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

In the Matter of:

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

Docket No. 12-OIR-1

M-S-R PUBLIC POWER AGENCY COMMENTS ON THE PROPOSED FINAL CONCLUSIONS

The M-S-R Public Power Agency (M-S-R)[1] provides these comments on the *Proposed Final Conclusions* issued by Chairman Weisenmiller on April 5, 2013. M-S-R appreciates the opportunity to address the California Energy Commission (Commission or CEC) on its proposed conclusions regarding potential revisions to the Emissions Performance Standard (EPS) Regulation[2] for local publicly owned electric utilities (POUs).

I. INTRODUCTION

M-S-R appreciates the time and effort that this Commission has expended engaging stakeholders and listing to the concerns raised by the parties to this proceeding. In most respects, M-S-R believes that the Proposed Final Conclusions accurately reflect the legal and factual

[1] M-S-R Public Power Agency is a joint powers agency whose members are the Modesto Irrigation District, the City of Santa Clara, and the City of Redding. M-S-R holds a 28.8 percent ownership interest in San Juan Generating Station (SJGS) Unit 4.

[2] 20 California Code of Regulations ("CCR") §§2900-2913.

issues raised in this proceeding. Specifically, M-S-R supports the Proposed Final Conclusions findings that:

1. *The current EPS should not be revised;*
2. *Further revisions to the definitions of "designed and intended to extend the life" and "routine maintenance" are not warranted*;
3. *All environmental improvements are not automatically deemed covered procurements*; and,
4. *It is reasonable to change the language in section 2913 to reference "investments," rather than "covered procurements."*

As more fully discussed herein, however, the Proposed Final Conclusions err in finding that that additional transparency is needed with regard to POU investments in non-EPS compliant facilities, and in mandating new filing and notice requirements on POU expenditures that are not covered procurements. M-S-R urges the Commission to strike the annual prospective reporting requirement proposed in new section 2908(b), as well as the new notice requirement for non-covered procurements. Should the Commission determine that the additional reporting and notice requirements are necessary, the definitions used in the newly proposed sections 2908(a)(1) and (2) and 2908(b) should be revised and refined as set forth herein, and should the Commission retain the annual reporting requirements, proposed section 2908(c) should be revised as discussed herein

II. COMMENTS ON THE PROPOSED FINAL CONCLUSIONS

A. Additional Filing and Notice Requirements are Neither Necessary, Nor Warranted

One of the issues addressed in this Rulemaking was:

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

As M-S-R and the other POU parties have testified to throughout this proceeding, California has a robust and effective EPS Regulation. The objectives of Senate Bill (SB) 1368 and the EPS Regulations have been realized, and are being carried out. As evidenced by both the oral and written comments made by M-S-R, the SCPPA-SJP,[3] Anaheim, and the Los Angeles Department of Water and Power (LADWP), the POU Parties are taking active and aggressive steps to divest from their significant economic interests in non-EPS compliant facilities. Indeed, the Commission itself notes in the Proposed Final Conclusions, that the "Energy Commission believes that early divestiture of these non-EPS compliant facilities is a primary objective of SB 1368 and the EPS," and due to the EPS, POUs are actively pursuing early divestiture of their contracts and ownership interests in non-EPS compliant facilities.[4]

M-S-R respectfully disagrees with the proposed conclusion that "it is reasonable and appropriate to require greater transparency regarding POU investments, including those solely for routine maintenance."[5] Despite assertions to the contrary, the POU decision-making process is open and transparent. Further, these transactions are conducted by POUs in a manner that meets the objective of SB 1368 to provide ratepayer protection, as they are carried out at the local level, making them directly accessible to the ratepayers. The testimony and evidence offered into the record makes it abundantly clear that POU processes are open, transparent, and subject to public review. No party has proffered evidence that this is not the case, nor that the POUs are *not* complying with both the letter and spirit of the law. Furthermore, as the POU parties have testified, and the Proposed Final Conclusions find, "despite the general accessibility of POU annual reports, operating budgets, resource plans, and the like, the Energy Commission

[3] Southern California Public Power Authority-San Juan Participants (SCPPA-SJP)

[4] Proposed Final Conclusions, p. 21.

