BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

**In the Matter of:**

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

Docket No. 12-OIR-1

RULEMAKING WORKSHOP

California Energy Commission
DOCKETED
12-OIR-01
TN # 70222
APR 05 2013

# PROPOSED FINAL CONCLUSIONS

## Background

In 2007, the California Energy Commission adopted a greenhouse gases (GHG) emission performance standard and related requirements at California Code of Regulations, title 20, sections 2900 through 2913 (the EPS [Emission Performance Standard). The EPS applies to "covered procurements" entered into by local publicly owned electric utilities (POUs). The Energy Commission adopted the EPS under the authority of Senate Bill 1368 (Perata, Statutes of 2006, Chapter 598, § 2) (SB 1368), codified at Public Utilities Code sections 8340 and 8341.

On January 12, 2012, the Energy Commission adopted an Order Instituting Rulemaking (OIR) to initiate a rulemaking proceeding to consider possible modifications to the EPS. The OIR focuses on whether to:

1. Establish a filing requirement for all POU investments in non-EPS compliant facilities regardless of whether the investment could be considered a covered procurement;

2. Establish criteria for, or further define, the term "covered procurement," including specifying what is meant by "designed and intended to extend the life of one or more generating units by five years or more" and "routine maintenance;"

3. Make changes consistent with the requirements of Public Utilities Code section 8341, subdivision (f). This subdivision requires the Energy Commission, in a duly noticed public hearing and in consultation with the California Public Utilities Commission (CPUC) and the State Air Resources Board, to reevaluate and continue, modify, or replace the GHG emission

performance standard when an enforceable GHG emissions limit applicable to POUs is established and in operation.

4. Make any other changes to carry out the requirements of SB 1368.

On April 18, 2012, the Energy Commission conducted a public workshop regarding the OIR. Workshop participants included representatives from interested organizations and POUs. On July 9, 2012, Chair and Lead Commissioner Weisenmiller issued Tentative Conclusions and Requests for Additional Information (Tentative Conclusions), asking parties to file comments by July 27, 2012 on the four OIR topics outlined above. In addition, POUs were asked to provide additional information to allow for a better understanding of how investment decisions in non-EPS compliant facilities are made, including procedures and policies for approving expenditures and procedures for bringing particular investments to a governing body for approval.

On August 31, 2012, Chair and Lead Commissioner Weisenmiller issued a Request for Reply Comments on a limited set of issues in the proceeding related to reporting requirements and possible lowering of the EPS, noting that the Energy Commission had sufficient information in the record on other matters to make final decisions. On December 20, 2013, Chair and Lead Commissioner Weisenmiller issued a notice of proposed workshop and a request for comments related to the reporting requirements. On January 29, 2013, the Energy Commission conducted a second workshop and subsequently provided an additional opportunity for parties to respond to issues raised in the workshop.

## Discussion

Based on information gathered in the record from the workshops and related comments, the following discussion presents proposed, final conclusions on the factual and legal issues before the Energy Commission.[1] The four above-listed OIR topics frame the discussion.

1. Whether to establish a filing requirement for all POU investments in non-EPS compliant facilities regardless of whether the investment could be considered a covered procurement.

1 Participants in the rulemaking included representatives from the Natural Resources Defense Council and the Sierra Club (NRDC), Los Angeles Department of Water and Power (LADWP), M-S-R Public Power Agency, Southern California Public Power Authority (SCPPA), San Juan Participants, California Air Resources Board (ARB), Northern California Power Agency (NCPA) Imperial Irrigation District (IID), Modesto Irrigation District (MID), the City of Pasadena Water and Power Department, Redding Electric Utility, the Turlock Irrigation District (TID), the City of Santa Clara, the California Municipal Utilities Association, Pacific Gas & Electric (PG&E), Southern California Edison (SCE), the Independent Energy Producers (IEP) and Calpine.

Within 10 days after a POU enters into a covered procurement it must submit documentation to the Energy Commission under Sections 2909 and 2910 of the regulations that would allow the Energy Commission to evaluate whether the covered procurement complies with the EPS.[2] Under Section 2907, POUs may request Energy Commission determinations on whether a prospective procurement would extend the life of a powerplant by five years, constitute routine maintenance, or comply with the EPS. In addition to compliance filings, under Section 2908 POUs must notify the public, via the Energy Commission, whenever a governing body will deliberate in public on a covered procurement.

As NRDC and Sierra Club point out, no POU has submitted a compliance filing or Section 2907 request for determination for a non-EPS compliant facility. They suggest that the absence of these filings signals possible non-compliance with the EPS or a misunderstanding of EPS requirements. Yet, neither they nor anyone else offer evidence of POU non-compliance.[3] Such evidence is essential to overcome the legal presumption that POU decision-makers regularly perform official duties under the EPS.[4]

Notwithstanding the statutory presumption that favors POUs, NRDC and Sierra Club reasonably question the transparency of POU decision-making and suggest that the Energy Commission should require reporting of "all" investments at non-EPS compliant facilities to ensure compliance with SB 1368. From the April 18 workshop comments and related submissions it appeared that POUs practices for approval of investments, both for covered procurements and routine maintenance, in non-EPS compliant facilities differ. While these POU decision-making processes are consistent with the EPS, they arguably inhibit public scrutiny and review of investment decisions. Given that ratepayer (for example, public) protection is an essential feature of SB 1368, it is reasonable and appropriate to require greater transparency regarding POU investments, including those solely for routine maintenance. Thus, the issue is how to achieve

---

2 A covered procurement is either a new ownership investment in a baseload generation power plant or a particular type of new or renewed POU contract commitment for the procurement of electricity with a term of five or more years. (Regulations, § 2901, subdivision (d).) In turn, a "new ownership investment" includes any investment in an existing, non-deemed compliant power plant owned in whole or in part by a POU that is either (1) designed and intended to extend the life of one or more generating units by five years or more, not including routine maintenance, or (2) results in an increase in the rated capacity of the power plant, not including routine maintenance. (Regulations, § 2901, Subdivision (j).)

3 NRDC and Sierra Club suggest that the Energy Commission might obtain possible evidence or a better understanding of POU practices by requiring POUs to provide data on past, current, and planned investments in non-complaint power plants. However, mere speculation about POU practices is insufficient to justify requiring the requested disclosures. Instead, if anyone has supportable reasons to question POU investments, the appropriate manner of raising these concerns is filing a complaint or request for investigation with the Energy Commission under Section 2911.

