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 ON THE CEC WHITE PAPER AND WORKSHOP – TRIGGERING AND INTERPRETATIONS OF SB 1368

In accordance with the direction of the California Energy Commission ("CEC" or "Commission") Electricity Committee provided at the *Electricity Committee Workshop on Greenhouse Gases Emission Performance Standard for Implementing Senate Bill 1368* ("Workshop") on December 8, 2007, the California Municipal Utilities Association ("CMUA") hereby files these Comments on selected issues presented at the Workshop and in the *Staff Issue Identification Paper: Implementation of SB 1368 Emissions Performance Standard* ("White Paper").

I. CMUA ANTICIPATES ADDITIONAL OPPORTUNITIES TO MORE ADEQUATELY CONSIDER THE MANY COMPLEX TECHNICAL ISSUES IN THIS RULEMAKING.

CMUA thanks the Electricity Committee for the opportunity to file these Comments in response to the White Paper and the issues discussed at the Workshop. Even though CMUA's request for implementing an alternative procedural schedule was denied, CMUA is not deterred in the sense that it *affirms clearly that it will continue to work very diligently and collaboratively with Commission Staff and other parties* during this hurried timeline in an attempt to craft workable regulations.

Nonetheless, CMUA is concerned that many highly complex technical subjects

have not been adequately considered at this early stage in 06-OIR-1 and so, CMUA is unable to provide definitive comments. Chief of among CMUA's concerns in these technical areas are the calculation and use of unspecified resources, the treatment of firming resources, and the calculation of the net emissions of electricity generating resources (biogenic and otherwise). CMUA inserts this paragraph as a "placeholder" for the many unresolved technical issues. CMUA will seek opportunities for further discussions with CEC Staff and additional consideration in future workshops before submitting detailed comments.

II. CHAPTER 3 ISSUES – TRIGGERS AND INTERPRETATONS OF LONG TERM COMMITMENTS.

The White Paper asked several questions concerning the possible definition for "a new ownership investment" as stated in prospective Public Utilities Code section 8340(j).

A. Question 3.1 – Does [a new ownership investment] only apply to an investment in a newly constructed facility or does it also apply to the repowering of an existing facility? Should there be a size or monetary threshold below which the phrase would not apply?

In accordance with the discussion below for Question 3.2, CMUA believes that SB 1368 reasonably restricts the definition of a "long term financial commitment" ("LTFC") to situations in which a new legal relationship is established. The White Paper presents several possible examples of "a new ownership investment."

1. Ownership may refer only to the purchase of facilities that will be owned directly by the POU.

Yes. CMUA agrees that this example is clearly "a new ownership interest" under SB 1368.

2. Ownership may also include participation in a joint powers authority.

Yes. The various joint powers agencies ("JPAs") may be structured in different ways and for different purposes. The ownership categorization would apply to commitments for building new powerplants by a JPA since in that case, the JPA would fit within the definition of a local publicly owned electric utility as per Public Utilities Code section 9604(d). See CMUA's response to Question 3.3, below.

3. First time acquisition of a baseload facility;

Yes. CMUA agrees that this example clearly is "a new ownership interest" under SB 1368.

4. Expenditure of additional dollars on an existing facility that will create, preserve or extend a baseload function for more than 5 years;

No. This is not "a new ownership investment." There is nothing in SB 1368 that would suggest it applies to any expenditure involving existing legal relationships. The Warren Alquist Act has language dealing with triggering for the CEC siting authority for modifications and if the Legislature had intended SB 1368 to apply to modifications, it would have included similar language in SB 1368. The "5 year" language in SB 1368 applies *only* to contracts. See CMUA's discussion below on Question 3.11.

5. Expenditure of additional dollars on an existing facility including that which will create, preserve or extend a baseload function for any period;

No. There is nothing in SB 1368 that would suggest it applies to any expenditure involving existing legal relationships.

6. Any planned expenditure on a facility including that for routine replacement, repair of failed or degraded equipment, or compliance with new regulations;

No. There is nothing in SB 1368 that would suggest it applies to any expenditure involving existing legal relationships. Furthermore, this could result in delays in necessary maintenance while the SB 1368 review was performed. This would be a perverse interpretation of the statute.

7. Any planned expenditure on a facility, including refinancing.

No. There is nothing in SB 1368 that would suggest it applies to any expenditure involving existing legal relationships. Utilities routinely refinance their powerplants when they can reduce the financing costs and reduce the amount of prospective rate increases.

