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Comments of Calpine Corporation on the Power Plant Compliance Petition to Amend Screening Form (18-SIT-01)

Additional submitted attachment is included below.

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June 5, 2018

Ms. Christine Root, Compliance Office Manager
Siting, Transmission, & Environmental Protection Division
California Energy Commission
Dockets Unit, MS-4
1516 Ninth Street
Sacramento, CA 95814-5512

RE: Comments of Calpine Corporation: Power Plant Compliance Petition to Amend Screening Form (18-SIT-01) and Power Plant Compliance Enforcement (18-SIT-02)

Dear Ms. Root:

On behalf of Calpine Corporation, including its subsidiaries ("Calpine"), we offer the following comments on the proposed Power Plant Compliance Petition to Amend Screening Form ("Screening Form"; Docket No. 18-SIT-01) and Power Plant Compliance Enforcement proposal ("Enforcement Proposal"; Docket No. 18-SIT-02) docketed by California Energy Commission ("Commission") Staff on April 11, 2018 (the "Power Plant Compliance Enforcement Letter," TN #: 223174).

Calpine is supportive of the Screening Form. As stated by Calpine representatives at the May 15, 2018, workshop, Calpine has already used the draft Screening Form and found it a useful tool for communicating effectively with Staff.

With respect to the Enforcement Proposal, Calpine has several concerns. As a legal matter, the proposed Compliance Advice Letters and Notices of Violation ("NOVs") are not authorized by existing law. In particular, the Commission Staff acting alone has no legal authority to impose fines or modify conditions of certification for purported noncompliance. As a practical matter, Calpine is concerned with the proposal for "enforcement tools" that are at odds with the dispute resolution and investigation procedures currently provided for in facility licenses and the Commission's regulations.

ENFORCEMENT PROPOSAL

Based on the Power Plant Compliance Enforcement Letter, it appears that the proposed "enforcement tools" would be used under circumstances where Staff has made a unilateral determination that a facility is not "in compliance". A Compliance Advice Letter would be utilized where Staff "determines that corrective action is needed at a project." An NOV would be utilized where Staff has determined that there is "non-conformance to the project's license or applicable laws, ord[i]nances, regulations or standards (LORS)." (Power Plant Compliance

Enforcement Letter, p.2.) Both "tools" -- and the Enforcement Proposal overall—are problematic for the following reasons.

First, the Warren-Alquist Act does not provide legal authority for the administrative enforcement process set forth in the Enforcement Proposal.

Second, the Enforcement Proposal ignores restrictions on the Commission's ability to modify a facility's license or impose administrative civil penalties, and removes fundamental due process protections that a project owner is entitled to before either of those enforcement mechanisms can be utilized.

Third, assuming that creation of the enforcement process contemplated in the Enforcement Proposal were proper under the Warren-Alquist Act, the process must be developed in a public and rigorous formal rulemaking process.

Fourth, the reservation to Staff of the authority to make a unilateral determination of a facility's compliance without any input from the project owner, is contrary to the dispute resolution procedures currently provided for in a facility's certification and the Commission's regulations.

For all of these reasons, Staff does not have the legal authority to, and should not, move forward with the Enforcement Proposal. Instead, Staff should utilize existing dispute resolution and compliance mechanisms to address any concerns with Commission jurisdictional facilities.

I. The Warren-Alquist Act Does Not Authorize The Administrative Enforcement Process Proposed By Staff In The Enforcement Proposal.

Public Resources Code section 25534 provides two mechanisms that the Commission can utilize to ensure that a facility complies with the terms of its license and all applicable LORS: (1) amendment or revocation of a facility's certification, not at issue here, and (2) assessment of an administrative civil penalty. Unlike the Commission's Appliance Efficiency program, wherein the Legislature specifically authorized the Commission to "adopt regulations establishing an administrative enforcement process,"[1] the Warren-Alquist Act does not provide for the establishment of a similar administrative enforcement process for power plants such as that proposed in the Enforcement Proposal.[2] As discussed in Section II below, the Warren-Alquist Act provides the Commission, but such authorization does not extend to the Staff, certain enforcement powers that must be exercised consistent with the important due process protections afforded by the Act.

