

**DOCKET****06-OIR-1**DATE OCT 30 2006RECD. DEC 13 2006**ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION  
OF THE STATE OF CALIFORNIA**

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In the Matter of: )) )  
Proposed Adoption of Regulations Establishing a )  
Greenhouse Gases Emission Performance Standard )  
for Baseload Generation of Local Publicly Owned )  
Electric Utilities. )  
)Docket 06-OIR-1  
(October 30, 2006)**COMMENTS OF THE  
CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION  
REGARDING COMPLIANCE**

December 13, 2006

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In order to address compliance with the California Energy Commission's ("Energy Commission") emission performance standard (EPS) for publicly owned utilities (POU), we must look at the governing structure and public processes used by POUs to adopt resource plans and make resource procurement decisions. POUs perform these functions in public and in compliance with laws like the Brown Act. For POUs, the projects covered by SB 1368 are already subject to a public review and approval process because these decisions are brought to the POU governing boards. Review by the Energy Commission then becomes a second and in some cases third level of public review of the long-term commitment for baseload generation. It is in this public environment that the POUs propose a compliance filing process wherein the Energy Commission can verify and ensure compliance with SB 1368.

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local publicly owned electric utility."<sup>1</sup> The discussion begins by looking at the statutory requirements contained in SB 1368 regarding POUs, then highlights the differences in governing structures from the investor owned utilities (IOU) and ends with a proposal for compliance based upon the statutory structure and governing structure of POUs. The final section also responds to specific questions posed in Chapter 5: Compliance & Enforcement Alternatives of the *Staff Issue Identification Paper: Implementation of SB 1368 Emissions Performance Standard* ("Staff Paper").

**I. THE ENERGY COMMISSION IS TASKED BY SB 1368 WITH ENSURING POU COMPLIANCE WITH ITS EMISSION PERFORMANCE STANDARD**

SB 1368 gives the Energy Commission the responsibility to develop a compliance mechanism for POUs.<sup>2</sup> The compliance mechanism must address the fundamental tenet in SB 1368, that POUs not enter into long-term financial commitments for baseload generation that exceeds the EPS established by the Energy Commission.

No load-serving entity or local publicly owned electric utility may enter into a long-term financial commitment unless any baseload generation supplied under the long-term financial commitment complies with the greenhouse gases emission performance standard established . . . by the Energy Commission. . .<sup>3</sup>

Issues regarding the correct emission performance standard (EPS), what commitments are covered under SB 1368 as well as the determination of "baseload generation" are covered in other California Municipal Utilities Association filings. Regardless of how those other terms are interpreted, the Energy Commission needs to ensure POU compliance with the requirements of SB 1368 and the soon to be adopted regulations.

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<sup>1</sup> Cal. Publ. Util. Code §8341(c)(1). SB 1368 will become law on January 1, 2007.

<sup>2</sup> "The Energy Commission shall adopt regulations for the enforcement of this chapter with respect to a local publicly owned electricity utility." Cal. Publ. Util. Code §8341(c)(1).

<sup>3</sup> Cal. Publ. Util. Code §8341(a).

## II. THE ENERGY COMMISSION HAS CONSIDERABLE FLEXIBILITY IN CREATING A COMPLIANCE PROGRAM FOR POUS

Public Utilities Code Section 8341(c)(2) recognizes that the POUs and IOUs have different structures and therefore, compliance mechanisms are permitted to be different.

The Energy Commission *may*, in order to ensure compliance with the greenhouse gases emission performance standard by local publicly owned electric utilities, apply the procedures adopted by the commission to verify the emission of greenhouse gases from baseload generation pursuant to subdivision (b)<sup>4</sup>.

Here, the legislature clearly provided that a separate agency, the Energy Commission, address POU compliance with SB 1368. In addition, the different governing structures of POUs and IOUs leads to development of different compliance mechanisms.

### A. The CPUC already pre-approves IOU procurement plans and contracts and thereby, provides certainty of timely recovery of procurement costs.

