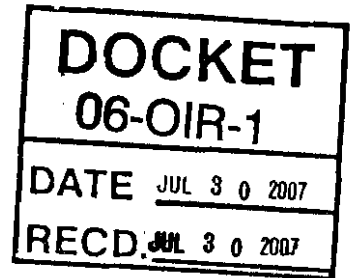


**ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA**



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

**COMMENTS OF THE
CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION ON THE OFFICE OF
ADMINISTRATIVE LAW'S DISAPPROVAL OF THE PROPOSED REGULATIONS
ESTABLISHING A GREENHOUSE GASES EMISSION PERFORMANCE STANDARD**

July 30, 2007

Bruce McLaughlin
Braun & Blaising, P.C.
915 L Street, Suite 1270
Sacramento, CA 95814
Tel: (916) 326-5812
Fax: (916) 326-5813
Email: mclaughlin@braunlegal.com

*Attorneys for the California Municipal Utilities
Association*

C. Susie Berlin
McCarthy & Berlin, LLP
100 Park Center Plaza, Suite 501
San Jose, CA 95113
Tel: (408) 288-2080
Fax: (408) 288-2085
Email: sberlin@mccarthyllaw.com

*Attorneys for the Northern California Power
Agency*

Jane Luckhardt
Downey Brand
555 Capitol Mall, 10th Floor
Sacramento, CA 95814
Tel: (916) 444-1000
Fax: (916) 444-2100
Email: jluckhardt@downeybrand.com

*Attorneys for the Sacramento Municipal
Utility District*

1 Introduction

In response to the Notice of Public Workshop and Committee Order (“Order”) in California Energy Commission (“CEC” or “Commission”) Docket No. 06-OIR-1, dated July 11, 2007,¹ the California Municipal Utilities Association (“CMUA”) hereby files these written Comments (“Comments”) and proposed language addressing the concerns of the Office of Administrative Law (“OAL”) in its disapproval of the CEC’s Proposed Regulations implementing an emissions performance standard (“EPS”) pursuant to Senate Bill 1368 (“SB 1368”). In making these Comments, CMUA does not waive any arguments made during the course of this proceeding.

2 Comments on Section 2900: Compliance filings should be limited to covered procurements involving powerplants that are 10 MW and larger

Shown below is CMUA’s recommended language that meets the “clarity” standard as required by Government Code § 11349.1. The CEC should adopt, and the OAL should approve, the following language for Proposed Regulation § 2900:

“This Article applies to covered procurements entered into by local publicly owned electric utilities. The requirements of Sections 2908, 2909, and 2910 apply only to covered procurements involving powerplants 10MW and larger.”

CMUA believes that SB 1368 applies to all long-term financial commitments in baseload generation. It is CMUA’s understanding that the 10 MW limit in § 2900 refers to CEC oversight responsibilities and does not obviate each publicly owned electric utility’s (“POU”) duty to comply with the EPS established by the CEC. This duty flows from the statutory language itself.

CMUA also believes that the initial draft of the Proposed Regulations correctly recognized the administrative burden for both POU and CEC staff associated with making and reviewing compliance filings on very small powerplants (some are measured in kilowatts!). Therefore, the Proposed Regulations should not require POUs to comply with the notice, filing, and review requirements in §§ 2908-2910 for covered procurements involving powerplants smaller than 10 MW. Even without these requirements, CMUA recognizes that POUs are still

¹ On July 27, 2007, CMUA was granted an extension to July 30, 2007 to file these comments.

responsible to ensure that every long-term financial commitment in baseload generation that they enter into is in compliance with the EPS established by the CEC. CMUA believes that its recommended language satisfies the “clarity” standard by being written in such a way that the “meaning of [the] regulations will be easily understood” by POUs.² Moreover, this recommended language provides the proper balance of POU autonomy, administrative ease, and the applicability of the CEC EPS and enforcement processes.