B. <u>Question 3.2 - How does the intent of the legislation guide our choice?</u>

Chapter 3 primarily deals with the interpretation of the phrase "Long-term financial

commitment," which according to the statute "means either a new ownership investment in baseload generation or a new or renewed contract with a term of five or more years, which includes procurement of baseload generation."[1] According to the rules of statutory interpretation, the entire subsection must be read together and in context before exploring extrinsic aids to determine the legislative intent.

> "When construing a statute, one must "ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose.""[2]

In all cases, the words, phrases, and sentences of SB 1368 evidence a legislative intent to trigger the emission performance standard ("EPS") only when a publicly-owned electric utility ("POU") *enters* a *new legal relationship*. The essence of SB 1368 is Public Utilities Code section 8341(a) which states that "[n]o . . . 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 . . . ."[3]

In other words, the test is whether or not the POU's action creates a *new legal relationship* involving baseload generation that would not *come into existence* but for the POU's action. SB 1368 does not evidence any legislative intent to affect any legal relationships during the time they are in existence, *only the act of entering into* new legal relationships.[4]

For example, a LTFC includes new contracts with a term of 5 or more years which include the procurement of baseload generation. Except by entering this new contract, the POU would not have a *legal relationship* concerning the baseload generation. In the case of expiring contracts, the renewed contract would enable a *new legal relationship* for baseload generation that would not exist otherwise, since the "old" legal relationship would terminate *according to the existing contract's terms*. Moreover, SB 1368 does not,

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[1] Pub. Util. Code section 8340(j).

[2] *Bodell Construction Co. v. Trustees of Cal. State University*, 62 Cal. App. 4th 1508, 1515-1516 (1998).

[3] Pub. Util. Code section 8341(a) (emphasis added).

[4] *See id.*

in any way, diminish or terminate the legal relationship in any existing contract.

Similarly, in the case of a new ownership investment, the POU's investment creates a new legal relationship in baseload generation. The usual and ordinary reading of the phrase "a new ownership investment" must be interpreted as written by the Legislature. In that vein, this phrase applies only to investments that *create a new legal relationship* for the POU in baseload generation that would not otherwise exist but for a new LTFC. Therefore, this does not apply to any investment by an existing owner, such as repowering, maintenance, environmental upgrades, or refinancing. Equipment replacement or installations that preserve the existing owned plant are not new ownership investments. Investments to extend the life of an owned plant or to comply with other regulations are not new ownership investments because there is no new legal relationship established in baseload generation.

CMUA points out that each of these activities has independent value to the utility and "will reduce potential financial risk to California consumers for future pollution-control costs," one of the very purposes of SB 1368.[5] These investments may actually produce immediate and long-term benefits to California, such as reduced emissions, lower fuel consumption, additional jobs, and other benefits to California's businesses. It seems an absurd interpretation of SB 1368 that would infer a legislative intent to close existing plants rather than improve them in a time of significant forecasted load growth and insufficient generating capacity.

One party would interpret SB 1368 by effectively removing the word "ownership" from the statutory phrase and suggest that the EPS applies to an owner's "new . . . investment" in baseload generation. Yet, then, they suggest that the list of new investments triggering the EPS is limited and concerns only those lasting five or more years. The only way to reach this conclusion, however, is to run Public Utilities Coded section 8340(j) through a grammatical chop shop.

CMUA offers the following grammatical explanation of the relevant portions of the sentence. This is necessary in order to give "the language its usual, ordinary import and according significance, . . . , to every word, phrase and sentence."[6]

It is apparent that the linked conjunctions ["either" / "or"] indicate that the subject

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[5] SB 1368, section 1(i).

[6] *See Bodell, supra*.

of the sentence ["long term financial commitment"] may be *only one* of two types of legal relationships: (1) a new ownership investment; or (2) a contract. However, an SB 1368 LTFC may not be categorized simultaneously as a new investment *and* a contract. The interpretation that the two types of legal relationships are entirely different is confirmed by the Legislature's sentence structure. Accordingly, each is listed in a separate dependent clause ["a new ownership investment in baseload generation" / "a new or renewed contract with a term of five or more years"].

Breaking down the first dependent clause a little further, the plain meaning of "a new ownership investment" is relatively clear. The three adjectives in this dependent clause modify the noun "investment." Although the word "ownership" is a noun, a noun may be used as an adjective when it *precedes* the noun that it modifies. These three adjectives, therefore, must remain as modifiers to the noun "investment" and cannot be individually removed without changing the meaning of the entire dependent clause. Hence the word "ownership" is used to describe the specific type of investment, i.e., not just any type of investment, but an investment that creates an "ownership" interest.