4 See, Evidence Code, § 664 [providing that "[i]t is presumed that official duty has been regularly performed"].

greater transparency without imposing onerous financial and administrative burdens on POUs.

To better understand these POU decision-making processes, the Energy Commission, in its July 9, 2013, Tentative Conclusions, requested that parties file additional information. From the responses, it became clear that practices for approving covered procurements and other investments in non-EPS compliant facilities, including those for routine maintenance, varied widely among the various POUs. It also became clear, due to the variety of procedures and practices, that implementing a standard reporting requirement for "all" investments in a non-EPS compliant facility would be problematic.

POUs use a number of different practices and procedures for approving covered procurements for non-EPS compliant facilities, ranging from delegation of decision- making authority to staff, to approval of all line item expenditures by governing boards. For example, Modesto-Santa Clara-Redding Public Power Agency (M-S-R) takes all line item expenses for San Juan Generating Station, whether they are covered procurements or routine maintenance, to their governing board for approval.[5] In contrast, the SCPPA staff examines the investment for capital improvements at the San Juan Generating Station to determine whether the investment is a covered procurement. Where there is a question about whether a particular investment is a covered procurement, SCPPA staff presents the investment to the SCPPA Board of Directors for consideration. If SCPPA staff determines an investment is clearly routine maintenance it does not require board approval.[6] In some cases, a dollar threshold is used to determine when or if a particular investment would be taken to a governing board for approval.[7]

For routine maintenance, in many cases the operator of the non-EPS compliant facility is responsible for determining what investments are to be made consistent with prudent utility practices and the costs are simply passed on to those POUs holding a contract or ownership share. The individual POUs may have representatives on the various committees that make decisions on investments, but they are often not the actual operator of the facilities and are therefore not the

---

5 M-S-R has a formal process for review and approval of expenditures at San Juan Generating Station that involves approval of the total annual budget, as well as specific expenditures set forth therein. See Joint Comments of SCPPA. M-S-R, and the City of Anaheim in Response to the Tentative Conclusions, July 27, 2012, pp.4-5.

6 Ibid, pp 6-8.

7 In the case of LADWP, under arrangements for purchase of power from the Intermountain Power Project, the Intermountain Power Service Corporations, as the Operating Agent for the plant, prepares the annual operating and capital budgets, which must then be approved by the Intermountain Power Project Coordinating Committee and the Intermountain Power Agency. Decisions on items under $500,000 are delegated to the Operating Agent. Comments from LADWP to the Energy Commission's Tentative Conclusions, July 27, 2012, pp. 7-8

final decision-makers over investments for routine maintenance.[8] POUs note that, due to the sheer volume of instances of routine maintenance that occur, requiring POUs to report on all instances of routine maintenance, including those that are typically covered by an operations and maintenance budget, would unduly burden the staffs of POUs. The Energy Commission agrees that requiring reporting for "all" investments, including all instances of routine maintenance, on non-EPS compliant facilities would impose a significant burden and go beyond what is necessary and reasonable to ensure POU compliance with SB 1368.

In considering how to achieve greater transparency without imposing onerous financial and administrative burdens on POUs, Section 2908 of the EPS serves as a useful guide. As previously mentioned, Section 2908 requires POUs to post specified notices in accordance with the Brown Act, whenever their governing bodies will deliberate in public on a covered procurement.[9] Section 2908 also requires POUs make public the information and supporting documents provided to the governing bodies for their deliberations. POUs can satisfy these noticing requirements by providing the Energy Commission with the uniform resource locator (URL) that links to the required information.

In their July 25, 2012, comments, NRDC and Sierra Club put forward a proposal regarding notification requirements for all expenditures on non-EPS compliant facilities. They recommend that POUs provide the Energy Commission with URLs for the agenda and supporting documentation for all expenditures on non-EPS compliant facilities that POU governing boards deliberates on, whether the expenditures are believed to be covered procurements or not. They propose that the POUs provide this information to the Energy Commission within the timeframe set forth in the Brown Act. NRDC and Sierra Club also suggested that the Energy Commission ensure that relevant service lists are simultaneously informed of POU activity and that URL links to POU disclosures are posted on a publicly available Energy Commission website.

NRDC and Sierra Club suggested that the Energy Commission require notice be posted and available as soon as the relevant information is available and with

---

8 For example, SCPPA, as part owner of the San Juan Generating Facility, has a representative who sits on the various San Juan committees (including the Engineering and Operating Committee, the Fuels Committee, and the Project Coordinating Committee) that approve capital expenditures for the plant. Under the provision of the San Juan Participation Agreement, the Operating Agent (Public Service of New Mexico) must perform operating work (including maintenance, operating, purchasing, and so forth) in accordance with the Participation Agreement and prudent utility practice. If the Coordination Committee fails to reach agreement on a matter, the Operating Agent is authorized and obligated to conduct work necessary to operate and maintain the facility. Although SCPPA could vote no on a particular capital investment, it would still be required to bear its proportional share of the investments. The same circumstance holds for M-S-R or the City of Anaheim as partial owners of San Juan. See SCPPA San Juan Participants Comments on Questions in the Notice of Rulemaking Workshop, March 26, 2012, pp.14-17 and SCPPA, M-S-R and City of Anaheim Response to Tentative Conclusions, July 27, 2013, pp. 4-10.

9 Government Code Section 54950 and following.

sufficient notice to ensure public stakeholders are able to participate. In the case of agendas and agenda descriptions for public meetings, under Brown Act requirements, NRDC and Sierra Club acknowledge this may be 72 hours in advance of that meeting. In other cases, they suggest that information should be made available sooner. NRDC and Sierra Club recommend that all documents or information needed to allow for an informed understanding of POU investments in non-EPS compliant plants be made available through the notification methods detailed above. NRDC and Sierra Club suggest to ease potential administrative burdens, that a standard could be established such that expenditures under a threshold value, such as $50,000, need not be disclosed. The Energy Commission sought input on the elements of the NRDC and Sierra Club proposal outlined above, and any other related details contained in their July 27, 2012, comments, including the adequacy of the utility information that is made available.

In their September 28, 2012, reply comments the POUs, including LADWP, SCPPA, City of Anaheim, NCPA, California Municipal Utilities Association (CMUA), and M-S-R argued that NRDC and Sierra Club reporting proposal imposes significant burdens on POUs and Energy Commission staff and that it is unclear what will be achieved by the proposal that is not already achieved through the existing Brown Act provisions with which they comply. Several of the POUs believe there is no need to change the current reporting requirements because they provide sufficient transparency. They believe their ratepayers, who are the primary target audience for information on investments in non-EPS compliant facilities, already have access to agenda items and backup information on the individual POU websites.