Unlike POUs, the California Public Utilities Commission (CPUC) approves procurement plans and contracts of the IOUs. Recent legislation has created CPUC approval of both IOU procurement plans and power contracts, and provides pre-authorization for IOUs giving IOUs certainty regarding cost recovery for those approved resources and contracts.

(c)The commission shall review and accept, modify, or reject each electrical corporation's procurement plan. . . .

(1) . . . Any purchases made in compliance with the commission-authorized process shall be recovered in the generation component of rates.

. . .

(3) . . . The commission shall provide for expedited review and either approve or reject the individual contracts submitted by

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<sup>4</sup> Cal. Publ. Util. Code §8341(c)(2) (emphasis added).

the electrical corporation to ensure compliance with its procurement plan. . . .

(d) A procurement plan approved by the commission shall accomplish each of the following objectives:

(1) Enable the electrical corporation to fulfill its obligation to serve its customers at just and reasonable rates.

(2) Eliminate the need for after-the-fact reasonableness reviews of an electrical corporation's actions . . .

(3) Ensure timely recovery of prospective procurement costs incurred pursuant to an approved procurement plan.

. . .

(5) Provide for just and reasonable rates, with an appropriate balancing of price stability and price level in the electrical corporation's procurement plan.<sup>5</sup>

Because the CPUC is already reviewing IOU procurement plans and contracts, it is logical for the CPUC to also review those same procurement plans and contracts for compliance with the EPS. In fact, in SB 1368 the legislature recognized the current review structure and put this CPUC pre-review requirement into the statute.

The commission shall not approve a long-term financial commitment by an electrical corporation unless any baseload generation supplied under the long-term financial commitment complies with the greenhouse gases emission performance standard established by the commission . . .<sup>6</sup>

Thus, SB 1368 directs the CPUC to review compliance with SB 1368 in its procurement and contract review process.

**B. POU governing boards provide procurement review and rate setting for POU's**

For POU's it is their governing boards that set procurement policy and set policy for or approve contracts subject to SB 1368. It is also the POU's governing

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<sup>5</sup> Cal. Publ. Util. Code §454.5 (c) & (d).

<sup>6</sup> Cal. Publ. Util. Code §8341(b)(1).

boards' responsibility to set rates. POU's are defined in Public Utilities Code Section 9604 as a municipality or municipal corporation furnishing electric service, a municipal utility district furnishing electric service, a public utility district furnishing electric service, an irrigation district furnishing electric service, or a joint powers authority that includes one of these agencies and owns generation or transmission or furnishes electric service over its own or its member's electric distribution system. Therefore, POU's are either municipalities, joint powers authorities or special districts.

The CPUC ensures compliance with SB 1368 of IOU's and energy service providers (ESP's). Both ESP's and IOU's are for profit entities than are not required to make their procurement decisions in public. Once the IOU's make their decisions, the IOU's take their procurement plans and proposed contracts to the CPUC for review and approval. ESP's to a lesser extent provide resource adequacy and renewable portfolio standard information to the CPUC where their acquisitions are reviewed for compliance with those standards. Conversely, POU's are public entities where most resource decisions that would be subject to the requirements of SB 1368 are already conducted in public. Special districts are defined in the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 as "an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries".<sup>7</sup> As such, POU governing boards are responsible for approving electric supply plans and the rates that are required to cover the costs of those electric resources whether owned or purchased through contract. POU decisions by law take place in a public and transparent process.

### **III. POU GOVERNING BOARDS SHOULD BE RESPONSIBLE FOR COMPLYING WITH THE REQUIREMENTS OF SB 1368**

Because governing boards are responsible for setting the policy for and/or approving POU procurement decisions, it is POU governing boards that should be the entities charged with ensuring compliance with the requirements of SB 1368.

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<sup>7</sup> Cal. Gov. Code §56036(a).

