

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

January 22, 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 Comments on January 29, 2013
Notice of Rulemaking Workshop**

The Sierra Club and Natural Resources Defense Council (NRDC) submit the following comments on the Notice of Rulemaking Workshop in advance of the workshop scheduled for January 29, 2013. The Notice seeks additional input on the appropriate public review mechanism to ensure compliance with SB 1368's requirements on limiting future investments by publicly owned utilities (POUs) in non-compliant (largely coal-fired) facilities. The Notice proposes four options for a notification requirement: (1) the POU providing the CEC with a URL link to the agenda for the public meeting in which any investment in a non-compliant plant will be deliberated for posting on the CEC website; (2) an expansion of the existing notice requirement in Section 2908 to include "major" investments and/or "investments to meet environmental or other regulatory requirements"; (3) an annual filing that prospectively identifies "major" investments in non-compliant facilities and/or "investments to meet environmental or other regulatory requirements" for the upcoming year; and (4) an annual filing of investments of the past year.

In weighing appropriate notice requirements, it is important to recognize that in the case of some POUs, few specific investments in non-compliant facilities are deliberated by the POU's governing body.¹ In addition, 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. **For these reasons, the Sierra Club and NRDC believe that both Options 2 and 3 must be implemented to ensure adequate public review of POU investments in non-compliant facilities and keep with SB 1368's overarching purpose.**

¹ At the April 18, 2012 workshop and subsequent filings the POUs present noted a variety of processes for approval of investments in non-compliant facilities, ranging from staff-level authorization to board deliberation.

POU capital investments in non-compliant facilities are often approved prior to, or without any POU governing board action and therefore avoid any type of public review. For example, while LADWP is appointed Project Manager and Operating Agent for the Intermountain Power Project (IPP) “[n]either the Los Angeles Board of Water and Power Commissioners nor the Los Angeles City Council provides a separate approval for the operating and budgeting decisions for the IPP.”² Rather, approval for specific capital expenditures in excess of \$500,000 is by the IPP Coordinating Committee and Intermountain Power Agency.³ As LADWP notes, “LADWP, as well as other California Purchasers are not owners of IPP, and as such, are not representatives on the IPA Board.”⁴ Therefore, the LADWP governing body does not review and approve specific expenditures at IPP. Similarly, with regard to Navajo Generating Station (NGS), “LADWP is not required to have approvals of the Board of Water and Power Commissioners of the Los Angeles City Council for operating and budget decisions unless the subject matter is out of the context of the current participation agreements.”⁵ The SCPPA governing body also has an extremely limited role in reviewing investments in non-compliant facilities. According to SCPPA, “[e]ach time that SCPPA is asked to vote on a capital project, the SCPPA *staff* examines the investment to determine whether the investment falls within [the EPS].”⁶ Only where staff, in its discretion, deems that a given investment may trigger SB 1368 will the investment be elevated for review and approval by the SCPPA board. Accordingly, Options 1 and 2 alone are inadequate because specific significant investments in non-compliant facilities may not be deliberated and approved by the POU governing body. Moreover, Options 1 and 2 provide little opportunity to resolve potential disputes because they only require notice of the proposed investment three days in advance of board approval.

With regard to the filing of an annual report with the Commission, a prospective report than identifies potential future investments in non-compliant facilities (Option 3) is far superior to an approach that calls for a retrospective report that identifies investments already made (Option 4). The whole point of the notice requirement is to allow for vetting and review of potential investments *before* they are made to prevent violations of SB 1368 and avoid unnecessary litigation. Moreover, as ownership interests in non-compliant facilities often involve in and out-of-state actors, early notice and review of potential covered procurements will help avoid expectation and provide certainty for all parties with an interest in a non-compliant plant. The Sierra Club and NRDC also request that Option 3 be supplemented to require that, in future years, the annual filing also include unexpected investments made in the previous year that could not reasonably be known at the time the previous report was filed.

² 12-OIR-1, Comments from LADWP to the CEC’s Tentative Conclusions and Request for Additional Information, dated July 27, 2012 at 9.

³ *Id.* at 8 (approval for capital expenditures below \$500,000 is made by the Operating Agent without IPP Coordinating Committee and Intermountain Power Agency).

⁴ *Id.*

⁵ *Id.* at 10.