In light of the continuing disagreement about whether additional reporting requirements were necessary and what they should entail, the Energy Commission scheduled a public workshop to specifically address reporting issues. In the December 20, 2012, Notice of Rulemaking Workshop, the Energy Commission requested input from the parties on several additional filing or notification options, which are outlined below.

**Option 1**: This option would entail a POU providing a URL linked to the agenda for the public meeting of the POU at which any investment in a non-EPS compliant plant is being deliberated in advance of each business meeting. The URL would be provided no later than three days prior to the meeting and would be posted on the Energy Commission's website. This option would not require the Energy Commission to post backup information on its website, nor would it distribute the URL and backup information to a listserv.

**Option 2:** This option would be an expansion of the existing public notice requirements for covered procurements (in Section 2908 of the regulations) to include "major" investments or "investments to meet environmental or other regulatory requirements." This would require a POU to provide a URL that links to the agenda of the public meeting at which investments are being deliberated and the backup information related to the investments' compliance with EPS. The

URL would be provided at least three days prior to the meeting and would require the Energy Commission to post the URL and backup information on the Energy Commission's website and notify the listserver.

**Option 3:** This option would have a POU provide an annual filing that prospectively identifies "major" investments in non-EPS compliant facilities and/or "investments to meet environmental or other regulatory requirements," for the upcoming year. The filing would contain a description of the investment and what it is intended to do, the costs, and an indication of when a decision to move forward is expected. This annual filing would supplement the existing filing requirement under Section 2909 of the regulations.

**Option 4:** This option would entail a POU providing an annual filing (similar to what the CPUC requires of LSEs) that contains a description of the investment, what it was intended to do and the costs, along with an attestation that the financial commitments entered into during the prior calendar year are in compliance with the EPS. The investments reported to the Energy Commission could be defined as a "covered procurement" or could also include "major" investments or "investments to meet environmental or other regulatory requirements." This annual filing would replace the existing filing requirement.

In addition to comments on the filing or notification options, the Energy Commission asked parties to address the questions regarding the possible use of the terms "major" and/or "investments to meet environmental or other regulatory requirements" to characterize investments on which POUs would provide notification. Following the January 29, 2013, workshop, the Energy Commission allowed parties to provide additional comments on issues raised during the workshop.

Based on discussion at the workshop and comments filed by parties some, areas of agreement began to emerge. NRDC and Sierra Club clarified that they were most concerned with reporting of investments from the three highest-emitting facilities used by the POUs.[10] With respect to the different reporting options, NRDC and Sierra Club stated, "the intent of each of these options was limited to a very small number of facilities, and likely a small number of investments at those facilities." With this clarification in mind, the parties began to discuss ways to narrow the terms "major" and "investments to meet environmental and other regulatory requirements," or develop alternative terms, to focus reporting requirements on this narrow set of investments of most concern.

All of the POUs expressed concerns with the proposed use of the term "major" to identify the type of investments on which POUs would report to the Energy Commission as they believed it to be overly broad, arbitrary, or subjective. The POUs also expressed concerns with the proposed use of the term "investments to meet environmental or other regulatory requirements" because of the multitude

10 Transcript from Tuesday, January 29, 2013, workshop, pp. 37-38.

of environmental and regulatory requirements at non-EPS compliant facilities involving not only air quality and GHG emissions, but California Environmental Quality Act/National Environmental Policy Act, toxics and hazardous substances, water and wastewater, industrial hygiene, and worker safety.

In their February 15, 2013, comments NRDC and Sierra Club and the POU parties came very close in suggesting terms to describe the limited set of investments on which POUs would be required to provide notification. NRDC and Sierra Club suggested using the term "expenditure to meet environmental regulatory requirements, whether or not the utility has determined that the expenditure is a covered procurement." The POU parties suggested use of the term "ownership investment over $5 million to meet environmental or regulatory requirements specifically related to emission controls at non-EPS compliant baseload plants." POU parties suggested using a $5 million threshold for the reporting requirement based on the amount of annual capital investments made at the San Juan Generating Station, which have averaged about $90 million per year. As the POU Parties point out, NRDC and Sierra Club in earlier comments had suggested a $250,000 threshold, which would amount to only 0.028 percent of the annual capital expenditure. The $5 million threshold would amount to roughly 0.56 percent of the annual capital budget.

The Energy Commission concludes that the threshold for reporting under Section 2908 should be set at $2.5 million (or about 0.28 percent of annual capital expenditures for the San Juan facilities), which is a more reasonable threshold for reporting. Consequently, the Energy Commission believes the term "expenditures over $2.5 million to meet environmental regulatory requirements at non-EPS compliant facilities" is an appropriate term for use in Section 2908. It clearly identifies the types of investments and sets a clear dollar amount that triggers the need for a POU to file a notice with the Energy Commission.

Another clarification that was helpful in considering reporting requirements was how the Energy Commission would use the information under the four proposed options and whether the Energy Commission would be in a "review and approval role" with respect to the investments being reported by POUs. The POUs, in verbal and written comments, expressed strong concerns about having anyone other than their governing boards approve investments in non-EPs compliant facilities or determine whether the investments were covered procurements. Of course, the exception to this would be if a POU filed a request for Energy Commission evaluation of a prospective procurement under Section 2907 to determine whether it was a covered procurement. The Energy Commission staff clarified that the role of the Energy Commission for the purpose of the reporting options would be a "notification role," rather than a "review and approval role."[11]

There were also disagreements between the parties over which of the reporting options were most appropriate. The POU parties continued to argue that that the

11 Transcript from January 29, 2013 Workshop, p. 60.

current filing requirement in the EPS is sufficient to ensure compliance with SB 1368. However, they did propose a compromise in the event the Energy Commission determined additional reporting was necessary. The POUs' compromise encompasses the spirit of staff's proposed Option 2.[12] NRDC and Sierra Club continued to recommend that the Energy Commission should adopt slightly reworded versions of both Options 2 and 3, which would include a notification requirement in addition to an annual prospective filing on expenditures. The Energy Commission believes it is reasonable to establish a filing requirement based on Option 2 since this option provides for notification within the timelines of the Brown Act and the parties agree that this is an appropriate reporting mechanism. As part of Option 2, POUs would be required to notify the Energy Commission and persons on the most current service list.

Therefore, the Energy Commission concludes that it should revise the existing noticing requirement under Section 2908 to include the term "expenditures over $2.5 million to meet environmental regulatory requirements for non-EPS compliant facilities" and to add a provision that POUs provide notice to persons on the Energy Commission's most current climate change service list.