**A. POU governing boards must approve contracts and investments in new baseload generation that are covered by SB 1368.**

At the current time, governing boards approve the long-term financial commitments in baseload generation covered by SB 1368. For example, the Sacramento Municipal Utility District's (SMUD) publicly elected governing board must act on all construction and maintenance services competitive contract awards that exceed \$5 million dollars.<sup>8</sup> This dollar amount covers all major resource additions for baseload generation. In addition, SMUD's board must act on all purchases, sales and exchanges of electricity for terms longer than three years.<sup>9</sup>

The Los Angeles Department of Water and Power's (LADWP) governing board must act on all competitive contract awards that exceed \$150,000 dollars. This dollar amount covers all resource additions for baseload generation. In addition, LADWP's board must act on all purchases, sales and exchanges of electricity for terms longer than eighteen months. For agreements longer than three years, the City Council must act.

The City of Riverside's Public Utility Board and/or City Council must approve all competitive contract awards that exceed \$50,000. Riverside Public Utilities' Council-approved "Power Resources Financial Risk Management Policy" provides that the Public Utilities Board and/or the City Council retain ultimate authority for all power supply transactions except as otherwise delegated therein. The Public Utilities Director has the authority to enter into individual transactions with a term up to 24 cumulative months, not to exceed five calendar years.

Because POU governing boards make resource planning and procurement decisions and/or set the policies governing such actions by their POU, they are in the best position to ensure that these commitments meet the requirements of SB 1368.

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<sup>8</sup> SMUD Board Policy No. BL-7, Delegation to the GM with Respect to Procurement, at 3 (June 3, 2004).

<sup>9</sup> SMUD Board Resolution No. 03-07-12 as revised by Resolution No. 03-12-06.

**B. POU governing boards must act in compliance with applicable legal requirements.**

SB 1368 places a new legal requirement on governing boards of POUs regarding procurement by stating, "No . . . local publicly owned electric utility may enter into a long-term financial commitment unless any baseload generation supplied . . . complies with the greenhouse gases" EPS.<sup>10</sup> This legal requirement applies to POUs regardless of any action taken by the Energy Commission. General principles of law require that government agencies and special districts comply with the law.<sup>11</sup> Many governing boards have explicit policies requiring that they act in compliance with the law.

SMUD Board Policy delegating to SMUD's General Manager procurement responsibility includes a policy that "procurement shall take place in accordance with applicable legal requirements".<sup>12</sup> Furthermore, the SMUD Board policies for conduct commits the SMUD Board and its members to "lawful conduct". Specifically, "Board members shall conduct themselves in accordance with all laws".<sup>13</sup>

Because POUs are required to act in accordance with applicable law and many POU governing boards already have specific policies to act in accordance with the law, POUs are already obligated to conduct the operations of their POU in accordance with the mandates of SB 1368.

Therefore, in the case of POUs the Energy Commission's compliance check would be the second or in the case of LADWP the third public board level review of long-term financial commitments for baseload generation. It is because of this double

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<sup>10</sup> Cal. Publ. Util. Code §8341 (a).

<sup>11</sup> Administrative agencies have only such powers as are conferred by law creating them and may not act in excess of those powers. *20th Century Ins. Co. v. Quackenbush*, 64 Cal.App.4th 135, 139 (1998), *Weber v. Board of Retirement of Los Angeles County Retirement Assn.*, 62 Cal.App.4th 1440, 1446 (1998), *Larson v. State Personnel Bd.*, 28 Cal.App.4th 265, 273-274 (1994), *General Telephone Co. v. Public Utilities Comm.*, 34 Cal.3d 817, 823-825 (1983).

<sup>12</sup> SMUD Board Policy No. BL-7, Delegation to the GM with Respect to Procurement at 1 (June 3, 2004).

<sup>13</sup> SMUD Board Policy No. GP-7, Board Members' Code of Conduct, at 1 (April 6, 2006).



or triple layer of review that compliance for POU's should differ from compliance for IOUs.

#### IV. ENSURING POU COMPLIANCE WITH THE ENERGY COMMISSION'S EPS

A. Expanding the list of compliance attributes (Question 5.1 – Are there additional attributes of a compliance mechanism that should be considered?)

