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

California Energy Commission
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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
REPLY TO DECEMBER 20 WORKSHOP NOTICE

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The M-S-R Public Power Agency (M-S-R)[1] provides these comments in response to the *Notice of Rulemaking Workshop* (Workshop Notice) issued by Chairman Weisenmiller on December 20, 2012. In this reply, M-S-R addresses the Commission's inquires regarding potential revisions to the Emissions Performance Standard (EPS) Regulation[2] regarding reporting and notification of expenditures in non-EPS compliant facilities, and also provides an update to the California Energy Commission (CEC) regarding M-S-R's investments in a non-compliant facility, the San Juan Generating Station (SJGS).

I. THE COMMISSION SHOULD NOT ESTABLISH A FILING REQUIREMENT FOR ALL POU INVESTMENTS IN NON-EPS COMPLIANT FACILITIES.

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

The question of whether to establish a filing requirement for all publicly owned utility (POU) investments in non-EPS compliant facilities has been addressed by parties to this

[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 Project Unit 4.

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

proceeding over the course of several months.[3] The preponderance of information provided in this proceeding justifies a Commission determination that the scope of the EPS Regulation, as set forth in § 2900, should not be expanded.[4] M-S-R and several other public agencies have provided extensive evidence regarding the current reporting and notification practices of POUs. Those practices comply with the relevant provisions of existing statutes. Furthermore, these processes are not limited to matters regarding the EPS; they apply to *all POU transactions,* as well as compliance with myriad local, state, regional, and federal regulatory requirements. No party has provided evidence that a POU has violated existing laws, either in reporting under the Regulation, or in compliance with the Regulation. Nor has any party demonstrated why the current scope of the EPS Regulation is inadequate to meet the objectives of SB 1368, or why it should be expanded to address "all investments" in non-EPS compliant facilities, rather than "covered procurements" in "baseload" facilities, as those terms are already defined in the Regulation.

The record in this proceeding does not support making changes to the existing reporting requirements under the EPS Regulation. The POUs have repeatedly attested to the robust public process that is undertaken as part of compliance not only with the EPS regulation, but countless other local, state, regional, and federal mandates.

As currently drafted, the EPS Regulation correctly reflects the Commission's role of reviewing compliance filings. An expanded Commission role to address the revised

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[3] In addition to oral testimony during the April 18, 2012 workshop, M-S-R has filed extensive comments regarding its reporting and public disclosure processes, including comments submitted on July 27, 2012 and September 28, 2012.

[4] 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)

requirements has not been discussed. What will the Commission's role be will the Commission's role be vis-à-vis these additional reports? How will the Commission use the reports? What end goal is served by requiring the POUs to submit additional filings to the Commission and having the Commission expend resources to review these filings? Without affirmative responses to each of these inquiries, additional requirements should be avoided. Changing the reporting and notification requirements is not necessary, would add additional burdens and obligations to POUs, would require extensive revisions to the scope of the Regulation and the definitions set forth therein, and simply create more paperwork with no clear purpose.[5]

There are very few non-EPS compliant facilities in California and none owned or operated by either M-S-R or its members. Of those out-of-state non-EPS compliant facilities, some POUs, such as M-S-R, have expressed their intent to make timely divestitures of such ownership interests. However, such divestiture cannot be done in a vacuum. Ownership interests such as M-S-R's are part of multi-state, multi-contract, and multi-party arrangements. Divestiture will occur, as quickly as possible, with or without revisions to the EPS Regulation, and additional administrative requirements do nothing to further this objective, but rather add extra expenses to the public agencies.

M-S-R urges the Commission to closely review the entirety of the record in this proceeding and reject any proposals to further expand the scope of the Regulation and impose additional obligations on POUs.

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[5] As M-S-R has previously noted, there is nothing to justify expanding existing practices to afford special treatment of this one matter. In fact, additional reporting to meet special interests presents a poor precedent and would allow those with a particular interest in a certain project to impose additional burdens on public agencies.