Under the Brown Act, Option 2 provides notification 72 hours in advance of a meeting, or 24 hours in advance of a special meeting, in which a POU is deliberating an investment in a non-EPS compliant facility. However, the Energy Commission notes that this is a relatively short period of time for a party to receive notification about investments in non-EPS compliant facilities. NRDC and Sierra Club state that "advanced notice of contemplated major investments and those intended to meet environmental and/or other regulatory requirements benefits all stakeholders by allowing for sufficient lead time to vet whether the investment is consistent with SB 1368 and avoid improper expectation and eleventh hour disputes."[13] In the interest of transparency, the Energy Commission believes that an additional annual prospective filing requirement, as outlined in Option 3 and advocated by NRDC and Sierra Club, would provide interested parties a longer period of time to examine and consider investments in non-EPS compliant facilities, so that when they receive notification under the Brown Act timelines they are prepared to more meaningfully participate in POU deliberations.

As outlined in Option 3, this annual reporting requirement would include a description of the investment, what it was intended to do, and the associated costs. NRDC and Sierra Club also suggested that the annual filing include unexpected investments made in the previous year that could not reasonably be known at the time the previous years' report was filed.[14] This annual reporting

---

12 M-S-R, SCPPA, City of Anaheim and LADWP Comments on the January 29, 2013 Workshop, February 15, 2013, pp 4-7.

13 Sierra Club and NRDC Comments on January 29, 2013, Notice of Rulemaking Workshop, January 22, 2013, pp 2-3.

14 Ibid.

requirement is similar to what the CPUC requires of Energy Service Providers (ESPs) for compliance with SB 1368.[15] The Energy Commission concludes that this is a reasonable element of the annual reporting requirements. Rather than setting a calendar date for the annual filing requirement, the Energy Commission believes it is most practical for each POU to submit their annual report within 10 days of approval of the annual capital budgets for the non-EPS compliant baseload facilities.

The Energy Commission believes that an annual reporting requirement can be crafted so it imposes minimal reporting burdens on POUs, especially if POUs continue to aggressively pursue divestiture of non-EPS compliant baseload facilities. The POUs have requested that any revisions to new reporting requirements be deemed applicable only to facilities where the ownership interest or contract is for greater than five years from the effective date of the regulatory revision, given the extensive and extraordinary effort they have been making to lawfully and expeditiously divest.[16] In addition, the POUs are requesting that such revisions take effect no sooner than January 1, 2014, to allow the POUs to make further progress toward their long-term and ongoing divestiture efforts.

The Energy Commission agrees that the effective date of the new reporting requirement be delayed as requested by the POUs. The Energy Commission also thinks it is reasonable for a new annual reporting requirement only apply to ownership interests and contracts of five years or longer, so long as there is a binding agreement in place to ensure that divestiture occurs within that 5-year timeframe. The Energy Commission notes that under this set of circumstances the new annual reporting requirement would become moot. The Energy Commission concludes that the benefits of increased transparency from a new annual reporting requirement outweigh the minimal burdens imposed.

The Energy Commission believes the revisions to Section 2908 of the regulations discussed above strike an appropriate balance between the need for transparency and the need to impose minimal administrative burdens. The Energy Commission proposes the following changes to Section 2908:

**§ 2908 Public Notice**

(a) Each local publicly owned electric utility shall post notice in accordance with Government Code Section 54950 et seq. whenever its governing body will deliberate in public on a covered procurement.

---

15 ESPs, community choice aggregators, and electrical corporations, other than SCE, PG&E and San Diego Gas & Electric Company are required to file an annual letter, due by February 15th of each year, attesting to the Energy Commission that the financial commitments it has entered into during the prior calendar year are in compliance with the EPS. CPUC D-07-039, pp. 167-171.

16 M-S-R, SCPPA, City of Anaheim and LADWP Comments on the January 29, 2013, Workshop, February 15, 2013, p. 15.

~~(a)~~ (1) At the posting of the notice of a public meeting to consider a covered procurement or any expenditure over $2.5 million to meet environmental regulatory requirements at a non-EPS compliant baseload facility, the local publicly owned electric utility shall notify the Commission and all persons on the Commission's most current Climate Change service list of the date, time and location of the meeting so the Commission may post the information on its website. This requirement is satisfied if the local publicly owned electric utility provides the Commission and all persons on the Commission's most current Climate Change service list with the uniform resource locator (URL) that links to this information.

~~(b)~~ (2) Upon distribution to its governing body of information related to a covered procurement's compliance with the EPS or any expenditure over $2.5 million to meet environmental regulatory requirements at a non-EPS compliant baseload facility, for its consideration at a noticed public meeting, the local publicly owned electric utility shall make such information available to the public and shall provide the Commission and all persons on the Commission's most current Climate Change service list with an electronic copy of the document for posting on the Commission's website. This requirement is satisfied if the local publicly owned electric utility provides the Commission and all persons on the Commission's most current Climate Change service list with the URL that links to the documents or information regarding other manners of access to the documents.

~~(c)~~ (3)For a covered procurement involving a new or renewed contract with a term of five years or more, the documentation made publicly available at the time of posting pursuant to Subsections (a) and (b) shall include at a minimum:

~~(1)~~ (A) A description of the terms of the contract and option(s) to extend the contract;

~~(2)~~ (B) A description and identification of the powerplant(s) providing energy under the contract, including, but not limited to, power generation equipment and fuel type;

~~(3)~~ (C) A description of the design or operation of the powerplant(s) so as to indicate whether or not the powerplant(s) operates to supply baseload generation;

~~(4)~~ (D) An explanation as to how the contract is compliant with the EPS; and

~~(5)~~ (E) Supporting documents or information that allow for assessment of compliance with the standard, including, but not limited to, staff assessments and reports to the local publicly owned electric utility's governing body, planned or historical production and fuel use data, and applicable historical continuous emissions monitoring data.

~~(d)~~ (4) For a covered procurement involving a new ownership investment, the documentation made available at the time of posting pursuant to Subsections (a) and (b) shall include at a minimum:

~~(1)~~ (A) For new construction or purchase of an existing generating unit or powerplant, a description and identification of the planned powerplant or the purchased asset specifying the power generating equipment, power source, such as fuel type, wind, or biomass, all supplemental fuel sources, and all available historical production and fuel use data;

~~(2)~~ (B) For an incremental investment that is a covered procurement as defined in Section 2901(d), a description of the modifications to the unit(s) and their impact on generation capacity, carbon dioxide emissions, and planned operation.

