FINAL STATEMENT OF REASONS

FOR ADOPTION OF REGULATIONS ESTABLISHING AND IMPLEMENTING A GREENHOUSE GASES EMISSION PERFORMANCE STANDARD FOR LOCAL PUBLICLY OWNED ELECTRIC UTILITIES

California Energy Commission
Docket No. 06-OIR-1
Notice File Number Z-07-0227-01
OAL File Number 07-0601-04S
August 31, 2007

INTRODUCTION

These regulations establishing and implementing a greenhouse gases emission performance standard for local publicly owned electric utilities, along with similar regulations adopted by the California Public Utilities Commission (CPUC), are among the first greenhouse gas regulations in the country. In late 2006, the Legislature and Governor approved SB 1368 (Stats. 2006, ch. 598), requiring the Energy Commission and the CPUC to quickly adopt these groundbreaking regulations. In October 2006, the Energy Commission embarked on a thorough rulemaking process that included dozens of informal meetings with many stakeholders, three lengthy workshops, and two hearings along with almost daily communication with interested parties. While the issues encompassed by these regulations were contentious, and objections were raised to several provisions, in the end all objections raised by the California Municipal Utility Association (CMUA) and all other regulatees were addressed and these parties, as well as concerned environmental groups, voiced support for the adopted regulations (though, as discussed further in the response to comments section, two non-regulatees remain opposed to the regulations).

The Commission is adopting regulations to comply with Public Utilities Code sections 8340 and 8341, which require, in consultation with the CPUC and the California Air Resources Board (CARB), to establish a greenhouse gases (GHG) emission performance standard (EPS) and implementing regulations for all long-term baseload generation commitments made by local publicly owned electric utilities. The legislation directs the Commission to establish the performance standard as one not exceeding the rate of greenhouse gases emitted per megawatt-hour (MWh) associated with natural gas-fired combined-cycle combustion turbine baseload generation. The law requires that the Commission's standard be consistent with that adopted by the CPUC in a companion proceeding. The implementing regulations are required to include a greenhouse gases emission performance standard and an output-based methodology for calculating and enforcing the emission performance standard.

PROCEDURAL HISTORY

On October 25, 2006, the Energy Commission adopted an Order Instituting Rulemaking to establish regulations in order to comply with Public Utilities Code sections 8340 and 8341. The Energy Commission held three public workshops to discuss proposals for the regulations and a Notice of Proposed Action was published in the California Regulatory Notice Register on March 9, 2007. Various parties submitted comments in writing and also presented their comments at the April 25, 2007 hearing. In response to the comments received in writing and at the hearing, the Energy Commission modified the proposed regulations. On May 4, 2007, the Energy Commission (1) made the full text of the resulting proposed regulations available to the public (see Government Code section 11346.8(c).); and (2) mailed a notice stating the period within which comments would be received and containing the full text of the regulations as originally proposed, with the proposed changes clearly indicated in double underline and double strikeout, to the persons listed in California Code of Regulations, title 1, section 44, subdivision (a). (See Statement of Mailing of Notice As Required By Title 1, California Code of Regulations, Section 44.) This 15-Day Language resulted from comments received on the 45-Day Language and was sufficiently related to the original text that the public was adequately placed on notice that the proposed revisions could result from the originally-proposed February 2007 text.

Specifically, the 15-Day Language changes involved the following changes: 1) clarifying that section 2901(j)(2) does not apply to deemed compliant power plants; 2) clarifying that section 2901(j)(4)(A) does not apply to routine maintenance; 3) changing the term "system energy" to "unspecified energy" for clarity; 4) changing the phrase "participate in" to "enter into" under section 2902(b) for clarity; 5) removing the exemption for qualifying facilities; 6) adding a process for POUs to request, prior to entering into a procurement, an energy commission determination on whether a prospective procurement would increase the life of a power plant by five years, would constitute routine maintenance, or would comply with the EPS; 7) adding a process where POUs can request an exemption from the EPS for procurements under pre-existing multi-party commitments; and 8) a few other changes to clean-up the regulations. On May 23, 2007, the Energy Commission adopted the text of the proposed regulations ("45-Day Language") that accompanied the Notice of Proposed Action published by the Office of Administrative Law on March 9, 2007 – modified by the proposed revisions published and noticed on May 4, 2007 ("15-Day Language").

After receiving the Disapproval Decision from the Office of Administrative Law, the Energy Commission requested comments on the four items raised in the decision and held a public workshop on August 2, 2007 to discuss these items. After receiving input from the stakeholders, the Energy Commission proposed changes to sections 2900 and 2901(j)(4)(B) and provided an explanation for these provisions as well as the 50MW exemption under section 2901(j)(3). On August 10, 2007, the Energy Commission (1) made the full text of the resulting proposed regulations, as well as an explanation of the provisions identified in the disapproval decision, available to the public (see Government Code section 11346.8(c).); and (2) mailed a notice stating the period within which comments would be received and containing the full text of the regulations as originally proposed, with the proposed changes clearly indicated in double underline and double strikeout, to the persons listed in California Code of Regulations, title 1, section 44, subdivision (a). (See Statement of Mailing of Notice As Required By Title 1, California Code of Regulations, Section 44, dated August 10, 2007.) This second 15-Day

Language resulted from comments received from OAL on the rulemaking package and was sufficiently related to the original text that the public was adequately placed on notice that the proposed revisions could result from the originally-proposed February 2007. Specifically, the second 15-Day Language changes 1) clarified in section 2900 that the EPS applies to covered procurements of any size, but the reporting requirements only apply if the covered procurement is 10MW or more; and 2) the definition of new ownership investment under section 2901(j)(4)(B) includes any investment in a non-deemed compliant powerplant that results in an increase in rated capacity except for investments for routine maintenance. On August 29, 2007, the Energy Commission adopted the text of the proposed regulations ("45-Day Language") that accompanied the Notice of Proposed Action published by the Office of Administrative Law on March 9, 2007 – modified by the proposed revisions published and noticed on May 4, 2007 ("15-Day Language") and August 10, 2007.

INCORPORATION BY REFERENCE OF MATERIAL FROM THE NOTICE OF PROPOSED ACTION

The 15-Day Language does not substantially deviate from the originally-proposed text; therefore, in accordance with Government Code section 11346.9(d), the Energy Commission determines that this Final Statement of Reasons can satisfy the following requirements by incorporating by reference various parts of the March 9, 2007, Notice of Proposed Action.

- Section 11346.9(a)(2). The Local Mandate Determination from the Notice of Proposed Action is incorporated by reference.

- Section 11346.9(a)(5). The Small Business Impacts and Economic Impact on Business determinations from the Notice of Proposed Action are incorporated by reference. The Energy Commission has determined that the regulations have no adverse economic impact upon small businesses. Thus, alternatives to lessen any impact were not considered.

- Section 11346.9(c). The Relationship to Federal Regulations from the Notice of Proposed Action is incorporated by reference.

UPDATE OF THE INITIAL STATEMENT OF REASONS

Government Code section 11346.9(a)(1) requires the FSOR to contain an update of the information contained in the initial statement of reasons. The following represents the necessary update.

Under documents and reports relied upon, the following additions to the rulemaking record were noticed on May 4, 2007:

California Energy Commission, Implementation of SB 1368 Emission Performance Standard.

Staff Issue Identification Paper in support of the SB 1368 Greenhouse Gas Proceeding. November 2006.

California Energy Commission, Staff-Proposed Regulations for Implementing the Greenhouse Gases Emission Performance Standard for Local Publicly-Owned Electric Utilities. Staff White Paper in support of the SB 1368 Greenhouse Gas Proceeding. January 2007.

California Energy Commission Electricity Committee, "Greenhouse Gases Emission Performance Standard for Implementing Senate Bill 1368". Public Workshop Proceedings, December 8, 2006. Docket No. 06-OIR-1.

California Energy Commission Electricity Committee, "Greenhouse Gases Emission Performance Standard for Implementing Senate Bill 1368". Public Workshop Proceedings, January 11, 2007. Docket No. 06-OIR-1.

California Energy Commission Electricity Committee, "Greenhouse Gases Emission Performance Standard for Implementing Senate Bill 1368". Public Workshop Proceedings, January 18, 2007. Docket No. 06-OIR-1.

Additionally, the following additions to the rulemaking record were noticed on August 10, 2007:

California Energy Commission Electricity Committee, "Greenhouse Gases Emission Performance Standard for Implementing Senate Bill 1368." Public Workshop Proceedings, August 2, 2007. Docket No. 06-OIR-1.

California Energy Commission Electricity Committee, "Electricity Committee's Explanation of Changes to Regulations Establishing and Implementing a Greenhouse Gases Emission Performance Standard for Local Publicly Owned Electric Utilities in Response to the Office of Administrative Law's Disapproval Decision." Docketed August 10, 2007.

California Municipal Utilities Association, "Comments of the California Municipal Utilities Association on the Office of Administrative Law's Disapproval of the Proposed Regulations Establishing a Greenhouse Gases Emission Performance Standard." Filed in response to California Energy Commission Docket No. 06-OIR-1. July 30, 2007.

California Municipal Utilities Association, "Comments of the California Municipal Utilities Association on the CEC White Paper and Workshop – Triggering And Interpretations Of SB 1368." Filed in response to California Energy Commission Docket No. 06-OIR-1. December 13, 2006.

Los Angeles Department of Water and Power, "Additional Comments of the Los Angeles Department of Water and Power on the Implementation of SB 1368 Emission Performance Standard." Filed in response to California Energy Commission Docket No. 06-OIR-1. December 14, 2006.

Natural Resources Defense Council, "Comments of the Natural Resources Defense Council (NRDC), the Union of Concerned Scientists (UCS), and the Sierra Club California on the Concerns Identified in OAL's Disapproval Decision for Regulations Establishing and Implementing a Greenhouse Gases Emission Performance Standard for Local Publicly Owned Electric Utilities." Filed in response to California Energy Commission Docket No. 06-OIR-1. July 30, 2007.

The following changes are made in the section discussing specific requirements:

Section 2900

The Energy Commission has modified the language of section 2900 to clarify that the reporting requirements of Article 1 do not apply to covered procurements involving powerplants under 10 MWs. Therefore, the following language, with changes, should appear under section 2900:

This section explains that the reporting requirements contained in Article 1 only applies to long-term financial commitments with units 10 MWs and larger. The Commission determined that given the tight deadline for establishing and implementing these regulations, and administrative constraints, it was necessary to focus on powerplants with the greatest greenhouse gases emissions. This was determined to be facilities of 10 MWs or larger. The Commission has reserved Article 2 to address facilities of less than 10 MWs at a later time.

Section 2902

The discussion of section 2902 mistakenly refers to subsection (e). The provision is actually contained in at the end of section 2903(a) and the discussion should have referred to, and have been located in, that section instead. The explanation of the provision itself does not need to be altered. Therefore, the following language, with changes, should appear under section 2903.

Section 2902 & 2903

Subsection ~~(e)~~ 2903(a) requires that powerplant emissions be calculated based on intended operations and not on a hypothetical, best performance scenario that fails to take into consideration factors specific to the powerplant being analyzed. Emissions per megawatt hour are higher when a plant is operating at low levels, such as when it is starting or ramping. Emissions per megawatt hour start to drop when the unit is operated at an intermediate level, and are lowest when it is fully on at a maximum performance of a "full load heat rate." Since the purpose of SB 1368 is to dissuade certain long-term investments in powerplants that do or will exceed the EPS, it is important that the calculation of a powerplant's greenhouse gases emissions be based on an operating scenario that is likely to be utilized; thus leading to an accurate estimate of likely emissions.

Section 2907

Section 2907 has been replaced; therefore the following discussion should wholly replace the original discussion of this section.

This section allows a local publicly owned electric utility to seek, before it enters into a procurement, a determination from the Energy Commission on whether the procurement would extend the life of a power plant by five years, would constitute routine maintenance, or would be in compliance with the EPS. All requests for such a determination are to be processed under the provisions contained in Chapter 2, Article 4 of the Energy Commission's regulations, which establish timelines for investigatory proceedings.

Section 2912

Section 2912 was modified to remove the requirement that an exemption under this section for financial harm be allowed only if such harm was not contemplated during preparation of these regulations. The Energy Commission determined that this provision was too stringent and would not allow for valid claims of financial harm. The following change is made to the discussion of this section:

This section allows local publicly owned electric utilities to file a petition to exempt a particular covered procurement from the emission performance standard if they can demonstrate that the covered procurement is necessary to address system reliability concerns, or that there are extraordinary circumstances, catastrophic events, or threat of significant financial harm that will arise from application of the EPS ~~that was not contemplated during preparation of these regulations~~. Once the petition is filed, the section directs the Executive Director to review the petition, ensure its completeness, and provide a recommendation to the Commission, who shall vote on that recommendation within 30 days after receipt of the petition. This provision is necessary to ensure that application of the EPS will not result in significant impacts to system reliability or overall costs, and comports with direction from SB 1368.

Section 2913

The following discussion of section 2913, a new provision, is added:

This section allows a local publicly owned electric utility to petition the Energy Commission for an exemption from the regulations for covered procurements required under the terms of a pre-existing multi-party commitment. The Commission may grant such a petition if the POU demonstrates that the covered procurements are required under the terms of the contract or ownership agreement and the contract or ownership agreement does not afford the POU the opportunity to avoid making the covered procurements. This section requires the Energy Commission to act on complete petition within 30 days of receipt.

No other changes to the Initial Statement of Reasons are necessary, and those items not addressed above are hereby incorporated by reference.

UPDATE OF THE INFORMATIVE DIGEST

Pursuant to section 11346.9(b), and except for the small change noted below, the Informative Digest contained in the Notice of Proposed Action is incorporated by reference.

The following change is made:

Existing law requires the Commission, in developing and implementing the greenhouse gases emission performance standard, to consider and act in a manner consistent with any rules adopted pursuant to Section 824a-3 of Title 16 of the United States Code. ~~These regulations would ensure that, in order to avoid any conflict with federal law, any obligation to purchase from qualifying facilities would not be affected by application of the EPS.~~ These regulations are consistent with rules adopted pursuant to 16, United States Code, section 824a-3.

CONSIDERATION OF ALTERNATIVE PROPOSALS

As stated in its August 29, 2007, Adoption Order, the Energy Commission determined that no alternative before it would be more effective in carrying out the purpose for which this action is proposed or would be as effective and less burdensome to affected persons than the adoption of the proposed regulations – indeed, except for alternative language, no alternatives to the regulations themselves were proposed.

SUMMARY OF COMMENTS RECEIVED

Comments Submitted During 45-day Comment Period

1. **Comments of San Diego Gas & Electric Company (SDG&E), dated April 17, 2007.**

    a. SDG&E objects to the exclusion of power plants 10 megawatts (MW) or smaller from the proposed regulations, arguing that such exclusion is inconsistent with the rules adopted by the CPUC and ignores direction in SB 1368.

    Energy Commission Response:

No change. This provision is consistent with SB 1368 and does not exceed the authority provided under the statute. Because of the tight deadline imposed by SB 1368, and the need to wisely use scarce administrative resources, the Energy Commission decided to focus this rulemaking on powerplants that would emit more than a de minimis level of greenhouse gases. The Energy Commission has determined that power plants under 10 megawatts in size do not contribute a substantial amount of greenhouse gases, even when these emissions are aggregated. Because SB 1368 requires the Energy Commission to undertake a new role in overseeing the activities of POUs, it is important that the Energy Commmission craft these regulations in a manner that allows this oversight to be carried out using the resources at this agency's disposal. Except for the IOUs, no other party has objected to the Energy Commission's determination that powerplants under 10 megawatts present a de minimis level which does not warrant Energy Commission review. If it is determined, after implementation of these regulations, that there is a need for oversight of these de minimis facilities, we have reserved space in the regulations to do so. (In other words, such facilities have not been "excluded" from the scope of the regulations;

rather, the Energy Commission has chosen to include larger facilities first. To take "first things first" is entirely appropriate for an agency. (See *Alfaro v. Terhune* (3d Dist. 2002) 98 Cal.App.4th 492, 503-04 [120 Cal.Rptr.2d 197], and cases there cited.) The CPUC analyzed an exemption for 25 megawatt power plants, but did not consider an exemption for power plants under 10 MW in size. Additionally, the CPUC already has the administrative infrastructure in place to oversee the procurement decisions of its regulatees; implementing SB 1368 will be less complicated and, therefore, there was less of a need for that agency to consider any type of de minimis level. This is not the case for the Energy Commission.

b. SDG&E objects to the exemption of Qualifying Facilities, arguing that such exemption is unnecessary for the POUs to comply with PURPA and inclusion of the exemption is inconsistent with rules adopted by the CPUC.

Energy Commission Response:

After receiving several comments on this issue from various parties, the Energy Commission has, in 15-day language, removed the provision exempting Qualifying Facilities from the EPS. Because Qualifying Facilities will still be allowed to sell their electricity to POUs through short-term contracts, the Energy Commission has determined the proposed regulations are consistent with the rules adopted pursuant to Section 824a-3 of Title 16 of the United States Code.

c. SDG&E objects to the language allowing a 10% increase in rated capacity before triggering application of the GHG EPS, arguing that this provision is inconsistent with the CPUC's rules.

Energy Commission Response:

No change. SB 1368 states that the "greenhouse gases emission performance standard established by the Energy Commission for local publicly owned electric utilities shall be consistent with the standard adopted by the [PUC] for load-serving entities." The Energy Commission does not view this directive as requiring us to adopt an exact replica of the CPUC's decision; "consistent with" does not mean "the same as," and if the Legislature had intended to have the Energy Commission adopt every provision exactly as adopted by the CPUC it could and would have said so. We have adopted the same numerical standard, 1,100 lbs of CO2/MWh, and we have tried to closely follow the CPUC's decision where appropriate, but we have determined, based on the entire record and in particular the differences between the CPUC and the CEC, and between IOUs and POUs, that in some areas it is appropriate to deviate from the CPUC's decision. One striking difference between the two proceedings is that the CPUC's decision can be interpreted and altered relatively quickly and easily, whereas the Energy Commission's regulations, once adopted, cannot be further refined without the initiation, implementation, and completion of another rulemaking proceeding. Additionally, under SB 1368 the two agencies deal with two different sets of regulatees, each of which presents different issues that need to be addressed in different ways; for example, POUs own more of their generation than IOUs do, making this more of an issue for POUs than it is for IOUs. Thus, in order to ensure that the

regulations can be practically applied, the Energy Commission has determined that a few refinements to the CPUC's decision are necessary.

Allowing procurements that do not increase a power plant's capacity by more than 10% (if they do not trigger any of the other criteria in section 2901(j)) ensures that POUs are able to maintain their power plants in working order. Without such minimal flexibility, POUs might be prohibited from maintaining power plants that do not meet the EPS and such power plants would start to deteriorate, further contributing to pollution and reliability problems. The Energy Commission does not believe that it was the intent of SB 1368 to result in the deterioration of existing power plants.

d. SDG&E argues that consistency with CPUC rules is necessary to ensure "fair and robust competition" and by deviating from the CPUC's rules, the Energy Commission is giving competitive advantage to POUs and ultimately harming competition and ratepayers.

Energy Commission Response:

No change. The proposed regulations do not give POUs a competitive advantage over IOUs or any other entity regulated by the CPUC. Tellingly, SDG&E does not explain exactly how minor differences in the proposed regulations impart a competitive advantage.

While a publicly-owned utility may enter into a long-term contract with selected, small facilities that would be precluded from entering into a similar contract with an investor-owned utility, any advantage obtained is no different in quality or magnitude than that arising from numerous differences between the two classes of utilities with respect to regulatory treatment. Moreover, SDG&E fails to demonstrate how such an advantage "ultimately [harms] competition or ratepayers." To the extent that the exemption may reduce ratepayer costs for a local publicly owned utility, it benefits ratepayers and may be assumed to spur increased competition.

e. SDG&E argues that the Energy Commission's regulations are more lenient towards the POUs than the CPUC's treatment of IOUs and, that this "leniency" is contrary to the intent of SB 1368 and would "maximize leakage while minimizing emission reductions."