[5] Proposed Final Conclusions, p. 3.

has received no complaints or investigation requests" regarding POU activities related to non-EPS compliant facilities.[6] The preponderance of evidence provided in this proceeding justifies a Commission determination that the scope of the EPS Regulation, as set forth in § 2900, should not be expanded to include non-covered procurements.[7]

As this Commission recognized, no party has provided evidence that a POU has violated existing laws, either in reporting under the Regulations, or in compliance with the Regulations.[8] Indeed, the Final Proposed Conclusions find that "mere speculation about POU practices is insufficient to justify requiring" data on past, current and planned investments in non-compliant power plants to "obtain possible evidence or a better understanding of POU practices."[9] The record in this proceeding does not support making changes to the existing reporting requirements under the EPS Regulation. Yet, despite this, the Proposed Final Conclusions would still impose two new requirements on POUs.

1. Notification of POU Deliberations is Not Necessary.

Section 2908 of the EPS Regulations[10] provides that "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." The Proposed Final Conclusions would revise section 2908(a) to require POUs to notify the Commission and the

[6] Proposed Final Conclusions, p. 14, emphasis added.

[7] Section 2900 reads: "Scope. This Article applies to covered procurements entered into by local publicly owned electric utilities. The greenhouse gas emission performance standard established in section 2902(a) applies to any Baseload generation, regardless of capacity, supplied under a covered procurement. The provisions requiring local publicly owned electric utilities to report covered procurements, including Section 2908, 2909, and 2910, apply only to covered procurements involving powerplants 10MW and larger." (20 CCR § 2900)

[8] Tentative Conclusions and Requests for Additional Information, July 9, 2012, p. 3.

[9] Proposed Final Conclusions, p. 3, fn 3.

[10] 20 CCR § 2908.

Commission's climate change service list at the posting of a notice 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 POU must also provide the CEC and the climate change service list with an electronic copy of all materials that are provided to the governing board regarding the expenditure.[11]

M-S-R does not believe that this addition is necessary. Given the Commissions role vis-à-vis the information submitted, M-S-R believes that the same objective would be met without unnecessary intervening steps if the interested parties were placed on the service list of the agencies with non-EPS compliant facilities at issue. NRDC/Sierra Club desire advanced notice of contemplated major investments and those intended to meet environmental and/or other regulatory requirements in order to allow sufficient lead time to vet whether the investment is consistent with SB 1368.[12] NRDC/Sierra Club stated that placing interested parties on a service list for POU governing board meetings where the investments are addressed would be insufficient because the Commission has a role in the enforcement of the regulation.[13] Given the affirmation in the Proposed Final Conclusions that the Commission's role "for the purpose of the reporting options would be a 'notification role,' rather than a 'review and approval role,'"[14] notification through the POU's service list should be sufficient. This is especially relevant given the *very* limited number of agencies at issue *and* the fact that each of those agencies has presented evidence of their plans to divest of their interests in the non-EPS compliant facilities.

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[11] Proposed Final Conclusions, pp. 8, 11.

[12] Sierra Club/NRDC Comments on January 29, 2013 Notice of Rulemaking Workshop, January 22, 2013, pp.2-3.

[13] Hearing Transcript, January 29, 2013, Public Workshop, p. 97, *l*. 19.

[14] Proposed Final Conclusions, p. 8

M-S-R believes that the revisions to section 2908(a) would impose redundant and unnecessary requirements on POUs. Based on the record in this proceeding, the Commission should conclude that the POU processes are sufficiently open and transparent, and that the Regulation should not be revised to mandate additional requirements.