3 Comments on Section 2901(j): The Proposed Regulations should effectuate the purpose of SB 1368 in a manner that harmonizes with the emission reduction goals of AB 32

Assembly Bill 32 (“AB 32”) was passed in the same legislative year as SB 1368.³ AB 32 is neither technology-based nor vintage-differentiated and will place a total GHG emissions cap on all POUs. All POUs will be required to comply with AB 32 and their total GHG emissions must be reduced to an established cap by the year 2020.⁴ SB 1368 anticipates this GHG emissions cap and requires that “[t]he Energy Commission, . . . , shall reevaluate and continue, modify, or replace the greenhouse gases emission performance standard when an enforceable greenhouse gases emissions limit is established and in operation, that is applicable to local publicly owned electric utilities.”⁵ The CEC recognized the relevance of AB 32 to SB 1368 in the Notice of Proposed Action (“NOPA”) for this docket.⁶

While the first year for AB 32 enforcement begins in 2012, it is widely anticipated that implementation of the required emission reduction requirements will begin in the present and continue until California achieves the 2020 emissions limit. Therefore, compliance with AB 32 will necessarily occur over time as POUs take progressive actions to reduce their GHG

² Gov’t Code § 11349(c) (defining “clarity”).

³ California Global Warming Solutions Act of 2006, Health & Safety Code §§ 38500, et seq.

⁴ See e.g., Health & Safety Code §§ 38560, 38562. “On or before January 1, 2011, the state board shall adopt greenhouse gas emission limits and emission reduction measures by regulation to achieve the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions in furtherance of achieving the statewide greenhouse gas emissions limit, to become operative beginning on January 1, 2012.” Health & Safety Code § 38562(a).

⁵ Pub. Util. Code § 8341(f). See also SB 1368, Section 1 (f), (g).

⁶ Notice of Proposed Action for 06-OIR-01, Informative Digest, February 2007.

emissions. The Commission must take AB 32's purposes into account in crafting and implementing EPS regulations.

3.1 SB 1368 is vintage-differentiated in relation to all existing powerplants

SB 1368 is vintage-differentiated, i.e., its requirements do not apply unless and until a triggering event occurs. This vintage-differentiation is universal and covers *any* powerplant regardless of technology or fuel. As shown below, the statutory triggering event of SB 1368 occurs when a POU enters into a long-term financial commitment involving the procurement of baseload generation.

“No . . . 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 . . .” (Pub. Util. Code § 8341(a))

The statute defines a “long-term financial commitment” as “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.”⁷ Therefore, for an owned powerplant operated at 60% capacity factor or above,⁸ the triggering event occurs when the POU enters a *new ownership investment which includes the procurement of baseload generation*.

The statute doesn't expressly define what a new ownership investment is and, therefore, provides discretion for the Commission to interpret the scope of the trigger within the implementing regulations. The CEC's Proposed Regulations provided an interpretation in § 2901(j) and includes it within the overarching category called a “covered procurement.” The “covered procurement” in the Proposed Regulations is intended to be synonymous with the SB 1368 “long-term financial commitment.” Therefore, as shown below, the triggering event for the EPS in the Proposed Regulations occurs when a POU enters into a covered procurement.

“Unless otherwise specified in this Article, no local publicly owned electric utility shall enter into a covered procurement if greenhouse gases emissions from the powerplant(s) subject to the covered procurement exceed the EPS.” (CEC Proposed Regulation § 2902(b))

⁷ Pub. Util. Code § 8340(j).

⁸ Pub. Util. Code § 8340(a) (defining “baseload generation”).

Once triggered by entering a covered procurement, a POU must ensure that the subject powerplant meets the EPS.

3.2 Comments on Section 2901(j)(3): At a minimum, a 50 MW triggering event threshold for deemed-compliant plants is reasonably necessary to effectuate the purposes of SB 1368

CMUA believes that no language changes are required to Proposed Regulation § 2901(j)(3) in relation to the arguments set forth by the OAL. The OAL should approve the current language of Proposed Regulation § 2901(j)(3) as it is shown below.

““New ownership investment” means: . . . (3) Any investment in generating units added to a deemed-compliant powerplant, if such generating units result in an increase of 50 MW or more to the powerplant’s rated capacity; . . .”