II. The Enforcement Proposal Improperly Delegates To Staff Authorities Vested In The Commission And Ignores Critical Due Process Protections.

Even if the enforcement mechanisms contemplated by the Enforcement Proposal were authorized by the Warren-Alquist Act, the Enforcement Proposal ignores several key restrictions and due process protections required by statute and by state and federal constitutions. In

[1] See, Pub. Resources Code § 25402.11(a)(1).
[2] See, Pub. Resources Code §§ 25500 et seq.

particular, the Enforcement Proposal states that a NOV issued by Staff "may include a fine and/or a change to a facility[‘s] license to ensure compliance in the future." (Compliance Process Letter, p. 3.) The Warren-Alquist Act clearly provides that such actions may only be taken by the Commission following certain important procedural requirements discussed below.[3] There is no basis in statute to delegate the Commission's authority to impose these measures through the Staff's Enforcement Proposal.

Given the clear statutory requirements governing the procedures that must be followed before imposition of an administrative penalty, the Commission Staff should not waste any additional time or resources on a Staff-driven process for the imposition of penalties, particularly one that does not require or provide the clear procedural protections set forth in the Warren-Alquist Act.

A. The Warren-Alquist Act Clearly Defines The Limited Circumstances Under Which A Facility's License May Be Amended Or Revoked.

Public Resources Code Section 25534(a) provides for amendment or revocation of a facility's license in four limited circumstances: (1) Any material false statement set forth in the application, presented in proceedings of the commission, or included in supplemental documentation provided by the applicant; (2) Any *significant failure* to comply with the terms or conditions of approval of the application, as specified by the commission in its written decision; (3) a violation of the Warren-Alquist Act or any regulation or order issued by the Commission under the Warren-Alquist Act; and (4) if a project owner does not start construction of a project under a specific set of circumstances. (Emphasis added.)

However, under the Enforcement Proposal, a NOV may "include a change" to a facility's license "for non-conformance to the project's license or applicable [LORS]", ignoring the restrictions in the Warren-Alquist Act that such measures are applicable to only the most serious or "significant" failures to comply with the terms or conditions of the Commission's approval. The Legislature's addition of the word "significant" must be given effect under the canons of statutory construction:

> We seek to "ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." [Citation.] "[W]e begin by looking to the statutory language. [Citation.] We must give 'the language its usual, ordinary import and accord[ ] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. (Carmack v. Reynolds, 2 Cal.5th 844 (2017) 391 P.3d 625, 215 Cal.Rptr.3d 749 at 752.)

"Significant" is not surplusage. From this use of the term "significant" the Legislature mandated that amendment of a facility's license by the Commission is reserved for only the most serious noncompliance issues. In all other cases, the Commission and the project owner's work together, per the dispute resolution provisions in a facility's license, to resolve compliance issues at a facility. Thus, the Enforcement Proposal goes beyond the limited circumstances provided

[3] Pub. Resources Code § 25534.

for in the Warren-Alquist Act by suggesting that amendment of a facility's license may occur for any instance of noncompliance, not just a significant failure to comply.

B. The Warren-Alquist Clearly Defines The Procedural Requirements That Must Be Followed Prior To Unilateral Amendment Of A Facility's License By The Commission.

The Enforcement Proposal states that a NOV issued by Staff may include "a change to a facility['s] license to ensure compliance in the future." (Compliance Process Letter, p. 3.) This suggestion is not supported by applicable law.

The Warren-Alquist Act specifically provides that a facility's license can be amended for a significant failure to comply with the terms of its license only *after* "one or more hearings" by the Commission. (Public Resources Code Sections 25534.) California imposes a three part test to determine whether an agency's actions are consistent with the requirements of due process:

> Determining whether a particular administrative procedure is constitutionally sufficient requires analysis of the governmental and private interests involved: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and any probable value of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citations.] (Clary v. City of Crescent City, 11 Cal. App. 5th 274, 301–02, 217 Cal. Rptr. 3d 629, 656 (Ct. App. 2017).)

The proposed Compliance Enforcement mechanisms do not clear these important due process hurdles. An important private interest would be affected, the risk of deprivation is substantial, and the government interest has already been defined and accounted for in the statutory limits set forth in the Warren-Alquist Act. The right to a hearing before the Commission prior to amendment of a facility's license is just one important due process protection that is not recognized in the Enforcement Proposal. The suggestion of a change in a project's certification by any other process is improper and should be abandoned.