C. Question 3.3 - Is it generally clear that Joint Power arrangements constitute ownership under the statute?

There is little guidance in SB 1368 on this subject. A JPA that owns generation is defined as a local publicly owned electric utility in Public Utilities Code section 9604(d). Joint powers agencies ("JPAs") may be structured in different ways and for different purposes. Some JPAs are established to actually own and operate resources. Other JPAs are established to arrange or secure financing. Unlike the investor-owned utilities, in order to obtain their power resources POUs are often either permitted or required by law to enter into unique legal arrangements that do not fit neatly into either the ownership or contract categories. A subset of the ownership category is "ownership-like" interests. A formalistic, one-size-fits-all approach to defining ownership interests ignores POUs' unique legal arrangements. Such an approach will likely impose multiple layers of regulation, *i.e.*, on both the JPA that technically "owns" the resource and on the POUs that technically "contract" for the power.

Consistent with the "new legal relationship" test, a JPA that was formed to provide operational control and procurement of baseload generation should be considered to have an ownership or ownership-like interest in the resource. In addition, POUs who must

"contract" with a JPA to obtain power from a resource should not have that "contractual" transaction scrutinized under SB 1368 if the JPA's sole purpose is to own and operate generation on behalf of its constituent members.

D. Question 3.4 - Can one infer any legislative intent from the fact that the definition of "long-term financial commitment" refers to both "new and renewed" contracts but to only a "new" ownership investment? Does omission of the term "renewed" provide guidance for the types of activities that should be covered under "new ownership investment"?

It is clear that only new ownership investments and new or renewed contracts are covered by SB 1368. Ownership is never renewed. It can be sold or purchased, but the act of extending, modifying, or refinancing does not affect the ownership interest or create a new legal relationship. The use of the word "renewed" evidences a clear distinction between contracts and new ownership investments. As mentioned above, investments and contracts are the objects in two separate dependent clauses. The words in each of the dependent clauses do not apply to the other clause. Omission of the term "renewed" with regard to ownership interests provides further guidance with regard to the application of the standard. If the Legislature intended to cover all investments in existing facilities, it would have expressly indicated such. This is consistent with the "new legal relationship" test as discussed above in the answer to Questions 3.1/3.2. A "new ownership investment," a "new contract," and even a "renewed contract" indicate the three basic methods to create a *new legal relationship* in baseload generation.

In interpreting a statute, the courts will read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness. The "new legal relationship" test is in harmony with all sections of SB 1368, and not in conflict with any sections.

E. Question 3.5 – Does the investment have to affect a power plant's operation and production of greenhouse gases to subject it to the standard?

No. See Question 3.1. The investment must create a new legal relationship to trigger the EPS and is not related to an existing plant's operational characteristics.

F. Question 3.6 - Should the investment definition be tied to the size of the power plant modifications, similar to the 50 MW size threshold used for State siting permits?

No. See Question 3.1. Although, the EPS is not triggered by expenditures for modifications, CMUA does support a size threshold to ensure that certain resource types are not adversely impacted by the EPS (e.g., distributed generation and combined heat and power).

G. Question 3.7 - Should the definition of investment exclude expenditures made to comply with another law or regulation, such as unit retrofits to comply with once-through cooling limitations?

No. See Questions 3.1 and 3.6. The investment must create a new legal relationship to trigger the EPS and is not related to expenditures for retrofits or any mechanical modifications.

H. Question 3.8 - If a plant must be modified to comply with changing environmental regulations (or be shuttered for failure to comply), does the statute imply such plants be closed rather than modified if they cannot meet the EPS? If not, how does one reconcile two potentially competing environmental goals and determine which should take precedence?

No. See Questions 3.1, 3.6, and 3.7. The investment must create a new legal relationship to trigger the EPS and is not related to expenditures for environmental improvements, therefore, there are no competing environmental goals. In the alternative, a utility that is encouraged by other laws to modify a facility should not be placed in a quagmire of public policies. Furthermore, the purpose of SB 1368 is not stated as emission reduction, but rather protecting California's consumers from *future* costs. The immediate benefit of the environmental law trumps the *potential* for future harm of costs, even if the SB 1368 criteria were triggered which in this instance they are not.

I. Question 3.9 - Would a stringent investment definition discourage owners from undertaking modernization or maintenance investments? If the process for reviewing proposed financial investments is lengthy or covers many types of investments, would the cost of complying outweigh the benefits of maintaining or modernizing the plant?

Yes. A stringent definition, i.e. one which goes beyond the "new ownership interest" criteria of SB 1368 would squelch investments that might otherwise enable

immediate environmental and efficiency benefits. This is contrary to public policy and the intent of SB 1368.