CMUA expressly states its belief that the statute provides sufficient discretion for the CEC to exclude deemed-compliant powerplants from all EPS requirements going forward. For the purpose of these Comments, however, CMUA states its agreement with the CPUC’s *reasoning* that deemed-compliant powerplants should be treated differently than other powerplants and that the triggering event should be the *addition of a generating unit* with a threshold of *no less than* 50 MW additional capacity.⁹

SB 1368 declares that all combined-cycle natural gas turbines (“CCGTs”) “that are in operation, or that have an Energy Commission final permit decision to operate as of June 30, 2007, shall be deemed to be in compliance” with the EPS.¹⁰ Consequently, SB 1368 clearly establishes a technology-specific vintage-differentiation in Public Utilities Code § 8341(e)(1) that is separate and distinct from the universal vintage-differentiation in Public Utilities Code § 8341(a). The words of Public Utilities Code § 8341(e)(1) cannot be read in isolation, but rather must be interpreted in context with the remainder of SB 1368.¹¹ The “[w]ords must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent

⁹ Decision 07-01-039, Rulemaking 06-04-009.

¹⁰ Pub. Util. Code § 8341(e)(1).

¹¹ “It is a well-settled rule of statutory interpretation that courts must consider the statutory language in the context of the entire statute and the statutory scheme of which it is a part.” *Phelps v. Stostad*, 16 Cal.4th 23, 32 (1997). In statutory construction, the courts “do not consider . . . statutory language in isolation.” *Flannery v. Prentice*, 26 Cal.4th 572, 578 (2001). Instead, the court will “examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts.” *Alford v. Superior Court*, 29 Cal.4th 1033, 1040 (2003).

possible.”¹² Therefore, harmonizing the universal vintage-differentiation of § 8341(a) in context with the technology-specific vintage-differentiation of § 8341(e)(1), the separate code sections clearly demonstrate a legislative intent to establish a difference between the triggering events for deemed-compliant CCGTs and powerplants using other technologies or fuels.¹³ This point was recognized by the CPUC in Decision 07-01-039 implementing SB 1368 for CPUC-jurisdictional entities.

“Reading § 8341[e](1) to require that the same kind and scale of alterations, improvements, additions, or renovations that constitute “new ownership investment” would also trigger a requirement that deemed-compliant CCGT powerplants demonstrate actual compliance with the EPS, would render the § 8341[e](1) deemed-compliant provision redundant as applied to utility-owned CCGT powerplants. California courts have long observed the canon of statutory construction that when attempting to ascertain the meaning of a statute, “effect should be given... to the statute as a whole and to every word and clause thereof, leaving no part of the provision useless or deprived of meaning.” [citing *Gay Law Students Association v. Pac. Tel. & Tel. Co.*, (1979) 24 Cal.3d 458, 478] In order to give § 8340(j), (defining long term financial commitment to include new ownership investments), § 8341 (requiring that all long term financial commitments meet the EPS) and § 8341[e](1) (deeming CCGTs compliant) their full effect with respect to utility-owned CCGTs in operation as of the date of implementation of the EPS (or that obtain a CEC permit as of June 30, 2007), we conclude that “new ownership investment” in retained generation cannot automatically trigger EPS review for deemed-compliant CCGT powerplants.” (D.07-01-039 at 58)

In terms of the triggering specifics, strong arguments may be made that existing CCGTs are deemed-compliant in perpetuity and that no event will trigger the application of the EPS to a CCGT. It makes sense that existing CCGTs are permanently deemed-compliant in light of emission reductions needed to achieve the AB 32 cap. Under the AB 32 regime, retail electric providers will undoubtedly rely upon CCGTs as valuable sources of baseloaded generation. These resources will become increasingly important as renewable portfolios are increased, and CCGTs will be used to firm intermittent renewable resources. More realistically, the permanent

¹² *California Manufacturers Assn. v. Public Utilities Commission*, 24 Cal. 3d 836, 844 (1979).

¹³ “The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible.” “We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.” *Bodell Construction Co. v. Trustees of Cal. State University*, 62 Cal.App.4th 1508, 1515-1516 (1998) (citations omitted in original).

compliance of existing CCGTs means that POUs may without restraint implement additions to existing CCGTs that result in reductions to their GHG emission portfolio to meet the AB 32 cap.

There are many reasons, consistent with the deemed-compliant language of SB 1368, to permit POUs the unfettered ability to add capacity to existing CCGTs. For one, these powerplants have already been sited and possess existing transmission and fuel supply infrastructure, and air permits. Improving existing CCGTs also makes sense in that new land use decisions will not be implicated along with the inherent environmental impacts of siting a new power plant. Furthermore, these regulations should not inhibit POUs from improving existing CCGTs potentially reducing environmental impacts globally and locally.