Energy Commission Response:

No change. The Energy Commission believes that the minor deviations from the CPUC decision are: 1) necessary to address issues specific to POUs; 2) conform to the intent of SB 1368; and 3) are a result of the differences inherent in the CPUC and Energy Commission rulemaking proceedings. The regulations are not more lenient that those adopted by the CPUC, they are just more specific. As the CPUC's decision is implemented, it is likely that the agency will make adjustments as issues arise that need clarification or further direction. Since the Energy Commission does not have the luxury of making such modifications when implementing the

regulations, it must anticipate potential problems with enforcing the regulations and address them during the rulemaking. Thus, the few deviations contained in these regulations represent such a necessary approach and are fully in keeping with SB 1368.

2. Comments of Los Angeles Department of Water and Power (LADWP), dated April 23, 2007.

a. LADWP believes the time frame for processing an application and the applicable requirements for timely rectification of a non-compliant filing specified in section 2910 do not allow for sufficient due process. Additionally, LADWP believes there should be a process to discuss differences in interpretation or understanding of the information presented in the application. "LADWP recommends an expedited process for deeming whether the filing is complete, and if incomplete, an explicit and timely description of the deficiencies" and a "process by which a dialog on the perceived deficiencies can occur." "LADWP requests the regulations be made clear that during this process, a utility is not precluded from accepting electricity from the procured source" and that "the CEC's consideration of the Executive Director's determination be at a public hearing." (Comments pp. 1-2.)

LADWP proposes the following changes to section 2910:

Within 14 calendar days after receipt, the executive director shall review each compliance filing and make a recommendation to the full Commission on stating whether the covered procurement complies with this Article. ~~The executive director may, within 14 days after receipt of a compliance filing, notify the local publicly owned electric utility in writing that the compliance filing was not complete, and shall specify what information is missing from the filing.~~ The executive director's failure to make a recommendation within said time period shall be deemed recommended by the executive director.

(a) If the executive director recommends to the full Commission that the compliance filing be determined not to be in compliance with this Article, such recommendation shall: (1) specify and explain in detail each particular in which the compliance filing is not in such compliance, supporting each such specification with a production of all relevant information available to the executive director, and (2) serve the recommendation by e-mail and by certified U.S. mail with next-day delivery upon the person who signed the compliance filing on behalf of the local publicly owned electric utility that submitted the compliance filing.

(b) The local publicly owned electric utility that submitted the compliance filing shall have an opportunity to respond to the recommendation within 10 calendar days of its receipt. In its response, the local publicly owned electric utility may supplement its original filing with additional information and documentation.

The Commission shall consider the executive director's recommendation and shall, within 30 calendar days after the executive director's recommendation ~~receipt of a complete compliance filing~~, conduct a public hearing on the compliance filing and issue a decision on whether the covered procurement described in the compliance filing complies with this Article.

Nothing in this Article shall preclude a local publicly owned electric utility from accepting electricity under the covered procurement during the pendency of the compliance filing and any subsequent proceedings before the executive director or Commission.

In lieu of a compliance filing, a local publicly owned electric utility may self-certify that the covered procurement complies with this Article by so indicating in a compliance filing that otherwise meets the requirements of these regulations. Self-certified compliance filings shall be subject to compliance investigations as set forth in Section 2911.

Energy Commission Response:

No change. Section 2910 provides 14 days for the Executive Director to determine whether a compliance filing is complete. If the filing is found not to be complete, the Executive Director is directed to specify what is missing from the filing and the POU is not restricted in the time it

may take to correct the deficiency. Nothing in the regulations prohibits the POU from discussing the deficiencies with the Executive Director. The Energy Commission is required to issue a decision on the filing within 30 days. Pursuant to regulations already in place, this decision must be made at a public hearing, thus, there is no need to repeat that requirement in these regulations. Full due process is accorded for every compliance decision.

Staff does not believe it is necessary to indicate in the regulations that POUs are not precluded from accepting electricity from a source under review. The regulations do not themselves contain any language that could be construed as prohibiting the acceptance of such electricity and the review process itself was devised to occur after the electricity has been procured to ensure that the Energy Commission's review did not act as a premature hindrance. POUs may certainly accept electricity from procurements under review but they do so accepting the risk that the Energy Commission may ultimately deem the procurement out of compliance with the regulations. This decision becomes effective 30 days after it is made, affording the POU enough time to find an alternative, compliant source of electricity.

b. LADWP believes section 2911 is too broad. "LADWP recommends that any request for a compliance investigation must be made within 30 days of the compliance filing submission." "LADWP believes that initiation of such an investigation should not be undertaken for trivial or non-substantive reasons, nor in response to a trigger from any disgruntled entity." LADWP also recommends that "an investigation should only be initiated if there is a finding of willful misrepresentation of the facts, namely that the covered procurement would not materially and consistently meet the emission standards." LADWP believes there should be a time limit for triggering this section and that "any investigation be completed in a timely fashion."(Comments p. 2.)

LADWP proposes the following paragraph be added to section 2911:

Within 30 calendar days of the submission of a compliance filing, a covered procurement approved or pending under Section 2910 may be the subject of a complaint or investigation proceeding under this Section if and only if it is claimed that the covered procurement materially and consistently exceeds the emissions standards required by this Chapter or that the compliance filing contains a material misrepresentation of fact concerning the probability that the covered procurement would meet such standards. Said compliant procedure shall be heard on an expedited basis with a decision within 90 days of the filing of the complaint or request for investigation.

Energy Commission Response:

No change. This provision enables the Energy Commission to open a proceeding to determine whether or not a POU is in compliance with these regulations. It is arbitrary to restrict this provision to within 30 days of the compliance filing or to impose another restrictive time limit. In addition to concerns regarding misstatements in the compliance filing, this section may also be used to investigate an alleged failure to make a compliance filing in the first place. The

Energy Commission would have no recourse in such a situation if it adopted LADWP's proposal.

Similarly, LADWP's proposal to limit review to only those instances where there is a willful misrepresentation of fact is unnecessarily limiting. In order to ensure that these regulations are adhered to, the Energy Commission must be able to investigate suspected noncompliance, whether willful or not.

The Energy Commission will not open an investigatory proceeding based on trivial or non-substantive reasons. The regulations do not require the Energy Commission to open such a proceeding upon the filing of any petition – it may and will use its judgment to determine whether a petition presents a valid claim that a potential non-compliance exists. If such a valid claim exists, the Energy Commission will certainly endeavor to complete the investigation in a timely fashion; however, it would be arbitrary to insert an artificial timeline for the completion of investigatory proceedings in these regulations.

c. LADWP believes that the time frame for processing a petition under section 2912 provides insufficient due process "because the Commission is not required to take action until a complete petition is received." "LADWP recommends an expedited process for determining whether a petition is complete." (Comments pp. 2-3.)

Energy Commission Response:

No change. The Energy Commission cannot act on a petition that does not contain sufficient information on which to base a decision. It is unclear how requiring a complete petition before the Energy Commission will make a determination would deprive LADWP or any other POU of due process. As noted above, the regulations do not restrict POUs from receiving electricity from covered procurements immediately upon entering into the covered procurement. The whole purpose of having the Energy Commission review procurements after they have been made instead of before was to ensure that such review did not act as a delay in the efforts by the POUs to obtain electricity.

d. LADWP believes that section 2912 should include an exemption for "necessary and beneficial expenditures, including capital expenditures, to ensure continued plant performance and operation." LADWP argues that without such an exemption, POUs are placed "in an untenable situation of deciding whether to forgo essential maintenance in order to avert an EPS regulatory trigger." LADWP also recommends that there be a similar exemption for any expenditures that are legally or regulatorily required and which have no bearing on a facility's emission profile. LADWP argues that these recommendations are in keeping with the intent of SB 1368. LADWP also reiterates its previous comments concerning its belief that "there is insufficient due process provided in terms of the time frame for processing a petition because the Commission is not required to take action until a complete petition is received…LADWP recommends an expedited process for deeming whether a petition is complete." (Comments pp. 2-3.)

LADWP recommends the following changes be made to section 2912:

(b) Upon receipt of a petition, the executive director shall review and make recommendation to the full Commission on whether to grant the petition. The executive director ~~may~~ shall, within 14 days after receipt of a petition, notify the local publicly owned electric utility in writing of any additional information needed to review the petition. The executive director's failure to notify the petitioner within said time period shall deem the petition complete. The Commission shall consider the executive director's recommendation and shall issue a decision on whether to grant the petition within 30 days after receipt of the complete petition.

(c) necessary and beneficial expenditures including capital expenditures intended to perform maintenance, ensure operational reliability or safety, preserve power plant asset value, comply with legal or regulatory requirements, or achieve environmental improvements.

Energy Commission Response:

The Energy Commission understands LADWP's concern that certain maintenance activities not be precluded by these regulations. Therefore, section 2901(j)(4)(A) has been modified in 15-day language to make explicit that "routine maintenance" does not trigger the EPS. Instead of having to apply for an exemption for maintenance activities that would otherwise trigger Energy Commission oversight, as LADWP's language proposes, these activities are exempted outright. This should also address any due process concerns as the POUs do not have to wait for an exemption to be processed.

The Energy Commission does not believe that SB 1368 allows exemptions for "legally or regulatorily required" expenditures, except for the limited circumstances surrounding pre-existing multi-party commitments.

Regarding general due process concerns under section 2912, the Energy Commission believes that the expedited time period provided in the regulations is the shortest time the Energy Commission could feasibly process an exemption request. LADWP has not shown how this already expedited process violates their due process. Once a petition is received, the Executive Director will review it and notify the petitioner within 14 days if additional information is necessary. The Energy Commission is then required to issue a decision within 30 days of receipt of a complete petition. The Energy Commission cannot act on an incomplete petition, as its incomplete status inherently means that it does not contain sufficient information on which to base a decision. The Executive Direct will endeavor to work with any and all petitioners to ensure that any noted deficiencies are conveyed to the petitioners and quickly remedied.

3. Comments of the Southern California Edison (SCE), dated April 24, 2007.

a. SCE argues that the differences between the proposed regulations and the rules adopted by the CPUC will "place entities subject to the CPUC's EPS at a competitive disadvantage in the electricity market leading to adverse effects on customers of IOUs and, potentially, an increase in GHG leakage." SCE argues that consistency with the CPUC requirements is necessary "[i]n order to ensure that ratepayers in areas subject to the CPUC's jurisdiction do not shoulder a disproportionate amount of the burden for achieving California's greenhouse gas ('GHG') goals." (Comments pp. 1-2.)

Energy Commission Response:

No change. See the Energy Commission's response to comments 1(d) and (e) above.

b. SCE argues that the Energy Commission has not justified or articulated any sound policy reasons for deviating from the CPUC's rules by including a small size exemption. SCE argues that the CPUC rejected such an exemption, finding: 1) no indication the legislature considered such an exemption in drafting SB 1368; 2) such an exemption could have the "unintended consequence of driving down the size of high-emitting facilities for the sole purpose of obtaining an exemption from EPS compliance;" and 3) ratepayers could be adversely affected by any exemption for small units and "a blanket exemption that eliminates what could amount to be many facilities from EPS compliance could expose ratepayers to significant future risks and comments." SCE recommends that the 10MW exemption be removed. (Comments pp. 2-3.)

Energy Commission Response:

No change. See response to comment 1(a) above. The Energy Commission believes the regulations meet the requirements of SB 1368. Because the Energy Commission has finite resources it is imperative that implementation of the EPS be as administratively simple as possible; the Energy Commission has determined that it is not currently administratively feasible to impose these regulations on small or diminimis sources. Nor does focusing the proposed regulations on facilities 10MW and larger "exempt" the smaller facilities from application of SB 1368. SB 1368 specifically states that "[n]o…local publicly owned electric utility may enter into a long-term financial commitment unless any baseload generation supplied under the long-term financial commitment complies with the greenhouse gases emission performance standard established by…the Energy Commission." (Pub. Utilities Code, section 8341(a).) The regulations do not change the requirements of SB 1368; they identify the methods the Energy Commission has determined are best suited to implement and enforce the EPS. POUs will need to ensure that they are complying with SB 1368 even if certain activities do not fall under Energy Commission oversight. If it becomes necessary or administratively feasible to also oversee powerplants that are under 10MW, Article 2 is set aside to do just that in another rulemaking.

The exemption considered by the CPUC was for facilities or contracts of 25 megawatts, much larger than the under-10MW at issue in these regulations. The Energy Commission believes that focusing the enforcement mechanisms on procurements with facilities 10MW and larger is the most administratively efficient option for implementing SB 1368 and will not result in the potential unintended consequences cited in passing, but not substantiated, by the CPUC when it contemplated a 25MW exemption.

The state's publicly owned local utilities are cognizant of the needs to reduce greenhouse gas emissions given the constraints and costs to be imposed pursuant to AB 32. While the exact details of the limits to be imposed are not known, the POUs can be expected to take greenhouse gas risk into account when considering investments with small, high-emission resources and weigh them against other factors. Simply because the Energy Commission has determined that powerplants under 10MW present a deminimis impact in terms of greenhouse gas emissions and financial and reliability risks does not mean that POUs are going to start heavily favoring these facilities. Regardless of Energy Commission regulations, POUs must ensure that they are in compliance with SB 1368. If it appears that there is increased use of these facilities such that financial and reliability risks are becoming evident, the Energy Commission can step in and devise regulations at that time. Doing so at this time, without evidence that there will likely be such a problem, is premature and not warranted.

c. SCE argues that §2901(j)(4)(b), which defines "new ownership investment" as an investment that results in an increase of greater than 10% in the rated capacity of the powerplant, creates a large and unjustified exception for POUs that is not available to entities under the CPUC's jurisdiction. SCE argues that allowing such an increase, which they estimate could be as large as 45MW for some of the larger facilities, is "inconsistent with the Legislature's mandate to limit emissions from long-term financial commitments." Finally, SCE argues that the Energy Commission has not justified the need for allowing such an increase on either policy or factual grounds. SCE recommends that this section be revised "to indicate that any investment in an existing, non-compliant powerplant which [sic] increases the "net rated capacity" of the powerplant is subject to compliance with the Proposed Regulations." (Comments pp. 4-5.)

Energy Commission Response:

No change. The Energy Commission determined that allowing an increase of up to 10% in rated capacity without triggering the necessity to comply with the regulations was necessary to allow for routine maintenance and was still in keeping with SB 1368. The record is replete with comments from the POUs that if they are not allowed to perform routine maintenance on their facilities, then both reliability and their ability to comply with environmental laws will degrade. SB 1368 is not intended to shut down currently operating power plants; its focus is ensuring that substantial investments are not made that would lead to further costs when AB 32, or a similar program establishing a greenhouse gases emissions limit, is implemented.

Routine maintenance may include replacing parts when they wear out. New parts are sometimes made better than previous iterations and improvements in some parts (e.g., turbine blades) can lead to an increase in efficiency and capacity. The Energy Commission determined that it is necessary to ensure that POUs are not prohibited from maintaining the operation of their power plants simply because there might be an incidental increase in capacity resulting from such maintenance. Allowing up to a 10% increase in capacity strikes an appropriate balance and is fully in keeping with SB 1368. Because the CPUC has the flexibility to alter their decision as the need arises, they did not need to address this particular problem right away. The Energy Commission must foresee and address problems before they arise in order to ensure that the regulations establish a practical enforcement mechanism.

d. SCE argues that there is no legal basis for excluding Qualifying Facilities (QFs) from the EPS under §2907. SCE argues that there is no conflict between PURPA and SB 1368 that would warrant such an exemption because QFs would still be able to sell their electricity through short-term contracts. SCE recommends that the Energy Commission either provide a "legally reasoned justification" for the QF exemption or eliminate the exemption for QFs. (Comments pp. 5-6.)

Energy Commission Response:

The Energy Commission appreciates SCE's concerns on this issue and, based on these and other comments, has removed the QF exemption in 15-day language. Because Qualifying Facilities will still be allowed to sell their electricity to POUs through short-term contracts, the Energy Commission has determined the proposed regulations are consistent with the rules adopted pursuant to Section 824a-3 of Title 16 of the United States Code.

e. SCE argues that it is not clear whether the Energy Commission "intends different EPS standards to apply to bottoming- and topping-cycle cogeneration." SCE argues that allowing "certain types of cogeneration to be exempt from the EPS will contribute to the failure of California's regulations to meet the emissions goals set forth in SB 1368." SCE recommends that the Energy Commission "make clear its intention to apply the EPS to all cogeneration." (Comments p. 6.)

Energy Commission Response:

No change. The regulations themselves are straightforward as to how to calculate a cogeneration power plant's annual average electricity production for both topping and bottoming cycle facilities. The regulations do not exempt topping and bottoming cycle cogeneration power plants from the EPS; however, they are treated somewhat differently than other power plants in compliance with SB 1368 directives. SB 1368 requires the Energy Commission to "establish an output-based methodology to ensure that the calculation of emissions of greenhouse gases for cogeneration recognizes the total usable energy output of the process, and includes all greenhouse gas emitted by the facility in the production of both electrical and thermal energy." (Public Utilities Code section 8341(e)(4).) The regulations establish the required methodology and the Energy Commission does not believe further clarification is necessary or warranted.

f. SCE recommends the Energy Commission revise certain terms in §2905 to ensure consistency with the CPUC. Specifically, SCE recommends the term "annual average emissions" be changed to CPUC's term "total GHG emissions." SCE also recommends the Energy Commission coordinate with the CPUC to reconcile the Energy Commission's use of MWh with the CPUC's use of kWh. SCE argues that, to the extent possible, the Energy Commission "use the terms employed by the CPUC or explain why the term is being rejected and why the CEC's term is more appropriate. SCE argues that "use of multiple, differing terms, for the same issue will be confusing to parties attempting to comply with EPS regulations." (Comments pp. 6-7.)

Energy Commission Response:

No change. The terms chosen for these regulations have undergone careful consideration to ensure that the regulations meet the requirements of the Administrative Procedure Act (APA) and satisfy the clarity standard. The CPUC's decision does not take the form of specific regulations that undergo review pursuant to the APA, therefore, the CPUC does not have to carefully choose the terms they use with the precision inherent in a formal rulemaking under the APA. The Energy Commission has worked closely with the stakeholders to ensure that the chosen terms are readily understandable. The term "total GHG emissions" is too vague to be of use. The Energy Commission prefers the term "annual average carbon dioxide emissions" to connote that the focus of the EPS is on carbon dioxide emissions and a power plant's annual average emissions will be used to determine compliance with the EPS. Similarly, the Energy Commission does not believe it is necessary to change the regulation's use of MWh to KWh. Regardless of what unit of measurement is used, the EPS established by the CPUC and the Energy Commission is the same. The Energy Commission has tried to stick as closely as possible to the language used by the CPUC, but has needed to deviate on occasion to ensure that the regulations meet the requirements of the APA and are readily understandable.

g. SCE recommends that §2906 be retitled "Substitute System Energy" instead of "Substitute Energy" to avoid confusion and "clearly link this section to the CPUC's statements on the identical subject." SCE comments that the regulation uses "substitute energy" and "system energy" interchangeably. (Comments p. 7.)

Energy Commission Response:

Because the section deals with the circumstances under which substitute energy can be used, whether it be system energy or electricity from a particular source, the Energy Commission determined that "Substitute Energy" is a more appropriate section heading than "Substitute System Energy." To avoid any confusion over use of the term "system energy", the Energy Commission modified the regulations in 15-day language to use the terms "unspecified energy" and "substitute energy" and does not use these terms interchangeably.

h. SCE comments that the Initial Statement of Reason describes a non-existent subsection 2902(e). (Comments pp. 7-8.)

Energy Commission Response:

The Energy Commission agrees with this comment and appreciates SCE's attention to detail. Prior to publication, the proposed regulations contained subsection 2902(e), which was moved to the end of subsection 2903(a) in the final version that was published. The ISOR did not keep up with this last minute reorganization. The ISOR has now been updated to reflect this change.

i. SCE supports the prompt deadlines contained in the regulations, noting that "having concrete and prompt deadlines reduce [sic] (if not eliminate [sic]) the possibility of any proposed commitment being found in violation of law, reduce [sic] the financial and legal risks to both parties to an agreement, and may therefore result in the lowering of costs." (Comments p. 8.)

The Energy Commission agrees with this comment. No further response is necessary.