~~(3)~~ (C)For non-renewable resources, the heat rate or carbon dioxide emissions profile of the powerplant and the source of this information.

(b) Except as provided below, each local publicly owned electric utility shall file annually a notice identifying all investments of $2.5 million dollars or more that it anticipates making in the subsequent 12 months on non-EPS compliant baseload facilities to comply with environmental regulatory requirements. The filing shall contain a description of the investment and what it is intended to do, the associated costs, and an indication of when a decision to move forward is expected. The filing shall also include such any investments made in the previous 12 month period that were not identified in the previous annual notice. The filing shall be made within 10 days of the approval of the annual budget for the non-EPS compliant baseload facility.

(c) A local publicly owned electric utility that has entered into a binding agreement to divest within 5 years of all baseload facilities exceeding the EPS is exempted from compliance with subsection (b) for as long as the binding agreement is in place or until such time that it has completed divestment of all non-EPS compliant baseload facilities.

2. Whether to establish criteria for, or further define, the terms "covered procurement," including specifying what is meant by "designed and intended to extend the life of one or more generating units by five years or more" and "routine maintenance."

To date, there are no specific recommendations for further refining or defining the phrases "designed and intended to extend the life" or "routine maintenance." Nor is it clear that consideration of any such recommendations would be productive. In fact, regarding the difficulty of further refining these phrases, the Energy Commission's *Final Statement of Reasons for Adoption of Regulations Establishing and Implementing a Greenhouse Gases Emission Performance Standard for Local Publicly Owned Electric Utilities* (*Final Statement*) states:

> The Energy Commission believes that this provision ["designed or intended to extend the life of one or more generating units by five years or more, not including routine maintenance"], ... 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. (emphasis added)[17]

17 *Final Statement*, pp. 38-39, emphasis added.

Moreover, the Energy Commission determined that:

> "[t]o 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."[18]

Accordingly:

> "[g]iven the complexity of the 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 [under Section 2907] to make these determinations was deemed the most workable approach."[19]

Notably, Section 2907 allows POUs to request Energy Commission determinations on whether a prospective procurement would extend the life of a powerplant by five years, constitute routine maintenance, or comply with the EPS. Regarding routine maintenance, the Energy Commission contemplated that various, different capital improvements, renovations, or upgrades, may well come within the ambit of routine maintenance. It also made clear that there should be no doubt that activities go beyond routine maintenance when, for instance, they are undertaken solely or principally for compliance with legal or regulatory requirements or to achieve environmental improvements.[20]

In explaining why routine maintenance is exempt from the EPS, the Energy Commission stated:

> 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

---

18 *Final Statement*, p. 39.

19 Ibid.

20 See, for example, *Final Statement*, pp. 21, 23, 26-28, 32, 35, 39-40, 42-43, 78.

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.[21]

If a POU is uncertain if an activity is routine maintenance, it can petition for an Energy Commission determination under Section 2907. Similarly, if the Energy Commission or a POU determines that an activity will go beyond routine maintenance, the POU may seek an exemption from the Energy Commission as provided by Sections 2912, allowing case-by-case Energy Commission review and exemption for reliability and financial exemptions and Section 2913, allowing for case-by-case Energy Commission review and exemption for preexisting multiparty commitments.

Although the EPS regulations give POUs the initial opportunity to determine what activities constitute "routine maintenance" or are "designed and intended to extend the life," the Energy Commission and public may challenge those determinations. In particular, Section 2911 authorizes the Energy Commission to conduct complaint or investigation proceedings, or both, on its own motion or at anyone's request. Yet, despite the general accessibility of POU annual reports, operating budgets, resource plans, and the like, the Energy Commission has received no complaints or investigation requests.

In the Tentative Conclusions, the Energy Commission determined that absent clear recommendations or guidance for further refining or defining "routine maintenance" and "designed and intended to extend the life," or facts establishing POU misapplication of the EPS compliance requirements, there is no basis for modifying these phrases or establishing additional criteria for a "covered procurement." In comments from the parties received on July 27, 2012, there appears to be agreement that defining additional criteria or further defining these terms in the regulations is not warranted.

In their comments, LADWP fully supports the Energy Commission's tentative conclusion that changes to the definition "routine maintenance" or referenced phrases are unwarranted.[22] The Joint POU Parties[23] state in their July 27, 2012, Comments that given the caution expressed by the Energy Commission in the *Final Statement* about including further definitions of criteria in the EPS regulation, and given the fact that no party to this proceeding has made any specific recommendations for further refining and defining the phrases used in the EPS regulation, this proceeding should be closed with no further defining of terms in the EPS regulation.[24]

---

21 *Final Statement*, pp. 16-17.

22 Comments from LADWP to the California Energy Commission's Tentative Conclusions, July 27, 2012 (July 27, 2012 LADWP Comments), p.4.

23 The Joint POU Parties include SCPPA, M-S-R, and the City of Anaheim.

24 Joint Parties Response to Tentative Conclusions, July 27, 2012, p. 12.

NRDC and Sierra Club make no specific reference to the need to develop criteria or further define terms in the current regulations in their comments. NRDC and Sierra Club, however, state that they "support the conclusion that activities undertaken to achieve environmental upgrades or comply with legal mandates are covered procurements."[25] The Energy Commission believes that NRDC and Sierra Club have incorrectly interpreted the conclusions laid out in the earlier 2007 EPS Rulemaking and July 8, 2012, Tentative Conclusions and the Energy Commission believes that some clarification of the issue is in order. NRDC and Sierra Club state that:

> The Energy Commission cites the Final Statement of Reasons extensively to conclude that "there should be no doubt" that activities "undertaken solely or principally for compliance with legal or regulatory requirements or to achieve environmental improvements" "go beyond routine maintenance" and therefore fall outside the exception of "routine maintenance" and are therefore covered procurement. (emphasis added)[26]

While the Energy Commission agrees that such investments fall outside the exception of "routine maintenance," the Energy Commission does not agree that these investments are therefore "automatically" covered procurements, as NRDC and Sierra Club have asserted in the highlighted text above. The many citations to the *Final Statement*, referenced in NRDC and Sierra Club comments, deal with the fact that the Energy Commission has determined that investments to make environmental improvements or to comply with legal or regulatory requirements are not exempted from the regulations because that would violate the intent and provisions of SB 1368.[27]

One more step is required before determining that such an investment constitutes a covered procurement: determining under Section 2907 of the regulations whether the investment is designed and intended to extend the life of the plant by 5 years or more, increases the rated capacity of the plant, or is designed and intended to convert from nonbaseload to baseload generation. Only if the investment meets one of these requirements under the regulations does it then qualify as a "covered procurement." To automatically conclude that any investment that goes beyond routine maintenance is a "covered procurement" is inconsistent with the plain meaning of the regulations. Thus, investments undertaken to achieve environmental upgrades or comply with legal mandates are neither automatically covered procurements nor automatically not covered procurements — each must be analyzed independently to determine if it

---

25 Joint Comments of the NRDC and Sierra Club in Response to the Energy Commission's Notice of Rulemaking Workshop, July 27, 2012, at Section 2(a).