The goal of this rulemaking process should be to create a program that is effective but does not create by itself additional burdens and therefore, additional costs to ratepayers. The Staff Paper identifies four compliance attributes. Those attributes are Effectiveness, Provide Transparency, Minimize Uncertainty and Administrative Ease.<sup>14</sup> We recommend that an additional consideration be included in that list. The additional attribute is Eliminate or Minimize Contracting Burden. Additional burdens placed upon contracts and the contracting process by the implementation of SB 1368 will result in higher costs to ratepayers. Higher costs due to the inability to contract long term for non-complying resources cannot be avoided, but higher costs due to lack of clarity in the standard, administrative complexity and unnecessary burdens placed upon POU's and their ability to contract will create additional costs for those contracts can be avoided.

The second aspect of minimizing contracting burden is reduce duplicative reporting and regulation. The California Air Resources Board is initiating a process to develop regulations for mandatory reporting of greenhouse gas emissions under AB 32.<sup>15</sup>

38530. (a) On or before January 1, 2008, the state board shall adopt regulations to require the reporting and verification of statewide greenhouse gas emissions and to monitor and enforce compliance with this program.

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<sup>14</sup> Staff Paper at 19.

<sup>15</sup> Cal. Publ. Util. Code § 38530(a), (effective as of January 1, 2007).

(b) The regulations shall do all of the following:

...

(2) Account for greenhouse gas emissions from all electricity consumed in the state, including transmission and distribution line losses from electricity generated within the state or imported from outside the state. This requirement applies to all retail sellers of electricity, including load-serving entities as defined in subdivision (j) of Section 380 of the Public Utilities Code and local publicly owned electric utilities as defined in Section 9604 of the Public Utilities Code.

...

(4) Ensure rigorous and consistent accounting of emissions, and provide reporting tools and formats to ensure collection of necessary data.

(5) Ensure that greenhouse gas emission sources maintain comprehensive records of all reported greenhouse gas emissions.<sup>16</sup>

The reporting requirements of both agencies should be created such that duplicative efforts are avoided. We note that under AB 32 the probable first year of data collection will most likely be 2008 with reporting to the California Air Resources Board in 2009.

We would like to stress the importance of providing transparency and certainty in application of the EPS. Transparency and certainty are essential to establish a clear EPS wherein a POU can understand the requirements of that standard and can in most cases easily determine whether a proposed long-term financial commitment is covered by the requirements of SB 1368 and if so, whether that financial commitment meets the Energy Commission's EPS.

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<sup>16</sup> Cal. Health & Safety Code § 38530(a) & (b).

**B. Structure for an effective and efficient compliance process (Question 5.2 – Is this typology sufficient? Are there other approaches to compliance and verification that should be discussed?)**

With these additional attributes in mind, we propose a compliance program with the following features:

1. Create a non-exclusive list of compliant baseload generators based upon publicly available information including the Energy Commission's own records on powerplants. This list could include facilities that are clearly in compliance, facilities that are borderline and facilities that clearly do not comply.
2. Require an annual filing by POU's explaining the long-term financial commitments for baseload generation entered into the previous year, if any. That filing could contain public governing board documents such as staff reports and governing board resolutions. Those documents could show the pertinent facts about the long-term financial commitment for baseload generation to demonstrate compliance of that commitment with the Energy Commission's EPS. The information needed to show compliance of a long-term financial commitment that is a new or renewed contract for baseload generation could include:
  - a. The term of the contract and any options to extend that contract.
  - b. The facility(ies), unit(s) or other source(s) of the energy, if known.
  - c. An explanation showing how the new or renewed contract complies with the Energy Commission's EPS.
  - d. A description of the design or operation of the energy source(s) showing that those source(s) are baseload.

Long-term commitments that are a new ownership investment in baseload generation should include:

- a. A description of the planned powerplant or the purchased asset specifying the power generating equipment, power source (i.e. fuel type, wind, biomass) and any supplemental fuel source.
- b. For non-renewable resources, the heat rate or emissions profile of the facility.
- c. An explanation showing how the new ownership investment complies with the Energy Commission's EPS.