4. Comments of Salt River Project Agricultural Improvement and Power District (SRP), as Operating Agent of the Navajo Generating Station (NGS), dated April 5, 2007.

a. SRP comments that "the proposed definition of New Ownership Investment includes expenditures in preexisting power plants and would prevent LADWP from paying its share of costs at NGS." SRP argues that this would prevent annual routine operations and maintenance activities in the short term and would preclude "expenditures for capital improvements, such as renovations, and plant rebuilding in the event of destruction" in the long term. SRP argues that this would "unconstitutionally impair existing contractual obligations." (Comments pp. 3, 12-20.)

Energy Commission Response:

The Energy Commission has made, in 15-day language, changes to the proposed regulations to address these concerns. The definition of new ownership investment has been modified to make explicit that expenditures for routine maintenance do not trigger the EPS. Additionally, section 2913 was added to allow POUs to petition for an exemption from the regulations for situations where a POU is obligated by a pre-existing contract to enter into certain covered procurements.
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b. SRP argues that the proposed regulations "unnecessarily broaden the scope of SB 1368 by defining 'new ownership investment' to apply to an *existing* ownership investment." SRP argues that SB 1368 does not apply to existing ownership investments and the legislature "was referring to expenditures 'to acquire property or other assets' when it used the term 'new ownership investment.'" SRP argues

that "[r]epairs, renovations, and operations and maintenance activities…do not fall within SB 1368's definition of 'long-term financial commitment.'" (Comments p. 9.)

Energy Commission Response:

No change. The Energy Commission believes that the phrase "new ownership investment" in SB 1368 applies to investments in existing as well as new power plants – in other words, a "new ownership investment" is any new investment by an owner that meets the other criteria in SB 1368, whether the facility in which the investment is made is new or existing. The CPUC shares this view. Moreover, the Legislative Counsel's Digest states that the bill requires the Energy Commission "to establish a greenhouse gases emission performance standard for all baseload generation of local publicly owned electric utilities." If the Legislature did not intend for the EPS to apply to existing facilities, it would have specified in the statutory language that the EPS applied only to new baseload generation. SRP offers no evidence to support its interpretation of the legislation.

c. SRP argues that "the legislature did not condition a 'new ownership investment' on whether the investment extends the life of a plant by five years."

Energy Commission Response:

No change. SB 1368 does not define the term "new ownership investment." Thus, it is up to the Energy Commission and the CPUC to define the term in a practical manner while carrying out the intent of the legislation. In accordance with SB 1368, the Energy Commission has adopted this prong of the CPUC's definition of new ownership investment. The Energy Commission believes that this definition strikes a good balance between ensuring the regulations are not unnecessarily restrictive and complying with the intent of SB 1368.

The CPUC chose this language because it closely tracks when a new or renewed contract triggers the EPS (when it is for 5 years or more). SB 1368 was intended to limit long-term (and arguably substantial) investments. It was not intended to foreclose short term (and arguably insubstantial) investments; therefore, allowing investments that would not extend the life of the plant, or would extend the life for less than five years, strikes a good balance – it allows minor short-term investments, such as those needed for maintenance, while implementing the intent of SB 1368 by not allowing what would be considered long-term and more substantial investments.

d. SRP comments that "ongoing operations and maintenance activities should be specifically excluded from the Proposed Regulations." SRP comments that "the NGS Owners will need to maintain the power plant as if it would function in perpetuity" and some "operations and maintenance expenditures may have the effect of extending the life [of the plant] by five years or more. SRP believes the proposed regulations "would have the negative effect of essentially paralyzing operations at NGS because the definition of 'new ownership investment' would

prevent LADWP from authorizing annual budgets that included funds for necessary maintenance, renovations and funding reconstruction in the event the plant is damaged." (Comments pp. 10-11.)

Energy Commission Response:

The Energy Commission has, in 15-day language, modified the regulations to make explicit that investments for routine maintenance will not trigger application of the EPS. For activities that go beyond routine maintenance, LADWP could petition for an exemption under sections 2912 or 2913.

e. SRP comments that "LADWP would be unable to approve any budget with expenditures for items that would have the effect of extending the life of NGS by five years or more because such a decision would cause LADWP to be in violation of the emission performance standard" and the proposed regulations "would put a stop to any reconstruction of the plant in the event of destruction because LADWP would be unable to fund such efforts and in some instances LADWP could be in breach of the Governance Agreements. Without LADWP's approval, that would effectively halt the passage of all budgets containing expenditures for operations and maintenance, capital improvements or rebuilding efforts." (Comments p. 11.)

Energy Commission Response:

As discussed in response to the previous comment, the regulations were modified in 15-day language to make explicit that investments for routine maintenance will not trigger the EPS. Additionally, section 2913 was added to allow parties subject to pre-existing multi-party commitments to petition for an exemption. These two changes make clear that LADWP and other POUs can make investments for routine maintenance and, if more substantial investments for non-maintenance activities are needed, allow LADWP and other POUs to petition for an exemption. Additionally, section 2912 allows POUs to petition for an exemption on reliability or financial grounds.

f. SRP argues that the regulations would impair existing contractual obligations in violation of the Contracts Clause because there is an existing contractual relationship between the NGS owners, the proposed regulations would render the terms of the NGS Governance Agreements fruitless, and the contractual impairment is neither reasonable nor necessary to fulfill the state purposes of SB 1368. (Comments pp. 12-20.)

Energy Commission Response:

See response to comments 4(d) and (e) above. In analyzing cases under the contract clause, the courts first determine whether "the change in state law has 'operated as a substantial impairment

of a contractual relationship.'" (General Motors Corp. v. Romein, 503 U.S. 181, 186 (1992).) If a substantial impairment is found, the courts then determine whether the change in law has a legitimate and significant public purpose. If the court finds that there is a valid public purpose, it will then determine whether the adjustment of the contracting parties' rights and responsibilities caused by the legislation is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. (Energy Reserves Group, Inc. v. Kansas Power and Light 459 U.S. 400 (1983).)

The regulations do not act as a substantial impairment because, as discussed in response to previous comments, LADWP will be able to invest in routine maintenance and can petition for an exemption from the EPS for more substantial activities. Even if this were to be deemed a substantial impairment, there is a reasonable and legitimate public purpose behind these regulations and the regulations properly and reasonably effectuate this public purpose. The public purpose behind these regulations, as clearly stated in SB 1368, is threefold: 1) to reduce potential financial risk to California consumers for future pollution control costs; 2) to reduce potential exposure of California consumers to future reliability problems in electricity supplies; and 3) to provide a necessary and logical step to meeting goals for the reduction of greenhouse gas emissions. Each of these is a reasonable and legitimate public purpose and each is properly and reasonably effectuated by the regulations.

g. SRP comments that the "inability to maintain NGS may also result in the impairment of contractual obligations that NGS Owners may have under various debt financings and their associated bond resolutions" and that the potential violation of covenants and representations made as part of the debt issuance will have major and dire consequences to the NGS Owners and to the people and institutions that hold such debt securities in their investments. SRP also argues that "a slowdown or early shutdown at NGS, resulting from LADWP's inability to approve cost measures, would have significant implications for the economies of the Navajo Nation, the Hopi Tribe, the states of Arizona and Nevada, and [would] frustrate the interests of the United States…." SRP also argues that "NGS is an asset held by its owners for the benefit of their customers and shareholders" and the owners have an obligation to maintain this asset and the proposed regulations "would interfere with the maintenance of the plant, breaching the understanding between the shareholders, customers and the utilities." (Comments p. 17.)

Energy Commission Response:

As discussed in response to the previous comments, changes have been made to the regulations in 15-day language that allow LADWP to approve cost measures at SRP, thereby avoiding the dire results predicted in this comment.

h. SRP comments that "if the Proposed Regulations are approved without modification, they would likely have the opposite effect of the intended public purposes of SB 1368…NGS owners would be prevented from making any

significant equipment advances because LADWP would be unable to approve such investments. Enhanced equipment could have the effect of reducing emission[s] or have other beneficial environmental improvements." (Comments pp. 19-20.)

Energy Commission Response:

As discussed in response to the previous comments, changes to the regulations were made in 15-day language to make explicit that POUs can make investments for routine maintenance. For investments for activities other than routine maintenance, LADWP can petition for an exemption under section 2913 if it can show that the covered procurements are required under the terms of the contract or ownership agreement and the contract or ownership agreement does not afford the POU applying for the exemption the opportunity to avoid making such covered procurements.

i. SRP recommends the definition of "new ownership investment" be modified so that it would not apply to financial expenditures for certain activities, including "operations and maintenance, capital improvements for equipment or plant upgrades and renovations, or necessary reconstruction, at existing power plants owned by a local publicly owned electric utility." SRP comments that "these expenditures allow plant owners to comply with contractual obligations entered into before the effective date of the Proposed Regulations" and "are necessary at existing power plants for reliability, safety, preservation of plant value, and to enable the plant to comply with regulatory requirements and make necessary environmental improvements." (Comments pp. 20-21.)

Energy Commission Response:

As discussed in response to the previous comments, the definition of "new ownership investment" has been modified in 15-day language to make explicit that investments for routine maintenance are allowed. The Energy Commission has determined that allowing investments for "capital improvements for equipment or plant upgrades and renovations or necessary reconstruction" that go beyond routine maintenance to automatically be exempt from the EPS would violate the intent of SB 1368, which has as one of its main goals reducing potential financial risk to California consumers for future pollution-control costs. SB 1368 is intended to prevent any new, substantial investments in facilities that exceed the EPS because such investments are likely to incur increased pollution-control costs in the near future when greenhouse gas emissions legislation goes into effect. The Energy Commission has included in 15-day language provisions that will allow a POU to apply for an exemption from the regulations for investments that are needed to comply with contractual obligations entered into before the effective date SB 1368.

j. SRP argues that the proposed regulations violate the Commerce Clause by regulating out-of-state conduct. SRP argues that the proposed regulations "will force NGS, and conceivably other out-of-state power plants, to bring their facilities into compliance with California's regulatory standards" and "will have

the effect of precluding operations at NGS, located in Arizona." SRP also asserts the proposed regulations regulate out-of-state conduct because they would "prohibit LADWP, a California entity, from taking action at NGS in Arizona" and would prevent "a California publicly owned electric utility from having an ownership interest in any out-of-state coal-fired power plants." (Comments pp. 21-24.)

Energy Commission Response:

The regulations do not violate the Commerce Clause as the regulation's effects do not occur wholly outside the state; the requirements apply equally in-state and out-of-state and have the effect of regulating in-state POUs. Nor do the regulations force NGS or other out-of-state entities to comply with California's regulatory standards. Routine maintenance can still be carried out on NGS without requiring the facility to meet the EPS and LADWP can petition for an exemption to allow more substantial activities on the facility if those activities are required under their existing ownership agreement. Additionally, other out-of-state entities can still sell power under less than five-year contracts to POUs without meeting the EPS and are not prohibited from selling electricity to other states or entities that do not fall within SB 1368's purview.

Similarly the regulations do not prevent POUs from having an ownership interest in out-of-state coal-fired power plants. POUs with existing multi-party ownership interests may petition for an exemption from the EPS for investments in those plants that are required under the existing agreements, and all POUs are able to continue to invest in routine maintenance for any type of facility. Even if the end result of the statute and these regulations is to prevent POUs from investing in new out-of-state power plants with high greenhouse gases emissions, this would not run afoul of the Commerce Clause. States are not precluded from regulating the in-state components of an interstate transaction so long as the regulation furthers a legitimate state interest. (A.S. Goldmen & Co. v. New Jersey Bureau of Securities (3rd Cir.1999) 163 F.3d 780.) As discussed in response to comment 4(f), there are several legitimate state interests that are furthered by SB 1368 and these regulations.

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5. Supplemental Comments of Salt River Project Agricultural Improvement and Power District (SRP), as Operating Agent of the Navajo Generating Station (NGS), dated April 24, 2007.

a. SRP argues that section 2901(j)(4), which defines a "new ownership investment" as "[a]ny investment in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility that: (A) is designed and intended to extend the life of one or more generating units by five years or more," violates the clarity requirement under the California Administrative Procedure Act. SRP argues that there is a distinction between "investment" and "expenditure" and the proposed regulations "do not clarify whether the term 'investment' is restricted to major investments, such as those expenses incurred in the acquisition of revenue-producing property or assets, as opposed to normal costs required to maintain equipment and operation systems in good working

order at a power plant in accordance with prudent utility practice." SRP interprets this provision as covering "costs incurred to comply with federal and state legal or regulatory requirements" as well as "costs associated with installation of equipment for environmental upgrades." SRP recommends the Energy Commission clarify whether "new ownership investment" applies to all expenditures of money at a power plant or is limited to significant investments. (Comments pp. 2-4.)

Energy Commission Response:

The regulations, as amended by 15-day language, clearly state that a new ownership investment is "any investment" that meets the criteria outlined in 2901(j)(1) through (4). If the investment satisfies any of these criteria, then it is considered a "new ownership investment," regardless of the size of the investment, and the POU must either obtain an exemption or the subject power plant must meet the EPS. Section 2901(j)(4)(A) has been modified to make clear that routine maintenance is exempt from this criterion.

b. SRP comments that section 2901(j)(4)(a) is also ambiguous because there is no "guidance as to when an extension of the life of a plant is triggered and from what point in time the extension period is calculated. It is unclear whether the extension in life is measured from the time of the investment or is measured as extending the life of the plant for five years beyond its projected end date." SRP recommends the Energy Commission clarify under what circumstances an investment would extend the life of a plant by five or more years and how such an extension would be calculated. (Comments pp. 3-4.)

Energy Commission Response:

In keeping with the requirement under SB 1368 that the Energy Commission be consistent with the PUC, the language at issue was taken initially directly from the PUC's decision. In response to the SRP concern, the Energy Commission has, in 15-day language, modified the language to clarify that routine maintenance is exempted from this provision. It is important to note that the test is not just whether a procurement would extend the life of a powerplant by 5 or more years, but whether a procurement "is designed and intended" to do so. For any activity a POU plans to perform on a powerplant, it should know what that activity is designed and intended to do. If the POU wants certainty that the Energy Commission would agree with its own conclusion, it can request for a determination from the Energy Commission before entering into the procurement. Section 2907 establishes a process whereby a POU may, prior to entering into a potentially-covered procurement, request that the Energy Commission evaluate whether a prospective procurement would extend the life of a power plant by five years, would constitute routine maintenance, or would comply with the EPS. This section establishes a public proceeding in which these questions can be adjudicated, with the POU and Energy Commission staff providing their advice as to what determination the Energy Commission should make. Therefore, if a POU has any questions as to whether a prospective procurement would extend the life of a power plant by five years or more, the POU can request a determination from the Energy Commission.

To attempt to further define the phrase “designed and intended to extend the life” would be fraught with difficulties and a high likelihood of unintended consequences, because whether an investment will extend the life of a powerplant, or more relevant, is designed and intended to, is heavily dependent upon the factual circumstances of that investment. Given the complexity of this issue, there is no way to simplify all the factors that go into such a determination and condense them into a concise and workable rule. Therefore, establishing an adjudicatory proceeding to make these determinations was deemed the most workable approach. As discussed in response to comment 5(c) below, SRP’s proposed language would create too large of an exemption, allowing activities that are required to be subject to the EPS under SB 1368.

c. SRP proposes alternative language that would “prevent the Proposed Regulations from applying to financial commitments made by regulated entities to existing power plants for routine operation and maintenance activities, to comply with legal or regulatory requirements, or to attain environmental improvements at an existing plant.” (Comments pp. 5-8.) SRP proposes the following 3 alternatives:

Section 2901:

(d) "Covered procurement" means, *except as provided in subsection (3), either*:

(1) A new ownership investment in a baseload generation powerplant, or

(2) A new or renewed contract commitment, including a lease, for the procurement of electricity with a term of five years or greater by a local publicly owned electric utility with:

(A) a baseload generation powerplant, unless the powerplant is deemed compliant, or

(B) any generating units added to a deemed-compliant baseload generation powerplant that combined result in an increase of 50 MW or more to the powerplant's rated capacity.

(3) A covered procurement does not include financial commitments made by a local publicly owned electric utility for any interest in a power plant owned by such utility as of the effective date of this chapter that are designed and intended:

(A) to perform routine maintenance, repair, and replacement to preserve or improve plant reliability and prevent asset deterioration required by prudent utility practice;

(B) to comply with legal or regulatory requirements; or

(C) to achieve environmental improvements.

or

§ 2901(j) "New ownership investment" means, *except as provided in subsection 5 below, the original financial commitment for a capital expenditure*:

(1) *for the* construction of a new powerplant;

(2) *for* the acquisition of a new or additional ownership interest in an existing *non-deemed compliant* powerplant previously owned by others;

(3) in generating units added to a deemed-compliant powerplant, if such generating units result in an increase of 50 MW or more to the powerplant's rated capacity; or

(4) in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility *as of the effective date of this chapter* that:

(A) *increases the emission rate as defined in section 2903(a)*;

(B) results in an increase of greater than 10% in the rated capacity of the powerplant; or

(C) is designed and intended to convert a non-baseload generation powerplant to a baseload generation powerplant.

(5) A new ownership investment does not include expenditures in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility as of the effective date of this chapter that are designed and intended:

(A) to perform normal maintenance, repair, and replacement to preserve or improve plant reliability or prevent asset deterioration;

(B) to comply with legal or regulatory requirements; or

(C) to achieve environmental improvements.

or

§ 2901(j) "New ownership investment" means *the original financial commitment for a capital expenditure*:

(1) *for the* construction of a new powerplant;

(2) *for* the acquisition of a new or additional ownership interest in an existing *non-deemed compliant* powerplant previously owned by others;

(3) in generating units added to a deemed-compliant powerplant, if such generating units result in an increase of 50 MW or more to the powerplant's rated capacity; or

(4) in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility *as of the effective date of this chapter* that:

(A) *is designed and intended to upgrade one or more generating units*;

(B) results in an increase of greater than 10% in the rated capacity of the powerplant; or

(C) is designed and intended to convert a non-baseload generation powerplant to a baseload generation powerplant.

(q) "Upgrade" means any modification made for the primary purpose of increasing the electric generation capacity of a baseload electric generation facility. "Upgrade" does not include routine or necessary maintenance, installation of emission control equipment, installation, replacement, or modification of equipment that improves the heat rate of the facility, or installation, replacement, or modification of equipment for the primary purpose of maintaining reliable generation output capability that does not increase the heat input or fuel usage as specified in existing generation air quality permits as of the effective date of this section, but may result in incidental increases in generation capacity.

Energy Commission Response:

The Energy Commission believes that the modification made to 2901(j)(4)(A) in 15-day language is sufficient to address the commenters' concerns that routine maintenance be allowed. The changes proposed above by SRP would allow for investments for activities that go beyond what would be considered routine maintenance. As discussed in response to comment 4(i), the Energy Commission believes allowing these types of activities would contravene the language and intent of SB 1368.

6. Comments of the Natural Resources Defense Council and the Union of Concerned Scientists (NRDC/UCS), dated April 24, 2007.

a. NRDC/UCS comments that "the EPS is an essential regulation that will protect Californians from the significant financial and reliability risks associated with

additional investments in highly GHG-intensive generating technologies and help meet California's GHG reduction goals. We strongly support the proposed regulations and urge the Commission to adopt them as soon as possible in time for enforcement to begin on June 30, 2007." NRDC/UCS supports the proposed regulations' compliance and enforcement process and comments that the proposed regulations are consistent with SB 1368 and the CPUC-adopted EPS rules. (Comments pp. 1-2.)

Energy Commission Response:

The Energy Commission agrees with this comment. No further response necessary.

b. NRDC/UCS recommends that in section 2907 "the proposed regulations make clear that the QF exemption will no longer apply if FERC removes its mandatory purchase requirements for QFs, after finding that the electricity market in which the utility operates is sufficiently competitive." (Comments p. 4.)

NRDC/UCS recommends the following change:

The Emission performance standard shall not apply to any qualifying small power production facility or qualifying cogeneration facility, as defined by 16 U.S.C. Section 796(17) and (18), that is, at the time the new commitment to the facility is made, the subject of an obligation to purchase pursuant to 16 U.S.C. Section 824a-3.