26 Ibid.

27 *Final Statement*, p. 44.

triggers one of the three attributes of a covered procurement. In adopting the original regulations, the Energy Commission anticipated that POUs would utilize Section 2907 to obtain a decision for these types of investments. To date, such has not been the case.

With regard to whether further definitions are necessary, based on the extensive record on this issue, both in the original proceeding and in this rulemaking, the Energy Commission reiterates its finding that developing criteria or further refining or defining the phrases "designed and intended to extend the life" or "routine maintenance" is unnecessary.

3. Whether the Energy Commission must or should make changes consistent with the requirements of Public Utilities Code section 8341, subdivision (f).

Public Utilities Code, Section 8341, Subdivision (f) requires the Energy Commission, in a duly noticed public hearing and in consultation with the CPUC and the ARB, to reevaluate and continue, modify, or replace the GHG emission performance standard when an enforceable GHG emissions limit is established and in operation, that is applicable to local publicly owned electric utilities.

As the agency tasked with implementing Assembly Bill 32 (Núñez, Global Warming, Statutes of 2006), the Energy Commission believes that ARB is best able to characterize whether the regulations established thereunder constitute an emissions limit applicable to local publicly owned electric utilities pursuant to SB 1368. Upon close consideration and in consultation with ARB, the Energy Commission determines that there is currently no GHGT emissions limit applicable to POUs. Based on this conclusion, the Energy Commission will not "reevaluate and continue, modify, or replace" the Commission's EPS pursuant to this provision at this time. The ARB points out that the EPS is an important part of California's overall approach to reducing GHG emissions and provides an important complement to cap-and-trade.[28] By statute, the Energy Commission is to undertake a reevaluation of the EPS when an emissions limit is established that is "applicable to local publicly owned electric utilities." ARB explains:

> ARB is implementing a cap-and-trade program that creates an enforceable economy-wide cap covering approximately 85 percent of California's greenhouse gas emissions. The cap-and-trade program became effective January 1, 2012. The program does not set any specific emissions limit for any single entity, or for any sector nor does the program require specific reductions in emissions from any entity or sector. Instead, it establishes a program-wide limit on aggregate emissions from those covered by the program. This limit on emissions (the cap) and the ability to trade create a price signal needed to drive long-term investment in

28 Email RE: Docket No. 12-OIR-1 Rulemaking to Consider Modification of Regulations Establishing a Greenhouse Gases Emission Performance Standard For Baseload Generation of Local Publicly Owned Electric Utilities, from Steven Cliff, ARB, June 28, 2012.

> cleaner fuels and more efficient use of energy. The program is designed to provide covered entities, including local publicly owned utilities, the flexibility to seek out and implement the lowest-cost options to reduce emissions.
>
> Because the cap-and-trade program does not create an emissions limit applicable to local publicly owned electric utilities, ARB believes the trigger for the Energy Commission to reevaluate the emission performance standard has not been met as a result of ARBs enforceable cap-and-trade regulation.[29]

The ARB provided a number of public documents that demonstrate how the cap-and-trade program is intended to function with an economy-wide cap, rather than establishing limits on specific entities or sectors. For example, the cap is described as a "cap on aggregate emissions," "it applies to all sources combined" and "individual facilities do not have caps."[30] Based on the information provided by the ARB regarding their interpretation of Assembly Bill 32, the Energy Commission agreed in the Tentative Conclusions that no "emissions limit" that applies to POUs has been established by the cap-and-trade regulations and that mandatory reevaluation of the EPS regulations is not triggered pursuant to section 8341(f).

NRDC and Sierra Club believe the EPS is a critical component of California's long-term policy to reduce global warming pollution and should therefore remain in place indefinitely. They support the Energy Commission's initial conclusion that evaluation under Public Utilities Code Section 8341, Subdivision (f) is not yet appropriate.

In contrast, the Joint POU Parties urge the Energy Commission to reconsider the conclusion that the ARB Cap-and-Trade Regulations do not establish an emissions limit on POUs that triggers a reevaluation of the EPS regulation under Section 8341(f) of the Public Utilities Code. The Joint POU Parties argue that the ARB information on which the Energy Commission relied for its decision misinterprets the section 8341(f) phrase, "an enforceable greenhouse gases emissions limit," as meaning an entity-specific limit that would apply to a single local POU. They note the ARB information observes that the ARB's cap and trade program does not trigger Section 8341(f) because it creates "an enforceable economy-wide cap covering approximately 85 percent of California's

---

29 Ibid.

30 ARB Staff Presentation, Public Hearing to Consider the Adoption of a Proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation, Including Compliance Offset Protocols, Dec 16, 2010. See slide 9. ARB Staff Presentation, ARB Public Hearing to Consider Adoption of the Proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation, Including Compliance Offset Protocols, October 20, 2011. See slide 7.

GHG emissions," but does not impose a "specific emissions limit" on a "single entity."

The Joint POU Parties believe that ARB's interpretation of the SB 1368 provision is flawed "insomuch as the cap-and-trade program creates an economy-wide cap that includes the POUs at issue, the cap-and-trade program **does** impose a cap on POUs."[31] The Joint POU Parties assert, contrary to ARB, that section 8341(f) does not require the establishment of entity-specific emissions limits that would apply to individual POUs. Instead, they believe it requires a reevaluation of the EPS when "an enforceable greenhouse gas emissions limit" is established that is applicable to "local publicly owned electric utilities" as a group.

The fundamental question appears to be whether the cap-and-trade program adopted by ARB constitutes a "greenhouse gases emissions limit...applicable to local publicly owned electric utilities" as contemplated under SB 1368. Based on comments received, and giving great weight to the ARB's description of how the cap-and-trade program will function, the Energy Commission has determined that the answer is no. As described by ARB, the cap-and-trade program does not set any specific limit for any sector, nor does the program require specific reductions in emissions from any entity or sector. The "cap" is the aggregate limit on GHG emissions from covered sources from 2012–2020. Covered entities may either reduce their emissions in accordance with the declining cap, or compete for a decreasing supply of allowances. Covered entities are also able to purchase offsets in addition to allowances.