3. Verification of compliance could be shown by any of the following methods:
  - a. Governing board documents showing the information described above, or
  - b. Mandatory emission reporting and verification provided to the California Air Resources Board, or
  - c. Land use or air quality permits for the owned or contracted asset(s), or
  - d. Continuous emissions monitoring data provided to the air district, or
  - e. An "in camera" document review by the Energy Commission at the POU, or
  - f. Other verifiable documents showing compliance of the long-term financial commitment with the Energy Commission's EPS.
4. A voluntary consultation process for assets, contracting opportunities or research and development projects where the POU would like to obtain a compliance decision from the Energy Commission prior to POU action. The voluntary prior consultation and decision process should take no longer than 60 days and should provide a decision that the POU can rely upon. The Energy Commission decision on compliance should be similar to an Internal Revenue Service Letter Ruling or a Fair Political Practices Commission advice letter, in that the entity with the ruling can rely upon that ruling without the fear of a later contrary determination or change in policy.

**C. Responses to compliance questions 5.3 through 5.15 and 5.22 in the Staff Paper.**

The Staff Paper asks a number of questions about the compliance filing concept. The following responds to those questions:

1. Question 5.3 -- Are there potential problems with self-certification that are not considered above?

There are no problems with compliance filings or self-certification. This section of the Staff Paper does not take into account the initial public review and action by POU governing boards. Governing boards of POUs have an obligation to comply with applicable laws including those governing open meetings such as the Brown Act. Footnote 4 in the Staff Paper fails to recognize this important distinction between IOUs and POUs. Many POU governing boards are elected, composed of elected representatives or appointed by elected representatives. These POUs are also

either government entities or agencies of the state. Thus, once a requirement is set the first responsibility for compliance should rest with the governing boards who will be taking a considerable risk if they decide not to comply with the requirements of SB 1368.

2. Question 5.4 – Are there existing models of self-certification from other industries that should be considered?

Yes, there are numerous examples of effective compliance filing programs. One example is in the solid waste area. Cities are required to adopt "source reduction and recycling elements" (SRRE's) as part of their state-mandated solid waste management plans<sup>17</sup>. The SRRE's are subject to regulatory review of the Integrated Waste Management Board. Once the SRRE is adopted by the city, the city files annual reports. In this case the Energy Commission is adopting the EPS, but the POUs are responsible for complying with the law and could follow a similar process by adopting annual compliance filings.

Another example is the self-certification of qualifying facilities who provide justification for their status as a qualifying facility and file that information with the Federal Energy Regulatory Commission (FERC). This program relieves FERC of opening a proceeding to evaluate each qualifying facility application saving regulatory time for matters where the standards or requirements are in question.

Furthermore, bond financing used to finance individual generation project construction or purchase, or general bonds for POU operations require disclosure statements signed by a responsible individual on behalf of the POU that the POU is operating in compliance with applicable laws. False or incorrect statements in bond disclosure documents carry significant penalties that provide a strong disincentive for POUs to ignore the requirements of SB 1368 and the Energy Commission's EPS.

3. Question 5.5 – Even given self-certification, is there a need for a mechanism that audits compliance filings? If so, what auditing mechanism (e.g., data requests from Energy Commission staff, independent auditing) would be appropriate?

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<sup>17</sup> See Cal. Pub. Res. code Sections 41000 et seq.

To ensure compliance the Energy Commission could review the filings of the POUs for compliance. Should the Energy Commission see something it questions or a concern it could request additional supporting documentation within 90 days of filing. The supporting documentation could include any of the following documents that may already exist and be able to clarify any question the Energy Commission may have.

- a. The California Air Resources Board is required to develop a reporting and verification program and documents produced as a part of this program may provide sufficient information, or.
- b. The California Climate Action Registry has an audit process that may be used to provide an independent review, or
- c. Air districts receive CEMS and source test data and requirement emissions calculations, or
- d. An in camera review of documents could be used to avoid the need to address confidential filings.