Energy Commission Response:

In response to other comments, the exemption for Qualifying Facilities was removed in 15-day language. The Energy Commission believes that this addresses the commenter's concerns; therefore, no clarification is necessary.

c. NRDC/UCS recommends that "the definition of 'covered procurement' be clarified such that existing contractual obligations through joint ownerships are not included." NRDC/UCS comments that just as SB 1368 was not intended to apply to existing contracts, it should also not apply to "existing contractual obligations, such as joint ownerships or joint power arrangements (JPA). However, in the event that a POU recommits or refinances its involvement or changes its stake in such a joint ownership, that represents a new financial commitment that should be subject to the requirements of SB 1368." NRDC/UCS recommends the following change in Section 2901(d)(2):

A new or renewed contract commitment, including a lease, ~~for~~ associated with the procurement of electricity with a term of five years or greater by a local publicly owned electric utility…. (Comments p. 4-5.)

Energy Commission Response:

The Energy Commission modified the regulation in 15-day language to allow a process to exempt covered procurements that are the result of existing contractual obligations through joint ownerships. Section 2913 has been added to allow a POU to petition for such an exemption if it can show that the covered procurements are required under the terms of a contract or ownership agreement that was in place as of January 1, 2007 and the contract or ownership agreement does not afford the POU requesting exemption the opportunity to avoid making the covered procurements. The Energy Commission believes the language proposed above is not sufficiently clear and may result in confusion. The Energy Commission believes that this change satisfies the concerns expressed in this comment.

7. Comments of Independent Energy Producers Association (IEP), dated April 18, 2007.

a. IEP "recommends a single modification to Section 2903(a), "*Compliance with the Emission Performance Standard*," in order to properly incorporate and account for the intent of SB 1368 to address 'net' emissions from the power sector." IEP asserts that the proposed regulations "fail to accurately capture the concept of netting envisioned in SB 1368." IEP recommends the word "net" be inserted between "annual average" and "carbon dioxide emissions" in section 2903(a). (Comments pp. 1-2.)

Energy Commission Response:

No change. The proposed change is not needed for clarity nor would it add anything of substance to the regulations. The concept of "netting" is accounted for when the powerplant's annual average carbon dioxide emissions are divided by the powerplant's annual average net electricity production, as required by the adopted regulation. In this case, net electricity production would be that electricity available for use onsite or for sale or transmission offsite, with any corrections for cogeneration added to the net electricity production. IEP does not explain or support its contention that the EPS calculation would be more accurate with an additional correction, or netting, of the CO_2 emissions when the calculation already includes average annual CO_2 and net electricity production. The regulations do not attempt to address lifecycle CO_2 emissions, nor is this the intent of SB 1368, so inserting the word net in front of CO_2 emission would not be appropriate. IEP does not explain how its proposed language makes a substantive difference.

b. "IEP recommends that the [Energy] Commission establish a formal process that would enable electric generators (or groups of generators representing a similar technology) to seek a certification from the [Energy C]ommission, upon the determination envisioned in Section 2903(a), that would enable them to be 'deemed compliant' for purposes of long-term contracting." (Comments p. 2.)

Energy Commission Response:

No change. The Energy Commission does not believe it is necessary, or a prudent use of administrative resources, to set up a separate process to add to the list of pre-approved technologies listed in Section 2903(b). POUs already have the option, under section 2907, of requesting whether a prospective procurement would be in compliance with the EPS. The Energy Commission believes it is most efficient to deal with questions concerning technologies not listed in section 2903(b) in that process, rather than establish another proceeding, which could be duplicative or inconsistent with the existing 2907 process.

c. IEP comments that section 2906(b)(3) "may create an incentive to structure baseload-like contracts with specified intermittent renewable resources that are effectively 'capacity only' contracts as it appears to leave unbounded the amount of system power that may be used for actual deliveries from specified intermittent resources." "IEP recommends that Section 2906(b)(3) be modified so as to protect against the instance in which undifferentiated system power, containing non-EPS compliant resources, may be used to 'backfill' wholly the contractual commitments from specified, intermittent resources." IEP recommends the following additional language to Section 2906(b)(3), "*Substitute Energy*," to ensure consistency with the intent to bound at 15% the use of undifferentiated system power in support of intermittent resources: (Comments pp. 1-3.)

(3) For specified contracts with intermittent renewable resources, the amount of system energy is limited to up to 15% of forecast energy production reasonably expected to occur such that total purchases under the contract, whether from the intermittent renewable resource or from system energy, do not exceed the total expected output of the identified renewable powerplant over the term of the contract.

Energy Commission Response:

The regulations have been modified in 15-day language to ensure that the amount of substitute energy purchases from unspecified resources is limited such that total purchases under the contract do not exceed the total reasonably expected output of the identified renewable powerplant over the term of the contract. While IEP's proposed language was not wholly adopted, it is the Energy Commission's understanding that this revision satisfies IEP's stated concerns. The lack of IEP comments on the 15-day changes further supports this understanding.

8. Comments of the M-S-R Public Power Agency, dated April 24, 2007.

a. M-S-R asserts that, "as publicly stated by Assemblyman Levine on January 25, 2007, to the Northern California Power Agency, it was not the intent of the legislature to prohibit improvements in efficiency or environmental controls of existing non-CCGT generating facilities." (Comments p. 2-3.)

Energy Commission Response:

No change. As an agency tasked with implementing SB 1368, the Energy Commission is restricted to the plain language of the bill. Only if the language of the bill is ambiguous may we look at legislative history to aid in interpreting a statutory provision. The language of SB 1368 is not ambiguous – it clearly provides no exception for efficiency or environmental controls. The CPUC has not provided an exemption for efficiency or environmental controls in its decision. Therefore, the Energy Commission believes that the bill provides no authority for the Energy Commission to provide such an exemption here. Moreover, even if it were appropriate to consult legislative history with regard to this matter, Comments made by individual legislators, especially after adoption of a bill, generally do not constitute reliable legislative history. (see California Teachers Assn. v. San Diego Community College Dist. (1981) 28 C.3d 692, 701 [holding a statement of personal belief of an individual legislator as to legislative intent cannot be considered].)

b. M-S-R comments that "[a]s part of routine operation and maintenance of the [San Juan Generating Station], boiler components are regularly replaced as are elements of the steam turbine and the electric generators." "M-S-R, as a minority owner of the station, does not have the sole right to veto any expenditures approved by the majority of owners. If such expenditures were found to be in conflict with CEC Staff's [sic] proposed regulations, M-S-R could be placed in the untenable position of choosing between regulatory compliance or defaulting on its obligations under the SJGS operating and ownership agreements." M-S-R comments that such a situation may be forthcoming, as the owners plan to replace the turbine blades and install "dense-pack" technology for SJGS Unit No. 4 in 2009. The replacement would increase efficiency by 4%, reduce CO2 production by 90 lbs/MWh and increase net capacity by 27 MW. M-S-R comments that while "divestiture is theoretically possible, it is not clear M-S-R could exercise this option without retiring all the bonds issued to finance this project. As the current market for coal-fired generation facilities would appear to value a sale of our interest at about $100 million [compared to the $400 million principle that remains outstanding on the bonds at this time], this option would create great economic hard-ship [sic] to M-S-R, its member[s] and their ratepayers." M-S-R recommends the Energy Commission adopt the modifications proposed by CMUA. (Comments pp. 1, 3-5.)

Energy Commission Response:

The Energy Commission has modified the regulations in 15-day language to exempt routine maintenance from the regulations. If the identified work is indeed part of the San Juan Generating Station's routine maintenance, then M-S-R will not be prohibited from investing in that particular activity. If the activity exceeds what is considered routine maintenance, then M-S-R can request an exemption under 2913 because it is part of a pre-existing multi-party commitment. The addition of these two provisions should address M-S-R's concerns.

9. Comments, Objections, and Recommendations of the California Municipal Utilities Association (CMUA), dated April 24, 2007.

a. CMUA asserts that SB 1368's admonition to be consistent with the CPUC applies solely to the Emission Performance Standard (currently proposed at 1,100 lbs CO2/MWh). (Comments p. 3.)

Energy Commission Response:

No change. The Energy Commission interprets the SB 1368 provision -- requiring the greenhouse gases emission performance standard established by the Energy Commission, for local publicly owned electric utilities, to be consistent with the standard adopted by the PUC, for load-serving entities -- to require consistency with not just the numerical EPS, but consistency with how the EPS is implemented as well. Nevertheless, the Energy Commission does not interpret the term "consistent" to require *identical* provisions. POUs operate differently than the PUC's LSEs and have different ownership interests in generating facilities. Additionally, the CPUC's process allows it to clarify and refine its rules under SB 1368 as issues arise. As such, the Energy Commission has determined that in a few areas it is necessary to deviate somewhat from the exact language adopted by the CPUC. The Energy Commission believes that even with these small deviations, the regulations are consistent with those adopted by the CPUC in accordance with SB 1368.

b. CMUA comments that it has included, as attachments, all documents previously submitted to ensure that they are included in the rulemaking record. (Comments pp. 3-4.)

Energy Commission Response:

These attachments were originally written and submitted prior to publication of the Energy Commission's Notice of Proposed Action for this proceeding. As such, these attachments do not pertain and are not specifically directed at the "specific adoption proposed." Therefore, the comments are irrelevant pursuant to Government Code section 11346.9(a)(3). Nevertheless, the Energy Commission has endeavored to respond to the general concerns raised in these and other comments. See comments and responses 30 through 33, below.

c. CMUA disputes the finding in the Initial Statement of Reasons that no party has otherwise identified or brought to the attention of the Commission any reasonable alternatives. CMUA believes that its proposed language for section 2901(j)(4)(A) is such an alternative, and without the proposed modifications, this section "may be interpreted to prohibit necessary activities on power plants that are routinely performed by small businesses located in California. (Comments p. 4.)

Energy Commission Response:

As discussed further below, section 2901(j)(4)(A) has been modified by 15-day language to clarify that routine maintenance will not trigger the application of the EPS under this provision. The Energy Commission has incorporated this "alternative" approach of expressly allowing

routine maintenance into the regulations; no reasonable alternatives to the regulations as they currently stand have been brought to the Energy Commission's attention. The alternative language proposed by CMUA is not a reasonable alternative because it would conflict with the provisions of SB 1368 by exempting activities that SB 1368 dictates be subject to the EPS.

d. CMUA argues that the conclusions reached concerning the economic impacts of the proposed regulations are not sufficiently supported as "[n]o cost-savings studies were incorporated into the administrative record to support the CEC's findings that would constitute substantial compliance to [sic] the APA." CMUA comments that no data requests or questions were posed during the rulemaking would support a finding on the issue of cost impacts to businesses. (Comments pp. 4-5.)

Energy Commission response:

Energy Commission staff performed a detailed analysis of the potential costs to various entities from implementation of the proposed regulations. Staff concluded that because options remain available for the sale of non-EPS compliant electricity, including through short-term contracts or to entities that are not regulated by SB 1368, the regulations will not result in any cost impacts to businesses. Though it is true that the Energy Commission did not formally request CMUA's input on whether the regulations would result in costs to other businesses or believe that such input from CMUA would be helpful in this analysis, CMUA could have provided such information or studies on its own volition. It has not done so.

For the purposes of the Economic Impact Statement, agencies need only include direct costs and benefits on regulated parties. Businesses and/or individuals are presumed to be directly impacted if: (1) they are legally required to comply with or enforce the regulation; (2) they derive some benefit as a result of the regulation; or (3) they incur some detriment as a result of the regulation. Only POUs, which are considered local governmental entities, are required to comply with these regulations. Businesses and individuals are not subject to the regulations and staff's analysis has concluded that businesses and individuals will not incur a detriment resulting from the enforcement of these regulations on POUs. The record supports this conclusion.

e. CMUA disagrees with the Energy Commission's reasoning for concluding that no private sector cost impacts would occur. CMUA argues that "certain affected power plants may be located within geographic zones in which POUs have local capacity requirements. A non-compliant powerplant within that zone would be precluded from providing baseload generation to POUs within that zone. Cost impacts to that seller may include the loss of a price premium for providing needed capacity within a constrained zone and increased transmission costs to sell the power out of state." CMUA argues that some of these may be "small businesses" under Government Code section 11342.610. (Comments p. 5.)

Energy Commission Response:

CMUA does not provide any evidence that the scenario it presents is in fact likely to occur; a hypothetical with no rooting in fact is not a sufficient basis on which to conclude that there exists a cost impact. Additionally, the premise for this scenario is false: a non-compliant powerplant would still be able to provide electricity in under-five year contracts, and is not completely foreclosed as CMUA suggests.

f. CMUA argues that the Economic Impact analysis did not take into account impacts to small businesses that provide support services to POUs and "may be adversely affected by the Proposed Regulation's definition of a new ownership investment in §2901(j)(4)(A)." CMUA argues that if POUs are not allowed to expend money for routine maintenance activities, small businesses that provide "engineers, welders, painters, mechanics, sheet metal workers, electricians, carpenters, and non-destructive testing technicians" may be adversely affected. (Comments p. 5.)

Energy Commission Response:

As discussed further below, the regulations have been modified by 15-day language to clarify that procurements for routine maintenance would not trigger application of the EPS under section 2901(j)(4)(A).

g. CMUA argues that the "Commission did not request, nor did it collect, any information from POUs that would support making a determination on the creation or elimination of businesses in California. CMUA argues that POUs were not asked to provide information concerning "the types, sizes, or locations of businesses that are routinely used to perform activities at POU power plants," and that there is no indication that these impacts were considered. CMUA argues that the analysis fails to comply with the APA because there is no estimate of the total number of businesses that are likely to be impacted by the regulation, no description of the type of businesses impacted, no estimate of the number or percentage of total businesses that are small businesses, and no estimate of the number of new businesses that may be created or eliminated as a result of the regulation. (Comments pp. 5-6.)

Energy Commission Response:

As discussed in response to comment 9(d), staff performed a comprehensive analysis of the potential economic impacts resulting from these regulations. Staff concluded that the regulations would not have any direct impacts on businesses or individuals in the private sector. These regulations will only have a five year lifespan. SB 1368 requires the Energy Commission to reevaluate these regulations when an enforceable greenhouse gases limit is put into place in California. AB 32, which requires California to reduce greenhouse gases emissions to 1990 levels by 202, will be fully implemented in 2012. When the enforceable limit is established, the Energy Commission will determine whether modifications should be made to these regulations to better comport with AB 32 implementation or whether to rescind the regulations altogether.

Even if these regulations remained intact beyond five years, it would be speculative to try to determine economic impacts that far out because implementation of AB 32 will lead to changes in the electricity sector that cannot be predicted at this time. Staff based its determination that there will be no impacts to the private sector on several factors: 1) generators with facilities that do not meet the EPS will still be able to sell electricity under existing contracts and under new contracts with a term under five years; and 2) there is sufficient EPS-compliant electricity in the system for POUs to meet their energy needs for a least the next five years. Additionally, routine maintenance is explicitly permitted, so CMUA's argument that small businesses that would be hired to maintain these facilities will be affected is no longer relevant.

h. CMUA argues that the "Commission did not request, nor did it collect, any information from POUs that would support making a determination of no cost impacts to POUs." CMUA claims that the "inability of POUs to contract long term for system or market power inhibits POUs [sic] ability to reduce price risk to POU customers." CMUA argues that "short-term contracts expose ratepayers to price fluctuation that long-term contracts avoid" and with "adoption of these regulations, POUs can no longer use long-term system or market contracts to protect POU ratepayers from the risk of price fluctuation. Therefore, POUs would need to purchase a hedging product to protect their ratepayers from these risks. The price of the hedge is an additional cost that is a direct result of the regulation. These additional costs to the POUs are then transferred to POU ratepayers through increases in rates." (Comments pp. 6-7.)

Energy Commission Response:

Under the regulations, POUs may enter into long-term unit-specific contracts (or with portfolios of EPS-compliant units) at fixed prices, which protect ratepayers from the risk of price fluctuation in the same fashion as long-term contracts for system power. CMUA did not provide any evidence that these contracts are more expensive or less protective than reliance on system power. In addition, one of the key purposes of SB 1368 is to limit the exposure to financial risk implicit in additional long-term investments in high-greenhouse gases emission resources as California and the country move to a system to reduce greenhouse gases emissions. CMUA's argument that these regulations increase financial risk by eliminating the ability of POU's to sign long-term contracts for high-greenhouse gases resources ignores this important intention of SB 1368.

i. CMUA comments that section 2901(a) and 2901(k) lack clarity as they "may be interpreted inconsistently with the statute and the legislative intent by adding an ambiguous term, permitted capacity, into the regulatory language." CMUA proposes the following clarifying language: (Comments p. 8.)

(a) "Annualized plant capacity factor" means the ratio of the annual amount of electricity produced, measured in kilowatt hours, divided by the annual amount of electricity the

powerplant could have produced if it had been operated at its maximum permitted capacity during all hours of the year, expressed in kilowatt hours.

Energy Commission Response:

The regulations have been modified in 15-day language to incorporate the proposed language.

j. CMUA argues that "SB 1368 does not authorize the CEC to exercise jurisdiction over existing owned facilities of POUs absent the entering of a new legal relationship by the POU." CMUA requests the Energy Commission's response to recommendations it provided in answers to questions 3.1, 3.2, 3.4, 3.5, and 3.7 – 3.12 from staff's Issue Identification Paper. These comments center around the definition of "new ownership investment" and CMUA's belief that this term was not intended to apply to expenditures at existing powerplants. The "recommendation" contained in these comments appears to be that the Energy Commission define "new ownership investment" as not applying to expenditures at existing facilities, and that this term should only apply where a "new legal relationship" is created; investments that improve the GHG emissions of a facility should not be prohibited, nor should those for "routine replacement and repair."

CMUA argues that because the CPUC "controls virtually every aspect of IOU activities concerning their retained generation" and the Energy Commission does not have similar oversight over the POUs, the Energy Commission's regulations should be different "concerning the extent of authority over powerplant operations and the approval of capital expenditures for [existing] utility-owned powerplants." (Comments pp. 9-10, comment #7.)

Energy Commission Response:

The Energy Commission does not agree with CMUA's interpretation of SB 1368. Both the Energy Commission and the CPUC interpret SB 1368 as applying to investments in existing utility-owned powerplants. Deviating from the CPUC on this substantive issue would violate the consistency requirement of SB 1368, as there is no basis for treating the regulated entities differently in this regard. The application of regulations to investments in existing utility-owned powerplants is a fundamental aspect of the emission performance standard. Both the Energy Commission and the CPUC have the jurisdiction and authority necessary to carry out the provisions of SB 1368 and the Energy Commission has determined that departing from the CPUC's decision on this matter is not warranted under the statute. The regulations were modified by 15-day language to clarify that expenditures for routine maintenance will not trigger application of the EPS under section 2901(j)(4)(A).

k. CMUA argues that under sections 2901(j)(1), (3), and (4) "POUs are left to surmise and conjecture on" the definition of "investment" and whether the term "any investment" should be interpreted literally. CMUA also comments that

"POUs are left to wonder whether the word "investment" includes only capital appropriations or whether it also encompasses activities that are expensed" or "whether the CEC intends that each successive appropriation for the same powerplant project will constitute a separate 'investment' that is subject to a compliance filing." (Comments pp. 10, 16, comment #8.)

Energy Commission Response:

The Energy Commission believes that the use of the term "investment" is sufficiently clear and is not open to differing interpretations; as with all regulations, this term is to be taken literally. A "new ownership investment" is "any investment" that meets any one of the listed criteria, regardless of the dollar amount of the investment. As used in these regulations, and as generally understood elsewhere, the word "investment" means the outlay of money – whether such outlay takes the form of capital appropriations or expensed activities. The expenditure of money for any activity that satisfies any of the criteria listed in 2901(j)(1) through (4) is a "new ownership investment" and is subject to the regulations and compliance with the EPS.

The regulations clearly require every procurement that qualifies as a new ownership investment to be filed with the Energy Commission; thus, every appropriation for a covered procurement must be submitted to the Energy Commission in a compliance filing. Whether these are filed separately or together, they must be filed within 10 days of the POU entering the covered procurement. Based on comments made throughout this proceeding, it appears that a POU only officially "enters into" a procurement after its Board has voted to approve the investment and delegated authority to the City Manager or other authorized individual to sign the necessary documents. If the board approves the initial investment and specified successive appropriations, then the same should be included in the compliance filing. If the board only approves the initial investment and requires additional Board approval for successive appropriations, then the successive appropriations should be included in a compliance filing only after they have been approved by the Board.

l. CMUA argues that section 2901(j)(4) lacks clarity regarding the definition of the phrase "extend the life," the "baseline from which a purported life extension is calculated," and "the scope and type of activities that would trigger this regulation." (Comments p. 10, comment #9.)