Thus, there is no specific limit with which POUs are required to comply — they are given a set number of allowances and if they wish to emit more than what is covered by the allowances, they may purchase additional allowances or offsets enabling them to do so. The plain language of SB 1368 refers to an emissions limit applicable to POUs, which the Energy Commission, giving great weight to ARB's interpretation, takes to mean a hard and fast limit that POUs specifically are not allowed to exceed. No party has provided a convincing argument that the legislature intended "greenhouse gases emissions limit...applicable to local publicly owned utilities" to include a flexible cap-and-trade program that focuses on an economy-wide cap instead of individual sector or project-specific limits. Therefore, the Energy Commission concludes that Section 8341(f) has not been triggered by implementation of ARB's cap-and-trade program and the Energy Commission is not required, at this time, to reevaluate the EPS and determine whether to continue, modify, or replace it.

4. Whether to make any other changes to the EPS regulations to carry out the requirements of SB 1368.

In the Tentative Conclusions, the Energy Commission noted that some parties had expressed an interest in revising the current GHG EPS, which is currently

31 Joint Parties Response to Tentative Conclusions, July 27, 2012, p. 14.

set at 1,100 pounds of carbon dioxide per megawatt hour of electricity and requested comments on this. In their July 27, 2012, comments, NRDC and Sierra Club state that the analysis they submitted demonstrates that an EPS of 825–850 pounds per megawatt hour, with potentially a higher EPS for smaller facilities, is feasible and economic today. NRDC and Sierra Club believe the current EPS is not sufficiently stringent to require the use of the most efficient and least polluting base-load fossil-fueled technology commonly available today — high efficiency natural gas combined-cycle.

The Energy Commission gave parties an opportunity to respond to the NRDC and Sierra Club proposal to lower the EPS and the technical information they have provided on this subject in reply comments. All of the POUs providing comments, including SCPPA, Anaheim, M-S-R, LADWP, NCPA, CMUA, TID, MID, Imperial Irrigation District, City of Santa Clara, Redding Electric Utility, and Pasadena Water and Power Department, opposed lowering the EPS to the level proposed by NRDC & Sierra Club. In addition, investor owned utilities, including PG&E, and SCE, as well as the IEP, opposed lowering the EPS. The Energy Commission noted that NRDC and Sierra Club relied on a national database to support their recommended EPS level. Although this data includes selective catalytic reduction in some cases, it does not account for corresponding allowable emission of nitrogen oxide and ammonia slip, which apply in California. The Energy Commission sought input on this and any other adjustments that might be necessary to reflect California specific conditions. Several parties, including LADWP, NCPA, SCPPA, and Anaheim, all responded that national data would need to be adjusted to reflect California-specific conditions such as environmental regulations and operation in desert climates.

Many parties believed that the NRDC and Sierra Club proposed EPS was overly optimistic and unworkable. For example, NCPA noted that "an EPS in the range suggested by NRDC and Sierra Club would adversely impact a significant portion of the state's electricity supply."[32] LADWP stated that the "suggested standard is impractical and presents unmanageable risks of either stranding clean and reliable natural gas generation or requiring utilities to procure excess generation."[33] M-S-R characterizes the proposed lower EPS as "a virtually unattainable level.[34]

Given that the EPS applies only to power plants that are designed and intended to operate as baseload facilities, the Energy Commission sought input on how many of California's baseload natural gas power plants would be affected by a lower EPS, such as in the range NRDC & Sierra Club have suggested. Several

---

32Reply Comments of the NCPA in Response to August 31, 2012 Request for Reply Comments, September 28, 2012, p.9.

33 Reply Comments of LADWP to the California Energy Commission's Tentative Conclusions, September 28, 2012, p.3.

34 M-S-R Public Power Agency Reply Comments, September 28, 2012, p2.

POUs, including NCPA, TID, Santa Clara, Redding, and Pasadena, noted that several of their plants, even highly efficient plants added in the last few years, would barely, if at all, be able to meet the NRDC & Sierra Club proposed EPS. NCPA states that it "does not believe that any of the natural gas fired power plants operated by it or its member agencies would meet the lower EPS."[35] NCPA further indicated that even the Lodi Energy Center, which was dedicated in August 2012, employing the latest state of the art emission reduction and efficiencies operation would barely meet the minimum threshold proposed by NRDC and Sierra Club.[36] TID noted that despite "being a relatively new and highly efficient natural gas combined cycle plant, the Walnut Energy Center would not likely meet the newly proposed, drastic change to the EPS.[37] Redding notes that its "combined-cycle operations currently meet the 1,100 lbs CO2/MWh requirements, but would not be able to meet an 850 pounds per megawatt hour threshold proposed by NRDC and Sierra Club."[38]

IEP reviewed the data supplied by NRDC and Sierra Club to support their claim that most of the power plants built in California since the inception of the EPS would meet their proposed lower EPS and noted that "it is apparent that only two of the ten California facilities cited in their table (in the net representative rate column) actually meet the lower EPS they are proposing. In fact, the other eight facilities that are listed would not be in compliance if the proposed emissions performance standard were in place today."[39] SCPPA argued that the same data showing that most natural gas plants would not meet the lower EPS standard failed to provide the Energy Commission with reasonable cause to reconsider the EPS.[40]

In addition, the Energy Commission sought input on the extent to which a lower EPS may impact the design or ability of natural gas power plants to operate more flexibly for integrating renewable resources, since the cycling of these plants entails lower efficiencies and fast ramp capabilities, and thereby an increase in emissions. All of the POUs providing comments, as well as IEP, PG&E and Calpine, are concerned that changes in operation for firming and shaping of renewable resources, or for flexible delivery of electricity (ramping units up and down), would necessarily increase a facility's emissions and likely cause plants to exceed the lower EPS proposed by NRDC and Sierra Club.

---

35 Ibid, p.8.

36 Ibid, p.9

37 Reply Comments of TID, September 28, 2012, p.2.

38 Redding Electric Utility Reply Comments on Revising the Current Emission Performance Standard, September 28, 2012, p. 2.

39 Reply Comment of the IEP Association to Consider Possible Modifications to the Emissions Performance Standard Docket 12-OIR-1, September 28, 2012, p. 5-6.