2. <u>If Notification of POU Deliberations is Required, the Commission's Proposed Definition for Reported Investments Should be Refined.</u>

In the interest of compromise, the Joint POUs[15] supported a revision to Section 2908 that would add to the current notice requirements the obligation to post notice of:

> *"ownership investment over $5.0 million to meet environmental or regulatory requirements specifically related to emission controls at a non-EPS compliant baseload facility*."[16]

The Commission has proposed that the reporting be for:

> "any expenditure over $2.5 million to meet environmental regulatory requirements at a non-EPS compliant baseload facility."[17]

Due the myriad transactions associated with the facilities at issue, the Joint POUs recommended the use of the more detailed description in order to bound the scope of the noticed investments, and ensure that the statutory distinction between "investments" and "expenditures" was retained. By using the term "environmental or regulatory requirements specifically related to emission controls at a non-EPS compliant baseload facility," the notice requirement succinctly addresses those matters that directly impact the EPS Regulation and the scope of SB 1368. The Commission's proposed definition would invoke the term "expenditure," which is not part of the EPS. As currently drafted, the Regulations apply to "covered procurements," and do not define

[15] M-S-R submitted joint comments, along with the SCPPA San Juan Participants, Anaheim, and LADWP, on February 15, 2013.

[16] Joint POU Comments, p. 5.

[17] Proposed Final Conclusions, p. 8.

"investments." While the term "*new ownership* investment" is defined, it is included in the definition of a covered procurement.[18] Requiring public notice of each and every deliberation of virtually all transactions associated with a POUs investments in a non-EPS compliant facility (even with the $2.5 million threshold) could quickly become burdensome if some parameters are not placed around this term.

The Joint POUs proposed a $5 million dollar threshold, which represents approximately 5.5 percent of the average annual SJGS Capital Budget. Over the last five years, the SJGS Annual Capital Budgets have averaged $90.8 million per year, while the total San Juan Plant Budgets have averaged $594 million per year. For 2013, the plant-wide capital budget is $91.2 million and the total budget is 598 million.[19] M-S-R continues to believe that the expenditure threshold of $5 million as more plausible. However, in the event that the Commission determines otherwise, the $2.5 million proposed in the Proposed Final Conclusions, while more burdensome than a $5 million expenditure threshold, is reasonable if the threshold is intended to apply to the POUs' investments in the facility.

M-S-R supports the Commission's clarification that the scope of the documentation to be provided would be the same information made available to the governing body of the POU, and that additional documentation would not be required.

If the Commission determines that it is necessary to proceed with the additional reporting and notice requirements, the expenditure threshold should be $5 million, and the scope of the required reporting should be defined as proposed by the Joint POUs.

3. <u>A Prospective Filing Requirement is Unduly Burdensome and Unnecessary</u>

[18] 20 CCR § 2901(j).

[19] Joint POU Comments, page 6.

A prospective filing requirement would be unduly burdensome, is not warranted, nor supported by the record in this proceeding. The Proposed Final Conclusions would require an annual prospective filing, consistent with the Commission's Option No. 3. The Commission notes that this "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."[20] Section 2908 - Public Notice would be revised to add new subsection (c) what would include the following requirement:

> "Except as provided below, each [POU] 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 be made within 10 days of the approval of the annual budget for the non-EPS compliant baseload facility."

The Proposed Final Conclusions state that the proposed revisions to section 2908 "strike an appropriate balance between the need for transparency and the need to impose minimal administrative burdens" on the POUs.[21] M-S-R respectfully disagrees with this conclusion, and believes that the burdens imposed by this prospective requirement are not minimal. Indeed, this would require POUs to create an entirely new report each year. The amount of detail required to prepare that report would necessitate a substantial amount of POU resources, as having to go through each proposed investment and provide new descriptions and analysis would be extremely burdensome.

[20] Proposed Final Conclusions, p. 9.

[21] Proposed Final Conclusions, p. 10.

This additional requirement would create these additional administrative burdens on a POU without a documented need for the submission of extra information. Again, if the purpose of the filing is to inform the public of upcoming investments, notice to the POU's own service list of the approval of the annual budget would meet this purpose. To date, the record continues to be devoid of a demonstration of how such a filing would add value to the EPS compliance process. M-S-R appreciates the Commission's clarification that it will not take a "review and approval role" with regard to the information submitted,[22] and notes that this affirmation further obviates the need to make the filing. Due to the increased administrative burden involved in this prospective filing, and for all of the reasons noted above why additional reporting and notification requirements are not necessary, the Proposed Final Conclusions should be amended to strike the requirement to submit an annual prospective report as defined in proposed section 2908(b).