Existing and planned verification programs under AB 32 should be used to provide additional documentation whenever the Energy Commission wants to perform an additional review of a compliance filing. The current auditing process used by the California Climate Action Registry would provide sufficient information to the auditors to also certify compliance of new long-term financial commitments for baseload generation. Should the California Air Resources Board develop similar procedures for verifying the reporting information, that process could be used to confirm the information provided by the POUs. AB 32 requires, "on or before January 1, 2008, the state board shall adopt regulations to require the reporting and *verification* of statewide greenhouse gas emissions and to monitor and *enforce compliance* with this program."<sup>18</sup>

4. Question 5.6 - Should prior review and approval be required of all procurement that is subject to the standard?

No. Governing board review of long-term financial commitments subject to SB 1368 includes public notice and open meetings. Please note that Energy

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<sup>18</sup> Cal. Pub. Res. Code §38350 (a), (emphasis added), (effective as of January 1, 2007).

Commission pre-approval is really double and in some instances triple approval for POU's. Since POU's need to obtain approval for these actions from their governing boards, Energy Commission approval would be a second public review and approval of a long-term financial commitment. Thus, pre-approval is essentially requiring two different government agencies to approve the same proposal against the same standard.

A clear and easily understandable standard will go a long way to aiding compliance by governing boards facing the question of whether a long-term financial commitment meets the Energy Commission's EPS and the public in its review of publicly available information or within a public POU governing board meeting. A transparent EPS within a transparent governing board review process will provide the customers of the POU and the public in general an opportunity to be informed about POU actions subject to SB 1368.

Prior Energy Commission approval would create a new requirement and second approval against the same Energy Commission EPS for power contracting. Additional requirements add costs and create a disincentive for counterparties to work with POU's. Delays associated with regulatory review of contracts can chill a POU's ability to move nimbly in the market and complete transactions that comply with SB 1368. Therefore, only in those situations where the POU feels that consultation with the Energy Commission to obtain pre-approval would be helpful, should it be used. Energy Commission pre-approval for the sake of pre-approval will add an unnecessary layer of review and potentially additional costs to ratepayers when clear standards could make a compliance determination relatively simple.

5. Question 5.7 – How could prior review and approval be structured so as to minimize delays? How can it best be meshed with existing reporting to the Energy Commission by the POU's and the Energy Commission's decision-making processes?

Promulgation of a detailed standard for compliance that resolves issues of interpretation ahead of time is the best way to minimize confusion and delay. In this way, the need for prior approval can be avoided, as effective compliance can be achieved by POU governing boards.

Prior consultation and approval with the Energy Commission should be used only at the election of the POU for long-term financial commitments that involve different or unusual provisions where the POU is concerned that compliance is not clear. In such instances, consultation should occur within the shortest possible time, we recommend not exceeding 60 days. Opportunities for long-term financial commitments can be fleeting, time or price sensitive. Extended review time could significantly impact the price or availability of the opportunity.

6. Question 5.8 – Does a preferred standard require performance monitoring for the purpose of assessing compliance for certain resources? What type of resources? What data might be needed to evaluate the compliance of these resources?

Performance monitoring should not be required of non-research or development projects. Long-term financial commitments in the form of contracts should be reviewed by the POU at the outset and compared to the standard. Re-evaluation of a contract over time would pose a considerable problem for contracting parties. Therefore, performance monitoring should only be required for research and development projects that may propose novel carbon reduction or containment strategies. Contracts with existing facilities or new facilities should have an emissions profile that can be compared to the Energy Commission's EPS. Performance monitoring should only apply to a project where the emissions profile is unknown or in question due to its status as a research or demonstration project.

7. Question 5.9 – Is self-certification a reasonable option for new construction, repowerings and purchases of existing facilities? If so, what if any actions on the part of the POU would constitute self-certification? Is there a (legal) need for a certificate filing?

