regulation. That would be inconsistent with the terms of section 2913 itself.

Section 2913 provides for a POU to petition the Commission for an exemption from the EPS regulation if covered procurements are required under the terms of a contract or ownership agreement, and the contract or ownership agreement does not afford the POU the opportunity to avoid making the covered procurement.[15] Under section 2913 of the EPS regulation, exemptions for covered procurements are to be granted upon the submission of a petition by the POU. The Petitioners would effectively take away from POUs the option of deciding whether or not to seek an exemption by requiring them to provide the information in this proceeding that would determine whether or not covered procurements at a powerplant would be exempt under existing multi-party commitments. The decision about whether to seek an exemption should be left in the hands of POUs as explicitly provided in section 2913. If a POU determines that it is necessary to make such an election, the relevant supporting information should be provided to the Commission at that time as part of its submission.

C. POUs Should Not Submit Unnecessary Requests for a Commission Evaluation of a Prospective Procurement.

The Petitioners claim in bold print as though it might have some special significance that "**the Commission has not received a single compliance request from any POU for an investment in an existing baseload powerplant**."[16] It is not clear what the Petitioners mean when they refer to a "compliance request" insofar as that term is not used in the EPS regulation,

[14] Petitioners' Joint Comments, p. 2.

[15] 20 CCR §2913.

[16] Petitioners' Joint Comment, p. 2 (emphasis in original).

but presumably they are referring to requests that a POU might make under section 2907 of the regulation for a Commission evaluation of a prospective procurement to determine whether the procurement would be in compliance with the EPS.

M-S-R and SCPPA do not know whether in fact there have been no requests for a Commission evaluation under section 2907 as claimed by the Petitioners, but even if the Petitioners are right, no particular significance attaches to the fact that there have been no such requests. Section 2907 provides an *opportunity* to submit a request for a Commission evaluation of a prospective procurement if there were some doubt about the procurement and a POU desired the "safe harbor" of a Commission determination. Transactions that fall clearly outside of the definition of covered procurements would not require any such pre-expenditure evaluation by the Commission. Similarly, transactions that would clearly fall within the definition of covered procurements do not require a Commission determination prior to filing an exemption petition under PUC section 2912 and/or 2913.

Certainly it was not the intent of the Commission to have POUs frivolously submitting requests for Commission evaluations for the myriad of instances in which there is no doubt that the expenditure would constitute, for example, routine maintenance as commonly understood. The only significance that should be attributed to the lack of POU requests for Commission evaluations under section 2907 is that the regulatory language is clear enough to guide POU decision making, and that POUs are avoiding expenditures that are not clearly permitted by the EPS regulation, thereby properly avoiding burdening the Commission with unnecessary requests for evaluations. The notion that some malfeasance should attach to the fact that entities have not utilized an optional and voluntary provision is absurd.

D. POUs Are Required to Comply with a Carefully Articulated Regulation.

The Petitioners claim that "POUs have been given free rein to interpret" the EPS regulation.[17] To the contrary, POUs have been required to follow a regulation that, as determined by the Office of Administrative Law, is well-articulated. POUs are permitted to make expenditures for routine maintenance and, conversely, are prohibited from making expenditures that would, for example, extend the life of a project by more than five years. The regulation is narrowly crafted precisely for the purpose of avoiding giving "free rein to POUs."

E. The Size of the Expenditure Is Not Dispositive.

The Petitioners particularly seek "guidance" about "large investments" or "significant new investments" at existing non-EPS compliant powerplants.[18] The size of the expenditure is not dispositive as to whether an investment constitutes routine maintenance. The EPS regulation is not triggered by a minimum or maximum investment amount. A large expenditure on, for example, turbine blades can clearly be routine maintenance and not result in any increase in the life of the plant insofar as other equipment or permits limit the life of the plant. On the other hand a relatively small expenditure might increase the rated capacity or extend the life of a facility and be prohibited under the EPS regulation even though the cost is relatively low. Accordingly, when analyzing expenditures for compliance with the EPS, the ultimate dollar amount should not be a dispositive factor (although cost is very much an issue to a POU); rather, the necessary analysis should focus on the nature of the expenditure.

F. POUs Have Decided Against Expenditures that Would Violate the EPS Regulation.

The Petitioners declare broadly that "it is not clear that the POUs have thus far restricted their participation in any way" in non-compliant baseload powerplants. It is not clear what sort

[17] Petitioners' Joint Comment, p. 2.

[18] Petitioners' Joint Comments, p. 3.

of "participation" the Petitioners have in mind, but if the Petitioners mean investments that would, for example, increase the rated capacity at non-EPS compliant powerplants, the POUs have in fact restricted their participation. For example, as the SCPPA San Juan Participants explained in their opening comments, the SCPPA San Juan Participants rejected a proposal by General Electric to undertake a project that would increase the rated capacity in San Juan Project Unit 3.[19]

G. There Is No "Contractual Period" for San Juan.

The Petitioners claim that "participants in the San Juan Generating Station have analyzed how to minimize investments in the plant in order to time retirement of the facility with the end of the existing contractual period."[20] It is unclear what the Petitioners have in mind. There is no "contractual period" limiting the participation of M-S-R or the SCPPA San Juan Participants in the San Juan powerplant. M-S-R and SCPPA San Juan Participants have an ownership interest that is not limited by a "contractual period."