4. <u>If the Additional Filing Requirements are Imposed, all Facilities Subject to Early Divestiture Should be Exempted from the Requirements.</u>

M-S-R appreciates the Commission's conclusion that the effective date of any new reporting requirements should be no sooner than January 1, 2014, and that the requirements "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."[23] As the POUs have testified, divestiture of these resources is not a one-step process. There are numerous parties to the agreements, separate agreements to renegotiate and coordinated, and multiple state and federal agencies whose review and approval may be. Yet, despite these

[22] Proposed Final Conclusions, p. 8.

[23] Proposed Final Conclusions, p. 10.

obstacles, the POUs are committed to divesting their interests in the non-compliant facilities, and continue to work towards that end.

In recognition of the POU's extensive and extraordinary efforts to lawfully and expeditiously divest interests in non-EPS compliant facilities,[24] the Proposed Final Conclusions would include the following language in section 2903:

> "(c) A [POU] 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."

In order to ensure that this provision does not create any confusion regarding the POU's efforts to divest of its interests, the language should be revised minimally to recognize the facility at issue. Accordingly, the phrases "all baseload facilities exceeding the EPS" and "all non-EPS compliant baseload facilities," should be replaced with "its interest in the non-EPS compliant baseload facility." As revised, this section should read:

> "(c) A [POU] that has entered into a binding agreement to divest within 5 years of its interest in the non-EPS compliant baseload facility ~~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 its interest in the non-EPS compliant baseload facility ~~all non-EPS compliant baseload facilities~~."

B. The Emissions Performance Standard Should Not Be Changed

Also before the Commission in this proceeding was:

> *Whether or not to revise the existing emission performance standard.*

The Proposed Final Conclusions properly find that the current EPS should not be changed. NRDC/Sierra Club's assertion that an EPS of 825-850 pounds per megawatt hour is feasible and economic was completely unfounded, and unsupportable by the record in this

[24] Proposed Final Conclusions, p. 10.

proceeding. As the Commission notes, a wide range of parties opposed lowering the EPS, including POUs, investor owned utilities, and independent energy producers.[25] Furthermore, the proposal was based on national data, which did not take into account the specific geographic and operational conditions present in California.[26] In addition, several entities, many with new and state-of-the-art natural gas fired generation facilities, noted that their facilities would be adversely impacted by the lower EPS.[27]

With the ever increasing renewable energy mandate, the ability of utilities to utilize natural gas fired resources to firm and shape intermittent renewable energy is crucial. Ideally, utilities can use new, highly efficient facilities for this purpose. However, using these resources for firming and shaping causes emissions levels to rise. A lowered EPS that does not include a detailed analysis of this impact would have significant adverse effects on the ability of utilities to procure clean resources and reliably deliver renewable energy to their ratepayers. The Proposed Final Conclusions acknowledge the broad range of stakeholders raising concerns that these kinds of changes would cause facilities to likely exceed the lower EPS proposed by NRDC/Sierra Club.[28]

M-S-R appreciates the Commission's recognition of these important factors, as well as its acknowledgment of the extensive record that was developed to set the original EPS and the need to revise the EPS in conjunction with other state agencies, such as the California Public Utilities

[25] Proposed Final Conclusions, p. 19.

[26] *Id.*

[27] Proposed Final Conclusions, p. 20, referencing comments submitted by the Northern California Power Agency, Turlock Irrigation District, City of Santa Clara, the City of Redding and City of Pasadena.

[28] Proposed Final Conclusions, p. 20; citing comments from all the POUs, IEP, PG&E, and Calpine.

Commission and the California Air Resources Board.[29] The Proposed Final Conclusions properly find that the EPS should not be revised at this time.