Nonetheless, the CPUC adopted a 50 MW threshold that applies to generating units added to existing CCGTs, noting that:

“We select a 50 MW threshold because it is already used to mark the boundary between significant and minor changes in generating capacity for the purpose of triggering CEC powerplant permitting requirements under Public Resources Code § 25123. [footnote excluded] [B]y not requiring deemed-compliant CCGT powerplants to demonstrate compliance with the EPS for repowering as it is defined within the context of “new ownership investments,” we eliminate the redundancy that would otherwise exist between §§ 8340(j), 8341, and 8341[e](1) with respect to retained generation. [footnote excluded] While the addition of new units resulting in an increase of 50 MW or more to a powerplant’s rated capacity is certainly a “new ownership investment,” as we define it above, it is a subset of all the possible activities that would constitute “new ownership investment.” Thus, by limiting our reading of what parts of a CCGT powerplant are deemed compliant (to exclude additional units totaling 50 MW or more) we avoid redundancy and give each word of § 8341[e](1) a legal effect distinct from the other provisions of the statute. (D.07-01-039 at 59-60)

This provides substantial evidence that, *at minimum*, a regulation with a 50 MW exemption for deemed-compliant powerplants is reasonably necessary to “effectuate the purpose of the statute, . . . that the regulation implements, interprets, or makes specific, . . .”¹⁴ The current language of Proposed Regulation § 2901(j)(3) substantially conforms to the CPUC’s rules adopted for the deemed-compliant trigger. Therefore, the current language of Proposed Regulation § 2901(j)(3) complies with the “necessity” standard as required by Government Code § 11349.1 and should be approved by the OAL.

¹⁴ Gov’t Code 11349(a) (defining “necessity”).

3.3 Comments on Section 2901(j)(4): CMUA’s recommended language for triggering events on non-deemed compliant powerplants meets the “clarity” and “necessity” standards

CMUA believes that regulatory language permitting capacity increases on non-deemed compliant powerplants under certain exceptions is reasonably necessary to “effectuate the purpose of the statute, . . . that the regulation implements, interprets, or makes specific, . . .”¹⁵ The CEC should adopt, and the OAL should approve, the following language for Proposed Regulation § 2901(j)(4).

“Any investment in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility that:

- (A) is designed and intended to extend the life of one or more generating units by five years or more, not including routine maintenance;
- (B) is designed and intended to convert a non-baseload generation powerplant to a baseload generation powerplant; or
- (C) results in an increase of ~~greater than 10%~~ in the rated capacity of the powerplant except for capacity increases incidental to investments designed and intended to:
 - (i) preserve plant reliability or prevent asset deterioration;
 - (ii) comply with legal requirements; or
 - (iii) achieve environmental improvements.”

CMUA believes that its recommended language satisfies the “clarity” standard by being written so that the “meaning of [the] regulations will be easily understood” by POUs.¹⁶ The remainder of these Comments describes how and why CMUA’s recommended language complies with the “necessity” standard.

3.3.1 The purpose of SB 1368 is to reduce the potential exposure to future reliability problems and the potential financial risk for future pollution control costs

As stated in SB 1368 itself, the purpose for an EPS is to “reduce potential exposure of California consumers to future reliability problems in electricity supplies”¹⁷ and to “reduce

¹⁵ Gov’t Code 11349(a) (defining “necessity”).

¹⁶ Gov’t Code § 11349(c) (defining “clarity”).

¹⁷ SB 1368, Section 1, (j).

potential financial risk to California consumers for future pollution-control costs.”¹⁸ In this docket’s NOPA, the CEC described this purpose in light of the prospective AB 32 emission cap and the likelihood of federal regulation of GHGs. The CEC stated that:

“As a result, the electricity sector in the near future will likely have to either reduce its emissions of greenhouse gases or pay for the right to emit. Thus, there are financial risks associated with long term investments in powerplants with high greenhouse gas emissions. The broad objectives of these regulations are to internalize the significant and under-recognized cost of emissions and to reduce potential financial risk to California consumers for future pollution-control costs.”¹⁹

The CPUC made a similar statement in relation to the two code sections quoted above and stated:

“[T]he definition of covered procurements that we adopt today focuses on preventing “backsliding” through new LSE procurement decisions that will make future GHG reductions more difficult.”²⁰

“[W]e are looking for the best and most workable approach to identifying changes in an existing powerplant that would increase the expected level of GHG emissions from the facility over the long-term. This is not accomplished by requiring that every replacement of equipment or addition of pollution control equipment should trigger the EPS, Even after such changes, the plant and its operation may remain essentially unchanged. More importantly, this approach could reduce reliability as old parts are repaired rather than replaced.”²¹

As more fully demonstrated below, the CEC has discretion to establish a reasonable definition for the “new ownership investment” triggering event in a manner that permits capacity increases under certain situations, *particularly if the capacity additions result in GHG emission reductions*. As is true with almost every vintage-differentiated environmental regulation, the stringency of the trigger is an important aspect that may control whether or not the legislative goals are achieved. The clarifications to Proposed Regulation 2901(j)(4) set forth therein ensure the integrity of such a trigger.

¹⁸ SB 1368, Section 1, (i).

¹⁹ Notice of Proposed Action for 06-OIR-01, Informative Digest, February 2007.

²⁰ D.07-01-039 at 44.

²¹ D.07-01-039 at 51, 52.

3.3.2 The Proposed Regulations *must* include an exemption for certain capacity increases on non-deemed compliant powerplants in order to effectuate the purposes of SB 1368

SB 1368 mandates that “[i]n adopting and implementing the greenhouse gases emission performance standard, the Energy Commission, . . . , shall consider the effects of the standard on system reliability and overall costs to electricity customers.”²² The core requirement of AB 32 requires that its regulations should be designed “to achieve the maximum technologically feasible and cost-effective greenhouse gas emission reductions from sources or categories of sources,”²³ Hence, the CEC should ensure that the SB 1368 regulations incorporate principles of cost-effectiveness whereby the aggregate emission-reduction target may be achieved at the lowest possible cost.

Aggregate emissions may actually increase with more stringent regulations if they inhibit the addition of technological advancements that result in lower emissions. More stringent triggers can be environmentally counter-productive in the short-term if they discourage the utilization of cleaner technologies. Questions to evaluate the cost-effectiveness of an environmental regulation include: (1) will it achieve its stated goal?; (2) will it do it at the lowest cost, including the costs for monitoring and enforcement?; (3) is it flexible enough to incorporate technological changes?; and (4) does it provide an incentive for the adoption of emission reduction technology? These are discussed below.

- The more stringent the triggering event, the greater the probability that POUs will be forced to choose between two extremes. In regard to non-deemed compliant facilities such as most coal-fired powerplants, there is currently no cost-effective technology that will reduce GHG emissions *below* the EPS. Yet, there are technologies that improve plant efficiencies and/or reduce GHG emissions. If a stringent trigger definition is implemented in a way that prohibits incorporating these available technologies, POUs will be forced to choose between the two extremes of either inaction or divestiture. POUs will be forced into many Hobson’s choices as they decide between: (1) violating bond covenants, contractual obligations, or various environmental regulations by failing

²² Pub. Util. Code § 8341(e)(7).

to act as their existing powerplants deteriorate; or (2) an immediate divestiture costing ratepayers hundreds of millions of dollars and adversely affecting the reliability of California's electricity supply.

- The AB 32 GHG emission limits and emission reduction measures will become operative no later than January 1, 2012.²⁴ However, AB 32 encourages all entities to begin reducing GHG emissions before 2012 and requires the AB 32 regulations to ensure that entities "receive appropriate credit for early voluntary reductions."²⁵ Therefore, these Proposed Regulations should include language permitting POU's to introduce improvements to existing non-deemed compliant powerplants that allows a transitional and immediate approach to permanently reducing GHG emissions.
- A triggering event that is too strict will cause the exact opposite effect of that contemplated by SB 1368 (reducing future pollution-control costs) and mandated by AB 32 (reducing total emissions). In a "pay me now or pay me later" scenario, POU's will be prohibited from pursuing the most cost-effective actions for making voluntary early reductions in emissions and forced to take the same or similar actions *at a later time* when the cost may actually be *higher*. Without reasonable triggering rules, the POU's will be forced to operate higher emitting plants and prevented from progressively reducing emissions over the years leading to 2020.
- POU's were not required to divest of their resources during the AB 1890 era and they own substantial capacity in non-deemed compliant plants. This capacity cannot be replaced in the short-term without severely impacting customers' rates and the reliable provision of electricity. Unless the Proposed Regulations provide a workable recognition of a POU's need to maintain plant operability and reliability while it reduces emissions over time, the CEC's Proposed Regulations will discourage any progressive environmental improvements.