B. If Filing Requirements Are Added, Only Option 1 Presents a Workable Alternative.

M-S-R does not support that additional of any new notice or filing requirements. In the Workshop Notice, the Commission has presented four possible options for reporting and notice requirements for non-EPS compliant facilities.[6] As noted above, in the face of no demonstrated need for additional reporting and notification, M-S-R believes that the existing rules are sufficient and that none of the four options should be adopted. However, in the event that the Commission determines that it is necessary to make some changes to the Regulation, M-S-R urges the Commission to pursue a notification requirement similar to that which is outlined in Option 1.

> **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 back-up information on its website, nor would it distribute the URL and back-up information to a listserv.[7]

More mandates – even those that seem as innocuous as emailing an URL – only serve to place additional burdens on public agencies. If, however, the Commission finds that it is necessary to require further notice, M-S-R believes that Option 1 presents the only framework that would best balance the competing interests for information and additional burdens on public agencies. However, prior to initiating such changes, there are several aspects of Option 1 that must be clarified, including the broad use of the term "investment" and the 3-day notice requirement that would be even more restrictive than current statutory requirements. If the

[6] Workshop Notice, pp. 3-4.

[7] Workshop Notice, pp. 3-4.

deficiencies and ambiguities addressed below are corrected, Option 1 would be the preferred option.

Investments and procurements are not synonymous. Option 1 would require providing a URL link for POU meetings where "investment in a non-EPS compliant plant is being deliberated in advance of each business meeting." However, the Regulation applies to "covered procurements," and does not define "investments." While the term "*new ownership* investment" is defined, it is included in the definition of a covered procurement.[8] Requiring public notice of each and every deliberation of virtually all transaction associated with a non-EPS compliant facility could quickly become burdensome if some parameters are not placed around this term.

Exceptions to the Three Day Notice Requirement Exist: Generally speaking, the Ralph M. Brown Act requires public agencies, such as M-S-R, to provide 72 hours notice of their meetings.[9] This general requirement is consistent with the proposal in Option 1 for 3-days notice of the URL. However, the California Government Code also authorizes special meetings, which require 24-hours notice, rather than 72 hours.[10] In order to ensure that the notice requirements imposed by the Commission are not more onerous than those set forth in the Government Code, Option 1 should be revised to acknowledge the potential – no matter how remote – for the calling of a special meetings, and allow notification of the relevant URL to be provided accordingly.

> **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

[8] 20 CCR § 2901(j).

[9] The Brown Act, California Government Code Section 54950, *et. seq.*

[10] California Government Code § 54956.

meeting at which investments are being deliberated and the back-up 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 back-up information on the Energy Commission's website and notify the listserv.[11]

Option 2 should not be adopted. It creates new and subjective terms and broadly expands the scope of the EPS. Furthermore, attempting to define "major" investments or "investments to meet environmental or other regulatory requirements" sets the stage for protracted deliberations and ambiguous interpretations. Revising the provisions of Section 2908 to include additional defined terms is problematic. Those with an agenda to see specific information reported by the POUs will advocate for a definition that meets their particular needs, regardless of the relevance of the definition to the EPS or electric generation facility operations. Those opposed to such a definition would do likewise. As more fully discussed below, there are myriad situations where "investments" at an electric generation facility will serve several purposes; how then would they be classified under a revised EPS Regulation? The operators of electric generation facilities should not be forced to categorize expenditures into a specific framework that is totally unrelated to the best operational practices at such a facility.

Additionally, Option 2 is problematic in its reference to "back-up information related to the investments' compliance with EPS." It is not clear what is envisioned with such a reference. As drafted, the Regulation applies to covered procurements. Accordingly, only procurements that meet the definition set forth in the Regulation would be deemed covered procurements, and therefore, a determination that the procurement is not a "new ownership investment" as that term is defined in Section 2901(j) would mean that the POU has found that it is in compliance with

[11] Workshop Notice, p. 4.

the EPS. What back-up information would be required to prove the negative? The term and potential definitions would be highly subjective.