Yes. For new construction and purchases of existing facilities detailed air quality permit information including emission rates and estimates of annual emissions will be available. Whether a "repower" will be subject to review under SB 1368 is covered by another CMUA filing. Nonetheless, any alteration to the equipment or control apparatus which will significantly increase or affect the kind or amount of air



contaminants emitted would require a new or revised air permit for that emission source.<sup>19</sup>

To demonstrate compliance, the POU could provide air permitting documentation, or resolutions or staff reports from governing board actions. The analysis required to obtain an air permit would provide sufficient information to determine and if necessary, demonstrate compliance with the Energy Commission's EPS. The purchasing or building POU could include a copy of the application for the air quality permit, authority to construct, permit to operate or equipment description for commonly installed equipment such as a General Electric Frame 7 combustion turbine in combined cycle configuration for the facility in its annual compliance filing. The POU could also include a copy of the documents used by the governing board in reaching its decision on compliance of the long-term financial commitment with the Energy Commission's EPS.

8. Question 5.10 – If there are multiple sources of data that can establish eligibility under the standard, should the Energy Commission specify which data are required or preferred?

Clarity regarding the data needed to show compliance with the Energy Commission's EPS should be set by the Energy Commission. It is important that both the governing board and the Energy Commission are looking at the same data in making a determination regarding compliance with the Energy Commission's EPS. Nonetheless and because of the variation between air districts and other data sources, the regulations need to provide some flexibility regarding the type of data that can be used to show compliance with the Energy Commission's EPS. Not all circumstances will be contemplated prior to completing the work on these regulations. Some flexibility in the regulations will allow both the POUs and the Energy Commission to tailor the information to the situation where standard information would provide misleading results.

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<sup>19</sup> See San Joaquin Valley Air Pollution Control District, Regulation I, Rule 1020, Section 3.5.

The regulations could provide a list of initial sources of information say the configuration of the generating resource. If the configuration of the generating resource would not provide an accurate determination of the generating resource's emissions or operation, then the emissions data or air permit for the facility would be used. If the emissions data or air permit would provide misleading information, then the operating history of the facility should be used, etcetera.

9. Question 5.11 – Are there specific circumstances under which self-certification may not be an appropriate compliance mechanism for these resources? Are there instances when there may not be sufficient data filed with the Energy Commission or local permitting authorities, or otherwise available so as to allow for self-certification? For example, can filings with AQMDs misleadingly indicate that (a) the facility should be subjected to the EPS screen when it actually shouldn't, or (b) fails to meet the pass the EPS screen when it actually does so? If so, are there other data to support self-certification or would a review mechanism be necessary?

The POU's do not anticipate that insufficient or conflicting data would preclude accurate self-certification. POU's and their staffs would resolve any such uncertainties prior to committing to the resource, knowing that their governing boards and the CEC could not find the resource in compliance absent such clarity. Compliance with the law is important to POU's. Therefore, POU's will take compliance with SB 1368 seriously. POU's would resolve any such uncertainties just as they currently resolve other issues on price or resource characteristics before the POU makes a very large, long-term financial and reliability commitment to a resource the POU plans to use to service its load.

This question is asked in the context of physical resources. For physical resources information such as the equipment type and configuration along with the heat rate should be available. Equipment configuration and heat rate are often a key determinant for the planned operation of a facility i.e. peaking or baseload. Although a facility's air permit may allow baseload operation, the configuration may clearly indicate the actual operation of the facility. For facilities like cogeneration applications where additional information such as process steam use are important to show compliance with the Energy Commission's EPS, the POU could obtain additional information including calculations to demonstrate compliance.

10. Question 5.12 – Is self-certification sufficient for unit-contingent contracts where historical emissions data is readily available? If not, what financial or performance data should be submitted as part of the compliance and verification process?

Self-certification is the best approach for all circumstances, including unit contingent purchases. Unit specific contracts with historical emissions data should be sufficient to show compliance with the Energy Commission's EPS. The focus of the Energy Commission's EPS is on emissions not financial arrangements. No additional data should be required.

11. Question 5.13 – Should the Energy Commission maintain a list of existing facilities that meet the EPS for the purpose of determining the eligibility of resources? Should the list also include those facilities that do not meet the EPS given available data?