Energy Commission Response:

This provision was amended in 15-day language. The Energy Commission believes that this provision, with the recent clarification, coupled with the opportunity to seek a pre-determination from the Energy Commission under section 2907, provides sufficient guidance to regulated entities as to which investments are "designed and intended to extend the life" of a powerplant by 5 years or more. The originally-proposed Section 2901(j)(4)(A) was taken directly from the CPUC's decision. To provide clarity and address concerns raised by commenters, the Energy Commission made explicit that routine maintenance does not trigger the provisions of these

regulations to make clear that activities meeting this description are not considered designed and intended to extend the life of a power plant by five years or more.

To attempt to further define the phrase "designed and intended to extend the life" would be fraught with difficulties and a high likelihood of unintended consequences, because whether an investment will extend the life of a powerplant, or more relevant, is designed and intended to, is heavily dependent upon the factual circumstances of that investment. Therefore, the Energy Commission has added section 2907 to provide for an adjudicatory proceeding by which a POU may petition for a determination on whether a particular prospective procurement would trigger the "designed and intended to extend the life" criterion. In such a proceeding, the POU will have the opportunity to present its case on whether the procurement is designed and intended to extend the life of the power plant by 5 or more years; the Energy Commission, after hearing from the POU and any other interested party, will make an informed determination. Given the complexity of this issue, there is no way to simplify all the factors that go into such a determination and condense them into a concise and workable rule. Therefore, establishing an adjudicatory proceeding to make these determinations was deemed the most workable approach.

m. CMUA argues that the proposed regulations lack clarity because it is unclear whether 2901(j)(4)(A) encompasses "performing necessary and beneficial activities such as routine maintenance, repair, and replacements", "modifications or installations to achieve environmental improvements", or "expenditures to comply with legal or regulatory obligations." (Comments p. 11, comment #10.)

Energy Commission Response:

The regulations have been modified to exclude routine maintenance from 2901(j)(4)(A). As discussed above, the Energy Commission has determined that providing a universal exemption for environmental improvements or legal or regulatory obligations contradicts and exceeds the authority granted under SB 1368.

n. CMUA argues that prohibiting POUs from performing necessary and beneficial activities such as routine maintenance, repair and replacements, modifications or installations to achieve environmental improvements, or expenditures to comply with legal or regulatory obligations, conflicts with "the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies. The failure of a POU to perform those activities listed in Comment 10 (summarized in 9(m) above) will actually increase financial risks for future pollution-control costs and actually cause future reliability problems in electricity supplies." CMUA argues that "[b]y prohibiting maintenance activities and environmental improvements, the Proposed Regulations exceed the scope of SB 1368 to reduce future problems." (Comments pp. 11, 19, comment #11.)

Energy Commission Response:

The regulations have been modified by 15-day language to allow for routine maintenance. Thus, any concerns that POUs would be required to allow non-EPS compliant power plants to atrophy have been addressed. POUs are able to make environmental improvements beyond routine maintenance so long as those improvements result in the power plant meeting the EPS. The same is true for any investments needed to comply with legal or regulatory requirements. Alternatively, POUs can petition for an exemption from the EPS for reliability or financial purposes. SB 1368 is clear that "no…local publicly owned electric utility may enter into a long-term financial commitment unless any baseload generation supplied under the long-term financial commitment complies with the greenhouse gases emission performance standard…." (Pub. Utilities Code section 8341(a).) Long-term financial commitment is defined as "either a new ownership investment in baseload generation or a new or renewed contract with a term of five or more years, which includes procurement of baseload generation." (Public Utilities Code section 8340(j).) No exception from this requirement is made for investments needed to make environmental improvements or to comply with legal or regulatory requirements.

The purpose of SB 1368 is to take steps to meet greenhouse gases emissions reduction goals, reduce potential financial risk to California consumers for future pollution-control costs, and reduce potential exposure of California consumers to future reliability problems in electricity supplies. SB 1368 does not give the Energy Commission authority to allow a blanket exemption for investments that do not meet or further any of these goals. The legislative purpose of SB 1368 is not to reduce future problems in general, as argued by CMUA on page 19 of their comments. Its purpose is to reduce future problems specifically associated with investments in power plants that emit high amounts of greenhouse gases. The future problem SB 1368 is trying to address is the following: it is foreseeable that power plants, in the near future, will be required to mitigate their greenhouse gases emissions. Whether this mitigation takes the form of technological improvements to the power plant itself or the purchase of offsets, it is likely to be costly. If POUs have invested a large amount in high-GHG emitting power plants, then they will likewise be required to pay a large amount to mitigate for these high-GHG emitting power plants. If they cannot afford to mitigate, then the power plants may have to shut down, raising reliability concerns.

Thus, allowing POUs to make small environmental improvements in power plants without reducing the greenhouse gases emissions of these power plants to a reasonable level (as determined by the EPS) does not address the potential problems identified in SB 1368 and does not further the purpose of that statute.

o. CMUA argues that "[t]he determination that Proposed Regulations §2901(j)(4)(A) is reasonably necessary to effectuate the purpose of the statute is not supported by substantial evidence." CMUA argues that it provided substantial evidence demonstrating that "this subsection cannot be understood, followed, implemented or enforced." (Comments p. 11, comment #12.)

Energy Commission Response:

The regulations have been modified by 15-day language to make clear that routine maintenance is not considered to be designed and intended to extend the life of a plant by five or more years. In its comments on the 15-day language, CMUA expressed support for this modification and no longer asserts that the section is vague. If a POU intends to make an investment that cannot be considered routine maintenance, and is unsure of whether such activity would be considered designed and intended to extend the life of the power plant by five years or more, the POU can petition the Energy Commission under section 2907 for an adjudicatory proceeding and determination on the matter. The degree to which this determination depends on the details of particular cases makes attempting a more detailed definition in the regulations impractical. As discussed in response to comment 9(p) and (q) below, this provision is necessary to define "new ownership investment." Without a specific definition of this term, SB 1368 would be too vague to implement and enforce.

p. CMUA argues that the Energy Commission lacks authority to adopt section 2901(j)(4)(A). (Comments p. 11, comment #13.)

Energy Commission Response:

Section 2901(j)(4)(A), as amended by 15-day language, defines the term "new ownership investment" to include "any investment in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility that…is designed and intended to extend the life of one or more generating units by five years or more, not including routine maintenance." Public Resources Code sections 25213 and 25218(e) permit the Energy Commission to adopt regulations. Public Utilities Code section 8341(c)(1) obligates the Energy Commission to adopt regulations for the enforcement of SB 1368 with respect to local publicly owned electric utilities. Because SB 1368 does not define the term "new ownership investment," and that term is critical to determining whether a particular action is subject to the EPS, it is imperative that the regulations define what constitutes a "new ownership investment." Therefore, section 2901(j)(4)(A) is necessary to implement SB 1368 and does not exceed the authority provided by that statute.

q. CMUA argues that section 2901(j)(4)(A), which defines, in part, "new ownership investment," is "inconsistent with SB 1368 because an expenditure that adds a 5 year life extension is not a long term financial commitment in regard to an existing facility owned by a POU." (Comments p. 11, comment #14.)

Energy Commission Response:

As discussed in response to comment 9(p) above, a critical component of the regulations is a determination as to when the EPS applies. SB 1368 specifies that the EPS applies to any "long-term financial commitment" and defines that term as either a "new ownership investment" or a new or renewed contract with a term of five or more years. SB 1368 does not, however, define exactly what a new ownership investment is. Since that term is potentially ambiguous, the CPUC determined that it was necessary to define the term in its decision, and the Energy Commission determined that it was necessary to define the term in the regulations in order to

implement SB 1368. SB 1368 is concerned with reducing potential risk and restricting long-term commitments in power plants that do not meet the EPS. For contracts, long-term is defined in SB 1368 as five or more years. The Energy Commission and the CPUC determined that it was appropriate to use this same time frame as one criterion in the definition of "new ownership investment." The alternative would have been to define the term as any new investment, even if the investment did not increase the lifetime of a powerplant at all, which the Energy Commission and CPUC determined was too strict and would not further the purposes of SB 1368. Therefore, the more reasonable five-year timeframe was chosen as more in keeping with the purposes and provisions of SB 1368.

r. CMUA comments that it is unclear whether section 2901(j)(4)(A) is triggered by expenditures: 1) for activities performed pursuant to a generating unit manufacturer's approved periodic maintenance schedule; 2) for activities performed pursuant to a plant owner's adopted preventive maintenance program; 3) for activities performed pursuant to a plant owner's predictive maintenance program; 4) for corrective maintenance to repair damage incurred during powerplant operation; 5) for mechanical modifications of a generating unit to incorporate a manufacturer's service bulletin that is designed to prevent a catastrophic failure that has occurred in other generating units of similar model and vintage; 6) for corrective or restorative activities that are discovered by non-destructive testing; 7) that are designed and intended to reduce air emissions of prescribed criteria pollutants to comply with a federal or state statute or regulation; 8) that are designed and intended to reduce air emissions of prescribed criteria pollutants in accordance with a voluntary action initiated by the plant owner; 9) that are designed and intended to achieve environmental improvements unrelated to air emissions to comply with a federal or state statute or regulation; 10) that are designed and intended to achieve environmental improvements unrelated to air emissions in accordance with a voluntary action initiated by the plant owner; 11) for the installation of equipment necessary to reduce emissions of greenhouse gases in accordance with a voluntary action initiated by the plant owner; 12) for the installation of equipment necessary to remediate a recognized occupational safety hazard on a generating unit in accordance with a regulation or mandatory directive from Cal-OSHA; 13) that are designed and intended to improve the heat rate, efficiency, and/or reliability of a generating unit; 14) for the installation or replacement of a system that is designed and intended to improve reliability, efficiency, or other benefits such as the increased ability to change load providing transmission system benefits; 15) to return a generating unit to service after a forced outage due to mechanical reasons; 16) to return a generating unit to service after a forced outage caused by an act of God; 17) for the installation or repair of Continuous Emission Monitoring Equipment ("CEMS") if it is required in order to comply with mandatory greenhouse gas reporting under AB 32.

   CMUA argues that defining "new ownership investment" to include these activities conflicts with "the statutory objectives of reducing potential financial

risks for future pollution control costs and future reliability problems in electricity supplies," and would hinder POU attempts to meet AB 32 goals. (Comments pp. 11-14, 18, comment #15-31.)

Energy Commission Response:

The regulations were modified by 15-day language to exclude routine maintenance from section 2901(j)(4)(A). If a POU is unsure which of the activities identified in the comment qualifies as routine maintenance, it may petition the Energy Commission for a determination pursuant to an adjudicatory proceeding. As discussed in response to comment 9(n) above, investments to make environmental improvements or to comply with legal or regulatory requirements are not exempted from these regulations because that would violate the intent and provisions of SB 1368.

SB 1368 requires the Energy Commission to revisit these regulations when an enforceable greenhouse gases emissions limit applicable to POUs is established and in operation. (Pub. Utilities Code, section 8341(f).) Therefore, if any requirements are imposed on the POUs as part of the enforceable greenhouse gases emissions limits under AB 32, the potential for conflict can be addressed and resolved when the regulations are reevaluated.

s. CMUA comments that it is unclear whether section 2901(j)(4)(A) "requires a POU to either seek and obtain case-by-case approval for every necessary and beneficial activity or shut down the powerplant within 30 days of an adverse Commission decision on EPS compliance." CMUA argues that if this is the case, it is inconsistent with SB 1368 "because it falsely accelerates and actually causes the financial and reliability risks that the statute seeks to prevent." (Comments p. 14, comment #32.)

Energy Commission Response:

As discussed above, the regulations have been modified by 15-day language to exclude routine maintenance from triggering the EPS under section 2901(j)(4)(A). If a POU is unsure whether a prospective procurement qualifies as routine maintenance, or if not, whether it would be considered to extend the life of the power plant by five or more years, it can petition for a determination under section 2907. These provisions are consistent with SB 1368.

t. CMUA proposes the following changes to section § 2901(j):
§ 2901(j) "New ownership investment" means, <u>except as provided in subsection 5 below, the original financial commitment for a capital expenditure:</u>
(1) for the construction of a new powerplant;
(2) for the acquisition of a new or additional ownership interest in an existing <u>non-deemed compliant</u> powerplant previously owned by others;
(3) in generating units added to a deemed-compliant powerplant, if such generating units result in an increase of 50 MW or more to the powerplant's rated capacity; or

(4) in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility as of the effective date of this chapter that:
(A) increases the emission rate as defined in section 2903(a); or
(B) results in an increase of greater than 10% in the rated capacity of the powerplant; or
(C) is designed and intended to convert a non-baseload generation powerplant to a baseload generation powerplant.
(5) A new ownership investment does not include expenditures in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility as of the effective date of this chapter that are designed and intended:
(A) to perform normal maintenance, repair, and replacement to preserve plant reliability or prevent asset deterioration; or
(B) to comply with legal or regulatory requirements; or
(C) to achieve environmental improvements.
(Comments pp. 14-15.)

Energy Commission Response:

The Energy Commission does not believe that only the original financial commitment for a capital expenditure should trigger the EPS; any investment that meets a criterion under section 2901 should trigger application of the EPS regardless of whether it can be consider the original investment or not. Inserting a new "original investment" test presents the potential of letting investments intended to be covered by SB 1368 to slip through, particularly since later investments often include changes in project design or scope. The Energy Commission agrees with the change to section 2901(j)(2) and has modified the regulations accordingly in 15-day language. The proposed change to section 2901(j), adding the phrase "as of the effective date of this chapter," adds nothing of substance or clarity to the regulations. The proposed change to section 2901(j)(4)(A) conflicts with SB 1368, as the statute is concerned with all investments in high GHG-emitting power plants, not just those investments that increase emissions. Substituting in the proposed language would exclude investments from the EPS in contravention of SB 1368. The proposed addition of section 2901(j)(5) has been discussed above.

u. In the alternative, CMUA proposes the following changes to §2901(j) and the addition of §2901(q):
§ 2901(j) "New ownership investment" means the original financial commitment for a capital expenditure:
(1) for the construction of a new powerplant;
(2) for the acquisition of a new or additional ownership interest in an existing non-deemed compliant powerplant previously owned by others;
(3) in generating units added to a deemed-compliant powerplant, if such generating units result in an increase of 50 MW or more to the powerplant's rated capacity; or
(4) in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility as of the effective date of this chapter that:

(A) is designed and intended to upgrade one or more generating units; or
(B) results in an increase of greater than 10% in the rated capacity of the powerplant; or
(C) is designed and intended to convert a non-baseload generation powerplant to a baseload generation powerplant.
§ 2901(q) "Upgrade" means any modification made for the primary purpose of increasing the electric generation capacity of a baseload electric generation facility. "Upgrade" does not include routine or necessary maintenance, installation of emission control equipment, installation, replacement, or modification of equipment that improves the heat rate of the facility, or installation, replacement, or modification of equipment for the primary purpose of maintaining reliable generation output capability that does not increase the heat input or fuel usage as specified in existing generation air quality permits as of the effective date of this section, but may result in incidental increases in generation capacity.
(Comments pp. 15-24.)

Energy Commission Response:

Most of the proposed changes are discussed in the previous response. The proposed change to section 2901(j)(4)(A) and the addition of the term "upgrade" contradicts SB 1368. This provision would exempt from the EPS investments that could pose financial and reliability risks when a greenhouse gases emissions rule is implemented. This change is rejected as it would allow far more than investments for routine maintenance.

v. CMUA argues that "[i]f POUs are forbidden from maintaining existing facilities or installing pollution control equipment, this will artificially create current pollution problems and increase the compliance costs in future years. In terms of environmental improvements, CMUA can think of no legislative purpose to placing a disincentive on power plant owners to voluntarily reduce emissions of criteria pollutants or GHGs." (Comments p. 18.)

Energy Commission Response:

As discussed in response to comment 9(n) above, the regulations have been modified in 15-day language to exclude routine maintenance from triggering the EPS under section 2901(j)(4)(A). This will allow POUs to perform routine maintenance on non-EPS compliant power plants without triggering the need to comply with the EPS. Therefore, "pollution problems" will not arise from an inability to perform routine maintenance, nor will compliance costs be increased. POUs will only be unable to install pollution control equipment if such equipment would extend the life of the power plant by five years or more or increase its capacity by more than 10% and would not concomitantly reduce its greenhouse gases emissions to or below the EPS. SB 1368 does not place a disincentive on the reduction of pollution, it merely ensures that if POUs are going to make such an investment, with the potential risks that go with it, then POUs should ensure that greenhouse gases emissions are also reduced to an acceptable level.

w. CMUA comments that the term "system energy" in section 2901(o) is ambiguous in that it is used in an "inappropriate manner that does not have the same meaning as generally familiar to those 'directly affected' by the regulation." CMUA recommends that the section reference "unspecified energy" instead. (Comments pp. 24-25, comment #33-34.)

Energy Commission Response:

The regulations have been modified by 15-day language to use the term "unspecified energy" instead of "system energy."

x. CMUA comments that it supports setting the EPS at 1100 pounds per MWh.

Energy Commission Response:

The Energy Commission agrees with this comment. No further response required.

y. CMUA argues that §2902 "lacks clarity and may be interpreted inconsistently with the statute that it seeks to implement. CMUA proposes the following change:

(b) Unless otherwise specified in this Article, no local publicly owned electric utility shall enter into ~~participate in~~ a covered procurement if greenhouse gases emissions from the powerplant(s) subject to the covered procurement exceed the EPS. (Comments p. 26, comment #35.)

Energy Commission Response:

The regulations have been modified by 15-day language to incorporate this change.

z. CMUA argues that §2902(c) "is inconsistent because it conflicts with SB 1368 and is not reasonably designed to aid a statutory objective by failing to provide any opportunities for evaluating system or other non-unit specific resources." CMUA proposes the following changes:

For purposes of applying the EPS to contracts with multiple powerplants, in order to comply with these regulations outright, each specified powerplant must be treated individually for the purpose of determining the annualized capacity factor and net emissions, and each powerplant must comply with the EPS. However, any applicant may propose to the commission, a system power contract based on averaging powerplant emissions, provided that no more than 25% of the individual powerplants exceed the EPS, and provided further that no powerplants are added to the system that do not meet the EPS. The Commission may rule on such applications on a case by case basis, and may approve such a proposal if it

finds based on record evidence that the proposal furthers the intent and meets the requirements of SB 1368. (Comments pp. 27-28, comment #36.)

Energy Commission Response:

No change. The CPUC's rules do not contain such a provision and the Energy Commission does not believe there is any basis to support deviating from the CPUC on this matter. Including such a provision would allow POUs to enter into long-term financial commitments for electricity from baseload power plants that do not meet the EPS, in express contravention of SB 1368.

aa. CMUA recommends the following changes to provide "an opportunity for POUs to use system contracts for long-term power purchases:"

Alternative 1:
(a) Except as provided for below, a contract with a term of five years or more that includes the purchase of system or unspecified energy is not compliant with the EPS, unless a specific approval is obtained from the Commission pursuant to Section 2902(c).
(b) A new contract for covered procurement from identified powerplants may contain provisions for the seller to substitute deliveries of energy under any of the following circumstances:
(1) The substitute energy only comes from one or more identified powerplants, each of which is EPS-compliant.
(2) For specified contracts with non-renewable resources or dispatchable renewable resources, or a combination of each, system or unspecified energy purchases for each identified powerplant are permitted up to 15% of forecast energy production of the identified powerplant over the term of the contract, provided that the contract only permits the seller to purchase system or unspecified energy under either of the following conditions:
(A) The identified powerplant is unavailable due to a forced outage, scheduled maintenance or other temporary unavailability for operational or efficiency reasons; or
(B) To meet operating conditions required under the contract, including, but not limited to, provisions for the number of start-ups, ramp rates, or minimum number of operating hours.
(3) For specified contracts with intermittent renewable resources, the amount of system or unspecified energy is limited such that total purchases under the contract, whether from the intermittent renewable resource or from system or unspecified energy, do not exceed the total expected output of the identified renewable powerplant over the term of the contract.