C. The Legislature Limited Imposition Of Civil Penalties To "Significant" Failures To Comply With The Terms Or Conditions Of Approval Proven In Proceedings Before The Commission Or Material Misstatements.

Section 25534(b) of the Warren-Alquist Act provides for the imposition of administrative civil penalties on a power plant owner in two limited circumstances. These limited circumstances are not recognized in the Enforcement Proposal. Specifically, Section 25534(b) provides, "The commission may also administratively impose a civil penalty for a violation of paragraph (1) or (2) of subdivision (a)" of Section 25534." Subdivision (a), paragraphs (1) and (2) are limited in scope:

> 25534. (a) The commission may, after one or more hearings, amend the conditions of, or revoke the certification for, any facility for any of the following reasons:
>
> (1) Any material false statement set forth in the application, presented in proceedings of the commission, or included in supplemental documentation provided by the applicant.
>
> (2) Any significant failure to comply with the terms or conditions of approval of the application, as specified by the commission in its written decision.

Examining these two paragraphs, it is clear that paragraph (1) is limited to materially false statements in the AFC, post-Certification proceedings, or documentation supplied in an AFC or a post-Certification proceeding. Calpine agrees that imposition of civil penalties under these circumstances is warranted and necessary to the orderly administration of the Commission's duties.

However, Staff's focus in the Enforcement Proposal appears to be on "non-conformance to the project's license or applicable laws, ordinances, regulations or standards." This seems to fall squarely within the purview of paragraph (2), "Any significant failure to comply with the terms or conditions of approval of the application, as specified by the commission in its written decision."

Staff's introduction of its proposed NOV process states that NOVs will "state the maximum allowable fine for the specific violation(s) which are subject of the NOV." Yet absent from Staff's presentation is any recognition of the Warren-Alquist Act's limitation of the imposition of civil penalties to "significant failures":

> Any significant failure to comply with the terms or conditions of approval of the application, as specified by the commission in its written decision.

The use of the term "significant" is important and intentional. The Legislature recognized that imposition of civil penalties should be reserved for only the most serious, "significant" failures to comply with the terms or conditions of approval.

In all other instances, the Legislature intended that the Commission and the project owner's work together cooperatively, as currently provided, with the investigation and complaint proceedings reserved for the most egregious instances of noncompliance. The Enforcement Proposal ignores these limitations.

D. <u>The Warren-Alquist Act Clearly Defines The Limited Circumstances Under Which Administrative Civil Penalties Can Be Imposed.</u>

Section 25534(b) provides, in pertinent part, that "Any civil penalty shall be imposed in accordance with Section 25534.1…" Section 25534.1 provides that a formal complaint process, replete with rigorous due process requirements, must be followed before an administrative civil

penalty can be assessed. These requirements include issuance of a complaint that provides full and fair notice of the allegations and any supporting factual evidence, an opportunity to respond, hearing, and a decision by the Commission on the merits of the allegations.

Despite the unambiguous language of the Warren-Alquist Act that administrative civil penalties can only be imposed following a complaint process, Staff's presentation at the workshop stated that the NOV process would be separate and distinct from the Commission's complaint process. Calpine is concerned with the proposed removal of these key due process protections prior to assessment of an administrative civil penalty. Furthermore, imposition of an administrative civil penalty through any other process would be inconsistent with the Warren-Alquist Act, and would be beyond the bounds of the Commission's statutory authority.

III. The Enforcement Proposal Is Inconsistent With the Dispute Resolution Procedures Set Forth In Licenses Issued By The Commission And Adds to Regulatory Uncertainty.

Facilities licensed by the Commission contain provisions that outline the existing mechanisms available to the Commission and Commission Staff to address potential compliance issues. Such mechanisms typically include: (1) both formal and informal dispute resolution procedures; (2) both formal and informal investigations; and (3) complaint proceedings.