Given the amount of information publicly available regarding the emissions of existing powerplants in the western United States and the vast quantities of information held by the Energy Commission regarding powerplants in California, this exercise should be straightforward for a great number of facilities. A list of clearly compliant and clearly non-compliant facilities would enhance the ability of POUs to know whether a long-term financial commitment meets the Energy Commission's EPS.

12. Question 5.14 – If data is unavailable, e.g., a contract is signed with an existing unlisted unit whose thermal load is unknown, how should a determination be made?

It is incumbent on the POU to get the needed information to determine compliance. For cogeneration facilities where the thermal data is not readily available to the Energy Commission and therefore, not included on the list, the POU can get thermal load information to confirm that the specific unit meets the Energy Commission's EPS. Since the POU will be the purchasing entity, the POU will be able to get thermal load information and apply that information to the approved calculation method to confirm compliance with the Energy Commission's EPS.

13. Question 5.15 – If a facility is undergoing/has undergone modifications (to allow it to meet an emissions standard), and if publicly available data does not show how

modifications will change historical emissions sufficiently to meet the EPS, how should a determination be made?

If for some reason emissions information<sup>20</sup> is not available perhaps because the facility is so small that it does not trigger air permitting, the POU will need to obtain sufficient data to support a determination that the unit or facility meets the Energy Commission's EPS. The POU purchasing the resource or contracting with the resource can make accurate compliance information a requirement for the transaction to be completed. If the unit is experimental or a research project, the POU could request assistance from the Energy Commission or its staff.

14. Question 5.22 – What should the Energy Commission's position be on this issue (multiple short term contracts with the same resource) relative to POU procurement practices? Are regulatory provisions needed to prevent back-to-back contracts for the same resource of less than five years? Are there circumstances under which such contracts are justified? If so, how should a determination be made?

The situation described above appears to be a violation of public contracting called bid splitting. POUs are already prohibited from these types of activities.

Bid splitting should not be confused with a legitimate three-year contract followed by a new bid process or solicitation at the conclusion of that contract wherein the same party provides the energy or capacity for an additional three years. This subsequent three-year contracts would be the result of bidding or solicitations as opposed to a plan to avoid the Energy Commission's EPS.

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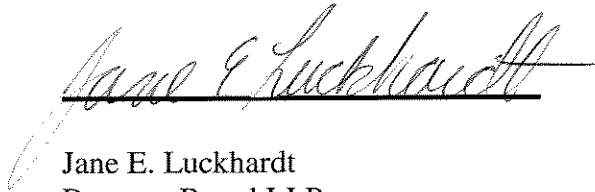
<sup>20</sup>Since the modification is defined as modifying the emissions of the unit or facility to meet an emissions standard, for all but very small units that modification would most likely be analyzed by the local air district. Although new source review is only triggered when a modification is determined to be major by either federal or local definitions, any alteration which will increase or affect the kind or amount of air contaminant emitted will require a modification to the air permit. For example, the San Joaquin Valley Air Pollution Control District defines alteration as "any addition to, enlargement of, replacement of, or any major modification or change in the design, capacity, process, or arrangement, or any increase in the connected loading of, equipment or control apparatus, which will significantly increase or affect the kind or amount of air contaminants emitted." San Joaquin Valley Air Pollution Control District, Regulation I, Rule 1020, Section 3.5 (June 1999). Therefore, most modifications that impact emissions will require a modification to an existing air permit. The analysis required to modify the air permit should be sufficient to determine whether the modified facility will meet the Energy Commission's EPS.

V. **THE ENERGY COMMISSION'S SB 1368 COMPLIANCE PROGRAM  
SHOULD RECOGNIZE POU GOVERNING BOARD RESPONSIBILITIES BY  
CREATING A COMPLIANCE FILING PROGRAM**

Given the POU governing board's responsibilities for procurement and rates, those governing boards should be the first review of a long-term financial commitment's compliance with the Energy Commission's EPS. Compliance filings should provide the Energy Commission with an opportunity to double check the POU governing boards and provide sufficient opportunity to review compliance.

Dated: December 13, 2006

Respectfully submitted,

A handwritten signature in cursive script, reading "Jane E. Luckhardt", written over a horizontal line.

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