⁶ 12-OIR-1, SCPPA, MSR, and City of Anaheim Response to Tentative Conclusions and Request for Additional Information at 7, dated July 27, 2012 (emphasis added).

The Sierra Club and NRDC therefore recommend that the Commission adopt both Option 2 and Option 3. Option 3 will allow for a needed forward look at potential future investments and early identification of investments that may be covered procurements. Option 2 compliments Option 3 by providing additional needed information on actual approval of the investment by the governing body (assuming such approval is actually sought). Option 2 is preferable to Option 1 because it requires provision of “the back-up information related to the investments’ compliance with EPS.” A simple link to an agenda as proposed in Option 1 is highly unlikely to provide requisite detail for the public to understand the nature of the investment for which approval is sought. In addition, Option 2 need not be burdensome to the POU or the Commission. The Commission could establish a service list (or use the existing list for this proceeding) that would be copied on emails to the Commission. Given that the Brown Act only requires 72 hour notice of Board agendas, this would ensure immediate notification to interested parties and remove the onus of expedited public posting from the Commission.

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, major investment, and/or investment to meet environmental or other regulatory requirements.

(a) At the posting of the notice of a public meeting to consider a covered procurement, major investment, and/or investment to meet environmental or other 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 major investments and/or investments to meet environmental or other regulatory requirements anticipated for the upcoming calendar year. The filing will include an estimate of cost and describe the purpose of each listed investment. Subsequent annual filings shall identify whether any major investments and/or investments to meet environmental or other regulatory requirements occurred in the previous year that were not listed in the previous annual filing and explain why that investment 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.

Additional Questions Posed by the Commission

- **If the Energy Commission were to establish a requirement for “major” investments, how should the term be defined? By a dollar amount? By some other criteria?**

Defining a “major” investment by a dollar amount would seem to offer the highest degree of certainty. In establishing the dollar amount that determines whether a particular investment is “major”, one can look to the internal review processes of the non-compliant facilities themselves. For example, in the case of Navajo Generating Station, projects over \$250,000 require approval of both Engineering and Operating Committee and Administrative Committees.⁷ Similarly, where costs to cure an operating emergency at the San Juan Generating Station exceed \$250,000, participants with an ownership interest must be immediately notified.⁸ The Sierra Club and NRDC believe \$250,000 (per plant, rather than per participating utility) could function as an appropriate threshold for defining “major” investments and a definition added to Section 2901 as follows:

§ 2901 Definitions

(j) “Major investment” means an investment contributing to a capital expenditure totaling over \$250,000.

- **If the Energy Commission were to establish a requirement for “investments to meet environmental or other regulatory requirements,” is any further definition of this term necessary?**

The Sierra Club and NRDC believe that the phrase “investments to meet environmental or other regulatory requirements” is sufficiently clear.

- **Would the two terms above capture the kinds of investments that are of most concern to parties? If not, is there some other category, short of “all” investments, that would be needed to cover such investments?**

A reporting requirement for “major” investments (defined as those above \$250,000) and/or “investments to meet environmental or other regulatory standards” would capture the investments of greatest concern to the Sierra Club and NRDC. However, as set forth in earlier filings, we also strongly urge the Commission to also amend SB 1368’s implementing regulations to clarify that “investments to meet environmental or other regulatory requirements”

⁷ 12-OIR-1, Comments from LADWP to the CEC’s Tentative Conclusions and Request for Additional Information, dated July 27, 2012 at 10.

⁸ Amended and Restated San Juan Project Participation Agreement Among Public Service Company of New Mexico, Tucson Electric Power Company, The City of Farmington, New Mexico, M-S-R- Public Over Agency, the Incorporated County of Los Alamos, New Mexico, Southern California Public Power Authority, City of Anaheim, Utah Associated Municipal Power Systems, Tri-State Generation and Transmission Associated, dated December 120, 2005, § 29.3.

constitute a “new ownership investment” under Section 2901(j) to the extent that they extend the legal operating life of the facility by five years or more. The Final Statement of Reasons is clear that SB 1368 does not provide an exception for investments made to comply with environmental and other regulatory requirements.⁹ Nonetheless, comments at the April workshop indicated that some POUs believe that pollution control investments needed to comply with regulatory requirements did not trigger the EPS. Commission clarification on this point through changes to SB 1368’s implementing regulations is needed to remove any confusion on this point. Thus, a provision should be added to Section 2901(j) as follows:

(j) “New ownership investment” means:

(1)....