CMUA comments that "[s]hould the Commission decide not to allow any use of system or unspecified contracts, CMUA requests that the Commission change the reference to 'system energy' to 'unspecified energy' to avoid confusion and to use

terms consistent with the way they are used in the industry. CMUA has proposed this alternative language as follows:

Alternative 2:
(a) Except as provided for below, a contract with a term of five years or more that includes the purchase of ~~system~~ unspecified energy is not compliant with the EPS.
(b) A new contract for covered procurement from identified powerplants may contain provisions for the seller to substitute deliveries of energy under any of the following circumstances:
(1) The substitute energy only comes from one or more identified powerplants, each of which is EPS-compliant.
(2) For specified contracts with non-renewable resources or dispatchable renewable resources, or a combination of each, system unspecified energy purchases for each identified powerplant are permitted up to 15% of forecast energy production of the identified powerplant over the term of the contract, provided that the contract only permits the seller to purchase ~~system~~ unspecified energy under either of the following conditions:
(A) The identified powerplant is unavailable due to a forced outage, scheduled maintenance or other temporary unavailability for operational or efficiency reasons; or
(B) To meet operating conditions required under the contract, including, but not limited to, provisions for the number of start-ups, ramp rates, or minimum number of operating hours.
(3) For specified contracts with intermittent renewable resources, the amount of ~~system~~ unspecified energy is limited such that total purchases under the contract, whether from the intermittent renewable resource or from ~~system~~ unspecified energy, do not exceed the total expected output of the identified renewable powerplant over the term of the contract. (Comments pp. 28-29, comment #37.)

Energy Commission Response:

As discussed above, the regulations have been modified by 15-day language to refer to "unspecified energy" instead of "system energy." The change in Alternative 1 to subsection (a) is rejected for the reasons discussed above.

bb. CMUA comments that it supports the noticing requirements in section 2908.

Energy Commission Response:

No response necessary.

cc. CMUA comments that while it supports §2910, it should be "amended to provide that any Commission decision should result in a formal determination of EPS compliance/non-compliance that becomes effective 30 days after the determination" in order to provide POUs with adequate time to procure substitute

power. CMUA also recommends that the regulations "should be amended to provide a process whereby any party may within a reasonable time period appeal an adverse decision to the Commission." CMUA proposes the following changes to §2910:
(b) Within 10 days of the decision made pursuant to subsection (a), any person may appeal the decision.
(c) If no party appeals a Commission decision pursuant to subsection (b) above, then the Commission decision shall become final and effective thirty (30) days after the Commission reaches such determination.(Comments pp. 30-32, comment #39-41.)

Energy Commission Response:

The regulations have been modified in 15-day language to clarify that the Energy Commission decision regarding a covered procurement's compliance with the regulations is not effective until 30 days after the date of the decision. The Energy Commission does not believe that allowing an appeal of the decision is a good use of the Energy Commission's time and resources. Since the original determination will be made by the full Commission, it is unlikely that this same body would make a different determination on appeal only a short time later.

dd. CMUA argues that §2911, which establishes a process for investigating alleged noncompliance with the regulations, is "inconsistent with SB 1368 and is not reasonably designed to aid a statutory objective" because "[i]t fails to incorporate the gateway concept and permits a review of a covered procurement after the CEC has already determined the procurement was entered lawfully by the POU." CMUA supports the following language proposed by LADWP:

Within 30 calendar days of the submission of a compliance filing, a covered procurement approved or pending under Section 2910 may be the subject of a complaint or investigation proceeding under this Section if and only if it is claimed that the covered procurement materially and consistently exceeds the emissions standards required by this Chapter or that the compliance filing contains a material misrepresentation of fact concerning the probability that the covered procurement would meet such standards. The complaint procedure shall be heard on an expedited basis with a decision within 90 days of the filing of the complaint or request for investigation. (Comments pp33-34, comment #42.)

Energy Commission Response:

No change. The Energy Commission determined that it is necessary to establish an adjudicatory process to investigate claims of non-compliance to ensure that SB 1368 is fully implemented. The intent of this process is to investigate claims that a compliance filing did not fully disclose all pertinent facts or made false statements, that a POU did not make a compliance filing for a covered procurement, that a covered procurement does not comply with the EPS, or to investigate any other allegation that a POU is not in compliance with these regulations. The

language proposed above is too restrictive because it would limit investigation into only whether the covered procurement exceeds the EPS or whether a POU's compliance filing contained misrepresentations. This provision would not enable the Energy Commission to investigate all potential claims of non-compliance. Establishing a procedure for investigating alleged non-compliance with these regulations is in keeping with SB 1368's directives that the Energy Commission enforce the EPS.

This provision does not conflict with a gateway approach and is not an attempt to reconsider determinations made with regard to compliance filings. This provision simply allows the Energy Commission to investigate allegations of non-compliance with the regulations. The Energy Commission would only revisit a previous determination if a substantive misrepresentation was discovered in a compliance filing or if the generation at issue did not operate in compliance with the EPS as asserted in a compliance filing.

ee. CMUA recommends that §2911 be amended to "provide a process whereby parties may seek compliance guidance from the CEC prior to entering the covered procurement." CMUA recommends the following language:

§ 2911(b) A publicly owned electric utility may request that the Commission evaluate a prospective procurement for compliance with the EPS. A request for evaluation shall be treated by the Commission as a request for investigation under Chapter 2, Article 4 of the Commission's regulations. The Commission shall consider the emissions attributed to a system or portfolio by using the calculation methodology developed for accounting for such emissions by the California Global Warming Solutions Act of 2006 in Division 25.5 of the Health and Safety Code (beginning with section 38500) or, until that regulation is adopted, any other method the Commission deems appropriate. (Comments pp. 34-35, comment #43.)

Energy Commission Response:

The regulations have been modified by 15-day language to include new language under section 2907 which establishes a process whereby POUs can, prior to entering into a procurement, request a determination on whether the prospective procurement qualifies as routine maintenance, whether the prospective procurement extends the life of a power plant by five years, or whether the prospective procurement meets the EPS.

ff. CMUA recommends a new section to "provide a process whereby POUs may comply with pre-existing contractual obligations." The following language is proposed:

§ 2913 Case-by-Case Review for Pre-existing Contractual Commitments
(a) A local publicly owned electric utility may petition the Commission for an exemption from application of this chapter for covered procurements or categories of covered procurements required under the terms of a contract or

ownership agreement that was in place on or before January 1, 2007. In order to qualify for an exemption under this section, the local publicly owned electric utility must demonstrate that:
(1) the covered procurements or categories of covered procurements are required under the terms of the contract or ownership agreement; and
(2) the contract or ownership agreement does not afford the local publicly owned electric utility applying for the exemption the opportunity to avoid making such covered procurements; the publicly owned electric utility shall not be required to divest its interest in the contract or ownership agreement in order to avoid such covered procurements.
(b) Upon receipt of a petition under this section, the executive director shall review and make a recommendation to the full Commission on whether to grant the petition. The executive director shall, within 14 days after receipt of a petition, notify the local publicly owned electric utility in writing of any additional information needed to review the petition. The executive director's failure to notify the petitioner within said time period shall deem the petition complete. The Commission shall consider the executive director's recommendation and shall issue a decision on whether to grant the petition within 30 days after receipt of the complete petition. (Comments pp. 35-36, comment #44.)

Energy Commission Response:

The regulations have been modified in 15-day language to include a new section 2913, which allows a POU to petition for an exemption for covered procurements that are required under a pre-existing multi-party commitment. The adopted language is slightly different from that proposed by CMUA, in that it does not reference "categories of covered procurements." Nevertheless, the provision allows a POU to request an exemption for multiple procurements if the specified requirements are met. Several POUs have commented that they are minority members in multi-party ownership agreements for power plants that do not meet the EPS. These agreements typically require the members to vote on whether to undertake certain activities on these facilities, including maintenance or upgrades. If a majority of members votes to approve a certain procurement, the ownership agreement typically requires the minority member POU to contribute funding regardless of whether the POU voted against the procurement. Minority members, by themselves, cannot overturn a vote. In such situations, POUs may be contractually obligated to pay for the procurement or they be forced to divest themselves of their ownership interest in the facility. The Energy Commission does not believe the intent of SB 1368 was to necessarily require POUs involved in existing multi-party commitments to divest their ownership in these facilities. Therefore, this provision is in keeping with SB 1368.

gg. CMUA argues that the Fiscal Impact Statement failed to conduct "any analysis of whether or not the Proposed Regulations impose a mandate on local agencies." CMUA argues that "there is nothing in the FIS that supports the conclusions contained [in the FIS], nor the assertion that the 'regulations merely provide direction regarding certain purchases.'" CMUA argues that it is unable to provide

substantive comments because of this and the Energy Commission is therefore obligated to draft a new FIS. (Comments p. 37, comment #45.)

Energy Commission Response:

Energy Commission staff performed a detailed analysis of the potential costs to various entities, including the POUs, from implementation of the proposed regulations. The FIS presents sufficient information on which POUs could comment; staff concluded that it does not appear that the regulations will result in a mandate as the regulations are not likely to be found to require a new program or an increased level of service. In addition, the mandated activities must involve the provision of governmental services and must apply uniquely to the local agency. (City of Sacramento v. State of California (1990) 50 Cal.3d 51, 266 Cal.Rptr. 139.) Generating, distributing, and selling electricity does not encompass the provision of governmental services. Nevertheless, in order to err on the side of caution, staff proceeded to determine whether, if found to impose a mandate, such a mandate was reimbursable or not. Staff concluded that any costs found to have been imposed by these regulations are not reimbursable because Public Utilities Code section 10001, 11501, 15501, and 20500 et seq. provide revenue sources for the affected entities to recoup their costs.

The plain text of the regulations clearly direct, in accordance with SB 1368, the electricity purchases of POUs. The regulations do nothing else, except establish a process for Energy Commission oversight of these purchases. CMUA does not explain why they believe this assertion is wrong nor provide clarification as to what the appropriate assertion should be.

hh. CMUA argues that the background section of the Fiscal Impact Statement restricts the fiscal analysis to the costs associated with the construction or purchase of powerplants and the costs associated with entering into long-term contracts while ignoring the costs associated with new ownership investments in existing powerplants, "which is a significant part of the proposed regulation and which directly impacts the financial implications associated with the proposed regulation." (Comments pp. 37-38, comment #45.)

Energy Commission Response:

Firstly, the background section merely contains a legal description of the legislation that is the basis for the regulation. It does not attempt to entirely define the potential impacts analyzed in the FIS, nor is it required to. This section clearly acknowledges that long-term investments with non-EPS compliant baseload generation by POUs are precluded. It then proceeds to give examples of what activities are considered to be long-term investments; this list is not, and was not intended to be, exhaustive. Secondly, CMUA does not provide any support for its assertion that certain costs were not included in the analysis that should have been. POUs are clearly permitted to invest in existing facilities to the extent that such investments do not extend the life of a plant by five years or more (unless they are considered routine maintenance), do not increase the plant's rated capacity by more than 10%, or do not convert a non-baseload facility to baseload. If a POU needs to do more than this they can request an exemption for cost or

reliability purposes, or if they are involved in a pre-existing multi-party commitment for the facility. If a POU needs extra capacity and is not given an exemption, staff has determined that there are existing EPS-compliant resources available to meet any capacity needs for the next several years; and no costs impacts result from obtaining the electricity as opposed to expanding capacity at existing non-EPS compliant facilities.

ii. CMUA argues that the Energy Commission "did not substantially comply with the cost assessment required by the APA." CMUA argues that the analysis fails to consider that "[t]he regulations will compel all regulated entities to undertake an entirely new program to address electricity procurement as required by the regulations, which includes significant 'front end' review and research *before* a long term financial commitment may even be brought before a POU's governing body. (Comments p. 38, comment #46.)

Energy Commission Response:

CMUA complains that the costs identified by staff are not complete, but provides no support for this assertion nor identifies what the "accurate" numbers should be. The regulations ask entities to provide the generation profile and fuel consumption of any unit that they build or purchase. This effort and the associated cost cannot be attributed to the regulations as it would be undertaken even in their absence; this activity is perhaps the most basic component of evaluating the addition of such a resource to a portfolio. The amount of effort needed to assess compliance of contracted-for resources will admittedly vary with the characteristics of the contract and the resource. For non-fossil resources (e.g., an RPS-compliant resource), the cost of determining that the resource is compliant will be effectively zero. For fossil resources providing energy at a price indexed to a fuel price, the effort and its associated cost cannot be attributed to the regulations as, as above, knowledge of the generation profile and fuel consumption are necessary to evaluate the contract even in their absence. Fixed price contracts with existing resources and cogenerators (which may require information about steam output) will require publicly available data or attestations from the counterparty. In either case the cost is more accurately subsumed under administrative costs as discussed in the FIS than as those associated with "an entirely new program…which includes significant 'front end' review and research," as claimed by CMUA.

jj. CMUA argues that the Energy Commission's conclusion that any near-term costs incurred in avoiding long-term financial commitments in non-EPS compliant power plants is outweighed by the costs to comply with AB 32 that would otherwise be incurred is speculative because the analysis earlier states that "[a]ny attempt to evaluate the interaction of these regulations with the future implementation of AB 32 (2006, ch. 488) would be speculative at this point, and will be deferred to the Energy Commission's re-evaluation of these regulations after an enforceable GHG emissions limit is adopted." (Comments p. 38, comment #46.)

Energy Commission Response:

It is highly likely, if not certain, that AB 32 will impose greenhouse gas emissions costs on publicly owned utilities. Those with generation portfolios that exceed the applicable cap will either have to purchase offsets or invest in technology to reduce emissions to the level established under AB 32. While it is true that we do not know exactly what these caps will be or how much it will cost each POU to comply with them, it is highly likely that these costs will not be diminutive, as evidenced by the costs of other air emissions offsets currently being traded. Because staff concluded that the near-term non-administrative costs of complying with these regulations is zero, it is not speculative to conclude that future greenhouse gas pollution-control costs that are otherwise avoided under these regulations would outweigh near-term costs.

kk. CMUA argues that there is no record to support the conclusions set forth in the FIS, including the initial determination that the proposed regulations will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. CMUA argues that because the Energy Commission "made no information requests to the POUs, conducted no analysis of prospective POU resource planning activities, made no inquiries regarding how those current planning activities would be impacted by the regulations" the Energy Commission "can make no findings based on any evidence to support such a conclusory and speculative statement." (Comments pp. 38-39, comment #46.)

Energy Commission Response:

After a thorough analysis, staff determined that these regulations will not impact the private sector. The regulations do not directly apply to any business or individual in the private sector nor do they require any reporting from these entities. The regulations only apply to POUs, who fall under the category of local government. The only argument that could be made that there may be an impact to business is if the regulations resulted in substantially increased costs to POUs and these costs were passed down to businesses that purchased electricity from these POUs and these increased rates were substantial enough to put these businesses at a disadvantage, especially when compared to out of state businesses. As discussed in the analysis, however, staff concluded that, in the near-term, there is sufficient EPS-compliant electricity available that POUs will not incur any increased non-administrative costs as a result of these regulations. Additionally, even if there was a chance that a POU would encounter an increase in costs substantial enough to impact businesses, it could obtain an exemption from application of these regulations under section 2912. The Energy Commission has the necessary expertise and experience to analyze these types of fiscal and economic impacts on the electricity sector and determined that it was not necessary to require the POUs to provide their opinion on potential impacts to other entities. CMUA provides no facts, evidence, testimony, report, or other document to support their assertions that staff's analysis is flawed.

ll. CMUA argues that the Energy Commission "did not consider whether performing necessary and beneficial expenditures on some non-deemed compliant plants could, in fact, be the most effective method to reduce potential future pollution-control costs and future reliability risks." (Comments pp. 39-40, comment #47.)

Energy Commission Response:

The regulations were modified by 15-day language to clarify that expenditures for routine maintenance do not trigger EPS-compliance under section 2901(j)(4)(A). The allowance for routine maintenance would encompass most "necessary" expenditures and addresses CMUA's concern that POUs would be required to let their non-EPS compliant powerplants deteriorate, the costs of which were not analyzed. As for other expenditures, the Energy Commission has determined that any "beneficial" investments that would not result in the powerplant meeting the EPS are implicitly not allowed under SB 1368. See response to comment 9(n), above. The cost impacts for not allowing these types of expenditures were included in staff's analysis.

mm. CMUA argues that the Energy Commission "did not consider all the increased costs that may result from the Proposed Regulations." CMUA argues that the assertion that POUs would not be anticipated to purchase existing high-emission resources fails to take into consideration two factors: the availability of scarce resources and transmission constraints. (Comments p. 40, comment #48.)

Energy Commission Response:

The assertion that POUs would not be anticipated to purchase existing high-emission resources refers to the improbability of their buying ownership shares in existing facilities that exceed the EPS (the purchase of a high-emission gas-fired resource to secure baseload energy would be economically unsound). This is based on the expectation that high-GHG resources would not be offered for sale at a discount to the cost of energy from compliant gas-fired resources, and if they were, any discount would reflect the risk associated with anticipated carbon costs and thus not reflect a true savings. The argument that said resources might nevertheless be preferred due to transmission constraints lacks merit in that some of these high-GHG emitting plants are themselves located far from potential load; it is implausible that transmission constraints would limit access to all but the most remotely located resources. That they might be preferred due to the scarcity of alternatives even in the absence of transmission constraints is belied by the sufficiency of EPS-compliant resources during the next five years and the possibility of entering into less-than-five-year contracts with non-compliant resources, if necessary. CMUA did not provide any facts, evidence, reports, or other documents to support their assertion otherwise.

nn. CMUA argues that the conclusion that no costs are likely to result from precluding new or renewed long-term contracts with high emission resources "fails to account for the ambiguously expansive §2901(j)(4)(A)." CMUA argues that this provision "will prohibit the POU from performing necessary and beneficial expenditures on non-deemed compliant plants" even though "these activities may be the most effective method to reduce potential financial risks in the future," and the Energy Commission failed to collect any information from the POUs on this issue. (Comments p. 40, comment #48.)

Energy Commission Response:

The regulations have been modified by 15-day language to make explicit that routine maintenance will not trigger EPS-compliance under section 2901(j)(4)(A). This comment appears to be directed more at the regulations than at the analysis of fiscal impacts resulting from the regulations. Staff's analysis includes the effect of all prohibitions in the regulations, including the impact of not allowing activities that constitute new ownership investments in non-EPS compliant powerplants. Staff concluded that there is sufficient EPS-compliant electricity available in the next several years that these regulations would not have any non-administrative cost impacts on POUs. CMUA fails to provide any facts, evidence, testimony, reports, or other documents to show otherwise.

oo. CMUA argues that the analysis fails to consider costs resulting from "the prohibition on using very reliable system and market purchases for long-term contracts" and that no "information on the prices for supplementary hedging products to replace the price hedging aspect of long-term system and market contracts" was collected. CMUA argues that "reliance on short-term energy purchases can expose a POU to substantial price fluctuations" and "[i]n order to protect their ratepayers against these potential price swings, many POUs use long-term energy purchases" many of which "involve system or market power." CMUA argues that the analysis does not address "these additional costs nor has it collected any data to support a finding on anticipated economic costs from additional price and supply hedging products." (Comments p. 40-41, comment #48.)

Energy Commission Response:

Under the regulations, publicly owned utilities may enter into long-term unit-specific contracts (or with EPS-compliant portfolios) at fixed prices, which protect ratepayers from the risk of price fluctuation in the same fashion as long-term contracts for system power. CMUA does not provide any facts, evidence, testimony, reports, or other documents to support the contention that staff's analysis is wrong. In addition, one of the key purposes of SB 1368 is to limit the exposure to financial risk implicit in additional long-term investments in high-greenhouse gases emission resources as California and the country move to a system to reduce greenhouse gases emissions. CMUA's argument that these regulations increase financial risk by eliminating the ability of POU's to sign long-term contracts for high-greenhouse gases resources ignores this important intention of SB 1368 and the legislature's determination that SB 1368 would decrease financial risk.

pp. CMUA argues that the initial determination that the action will not have a significant adverse economic impact on business does not consider §2901(j)(4)(A) and is not supported by cost-savings studies. CMUA also argues that the analysis does not contain sufficient support for conclusions regarding "the impact on business, with consideration of industries affected…[t]he creation or elimination of jobs within the State of California…[t]he creation of new

businesses or the elimination of existing businesses within the State of California; and…[t]he expansion of businesses currently doing business within the State of California." (Comments pp. 41-42, comment #49.)

