Submitted by e-mail to: docket@energy.ca.gov

February 15, 2013



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

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

**Sierra Club and NRDC Reply Comments on January 29, 2013 Notice of Rulemaking Workshop**

The Sierra Club and Natural Resources Defense Council (NRDC) submit the following reply comments on the January 29, 2013 workshop. At the close of the workshop, reply comments were requested to refine and seek consensus on reporting and a public review mechanism to ensure compliance with SB 1368's requirements on limiting future investments by publicly owned utilities (POUs) in non-compliant facilities.

**Public notice of expenditures at non-compliant facilities:**

As we noted in our previous comments and in the workshop, NRDC and the Sierra Club strongly believe a combination of option two (2) and option three (3) are needed to ensure meaningful and proactive notice and reporting. While, we were unable to reach consensus with POU stakeholders on reporting requirements, in the spirit of compromise and based on the discussions at the workshop, we offer a refinement of our earlier recommendation. This alternative recommendation places even less of a burden on the POUs and is the minimum level of notice and reporting necessary to ensure SB 1368 compliance and provide meaningful opportunities for engagement by the Commission and interested stakeholders.

The Sierra Club and NRDC continue to recommend that the Commission adopt both Option 2 and Option 3. However, we are willing to further limit reporting to require both annual and ongoing reporting requirements related only to "environmental regulatory requirements." This removes the obligation to notice and report "major" investments as well as non-environmental regulatory requirements as originally proposed. Because there are significant differences among the parties as to the whether investments needed to comply with environmental regulatory requirements trigger SB 1368, this minimal reporting requirement is absolutely necessary to ensure stakeholder and Commission notice and resolve any potential disputes prior to the point at which actual investments would occur.

To implement these changes, existing regulations should be amended to state:

**§ 2908 Public Notice**

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 or expenditure to meet environmental regulatory requirements, whether or not the utility has determined that the expenditure is a covered procurement.

(a) At the posting of the notice of a public meeting to consider a covered procurement or expenditure to meet environmental regulatory requirements, the local publicly owned electric utility shall notify the Commission and service list of interested parties 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 service list of interested parties with the uniform resource locator (URL) that links to this information.

(b) ….

(c) …..

§ 2908.1 Annual Filing Identifying Prospective Investments in Non-EPS Compliant Facilities

By the end of each calendar year, each local publicly owned electric utility shall file with the Commission a list and description of any expenditure to meet environmental regulatory requirements anticipated for the upcoming calendar year. The filing will include an estimate of cost and describe the purpose of each listed expenditure. Subsequent annual filings shall identify whether any expenditures to meet environmental regulatory requirements occurred in the previous year that were not listed in the previous annual filing and explain why that expenditure could not have been reasonably anticipated and disclosed. The Commission shall make the annual filing available to the public on its website within one week of receipt of the filing.

**Request for Exemption under multi-party agreements:**

NRDC and the Sierra Club object to any change to § 2913 at this time. We are concerned the requested changes could be used to game the regulation and undermine its effectiveness. Allowing a request for an exemption of an "investment" rather than a "covered procurement" would allow POUs to request exemptions without first concluding that an investment is in fact a covered procurement, or seeking CEC guidance to that effect. Determinations for exemptions under § 2913 are inherently fact-specific inquiries that require a showing that the POU is unable to stop investment in a covered procurement based on pre-existing contractual requirements. As written, the exemption only applies to covered procurements, where investment would otherwise be clearly precluded, and the responsibility of the POU to do everything within its legal and contractual rights to block the investment is clear. 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 investment was in fact a covered procurement, and therefore precluded.

Gamesmanship is even more risky in circumstances where multiple POUs are investing in the same facility and the outcome of any investment decision may depend on whether the POUs act under the same interpretation of whether an investment is a "covered procurement" and pool their collective ownership interests to ensure such an investment does not occur. As discussed at the workshop, this may be the case with the San Juan contract. Should one or more POUs utilize § 2913 without first having a consistent determination of the definition of "covered procurement," an investment decision may be authorized prior to Commission action that would improperly bind all San Juan participants.

While we hope that POUs would not attempt, and the Commission would not allow, such gamesmanship, we see no reason to broaden the scope of possible exemptions. Doing so would only complicate the regulations unnecessarily. Furthermore, we see this change as a low-priority issue given the stated objectives of all POUs to divest from the few remaining non-compliant facilities of concern to this proceeding.

Thank you for your consideration of these comments.

Respectfully Submitted,

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