The EPS, as currently and properly defined, applies to covered procurements. Covered procurements are defined in the Regulation. As evidenced by the vast majority of the public comments submitted in this proceeding, revising and adding definitions to the existing Regulation would be a difficult and lengthy process. An attempt to further dissect the term "covered procurement" or add the term "investment" is unnecessary and should be avoided.

> **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.[12]

Option 3 suffers from the same deficiencies as Option 2, and should be rejected. Furthermore, this requirement would create significant additional administrative burdens on a POU without an articulated or demonstrated need for the submission of the extra information. It would also place an additional burden on the CEC to review the filing. It is also problematic in that there is not articulated purpose for such a review, nor explanation of what such a review would entail. There is no explanation of the role of the CEC vis-à-vis such a report. For what purpose will the filing be used? How will such a filing add value to the EPS compliance process? These inquiries should be addressed prior to adopting further filing requirements. This is especially true since such a requirement radically alters the scope of the entire Regulation – no longer requiring a compliance filing associated with covered procurements, but rather imposing a significant new reporting requirement.

[12] Workshop Notice, p. 4.

Not only is this Option problematic to the extent that it requires additional definitional interpretations, but it flies in the face of recent and ongoing efforts at the Legislature to condense and streamline reporting requirements, and the Governor's own comments in that same regard.[13]

> **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.[14]

Option 4 suffers from many of the same deficiencies as Options 2 and 3. Furthermore, Option 4 is flawed in its comparison to the CPUC. The CPUC's requirements for IOU filings are simply not analogous in this situation. The relationship between the CPUC and IOU is the same as that for the POUs and their governing boards. Therefore, the reporting that the IOUs provide to the CPUC is already entailed in the agenda reports, notices, and submissions that the POUs make to their own governing boards. Requiring additional reporting to the CEC is not warranted, nor necessary. Additionally, as explained more fully herein, it is problematic to attempt to pigeon-hole investments in electric generation facilities into terms that have no direct relevance to the way in which facility investments are determined.

C. The Commission Should Not Create Requirements for "Major" Investments or "Investments to Meet Environmental or Other Regulatory Requirements."

The Workshop Notice asks if "the Energy Commission were to establish a requirement for 'major' investments" or ""investments to meet environmental or other regulatory

[13] See Executive Order B-14-11.

[14] Workshop Notice, p. 4.

requirements," how the terms should be defined.[15] The term investment should not be piecemealed into "major" or other categories. Unless an extensive analysis of all the myriad investments that go into a facility during any given time period is undertaken, attempting to define the types of transactions that may be categorized as "major" would be a subjective exercise. The same is true for "investments to meet environmental or other regulatory requirements,"

M-S-R understands that there are parties that are opposed to *any* investments in non-EPS compliant facilities, regardless of whether they are covered procurements or not. In an attempt to thwart expenditures in existing facilities, the idea has been proffered that "investments to meet environmental or other regulatory requirements," should be per se precluded. However, any attempt to apply such an arbitrary label is problematic for several reasons. First of all, what is done if an investment is necessary, not a covered procurement, but still meets environmental or other regulatory requirements? Second, the very terms "environmental requirements" and "regulatory requirements" are unduly broad and subjective. Any permit needed after the original contract was executed could be deemed a "regulatory requirement," yet such a ministerial expenditure, unless it otherwise meets the definition of a covered procurement, should not be prohibited. Furthermore, attempting to define expenditures in such a way will force unnecessary and burdensome deliberations on facility operations. Will operators be required to label transactions according to their primary, secondary, or sole purpose? Will operators be precluded from spending funds to improve the environmental attributes of a plant, even when such expenditure results in significant net benefits? These issues must be considered when deliberating on definitional changes of this magnitude.

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[15] Workshop Notice, p. 4.

Entities such as M-S-R also covenant to their bondholders and members to operate and maintain all electric generation facilities in compliance with "environmental and other regulatory requirements." Such expenditures are mandatory and not optional. While this Commission declined to make a blanket determination that such expenditures are not covered procurements, neither was there a finding that they automatically *are* covered procurements. Such determinations remain the responsibility of the POU governing board. If these expenditures are found to be a "covered procurement", then such investment would be reported to the Commission, and/or exempted under the provisions of Section 2913 of the Regulations. Additional definitions and attempts to compartmentalize transactions into arbitrary categories is not only detrimental to the prudent and efficient operation of electric generation facilities, it is unnecessary under the regulation, and simply not sound public policy.