The Enforcement Proposal adds to regulatory uncertainty by creating another process by which noncompliance issues may be raised and which potentially conflict with existing mechanisms. Under existing mechanisms, project owners have the ability to discuss compliance issues with Staff in an effort to resolve potential issues. Under the Enforcement Proposal, Staff will make unilateral determinations as to a facility's compliance with the terms of its license and applicable LORS; however, it is not clear that project owners will have the ability to respond or rebut the allegations. Furthermore, the structure of the Enforcement Proposal disincentives a project owner's ability to respond or rebut allegations of noncompliance for fear of being seen as "noncooperative" and potentially subject to higher penalties as a result.

The Commission's dispute resolution procedures are included in Commission's certification to emphasize the informal dispute resolution processes available. In contrast, the Enforcement Proposal seeks to make compliance proceedings formal, imposing jeopardy in the form of possible sanctions. Rather than create a whole new compliance enforcement process that is not within the scope of authority conferred by the Legislature, Commission Staff should instead utilize established compliance mechanisms.

IV. Any New Compliance Requirements Should Be Made In An APA-Compliant Rulemaking, Not By A Staff Letter Or Guidance Document, To Avoid Being An Underground Regulation.

Allegations of noncompliance and violations of applicable LORS are serious and important matters that may carry serious repercussions for project owners. The Enforcement Proposal would apply generally to all power plants under the Commission's jurisdiction, but Staff's letter has not been subject to the rigorous review in a rulemaking.

As stated above, the Warren-Alquist Act does not authorize the administrative enforcement process set forth in the Enforcement Proposal. However, even if the Enforcement Proposal were authorized by the Warren-Alquist Act, the Commission must undertake a formal, Administrative Procedure Act ("APA") compliant rulemaking process prior to utilizing the proposed enforcement tools. The APA provides as follows:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter. (Cal. Govt. Code § 11340.5.)

A regulation is defined as:

> . . .every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. (Cal. Govt. Code § 11342.600.)

Therefore, an agency is prohibited from issuing, utilizing, enforcing, or attempting to enforce any regulation unless it has undergone the formal, rulemaking process set forth in the APA and adopted as a regulation.

The Enforcement Proposal would clearly constitute a regulation as it would apply generally to every facility subject to the Commission's jurisdiction and govern the procedures by which Staff would enforce noncompliance with a facility's license or applicable LORS. The Enforcement Proposal cannot be utilized or enforced unless adopted as a regulation pursuant to the APA. If the Enforcement Proposal were implemented prior to a formal rulemaking, it would constitute an "underground regulation" pursuant to Title 1, section 250 of the California Code of Regulations:

> (a) "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

California law properly recognizes the Underground Regulations as invalid, and courts will not give such improperly promulgated regulations any effect:

> If an agency adopts an underground regulation, a court will treat the regulation as if it did not exist. If the underground regulation requires private parties to do or not to do something, this requirement will not be enforced. If the underground regulation is interpretive, a reviewing court will give it no deference.[4]

As a matter of law, Staff-created "policies" that are not set forth in formal, APA-compliant rulemaking are, at best, not fully developed and, at worst, constitute an Underground Regulation. We recognize that the rulemaking process can be long and onerous, but they are so precisely done to prevent arbitrary and capricious actions taken without the Due Process rights of notice and the opportunity to be heard. Anything less would be an Underground Regulation, contrary to law. To the extent that the Commission Staff wishes to impose new regulatory requirements, such requirements must be consistent with the Commission's existing statutory powers and promulgated in an APA-compliant Rulemaking. [5]

CONCLUSION

Calpine appreciates the opportunity to provide these comments. For the reasons set forth herein, Calpine urges the Commission Staff to not proceed with the proposed Enforcement Proposal and instead, utilize existing dispute resolution and compliance mechanisms to address any concerns with Commission jurisdictional facilities. Administrative penalties and amendment of licenses should be reserved for significant ***failures*** to comply with the terms or conditions of the Commission's certification, rather than any instance of noncompliance.

Sincerely,

Jeffery D Harris
Ellison Schneider Harris & Donlan LLP
Attorneys for Calpine Corporation

[4] California Practice Guide: Administrative Law Ch. 25-E; The Rutter Group, December 2017 Update California Practice Guide—Administrative Law, Michael Asimow, Michael J. Strumwasser, Herbert F. Bolz and Laurine E. Tuleja; Section 25:160.