C. Further Revisions to the Definitions of "Designed and Intended to Extend The Life" and "Routine Maintenance" are Not Warranted

The OIR also focused on:

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

1. The Record Supports the Definitions Currently Used in the Regulation.

The Proposed Final Conclusions find that attempting to further define the terms "designed and intended to extend the life of one or more generating units by five years or more," "routine maintenance," or "covered procurement" would not be productive.[30] As the Commission had previously noted, there is no basis for modifying these terms in the EPS regulation.[31] Indeed, this issue was addressed in the first EPS Rulemaking, 06-OIR-1. In the Final Statement of Reasons (FSOR), the Commission noted that attempting to further define the phrase was "fraught with difficulties," and heavily dependent upon the facts of each situation.[32] The Proposed Final Conclusions note the robust record in both this proceeding and 06-OIR-1 that set forth the reasons for adopting the current definitions, and negating the need for further revisions or deliberations on this issue. The Proposed Final Conclusions properly find that "developing criteria or further refining or defining the phrases 'designed and intended to extend the life' or 'routine maintenance' is unnecessary."

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[29] Proposed Final Conclusions, p. 21.

[30] Proposed Final Conclusions, p. 12.

[31] Tentative Conclusions at 6.

[32] FSOR, Docket No. 06-OIR-1, p. 40 (August 31, 2007).

2. All Environmental Improvements are Not Covered Procurements.

The Proposed Final Conclusions correct the assertions raised by NRDC/Sierra Club in prior filings that all since the FSOR determined environmental improvements are not deemed routine maintenance, they are therefore covered procurements. M-S-R and other parties have repeatedly noted – in both oral and written comments – that the FSOR does not support this interpretation. The Proposed Final Conclusions find that "[w]hile 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."[33] The Commission goes on to recognize the fact that in order to be a covered procurement, the new ownership investment must be either designed and intended to extend the life of one more generating units by five years or more, result in an increase in the rated capacity of the powerplant, or be designed and intended to convert a non-baseload generation powerplant to a baseload generation powerplant.[34] Accordingly, "[t]o automatically conclude that any investment that goes beyond routine maintenance is a 'covered procurement' is inconsistent with the plain meaning of the regulations."[35]

D. It Is Reasonable to Change the Language in Section 2913 to Reference "Investments," Rather Than "Covered Procurements."

The Commission also looked at:

> *Whether the term covered procurement should be replaced with investments in section 2913.*

[33] Proposed Final Conclusions, p. 15.

[34] 20 CCR § 2901(j)(4).

[35] Proposed Final Conclusions, p. 15.

The Proposed Final Conclusions find that it is reasonable to change the language in section 2913[36] to reference "investments," rather than "covered procurements." This section allows a POU to be exempt from the requirements of the EPS if the POU is contractually required to make the investment at issue, even if that investment is a covered procurement. Revising the Regulation to replace the term "covered procurements" with "investments" would allow the POU to petition the Commission without first having to make a determination of whether the investment at issue is a covered procurement or not. The Commission properly concludes that an evaluation of whether or not a POU could have avoided an investment is not dependent upon whether the investments is labeled an investment or covered procurement, and therefore it is reasonable to change make the change.[37] Furthermore, for consistency, the term "covered procurement" should be replaced with "investment" in each place it is used throughout section 2913.

IV. CONCLUSION

M-S-R appreciates the thoughtful and comprehensive analysis set forth in the Proposed Final Conclusions, and the Commission's proper findings that:

1. *The current EPS should not be revised*;
2. *Further revisions to the definitions of "designed and intended to extend the life" and "routine maintenance" are not warranted*;
3. *All environmental improvements are not automatically deemed covered procurements*; and,
4. *It is reasonable to change the language in section 2913 to reference "investments," rather than "covered procurements."*

However, as discussed above, M-S-R urges the Commission to strike the annual prospective reporting requirement proposed in new section 2908(b), as well as the new notice

[36] 20 CCR § 2913.

[37] Proposed Final Conclusions, p. 22.

requirement for non-covered procurements. Should the Commission determine that the additional reporting and notice requirements are necessary, the definitions used in the newly proposed sections 2908(a)(1) and (2) and 2908(b) should be revised and refined as set forth above. Finally, if the Commission retains the annual reporting requirements, proposed section 2908(c) should be revised as discussed herein.

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Respectfully submitted,

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