Energy Commission Response:

Staff conducted a thorough analysis of the potential cost impacts of these regulations on the private sector and determined that there would be no impact. See response to comment 9(kk).

qq. CMUA argues that the analysis "did not evaluate or even consider the economic effect of the 'life extension' Proposed Regulation in §2901(j)(4)(A) and POUs will incur significant costs if POUs must allow plants to deteriorate or must be shut down…in light of this ambiguous requirement." (Comments p. 42, comment #50.)

Energy Commission Response:

The regulations have been modified by 15-day language making explicit that routine maintenance does not trigger EPS-compliance under section 2901(j)(4)(A). Therefore, POUs will not be required to allow their plants to deteriorate and there will be no cost impact resulting therefrom.

rr. CMUA argues that the analysis "did not properly evaluate the administrative effect on POUs" nor did it "consider the administrative effect of the "life extension" Proposed Regulation in §2901(j)(4)(A)." CMUA argues that the conclusion that the administrative costs of complying with the proposed regulations will be minimal is unsupported by the record. CMUA argues "[t]here is no evidence to support the actual number of hours needed to research and locate appropriate electricity contracts, nor why verification of emissions compliance of a prospective investment would only involve non-technical staff administrative time. CMUA also argues that there is no support for the conclusion that administrative costs to POUs can be estimated to be $175,000 and that there will be no economic impact to local agencies over the next five years. (Comments pp. 42-43, comment #51.)

Energy Commission Response:

The regulations require regulated entities to ascertain the generation profile and fuel consumption of any unit that they are considering building or purchasing. This effort and the associated cost cannot be attributed to the regulations as it would be undertaken even in their absence; this activity is perhaps the most basic component of evaluating the addition of such a resource to a portfolio. The amount of effort needed to assess compliance of contracted-for resources will admittedly vary with the characteristics of the contract and the resource. For non-fossil resources (e.g., an RPS-compliant resource), the cost of determining that the resource is compliant will be effectively zero. For fossil resources providing energy at a price indexed to a

fuel price, the effort and its associated cost cannot be attributed to the regulations as, as above, knowledge of the generation profile and fuel consumption are necessary to evaluate the contract even in their absence. Fixed price contracts with existing resources and cogenerators (which may require information about steam output) will require publicly available data or attestations from the counterparty. In either case the cost is more accurately subsumed under administrative costs as discussed in the FIS than as those associated with "an entirely new program…which includes significant 'front end' review and research," as CMUA claims.

ss. CMUA argues that the analysis incorrectly assumes that the Southern California Public Power Authority and the Northern California Power Agency will be acting on behalf of their members. (Comments p. 43, comment #51.)

Energy Commission Response:

The analysis assumes that these entities will undertake evaluation of potential investments with respect to the EPS *for some investments, for some members*; for example, it seems unlikely that SCPPA would "assign" the task of compliance evaluation of a SCPPA-funded project to each of its members rather than undertake it itself. This was not intended to mean that a member of SCPPA would never be expected to evaluate an investment that it was considering "outside SCPPA." Similarly, for those power pool members who rely on NCPA for energy scheduling, ancillary services, etc., it is reasonable to expect that NCPA would devote resources to compliance determination. CMUA has not provided any data on which to base a conclusion different from the one reached by staff – that administrative costs for all POUs will likely average $175,000 per year.

tt. CMUA argues that the analysis "incorrectly notes that the burden will be even lower for smaller POUs." CMUA comments that "these smaller entities have fewer personnel resources, including both the technical and non-technical staff necessary to undertake the entire process of identifying potential procurements that will comply with the proposed regulation, which will then result in an even greater financial burden on these entities." (Comments p. 43, comment #51.)

Energy Commission Response:

As discussed above, few of the investments considered by filing entities will require any additional effort to verify compliance beyond that which would be necessary in any case to evaluate undertaking the investment. Those that require additional effort do not, as contended, require "an entirely new program…which includes significant 'front end' review and research," but merely the completion of incremental, non-technical tasks such as securing public data or soliciting data from potential counterparties. The majority of the incremental tasks imposed are those related to providing notice of public meetings and compliance filing, not determining whether prospective investments would be compliant. To the extent that smaller utilities make fewer long-term investments their associated administrative costs can reasonably be expected to be lower.

uu. CMUA argues that the analysis "did not properly evaluate the cost to sellers of electricity." CMUA also argues that the statement that POUs are a "small share of the Western US market's demand for wholesale electricity" is evidence that the analysis has 'piecemealed' potential impacts and "fails to recognize both the potential scarcity of compliant energy sources, and whether or not those available sources are obtainable with existing transmission facilities and rights." (Comments p. 44, comment #52.)

Energy Commission Response:

As discussed in response to comment 9(kk), staff's analysis of the impacts of these regulations concluded that there would be no impact to the private sector, including sellers of electricity. Sellers of non-EPS compliant electricity are still able to sell under existing contracts and will be able to sell under contracts of less than five years' duration. Sellers are also still able to sell to entities not subject to SB 1368, such as out-of-state purchasers. Staff did not "piecemeal" its analysis of economic and fiscal impacts. In order to analyze impacts, one must first determine the setting within which the regulations will be applied. California's electricity system is not an island, but is part of a larger network of interconnected facilities. Staff's analysis determined that for at least the next several years there will be sufficient EPS-compliant resources available to POUs to ensure that compliance with these regulations will not result in any extra non-administrative costs for the POUs. CMUA has not provided any facts, evidence, testimony, report or other document on which to base a different conclusion.

10. West LA Democratic Club, received April 18, 2007

The West LA Democratic Club offers its support of the proposed regulations. It comments that "[a]s the largest consumer of electricity in the western United States, [California has] a responsibility to ensure that our continued energy needs are met with cleaner, more renewable sources. Continued reliance on electricity sources that produce excessive amounts of greenhouse gas emissions subjects Californians not only to the dangers of global warming, but to financial and reliability risks, as well."

Energy Commission Response:

The Energy Commission agrees. No further response required.

11. Form Letters of Support (Approximately 1700) submitted at various times throughout the 45-day comment period

Over 1700 people submitted the same letter voicing their support of the proposed regulations and commenting that "[t]hese regulations would ensure that utilities are required to place their long-term investments in clean energy sources, thus helping California meet its global warming emissions reduction targets under the Global Warming Solutions Act (AB 32) and avoiding the unnecessary exposure of Californians to hundreds of millions of dollars in extra costs resulting from new

investments in highly polluting energy sources." The letters note that the PUC has already adopted rules to implement and enforce SB 1368 and the Energy Commission "is obligated to adopt consistent regulations for the state's local publicly owned utilities. The letters also comment that the "proposed regulations provide for necessary state oversight to ensure compliance with the standard, while allowing the publicly owned utilities enough flexibility to continue purchasing the cleanest, most affordable power for their customers."

Energy Commission Response:

The Energy Commission agrees. No further response is required.

Comments Made at April 25, 2007 Hearing

12. Bruce McLaughlin, CMUA

CMUA reiterates its concerns regarding section 2901(j)(4)(A) and argues that it violates several APA standards, including clarity, consistency, reference, authority, and necessity. CMUA argues that this is not a "proper standard" because "the life of a plant is an unknowable." CMUA expressed concern regarding where maintenance actions fit in under this test. CMUA argued that the provision needs more analysis and CMUA needs "more clarity on what is and isn't a new ownership investment which will trigger a long-term financial commitment." (Transcript pp. 57-66.)

Energy Commission Response:

See response to comments 9(k) through (v).

13. Allen Short, M-S-R

M-S-R is a minority owner in a coal-fired power plant and is concerned that the regulations may prevent them from participating in the maintenance of that power plant or a potential project to add solar power to enhance the heating of water for the generator. (Transcript pp. 66-70.)

Energy Commission Response:

See response to comments 8(b).

14. Norman Pedersen, Southern California Public Power Authority (SCPPA)

a. SCPPA supports CMUA's written and oral comments. SCPPA requests that section 2901(j)(4)(A) be eliminated and replaced with either of the two alternatives suggested by CMUA in their written comments (Comments 9(t) and

(u) above). SCPPA argues that this section is "impermissively vague, over-broad, and it goes far beyond SB 1368." (Transcript pp. 70-71, 74-75.)

Energy Commission Response:

See response to comments 9(t) and (u).

b. SCPPA comments that the term non-deemed compliant should be added to section 2901(j)(2) "to make it clear that that provision won't reach changes in ownership in a deemed compliant, combined cycle power plant." (Transcript pp. 71-72.)

Energy Commission Response:

The regulations have been modified by 15-day language to add the term "non-deemed compliant" to section 2901(j)(2).

c. SCPPA requests that section 2913 as proposed by CMUA be added to the regulations "to allow POUs to seek an exemption for covered procurements that a POU is contractually required to finance." (Transcript pp. 72-74.)

Energy Commission Response:

The regulations have been modified by 15-day language to include similar language to that proposed by CMUA which allows POUs to seek the suggested exemption.

15. Virgil Welch, Environmental Defense (ED) (also appearing on behalf of NRDC and UCS)

ED/NRDC/UCS support the proposed regulations, particularly the enforcement and compliance provisions, and believe that they are consistent with the regulations adopted by the CPUC. They urge adoption as soon as possible. (Transcript pp. 75-77.)

Energy Commission Response:

No response necessary.

16. Steven Kelly, Independent Energy Producers Association (IEP)

IEP expressed concern over the substitute power provision in section 2906(b)(3) and indicated consternation as to why it was even included in the regulations. IEP is concerned that this provision allows a POU to contract for X amount of power with a renewable and use X amount system power instead. IEP suggests the language be

deleted, or, if found to be relevant, IEP recommends the modification contained in its written comments (Comment 7(c) above). (Transcript pp. 78-86.)

Energy Commission Response:

The regulations have been modified by 15-day language to ensure that the amount of substitute energy purchases from unspecified resources is limited such that total purchases under the contract do not exceed the total reasonably expected output of the identified renewable powerplant over the term of the contract.

17. Manuel Alvarez, Southern California Edison (SCE)

a. SCE expresses concern that the regulations do not cover power plants under 10 megawatts. (Transcript pp. 86-87.)

Energy Commission Response:

See response to comments 1(a) and 3(b)

b. SCE suggests that the provision allowing a 10% increase in capacity be removed. (Transcript p. 87.)

Energy Commission Response:

See response to comments 1(c) and 3(c).

c. SCE expresses concern over the exemption for qualifying facilities. (Transcript p. 87.)

Energy Commission Response:

See response to comments 1(b) and 3(d).

d. SCE supports the proposed set of timelines for compliance filings and review. (Transcript p. 88.)

Energy Commission Response:

No response necessary.

18. Susie Berlin, Northern California Power Authority (NCPA)

NCPA comments that the requirement in SB 1368 that the EPS established by the Energy Commission be consistent with the standard adopted by the CPUC does not mean that they have to be identical. NCPA comments that the regulations address a

lot of the concerns that they had and do a very good job of balancing this notion of consistency. (Transcript pp. 88-90.)

Energy Commission Response:

The Energy Commission agrees with this comment. No further response is necessary.

19. Joy Warren, Modesto Irrigation District (MID)

MID urges the Energy Commission to consider NRDC's recommendation that procurements under existing contractual obligations not be considered covered procurements and suggests that the language proposed by CMUA be adopted (Comment 9(ff) above). (Transcript pp. 90-91.)

Energy Commission Response:

See response to comment 9(ff).

20. Jane Luckhardt, Sacramento Municipal Utility District (SMUD)

SMUD responds to IEP's earlier comment, explaining that there is the need to allow the use of system power to firm intermittent resources. SMUD explains that even though the intermittent power may not be determined to be baseload, the system power used to firm the intermittent resource would be determined to be so. Without the provision in 2906(b)(3), POUs would not be allowed to firm such resources. SMUD comments that this provision is carefully crafted to avoid the concern expressed by IEP because it limits the amount of substitute energy to not exceed the total expected output of the identified renewable resource. (Transcript pp. 91-95.)

Energy Commission Response:

The Energy Commission agrees with this comment. Additionally, IEP's concerns have been addressed with a modifications by 15-day language. See response to comment 16 above.

Comments Submitted during 15-day Comment Period

21. Comments of Natural Resources Defense Council and Union of Concerned Scientists, dated May 21, 2007.

NRDC/UCS comments that they strongly support the proposed regulations and believe that "the revisions to the proposed regulations [15-day language] provide useful clarifications to the 45-day language." They also comment that "[b]y ensuring that utilities make long-term commitments to clean energy sources, the [Energy] Commission is protecting our economy and environment from the effects of global warming" and the "regulations will shield customers of California's publicly-owned

utilities from hundreds of millions of dollars in extra costs due to regulation of global warming pollution." (Comments pp. 1-2.)

Energy Commission Response:

The Energy Commission agrees with this comment. No further response is necessary.

22. Environmental Entrepreneurs (E2), dated May 21, 2007

E2 comments that it strongly supports the proposed regulations. E2 comments that the EPS will provide "critical protections to California energy consumers and businesses by insulating them from the significant financial and reliability risks associated with investments in carbon-intensive generation." E2 supports the regulations "because of both the economic benefits it will provide to California consumers and business, and the competitive advantage California will enjoy as we lead the world in addressing global warming." (Comments p. 1.)

Energy Commission Response:

The Energy Commission agrees with this comment. No further response is necessary.

23. Comments of the California Municipal Utilities Association (CMUA), dated May 21, 2007.

a. CMUA comments that it interprets that section 2901(j)(4)(A) "is not triggered by any expenditure that is not designed and intended to extend the life of one or more generating units by five years or more" and it is "not triggered by any expenditure for routine maintenance." (Comments p. 1.)

Energy Commission Response:

This interpretation is correct.

b. CMUA comments that it "appreciates the Electricity Committee's incorporation of Proposed Regulation §2907 in response to CMUA's NOPA Comments." CMUA comments that if a POU is still required to make a compliance filing after obtaining a determination under §2907, it recommends a 30 day deadline for completion of the §2907 process. CMUA also comments that it is their understanding that if the covered procurement submitted under §2910 is "substantially the same" as that evaluated under §2907, the Commission's §2910 review will "comprise little more than a ministerial action to confirm this fact." CMUA recommends the following sentence be added at the end of §2907(b):

The Commission shall, within 30 days after receipt of a complete request, issue a decision on whether the prospective covered procurement described in the request complies with this Article.
(Comments pp. 1-2.)

Energy Commission Response:

While the Energy Commission agrees that such requests should be handled as expeditiously as possible, such a proscriptive deadline is inappropriate for this section. The requests are likely to vary greatly both in detail and in complexity. Some requests may be able to be decided quickly while others may require more time to identify and consider the necessary facts and details surrounding the prospective procurement. Parties may also disagree over the facts of a particular request. It would be inappropriate to limit the time in which the Energy Commission has to consider such potentially complicated situations.

c. CMUA comments that it expects that the Commission will "give deference to any decision reached during a §2910 review" and, therefore, "reasonably expects that any request for a §2911 compliance investigation of a covered procurement that was already reviewed by the [Energy] Commission under §2910 shall be dismissed unless the requester has met a burden of proof establishing that certain key facts of the covered procurement are different than those originally reviewed by the [Energy] Commission." (Comments p. 2.)

Energy Commission Response:

The Energy Commission will not accept for investigation frivolous petitions or petitions that lack sufficient information to sufficiently substantiate a claim of noncompliance to indicate that an investigation is warranted.

d. CMUA comments that it appreciates the incorporation of §2913 in response to CMUA's comments. CMUA comments that it interprets this section as allowing the Energy Commission to consider and exempt "broad categories of investments that a POU may prospectively enter into." (Comments p. 3.)

Energy Commission Response:

The Energy Commission may grant an exemption under section 2913 for multiple covered procurements if the petition contains sufficient detail about each covered procurement for which an exemption is requested and the petitioner meets requirements 1 and 2 in 2913(a).

24. Comments of the Salt River Project Agricultural Improvement and Power District as Operating Agent of the Navajo Generating Station, dated May 21, 2007.

a. SRP "express[es] gratitude for the revisions made to Section 2901(j)(4)(A), which provides that 'routine maintenance' is not included within the definition of 'new ownership investment.'" (Comments p. 2.)

Energy Commission Response:

The Energy Commission appreciates SRP's support of the modification.

b. SRP argues that section 2901(j) is still ambiguous as to whether the phrase "any investment" "means all expenditures of money at a power plant or is limited to significant investments." SRP also argues that section 2901(j)(4)(A) "lacks clarity regarding which activities would extend the life of a plant by five or more years and from what point in time such an extension would be calculated." SRP recommends the Energy Commission adopt language they proposed in previous comments (see Comment 5(c), above). (Comments pp. 2-4.)

Energy Commission Response:

See response to comments 9(k) through (v). It is of note that SRP is not a regulatee and is not required to comply with the regulations. LADWP, who is a regulatee and co-owner of a facility with SRP, does not object to the definition or any other provision of the regulations as included in the 15-day language.

c. SRP comments that it agrees with NRDC and UCS that "existing contracts for power plants [such as joint ownerships or joint power arrangements] should be excluded from the operation of the [Energy] Commission's regulations altogether."

Energy Commission Response:

See response to comment 6(c).

25. Comments of the Center for Energy and Economic Development (CEED), dated May 21, 2007

CEED's comments are not specifically directed the 15-day language and, thus, the specific adoption proposed. The 15-Day Language changes involved the following changes: 1) clarifying that section 2901(j)(2) does not apply to deemed compliant power plants; 2) clarifying that section 2901(j)(4)(A) does not apply to routine maintenance; 3) changing the term "system energy" to "unspecified energy" for clarity; 4) changing the phrase "participate in" to "enter into" under section 2902(b) for clarity; 5) removing the exemption for qualifying facilities; 6) adding a process for POUs to request, prior to entering into a procurement, an energy commission determination on whether a prospective procurement would increase the life of a power plant by five years, would constitute routine maintenance, or would comply with the EPS; 7) adding a process where POUs can request an exemption from the EPS for procurements under

pre-existing multi-party commitments; and 8) a few other changes to clean-up the regulations. CEED's comments pertain to none of these; therefore, these comments are irrelevant pursuant to Government Code section 11346.9(a)(3). Nevertheless, the Energy Commission has endeavored to respond to the general concerns raised.

a. CEED argues that the EPS "sets an unrealistically low GHG emissions standard." (Comments p. 2.)

Energy Commission Response:

SB 1368 directs the Energy Commission and the CPUC to establish a greenhouse gases emission performance standard "no higher than the rate of emissions of greenhouse gases for combined-cycle natural gas baseload generation." The CPUC undertook a thorough analysis to determine what this rate should be and, after receiving comments from various stakeholders and parties, concluded that 1,100 pounds of carbon dioxide per megawatt hour was the appropriate number. The Energy Commission concurred in this determination. No other party in this proceeding has argued that this number is not appropriate.

b. CEED refers to an Energy Ventures Analysis report (EVA Technical Evaluation) and argues that, as noted in this report, "the Standard contains no analysis or discussion of costs imposed on ratepayers resulting from the Standard, nor does it contain any analysis of the reliability concerns raised by homogenizing California's energy supply to rely upon natural gas." (Comments, p. 3.)

Energy Commission Response:

The report cited was prepared for a CPUC proceeding and is not particularly relevant to this rulemaking. While the report claims that no cost analysis was done, the Energy Commission has indeed performed such an analysis and determined that the regulations will not impose any non-administrative costs.

c. CEED claims that potential costs to ratepayers have not been addressed. CEED recommends the Energy Commission adopt emission offsets, portfolio averaging, and price caps to address costs to ratepayers. (Comments, pp. 3-5.)

Energy Commission Response:

The Energy Commission has determined that the regulations will not result in any increase in non-administrative costs to POUs or their customers. Nevertheless, the regulations contain exemption provision where application of the regulations on a covered procurement would result in "significant financial harm." SB 1368 does not give the Energy Commission the option or authority to adopt the measures proposed by CEED.

d. CEED argues that the EPS results in greater vulnerability to natural gas market reliability risks. (Comments, pp. 8-9.)