40 SCPPA San Juan Participants and the City of Anaheim Reply Comments, September 28, 2012, p. 22.

With the exception of NRDC, Sierra Club, and Calpine, no other party providing comments supported lowering the EPS at this time. Several parties, including CMUA and a number of POUs, argued that the Energy Commission should only take action to lower the EPS in cooperation with the CPUC, ARB, and California Independent System Operator, as required by SB 1368. They also note that the Energy Commission's EPS "shall be consistent with the standard adopted by the commission (CPUC) for load-serving entities."[41] The Energy Commission agrees that SB 1368 requires the Energy Commission's EPS to be consistent with that established by the CPUC. After consultation with the CPUC and other agencies, the Energy Commission concludes that lowering the Energy Commission's EPS at this time would provide little if any benefit.

The Energy Commission notes that IOUs under the CPUC's jurisdiction have already divested themselves of non-EPS compliant facilities. In addition, the POUs have provided comments in this rulemaking indicating that they are actively pursuing early divestiture of their contracts or ownership of non-EPS compliant facilities. The Energy Commission believes that early divestiture of these non-EPS compliant facilities is a primary objective of SB 1368 and the EPS. Parties also noted that the Energy Commission's adopted EPS was based on a considerable record and substantial public input and was consistent with the standard adopted by the CPUC, which was also supported by an extensive record. With the limited number of expected future baseload power plants that would be subject to the EPS and the other pressing issues before the two Commissions, including the implementation of the RPS and other preferred resources, it would make little sense to undertake the substantial effort that would be necessary to develop a full record for lowering the EPS. This is especially true given the progress California utilities are making with planned divestitures of non-EPS compliant facilities. Should circumstances change in the future that would warrant changes in the EPS, the Energy Commission has the option to revisit the issue.

A final issue raised in this rulemaking was the request by SCPPA to revise Section 2913 to replace the term "covered procurement" with "investments." Section 2913 provides for a case-by-case review by the Energy Commission to exempt from the regulations covered procurements that are required under the terms on a contract or ownership agreement, for which the agreement does not afford the POU an opportunity to avoid making the covered procurement. All of the Joint POU Parties supported such a revision in their written comments. The POUs believe that such a revision is supported by sound public policy and administrative ease, without changes to the substantive provisions affecting the underlying qualification for the limited exemption.[42] They further argued that it would result in administrative efficiencies for both the POUs and the Energy

41 Public Utilities Code Section 8341(g).

[42] M-S-R Power Agency, SCPPA San Juan Participants, City of Anaheim, and LADWP Comments on the January 29, 2013 Workshop, February 15, 2013, p 12.

Commission since the POUs could utilize the provisions of the section without having to undertake deliberations regarding whether an investment is a covered procurement.

NRDC and Sierra Club object to any change to Section 2913 because of concerns that the change could be used to game the regulation and its effectiveness. They argue that broadening the exemption to cover "investments" that may or may not be "covered procurements" might allow a POU to seek an exemption for an investment that they had not used their full legal and contractual rights to block, since they would not have been required to determine, or seek guidance, as to whether the investments was in fact a covered procurement, and therefore precluded.

Regardless of what term is used, the POU requesting exemption under this provision must show 1) that the investment is required under the terms of the contract or ownership agreement, and 2) the contract or ownership agreement does not afford the POU applying for the exemption the opportunity to avoid making the investment. In evaluating whether these two criteria have been met, where several California POUs are involved in the subject investment, the Energy Commission will need to consider to what extent the votes of these other California POUs would afford the POU requesting exemption the ability to avoid the investment. In other words, if the voting shares of all the California POUs involved in the investment were enough to stop the investment if all California POUs voted against it, then an exemption under Section 2913 would not be warranted since the POUs, acting together and in accordance with SB 1368, could indeed avoid the investment and, thus, would be obligated to do so. The Energy Commission believes that SB 1368 obligates California POUs to vote against investments that would violate SB 1368, whether or not that vote, on its own, would be sufficient to block the investment.

Nevertheless, an evaluation of whether or not a POU could have avoided an investment is not dependent upon whether the investment is labeled an investment or a covered procurement. Consequently, the Energy Commission concludes that changing the term "covered procurement" to "investment" is reasonable. The Energy Commission proposes the following language change to Section 2913:

**§ 2913 Case-by-Case Review for Pre-existing Multi-Party Commitments**

(a) A local publicly owned electric utility may petition the Commission for an exemption from application of this chapter for covered procurements required under the terms of a contract or ownership agreement that was in place January 1, 2007. The Commission may exempt covered procurements from application of this chapter if the local publicly owned electric utility demonstrates that:

(1) the investments ~~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 investments ~~covered procurements~~.

**Next Steps**

The Lead Commissioner for this rulemaking proceeding invites comments on the whether the proposed regulatory language effectively carries out the stated conclusions outlined above.

File any such comments and requested information with the Energy Commission Dockets Unit by April 19, 2013. Include Docket Number "12-OIR-1" in the subject line or first paragraph of your comments.

You may hand deliver or mail comments to:

California Energy Commission
Dockets Office, MS-4
Re: Docket No. 12-OIR-1
1516 Ninth Street
Sacramento, CA 95814-5512

Alternatively, you may attach your comments to an e-mail and submit the e-mail to the Dockets Unit at **docket@energy.ca.gov**. E-mail attachments should be in Microsoft Word format or in portable document format (PDF).

All written material relating to the rulemaking proceeding will be filed with the Dockets Unit and become part of the public record.

**Public Adviser and Public Participation**

The Energy Commission's Public Adviser's Office provides the public assistance in participating in Energy Commission activities. If you want information on how to participate in this forum, please contact the Public Adviser's Office at (916) 654-4489 or 800-822-6228 or e-mail at: **publicadviser@energy.ca.gov.**

**Information**

If you have a disability and need assistance to participate in this event, contact Lourdes Quiroz no less than five days prior to the hearing at (916) 654-5146 or e-mail: **lquiroz@energy.ca.gov**.

Please direct all news media inquiries to the Media and Public Communications Office at (916) 654-4989, or by e-mail at: **mediaoffice@energy.ca.gov**.

If you have questions on the technical subject matter of this meeting, please contact Sekita Grant, Advisor to Chair Weisenmiller, at (916) 651-0460, or by e-mail at: **sgrant@energy.ca.gov**.

Dated: April 5, 2013, at Sacramento, California.

ROBERT B. WEISENMILLER
Chair and Lead Commissioner
12-OIR-1 Rulemaking