(5) Any investment needed to meet environmental or other regulatory requirements to the extent that they extend the legal operating life of the facility by five years or more.

To the extent the Commission believes investments to meet environmental and other regulatory requirements should be reviewed on a case-by-case basis to determine whether they are considered a covered procurement, mandatory reporting and review will ensure that this review occurs. Presumably, these types of investments are quite limited and would pose minimal burdens to both the POUs and the Commission. Thus, as an alternative to amending Section 2901(j), the Commission could amend Section 2907 to state:

§ 2907 ~~Request for~~ Commission Evaluation of a Prospective Procurement

(a) A local publicly owned electric utility may request that the Commission evaluate a prospective procurement for any of the following:

(1) a determination as to whether a prospective procurement would extend the life of a power plant by 5 years;

(2) a determination as to whether a prospective procurement would constitute routine maintenance; or

(3) a determination as to whether a prospective procurement would be in compliance with the EPS.

(b) A local publicly owned electric utility must request the Commission evaluate a prospective investment needed to meet environmental or other regulatory requirements.

~~(bc)~~ A request for evaluation under this section shall be treated by the Commission as a request for investigation under Chapter 2, Article 4 of the Commission’s regulations.

⁹ As discussed in our August 31 and September 27, 2012 comments.

- **Is an attestation that POU investments in non-compliant plants made during the prior year comply with the EPS sufficient to ensure that these investments are consistent with SB 1368?**

Post-hoc assertions of SB 1368 compliance are wholly insufficient to ensure consistency with SB 1368. As set forth above, investment decisions in non-compliant facilities are frequently not subject to either governing board approval or public review. Moreover, POUs appear to have varying views on whether investments needed to comply with environmental regulations trigger the EPS. Thus, a POU may attest it is compliant with SB 1368, but this belief may be based on a misunderstanding of SB 1368's requirements. Absent public review in advance of major investments and those needed for regulatory requirements, there is no way to ensure SB 1368 compliance and avoidance of a prohibited investment.

Recent Washington State regulatory activity on the appropriate EPS level further justifies Commission reconsideration of the California EPS.

The Washington State Department of Commerce recently announced its intention to amend its EPS (originally modeled after and nearly identical to the CA EPS) to 970 lbs/MWhr.¹⁰ The decision was made after a state survey of performance of combined cycle natural gas facilities.¹¹ While we recommended a lower level based on our own survey, Washington's move demonstrates that the current EPS definition in California is clearly outdated and out of step with recent examination by our sister-state to the north.

Notably, the EPS under SB 1368 does not apply to gas plants that were operational, or had a permit to operate as of June 30, 2007.¹² Yet POU objections to lowering the EPS were largely premised on purported non-compliance of existing gas facilities operational prior to June 2007 and therefore exempt from a revised EPS.¹³ We strongly urge the Commission to hold a workshop to fully explore updating this obsolete standard. Public Utilities Code Section 8341(f) empowers the Commission to update the EPS and the Commission should exercise its independent authority to do so.¹⁴

Thank you for your consideration of these comments.

Respectfully Submitted,

¹⁰ See <http://apps.leg.wa.gov/documents/laws/wsr/2013/02/13-02-098.htm>.

¹¹ See http://www.leg.wa.gov/documents/legislature/ReportsToTheLegislature/Survey%20of%20Commercially%20Available%20Turbines_FINAL_11%205%2012%20pdf_a776d3a6-d603-42ad-b998-19bbf1c98a31.pdf.

¹² Pub. Util. Code § 8341(d)(1).

¹³ See, e.g., Reply Comments of the City of Santa Clara dated Sept. 28, 2012 (asserting Donald Von Raesfeld Power Plant would be impacted by a lowered EPS even though "Santa Clara brought the DVR power plant on line in 2005").

¹⁴ SB 1368 only requires that the Commission update the EPS "in consultation with the Air Resources Board and Public Utilities Commission." Pub. Util. Code § 8341(f). To comply with this requirement, the Commission need only provide notice and the opportunity to comment to these agencies.



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