Energy Commission Response:

This comment is not directed at the Energy Commission's particular EPS, but at SB 1368's requirements that an EPS be established at a rate no higher than that for a combined-cycle generator. This is evident by CEED's reference to the fact that "oil, clean coal, petroleum coke, and most waste fuels are precluded." The Energy Commission determined that 1,100 pounds of CO2 per megawatt hour appropriately represents the emissions of a combined-cycle generation facility and any number larger than this would violate the requirements of SB 1368. CEED does not identify another number that would meet SB 1368; it just objects to SB 1368's intent to preclude long-term commitments in high greenhouse gas powerplants. CEED's assertion that the EPS results in natural gas market reliability risks is unsupported; the Energy Commission determined that currently available resources are sufficient to accommodate implementation of these regulations and no such reliability risks will result. Nevertheless, the regulations contain a provision to exempt of covered procurement from application of the EPS if the it is necessary to address system reliability concerns.

e. CEED argues that the EPS is set too low for most combined-cycle natural gas turbines to meet and that it must be raised to "include all existing CCGT applications." (Comments, p.10.)

Energy Commission Response:

After extensive analysis of this issue, the CPUC determined that 1,100 lbs CO2/MWh was the appropriate EPS to meet the directives of SB 1368. SB 1368 directs that the EPS be "no higher" than the rate of emissions for combined-cycle natural gas baseload generation, clearly leaving the door open for the CPUC and Energy Commission to establish a lower rate. The provision stating that all combined-cycle natural gas powerplants that are in operation or have an Energy Commission permit as of June 30, 2007, "shall be deemed to be in compliance" with the EPS is not a directive that the agencies establish the EPS high enough for all of these facilities to meet. It is instead a provision "grandfathering-in" these facilities regardless of what the ultimate EPS is set at. If the intent of SB 1368 had been to establish a standard that all existing combined cycle natural gas powerplants could meet, it would not have been necessary for the law to deem those plants to be in compliance.

f. CEED recommends that advanced technology projects be automatically exempt from the EPS. (Comments, p. 10-11.)

Energy Commission Response:

SB 1368 does not contain an exemption for research projects and the Energy Commission does not believe that it has the authority to include such an exemption in the regulations.

g. CEED argues that the EPS violates the Commerce Clause. (Comments, p. 11-18.)

Energy Commission Response:

See response to comment 4(j).

26. Form Letters of Support (Approximately 102) Identical to those submitted during the 45-day comment period, received on May 7 and 8, 2007.

See comment and response 11.

Comments made at May 23, 2007 Adoption Hearing

27. Audrey Chang, Natural Resources Defense Council

NRDC urges the Energy Commission to adopt the proposed regulations, stating that these regulations are consistent with the CPUC's rules and "will insure that the statutory requirements of SB1368 will be met," (Transcript, pp. 26-28.)

Energy Commission Response:

The Energy Commission agrees with this comment.

28. John Weldon, Salt River Project Agricultural Improvement and Power District (SRP)

SRP reiterates written comments that it filed, stating that it is pleased with the new 15-day language addressing routine maintenance. SRP argues that they believe the regulations still apply to existing, jointly owned facilities, there is no definition of the term "investment," and it's unclear "when the calculation of a potential five-year extension of a plant's life begins:" whether it would be at the termination date of an existing lease for a facility or whether it would be triggered by an improvement that would extend the operating life of the facility. (Transcript, pp. 28-31.)

Energy Commission Response:

See response to comments 24(a) through (c).

29. Norman Pedersen, Southern California Public Power Authority (SCPPA)

SCPPA comments that they believe the regulations meet the objectives of SB 1368 while being administratively feasible. SCPPA reiterates support for the comments and recommendations filed by CMUA. (Transcript, pp. 31-32.)

Energy Commission Response:

See response to comments 23(a) through (d).

30. Bruce McLaughlin, California Municipal Utilities Association (CMUA)

CMUA reiterates its recommendation that a 30 day limit be placed on the proceeding identified under section 2907. (Transcript, pp. 32-35.)

Energy Commission Response:

See response to comment 23(c).

Comments Originally submitted before the Notice of Proposed Action and attached to subsequent comments or generally incorporated by reference.

Several parties attached or incorporated by reference previous comments submitted before the Notice of Proposed Action was filed. Because these comments were originally written and submitted before the proposed regulations existed, the Energy Commission believes that these comments are not relevant to the proposed action. However, in the interest of addressing all concerns, we will summarize and respond to those comments that may still be pertinent, even though we believe this is not required under the APA.

Government Code section 11346.9(a)(3) requires the Final Statement of Reasons to contain "[a] summary of each objection or recommendation made *regarding the specific adoption, amendment, or repeal proposed*, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations *specifically directed at the agency's proposed action* or to the procedures followed by the agency in proposing or adopting the action." As the comments at issue were all written before the Energy Commission had published its proposed action, these comments are not directed specifically at the proposed action and, therefore, do not fall under the requirements of section 11346.9(a)(3).

31. Comments of the Los Angeles Department of Water and Power, dated December 7 and 18, 2006. (Comments submitted before and after the December 8, 2006 workshop and incorporated by reference in LADWP's 45-day comments. This summary also combines and references previous comments submitted.)

a. The EPS should be adopted to support, and not conflict with, efforts to increase/meet the RPS goals.

Energy Commission Response:

The Energy Commission also supports this goal. The proposed regulations prescribe that RPS eligible technologies (with the exception of hybrid systems) are pre-determined compliant with the EPS, and allow substitute power to be used under specified conditions in contracts with

intermittent renewable resources.

b. The EPS should apply only to new ownership investments and not existing, ongoing ownership investments (needed to maintain plants in reliable, safe, and efficient condition) in baseload generation.

Energy Commission Response:

Both the Energy Commission and the CPUC determined that SB 1368 does not provide for a blanket exemption for all investments in existing non-deemed compliant powerplants. In order to ensure that investments needed to maintain plants in reliable, safe, and efficient condition are not precluded, the regulations specify that routine maintenance will not trigger application of the EPS under section 2901(j)(4)(A).

c. The EPS should be based on the actual and projected future operating profile of a generating unit instead of its name plate capacity factor or unit design.

Energy Commission Response:

Section 2903(a) of the proposed regulations specifies that the EPS will be applied on the basis of a plant's or unit's expected operating profile.

d. The regulations should clarify that the EPS applies only to baseload units (and not non-baseload units) at a power plant.

Energy Commission Response:

The proposed regulations specify that the EPS applies only to baseload powerplants with an annualized plant capacity factor of 60 percent. For a facility with multiple generating units, the regulations apply at the "powerplant" level. "Powerplant" is defined as a single generating unit or multiple units at a single location that are operationally dependent on each other.

e. The EPS should apply only to procurement contracts for baseload generation and not other related contracts that may constitute long-term financial commitments (e.g. fuel contracts, operating agreements, co-tenancy agreements, wheeling contracts).

Energy Commission Response:

Section 2901(d)(2) specifies that the EPS applies only to those contracts that are for the procurement of electricity from a baseload powerplant.

f. The EPS should not apply to existing cogeneration units (or to the renewal of contracts with existing cogeneration units).

Energy Commission Response:

The only existing powerplants specifically exempted from the EPS by SB 1368 are existing combined cycle natural gas facilities. Though SB 1368 directs the Energy Commission to determine a cogeneration powerplant's compliance with the EPS in a special manner, it does not allow for these facilities to have an outright exemption.

g. The EPS should be phased in over time to minimize ratepayer costs and ensure system reliability (start at 1,400lbs/MWh).

Energy Commission Response:

SB 1368 requires the Energy Commission to establish and fully enforce the EPS by June 30, 2007 – a phased-in approach is not contemplated by this legislation. The Energy Commission has adopted an EPS of 1,100 lbs/MWh, which is consistent with the CPUC standard, and reflects cost and reliability considerations evaluated by the CPUC and CEC.

h. LADWP request and recommends a longer rulemaking schedule to allow adequate public comment and ensure that potential conflicts are disclosed, considered and addressed.

Energy Commission Response:

The Commission's rulemaking schedule is necessary to enable adoption and enforcement of SB 1368's provisions by July 1, 2007 as required by the legislation. Appropriate opportunities for public comment have been provided in keeping with the legislation's implementation timeframe.

32. Comments of the Natural Resources Defense Council, dated February 5, 2007 (Post January 11th and 18th workshop Comments. Pages 1-11. Incorporated by reference in their 45-day comments. This summary also combines and references previous comments submitted.)

a. The CEC should adopt the content of sections 1, 3, 4, 6, 7, 8, 9, and 11 of the PUC's interim rule, except for reference to compliance and enforcement processes. (Recommended revisions are provided to achieve this goal.)

Energy Commission Response:

The Energy Commission's regulations are consistent with those adopted by the PUC. NRDC acknowledges this fact in their comments on the 45-day and 15-day language.

b. A financial penalty provision should be included as part of the enforcement component of the self-certification process.

Energy Commission Response:

SB 1368 did not give the Energy Commission the authority to impose civil penalties.

c. A compliance filing checklist should be developed to ensure necessary and consistent information/supporting documents are provided to facilitate the Energy Commission's efforts to determine compliance.

Energy Commission Response:

Section 2909 sets forth what must be contained in a POU's compliance filing.

33. Comments of the California Municipal Utilities Association, dated February 5, 2007. (Post January 11th and 18th workshop Comments. Pages 16, 27, and 33. This summary also combines and references previous comments submitted.)

a. The Energy Commission should adopt different regulations than the CPUC for utility-owned power plants based on the substance of the comments provided by CMUA.

Energy Commission Response:

SB 1368 requires the Energy Commission to adopt an EPS that is consistent with that adopted by the CPUC. The Energy Commission's standard meets this requirement, and only deviates where warranted by the inherent differences between the entities regulated by the CPUC and those regulated by the Energy Commission.

b. The Energy Commission should not utilize a test for "new ownership investment" based on the extension of the life of a plant.

Energy Commission Response:

See responses to comments 9(k) through (v).

c. The Energy Commission should not utilize a test for "new ownership investment" based solely on increased capacity without more clearly stating the standards.

Energy Commission Response:

Section 2901(j)(4)(B) clearly specifies the standard: an investment that "results in an increase of greater than 10% in the rated capacity of the powerplant."

d. The Energy Commission should propose draft regulations based upon the reasonable alternatives presented by CMUA in regard to necessary or beneficial expenditures.

Energy Commission Response:

The Energy Commission worked closely with the stakeholders, including CMUA, to draft

regulations that tried to address all concerns while also ensuring compliance with SB1368. In response to concerns expressed by CMUA and others, the regulations clarify that routine maintenance does not trigger application of the EPS under section 2901(j)(4)(A).

e. The Energy Commission should immediately open a new rulemaking if it is unable to effect workable regulations to permit necessary or beneficial expenditures by POUs within the existing timeline of Docket 06-OIR-1.

Energy Commission Response:

On May 23, 2007, the Energy Commission successfully adopted the proposed regulations without objection from CMUA or any other POU. The Energy Commission believes that, with the clarifications provided by 15-day language, the regulations are workable and will successfully carry out the provisions of SB 1368.

f. The Energy Commission should establish regulations to permit the use of unspecified power from systems or other sources, and CMUA believes that the statute specifically directs the Commission to do so.

Energy Commission Response:

Section 2906 of the regulations contain provisions allowing the use of unspecified energy resources, under limited conditions, consistent with the CPUC's regulations and with SB 1368. The Energy Commission does not believe that allowing unspecified or system power more broadly is consistent with SB 1368.

g. The Energy Commission should implement the methods and provisions in CMUA's proposed regulation sections 2908 and 2908.5.

Energy Commission Response:

Sections 2908, 2909 and 2910 of the proposed regulations reflect the proposed language regarding the compliance filing and review process agreed to by CMUA and NRDC in their joint filing submitted on February 2, 2007.

h. The Energy Commission should immediately open a new rulemaking if it is unable to effect workable regulations for the use of unspecified sources by POUs within the existing timeline of Docket 06-OIR-1.

Energy Commission Response:

On May 23, 2007, the Energy Commission successfully adopted the proposed regulations without objection from CMUA or any other POU. The Energy Commission believes that, with the clarifications provided by 15-day language, the regulations are workable and will successfully carry out the provisions of SB 1368.

i. The Energy Commission should not adopt any form of pre-approval of POU covered procurements.

Energy Commission Response:

The Energy Commission has adopted a post-approval approach and has given POUs the option of seeking an Energy Commission determination on whether prospective procurements meet regulatory requirements. Sections 2908, 2909 and 2910 of the regulations reflect the proposed language regarding the compliance filing and review process agreed to by CMUA and NRDC in their joint filing submitted on February 2, 2007. The regulations provide for an immediate review of executed procurement contracts (submittal within 10 days of execution), with provisions for voiding the contract, should the Commission's review find that the procurement violates the terms of the EPS.

j. The Energy Commission should adopt regulations acknowledging that POUs can self-certify their covered procurements and may begin energy deliveries prior to Energy Commission review.

Energy Commission Response:

The Energy Commission has taken such an approach. Sections 2908, 2909 and 2910 of the regulations reflect the proposed language regarding the compliance filing and review process agreed to by CMUA and NRDC in their joint filing submitted on February 2, 2007. The regulations provide for an immediate review of executed procurement contracts (submittal within 10 days of execution), with provisions for voiding the contract and terminating energy deliveries, should the Energy Commission's review find that the procurement violates the terms of the EPS.

k. The Energy Commission should adopt public notice regulations no more stringent than section 2921 proposed by CMUA-NRDC.

Energy Commission Response:

The Energy Commission has adopted the proposed language. Sections 2908, 2909 and 2910 of the regulations reflect the proposed language regarding the compliance filing and review process agreed to by CMUA and NRDC in their joint filing submitted on February 2, 2007. Section 2908 in particular outlines the specific public noticing and participation requirements agreed to by CMUA and NRDC.

l. The Energy Commission should adopt compliance filing regulations no more stringent than section 2921 proposed by CMUA-NRDC.

Energy Commission Response:

The Energy Commission has adopted the proposed language. Sections 2909 of the regulations

reflect the proposed language regarding the compliance filing agreed to by CMUA and NRDC in their joint filing submitted on February 2, 2007.

m. The Energy Commission should expressly acknowledge that existing Energy Commission confidentiality rules apply to these regulations.

Energy Commission Response:

The Energy Commission's regulations already contain provisions for filing confidential documents. It is unnecessary to repeat those provisions, contained in sections 2501 through 2511 of Title 20, in these regulations.

n. The Energy Commission review process of covered procurements should include a "fast track" process that expeditiously identifies covered procurements that are clearly compliant or non-compliant.

Energy Commission Response:

The regulations require an Energy Commission determination on a compliance filing within 30 days of receipt of a complete filing. Additionally, section 2907 allows a POU to submit a prospective procurement for an Energy Commission determination on whether the procurement would trigger or comply with the EPS. These provisions, along with the pre-determinations contained in section 2903(b), ensure that procurement determinations will be handled expeditiously.

o. The Energy Commission review process by a Committee should result in a formal determination of EPS compliance/non-compliance that becomes effective 30 days after the determination.

Energy Commission Response:

The compliance review process results in a formal determination by the full Commission. The regulations specify that the Commission decision is not effective for 30 days, allowing POUs sufficient time to find another source of electricity.

p. The Energy Commission should provide a process whereby parties may, within a reasonable time period, appeal adverse Committee decisions to the full Commission.

Energy Commission Response:

All determinations require approval by the full Commission. Therefore, no appeals process is necessary.

Comments Submitted in Response to the July 10, 2007 Notice of Public Workshop and Committee Order

34. Comments of the Natural Resources Defense Council (NRDC), the Union of Concerned Scientists (UCS), and Sierra Club California on the Concerns Identified in OAL's Disapproval Decision for Regulations Establishing and Implementing a Greenhouse Gases Emission Performance Standard for Local Publicly Owned Electric Utilities, dated July 30, 2007.

a. The CEC regulations should clarify that the EPS established by SB 1368 applies to procurements involving powerplants of all sizes, although the CEC will only enforce the standard for those powerplants 10 MW and larger.

Energy Commission Response:

The Energy Commission agrees with this comment. No further response is necessary.

b. We support the exemption of added units of 50 MW or less to a deemed-compliant powerplant in section 2901 (j)(3) of the proposed regulations.

Energy Commission Response:

The Energy Commission agrees with this comment. No further response is necessary.

c. The allowance of a 10 percent increase in rated capacity for investments made in existing powerplants is not necessary to effectuate the purpose of SB 1368. Any increase in rated capacity should trigger the EPS.

Energy Commission Response:

In the 15-day language issued on August 10, 2007, the Energy Commission removed the exemption for activities resulting in up to a 10% increase in rated capacity and replaced it with an exemption only for activities that constitute routine maintenance. Based upon evidence in the record, the Energy Commission believes that allowing for activities that constitute routine maintenance is necessary to ensure that existing facilities do not deteriorate from lack of maintenance.

35. Comments of the California Municipal Utilities Association on the Office of Administrative Law's Disapproval of the Proposed Regulations Establishing a Greenhouse Gases Emission Performance Standard, dated July 30, 2007.

a. Section 2900 should be modified as follows to meet the clarity standard: "This Article applies to <u>covered procurements entered into by local publicly owned electric utilities. The requirements of Sections 2908, 2909, and 2910 apply only to</u> covered procurements involving powerplants 10MW and larger."

Energy Commission Response:

The Energy Commission agrees with the proposed language, but feels additional clarification is necessary to address OAL's concerns. The language suggested by CMUA has been incorporated into the 15-day language issued on August 10, 2007.

b. At a minimum, a 50MW exemption for a deemed-compliant powerplant is necessary to effectuate the purposes of SB 1368.

Energy Commission Response:

The Energy Commission agrees, and in the explanation accompanying the 15-day language issued on August 10, 2007 provided the evidence relied upon in making this determination.

c. "AB 32 compliance will be virtually impossible unless POU's are allowed to make substantial improvements at non-deemed compliant powerplants." The following changes should be made to section 2901(j)(4)(B):

"Any investment in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility that:

(A) is designed and intended to extend the life of one or more generating units by five years or more, not including routine maintenance;
(B) is designed and intended to convert a non-baseload generation powerplant to a baseload generation powerplant; or
(C) results in an increase ~~of greater than 10%~~ in the rated capacity of the powerplant except for capacity increases incidental to investments designed and intended to:

(i) preserve plant reliability or prevent asset deterioration;
(ii) comply with legal requirements; or
(iii) achieve environmental improvements."

Energy Commission Response:

While we agree that it is necessary to provide an exemption for routine maintenance activities to ensure that powerplants are adequately maintained and do not deteriorate, we believe that exempting activities for other purposes, such as plant improvements for environmental or other reasons, goes beyond the intent of SB 1368.

Comments Submitted During the Second 15-day Comment Period

36. Joint Comments from CEERT, ED, NRDC, Sierra Club California, and UCS, dated August 24, 2007.

The joint commenters express support for the proposed changes and find that they are consistent with SB 1368 and the rules adopted by the CPUC.

Energy Commission Response:

The Energy Commission agrees with this comment. No further response is necessary.

37. Comments from Environmental Entrepreneurs (E2), dated August 27, 2007.

E2 expresses support for the proposed changes.

Energy Commission Response:

The Energy Commission agrees with this comment. No further response is necessary.

38. Comments of the California Municipal Utilities Association to the Second Proposed 15-Day Changes to Regulations Establishing and Implementing a Greenhouse Gases Emission Performance Standard for Local Publicly Owned Electric Utilities, dated August 27, 2007.

a. CMUA expresses support for the changes to section 2900 and to the reasoning supporting 2901(j)(3).

Energy Commission Response:

The Energy Commission agrees with this comment. No further response is necessary.

b. CMUA requests that the exemption in 2901(j)(4)(B) be expanded to also allow increases in rated capacity for "improvements designed and intended to reduce future pollution-control costs."

Energy Commission Response:

No change. Based on comments received from OAL and others, the Energy Commission believes that adding such a provision exceeds the intent of SB 1368 because it would greatly expand the list of activities that would not trigger the EPS.

Comments Made at the August 29, 2007 Adoption Hearing

39. Bruce McLaughlin, CMUA

Mr. McLaughlin reiterated the request contained in CMUA's written comments that the regulations allow for an increase in rated capacity for improvements designed and intended to reduce future pollution-control costs.

Energy Commission Response:

See response to 39(b) above.

40. Audrey Chang, NRDC

Ms. Chang expressed support for the proposed changes and stated that CMUA's proposed change would exceed the intent of SB 1368.

Energy Commission Response:

The Energy Commission agrees with this comment. No further response is necessary.