H. The Commission Should Not Wait for January 1, 2013, to Reevaluate the Need for the EPS Regulation.

PUC section 8341(f) requires that the Commission "reevaluate and continue, modify, or replace the greenhouse gases emission performance standard when an enforceable greenhouse gases emissions limit is established and in operation…."[21] The Petitioners claim that the "requirements of [PUC section 8341(f)] have not been triggered" by the CARB's cap-and-trade regulation. It appears that Petitioners are arguing that the Commission should wait until after January 1, 2013, to commence the reevaluation of the EPS regulation as required by section

[19] SCPPA San Juan Participants Opening Comments, p. 14.

[20] Petitioners' Joint Comments, p 4.

[21] PUC §8341(f).

8341(f) because January 1, 2013 is when the CARB's cap-and-trade declining cap will start to be enforced.

It is unnecessary to postpone the reevaluation. The CARB has adopted the cap-and-trade program, the regulations for the program are in effect, and the declining cap will become enforceable as of January 1, 2013 as a matter of law.[22] The required emissions reductions and the amount of the cap established by CARB were not revised or otherwise reduced to reflect the new January 1, 2013, compliance obligation start date. The only change is that penalties for failure to meet the mandated reductions do not commence until January 1, 2013. PUC section 8341(f) does not require the Commission to wait for January 1, 2013, to commence its reevaluation. Given that the regulations are already in effect, it is not even clear that the Commission has to wait for January 1, 2013, to amend the EPS regulation to include a sunset provision. It is undeniable that by January 1, 2013, an "enforceable greenhouse gases emissions limit" will be "established and in operation," insofar as the declining cap will be enforceable as of January 1, 2013.

Furthermore, M-S-R and SCPPA believe that the continued viability and utility of the EPS regulation needs to be reviewed, as directed in the enabling legislation. California's cap-and-trade program is a comprehensive measure designed to induce covered entities to reduce their GHG emissions in the most cost-effective and economic manner possible. Having spent considerable time working with the CARB staff and other stakeholders on the processes leading up to the adoption and implementation of the cap, M-S-R and SCPPPA believe that the outcome approved by the CARB last year is exactly what the legislature envisioned when it called for review of the EPS upon imposition of an emissions cap. Despite the efficacy of the EPS to date, M-S-R and SCPPA believe that it is imperative that the future of the standard be evaluated at this

[22] 17 CCR §95840(a).

time, as directed by the legislature. In the event that the EPS is found to be unnecessary to effect the state's GHG reduction objectives in light of the operational cap, then the EPS should sunset. Only if it is determined that the EPS is still needed should the Commission look to make any changes.

M-S-R and SCCPA understand that some believe that review of the EPS is not necessary, as it is a separate and distinct tool from the cap. However, given the mandates of PUC section 8341(f) and the comprehensive design of the cap-and-trade program, M-S-R and SCPPA do not believe that it is prudent or efficient for this important first-step to be ignored.

I. There Is No Need to Retain the EPS Regulation as a "Back-Stop" to the Cap-and-Trade Declining Cap.

The Petitioners claim that the EPS regulation should be retained after January 1, 2013, as a "back-stop" for the cap-and-trade program.[23] That would be inconsistent with the rationale underlying the adoption of the cap-and-trade program. The point of containing and reducing greenhouse gas emissions through a cap-and-trade program is that such a program would reduce GHG emissions in an economically efficient manner by having covered entities make decisions about the operation of emitting sources in response to the price of carbon as established through operation of the cap-and-trade program. According to the CARB, reductions would be expected to occur in the most cost-effective manner, because "the cost of reductions or the cost of allowances that can be purchased are determined by the market."[24] Under the cap-and-trade program, the decision to reduce GHG emissions by reducing or eliminating the production of electricity at a non-EPS compliant powerplant should be made in response to the pricing of allowances to assure the most economic emission reductions are achieved first. Maintaining the EPS regulation as a "back-stop" to the cap-and-trade program would result in the program

[23] Petitioners' Joint Comments, p. 6.

[24] Functional Equivalent Document ("FED") Supplement, p. 51.

operating less efficiently by interfering with economic decisions based on carbon prices established through the cap-and-trade program.

PUC section 8341(f) permits modifying the EPS regulation to include a sunset provision. The Petitioners claim that section 8341(f) "does not include elimination of the [EPS] as an option upon further review of the EPS regulation."[25] However, section 8341 permits the Commission, upon reevaluation, to "continue, modify, or replace" the EPS regulation. Including a sunset provision in the EPS regulation would constitute a modification of the regulation and accordingly, would be consistent with the text of section 8341(f).

J. A Compliance Investigation Would Be Unnecessary.

The Petitioners claim that if the Commission does not require POUs to submit all of the information that the Petitioners want POUs to submit in this rulemaking, the Petitioners "may determine that requests for enforcement are the most appropriate action."[26] Presumably, the Petitioners are referring to the right to request "a complaint or investigation proceeding" under section 2911 of the EPS regulation.

A compliance investigation would be inappropriate to the extent it would involve either M-S-R or the SCPPA San Juan Participants. As they explain in their opening comments, both MSR and SCPPA have fully complied with the EPS regulation.

III. CONCLUSION.

For the reasons set forth above and in the opening comments of M-S-R and the SCPPA San Juan Participants, M-S-R and SCPPA urge the Commission to revise the EPS regulation to

[25] Petitioners' Joint Comments, p. 6.

[26] Petitioners' Joint Comments, p. 7.

include a section that provides for the regulation to sunset as of January 1, 2013, and to make no further revisions to the regulation at this time.

Respectfully submitted,

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