Attempting to define these terms is analogous to further defining the term "designed and intended to extend the life" of the plant. 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.[16] Rather that embark on such an endeavor, the Commission, again noting the complexity of the issue and the fact that there is no way to simply identify all of the factors that go into such determinations, included in the Regulation adjudicatory processes to make these determinations, if necessary. Those processes and the discussions addressed therein are equally applicable in this instance.

D. No Additional Terms or Definitions are Needed.

The Workshop Notice asks if "the two terms above [major investments and investments to meet environmental or other regulatory requirements] capture the kinds of investments that are

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

of most concern to parties? If not, is there some other category, short of "all" investments, that would be needed to cover such investments?"[17] As noted above, it is not neither advisable, nor necessary to adopt additional terms. As the record in this proceeding demonstrates, the term "covered procurements" adequately captures the intent of SB 1368 and is properly defined in the Regulation. Adding more terms and attempting to further parse the definitions already included in the Regulation is problematic, ill-advised, and unnecessary. M-S-R urges the Commission to reject any reporting or rule revisions that would seek to define or incorporate the terms "major" investments for "investments to meet environmental or other regulatory requirements" into the Regulation.

E. An Attestation is Not Necessary to Ensure that POU Investments are Consistent with SB 1368.

The Commission has asked if "an attestation that POU investments in non-EPS compliant plants made during the prior year comply with the EPS sufficient to ensure that these investments are consistent with SB 1368?" The answer to this question begs the question itself. When it comes to the actions of a POU, an attestation is inherently redundant in that it would merely reiterate the conclusions and actions approved by the POU's governing board. It adds nothing to the record, since compliance with the EPS is demonstrated through the POU's governing board resolutions or meeting minutes. The nature of the governing board's review and determination on any given transaction, and in essence, the legitimacy of the investments, has already been "verified." Indeed, there is already a presumption that the POU governing board acted properly,[18] and any finding of the POU governing board whether expressed in an extract of

[17] Workshop Notice, p. 5.

[18] See California Evidence Code section 664.

minutes or resolution is deemed to be correct. Accordingly, the attestation requirement is not only superfluous, but unnecessary.

II. STATUS UPDATE ON INVESTMENTS IN NON-EPS COMPLIANT FACILITIES.

The Commission has asked for POUs to provide a "status update on their activities related to investments to meet environmental and regulatory requirements for the non-compliant facilities they have an ownership interest in." M-S-R has an ownership interest in the SJGS, located in New Mexico. M-S-R is at this time, and always has been, in compliance with the EPS, and any actions that the agency takes in relation to meeting the requirements of the Environmental Protection Agency's Federal Implementation Plan will continue to be done in a lawful manner. M-S-R appreciates the opportunity to provide the Commission with an update regarding the various events that have transpired recently. However, M-S-R is bound by confidentiality agreements and is prevented from providing any higher level of detail than what is set forth herein.

The Public Service Company of New Mexico (PNM), the operating agent for SJGS approved a contract with Fluor Corporation associated with environmental system upgrades at SJGS to meet Clean Air Act regional haze compliance requirements. On November 29, 2012, PNM presented a capital budget item (CBI) associated with payment of costs associated with the SCRs to the SJGS Coordination Committee – of which M-S-R is a member – for approval. The CBI was not approved on the abstentions of the Southern California Public Power Authority and the City of Anaheim, and the negative vote of M-S-R. While PNM has the authority to proceed with the CBI even without the approval of the Coordination Committee, it has not at this time expressed its intent to do so. As of December 28, 2012, PNM provided notice to Fluor to

suspend performance of the work under their contract, and all costs associated with the potential SCR project are currently booked as "Preliminary Surveys and Investigations" which are neither considered capital expenditures under Generally Accepted Accounting Procedures (GAAP) nor can be deemed covered procurements under SB 1368. In the event that work on the SCR was to commence, M-S-R would need to make a determination whether or not such work was a "covered procurement."[19]