J. Question 3.10 - If an investment significantly improves the GHG performance of a facility, but not below the performance standard, should it be prohibited? A POU might be interested in financing the retrofit of existing facility units to make partial improvements to the facility's GHG profile. Does the law intend to prohibit such investments?

Investments that improve the GHG performance of a facility should not be prohibited. Nor, does SB 1368 intend to prohibit such investments. Again, this example does not trigger the provisions of SB 1368. See answers to Questions 3.1, 3.8, and 3.9. Furthermore, any regulatory disincentive to reducing greenhouse gas emissions from an existing plant is not in harmony with Assembly Bill 32.

K. Question 3.11 - Does the statute require, allow, or prohibit defining "new ownership investment" as any investment that extends the life of a baseload power plant for more than 5 years? Does the statutory clause "term of five or more years" apply to ownership or contracts?

The statute prohibits applying the 5 year term to "a new ownership investment." See Questions 3.1, 3.2, 3.6, and 3.7. The investment must create a new legal relationship to trigger the EPS and expenditures extending the life of a powerplant do not trigger the EPS. Furthermore, the rules of sentence construction and statutory interpretation clearly demonstrate that "5 or more years" applies *only* to contracts.

In the definition of "long term financial commitment," the conjunctions "either" and "or" are critical to understanding this sentence. The conjunction "either" is used as a function word and is linked with the conjunction "or" to indicate a choice between two alternatives. Here, the alternatives are between the two dependent clauses. Neither of the dependent clauses can stand alone in the sentence because neither has a verb. Through the conjunctions, they are individually linked to the subject "long-term financial commitment" via the transitive verb "means." The words in the two dependent clauses cannot be interchanged. Therefore, an individual "long term financial commitment," *may be one* of the two alternatives *but not both* simultaneously. Hence, a new or renewed contract with a term of 5 or more years is a "long term financial commitment." A new ownership investment is another form of "long term financial commitment," but, there is no

associated time frame.

This interpretation is consistent with the definition proposed by CMUA in the "new legal relationship" test because an ownership investment is presumed to be long term and so SB 1368 need only proscribe that it shall not be entered into. For new ownership investments, it is the nature of the new legal relationship that triggers the EPS and not the duration.

L. Question 3.12 - Should expenditures excluded for complying with New Source Review requirements, such as routine replacement and repair, not be considered investments?

Yes, consistent with the "new legal relationship" test, these should *not be considered* new ownership interests. Nothing described in this sentence triggers the EPS.

M. Question 3.13(a) - What constitutes routine replacement and repair and how should such activities be defined in the regulations?

This question is not relevant since these activities do not trigger the EPS.

N. Question 3.13(b) - Would the statute's "design and intended" language apply to the facility's original or current capacity factor? Are there other factors that need to be considered to accurately identify baseload facilities?

CMUA believes that the "design and intended" language should apply to the current capacity factor. In response to the EPS value itself, a single number, i.e., 1100 lb CO2/MWh may be inappropriate. The language of SB1368 states that baseload generation shall have an emission performance standard "at a rate of emissions of greenhouse gases for combined-cycle natural gas baseload generation." Further, "combined-cycle natural gas" is defined in Public Utilities Code section 8340(b) as a powerplant that "employs a combination of one or more gas turbines and steam turbines in which electricity is produced in the steam turbine from otherwise lost waste heat exiting from one or more of the gas turbines."

Taken together, the words of SB1368 anticipate a range of values for the EPS, because the definition of "combined-cycle natural gas" does not specify any particular plant size or configuration. To select a single number – 1100 lb CO^2/MWh – may be inconsistent with the law itself, as well as overly burdensome on situations in which a utility requires a smaller powerplant**.**

O. Question 3.14 - Under the statute, should JPAs be treated as a contract for electricity procurement or as an ownership interest?

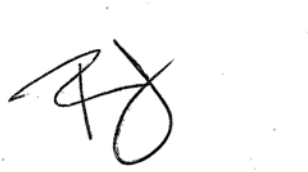
The answer to this question is entirely dependent upon the JPA's structure. See the answer to Question 3.3. Many JPAs create ownership-like interests in the respective JPA members. Other JPAs are structured whereby the JPA, as a separate governmental agency, has the ownership interest and the member POUs contract for the generation.

III. CONCLUSION

CMUA requests the Commission Staff to incorporate the arguments and positions set forth above in the draft proposed regulations for implementing SB 1368.

Dated: December 13, 2006

Respectfully submitted,



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