III. PROPOSED REVISION TO SECTION 2913.

Under certain conditions, Section 2913[20] allows POUs to petition the Commission for an exemption from the Regulation for covered procurements that are required under the terms of contracts or multi-party ownership agreements that were in place prior to January 1, 2007. The provisions specifically apply to covered procurements because the scope of the Regulation applies to covered procurements. While M-S-R has joined with other parties in reserving the right to potentially seek a revision to Section 2913 to replace the term "covered procurement" with "investment," such a revision should be considered in the context of any potential impacts on the overall regulation. M-S-R wants to ensure that the term "investment" not be broadly applied across the entire regulation, and be narrowly construed as pertaining only to the referenced petition. For all of the reasons discussed above, expanding the use of the term "investment" throughout the Regulation is problematic and fraught with uncertainties. However, as it pertains to Section 2913, expanding the term in this limited construct to include more than just covered procurements would allow POUs to utilize the exemption provisions without having

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[19] Attachment A to these comments is a recent press release issued by PNM regarding this matter.

[20] 20 CCR § 2913.

to be concerned that an overly broad reading of the petition would be construed as an admission that all of the transactions at issue are indeed covered procurements.

IV. CONCLUSION

For the reasons set forth herein, and in the previous filings M-S-R has submitted during the course of this proceeding, M-S-R urges the Commission to reject proposals to revise the Regulation to add filing requirement for all POU investments in non-EPS compliant facilities. M-S-R also urges the Commission to reject proposals that would create distinctions for "major" investments or "investments to meet environmental or other regulatory requirements."

Dated: January 22, 2013

Respectfully submitted,

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NEWS RELEASE

For Immediate Release
Jan. 18, 2013

PNM Renews Support for Discussion of Alternative to Address Regional Haze at San Juan Generating Station

(ALBUQUERQUE, N.M.) – PNM Resources' (NYSE: PNM) New Mexico utility, PNM, today announced renewed support for discussions that have resumed with the N.M. Environment Department ("NMED") and the U.S. Environmental Protection Agency ("EPA") to consider an alternative for San Juan Generating Station to comply with federal visibility rules.

Following the Nov. 29 expiration of the EPA's 45-day administrative stay extension, PNM announced it would work to comply with the federal rule that requires installation of selective catalytic reduction ("SCR") technology on all four units of SJGS.

Confidential discussions have since resumed. As a result, PNM has taken additional steps to push costs related to SCR installation into later phases of the project by temporarily suspending the work of its engineering, procurement and construction contractor. In addition, PNM's plan to file a request with N.M. Public Regulation Commission for approval of the SCR project has been put on hold.

There is no timeline established for the discussions to reach a definitive agreement, although the September 2016 deadline for installation of SCRs underscores the importance of moving forward quickly.

"We are prepared to install the federally mandated technology, but believe renewed discussions hold potential for agreement on an alternative that could position New Mexico for broader environmental benefits while also reducing the cost impact for PNM customers," said Pat Collawn, PNM Resources Chairman, President and CEO. "We are hopeful that the current discussions with NMED and EPA ultimately result in an agreement that can move the state's energy future forward in a positive fashion."

Background:
PNM Resources (NYSE: PNM) is an energy holding company based in Albuquerque, N.M., with 2011 consolidated operating revenues of $1.3 billion, excluding First Choice Power. Through its regulated utilities, PNM and TNMP, PNM Resources has approximately 2,530 megawatts of generation capacity and serves electricity to more than 738,000 homes and businesses in New Mexico and Texas. For more information, visit the company's Web site at www.PNMResources.com.

Safe Harbor Statement under the Private Securities Litigation Reform Act of 1995:
Statements made in this news release that relate to PNM's expectations, projections and estimates are made pursuant to the Private Securities Litigation Reform Act of 1995. Readers are cautioned that all forward-looking statements are based upon current expectations and estimates, and PNM assumes no obligation to update this information.

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