²³ Health & Safety Code § 38560. See Health & Safety Code § 38505(d)(defining "cost-effective" as the "cost per unit of reduced emissions of greenhouse gases adjusted for its global warming potential").

²⁴ Health & Safety Code § 38562(a).

²⁵ Health & Safety Code § 38562(b)(3). By virtue of the vintage-differentiated requirements of SB 1368, a POU has no immediate legal obligation to take actions that would reduce GHG emissions from its owned powerplants and so all reductions would be voluntary if taken before 2012.

- Ultimately, the legal regime that drives POU decisions to either shut or build powerplants is AB 32, which will place a cap on the total tons of GHG emissions. SB 1368, regardless of whether it continues past the implementation of AB 32 in 2012, should not inhibit decisions for the modernization and cleaning up of powerplants that will continue to operate for decades. An overly stringent definition for a triggering event will prevent ramped emission reductions. This will accelerate and create in the present, the very problem that SB 1368 was intended to prevent in the future – reliability and cost risks.
- The Proposed Regulations must be drafted fairly, because the POUs invested in generating capacity under the previous legal regime when their actions were deemed prudent. Now, in terms of SB 1368, these generating resources are deemed non-compliant even though they still meet the criteria of the original investments (reliability and cost). An overly stringent triggering event will improperly restrict the legal scope of which operating decisions are deemed prudent. This will effectively nullify the POUs' past proper actions to procure capacity and prevent them from achieving a reasonable return for their investments.
- Overly strict SB 1368 triggering regulation could actually result in an emission *increase* in the short-term and well into initial period of AB 32 implementation, as it may: (1) prohibit many of the most cost-effective emission reduction opportunities available to POUs; (2) provide a powerful disincentive for progressive improvements and efficiency upgrades; and (3) create an uncertain regulatory environment between AB 32 compliance and SB 1368 compliance. Since modifying existing equipment to operate more efficiently can reduce emissions and costs, the effect of an overly stringent SB 1368 regulation can be environmentally and economically harmful. Uncertainty and ambiguity in the regulation will cause POUs to shy away from improvements, as a result of the protracted, costly, and time-consuming efforts to seek exemptions.
- An overly stringent SB 1368 trigger may prevent investments for continuous and cost-effective emission reductions at existing powerplants. The regulation will be a disincentive for the adoption of emission reduction technologies. Existing plants will deteriorate because POUs will not be allowed to maintain them. In relation to the goal stated by the CPUC, this would cause the very backsliding that SB 1368 should prevent.

- An overly strict regulation will prohibit POUs from maintaining or improving the efficiency of existing plants as they degrade with age. Emissions will increase during the interim period thereby *causing* a negative effect as a result of SB 1368's vintage-differentiation. Since SB 1368 does not pertain to any existing plant absent a triggering event, the triggering event must provide an incentive for POUs to reduce emissions.

In summation, CMUA believes that AB 32 compliance will be virtually impossible unless POUs are allowed to make substantial improvements at non-deemed compliant powerplants beginning in the present day. These improvements may include efficiency improvements that result in incidental capacity increases but no increase in total emissions, effectively reducing the powerplant's emission rate. Moreover, these improvements may result in capacity increases together with actual reductions in total emissions. It makes no sense that the Legislature, in adopting two statutes in a comprehensive GHG reduction scheme during the same legislative session, intended that either statute would substantially impede the important purpose of the other.²⁶

CMUA's recommended language incorporates the goals of SB 1368 by restricting current investments that *increase the potential* for: (1) future reliability problems; or (2) financial risk for future pollution-control costs. In addition, CMUA's recommended language provides exceptions for those current investments that *decrease the potential* for these same two criteria. CMUA's recommended language permitting incidental capacity increases in certain prescribed situations is reasonably necessary to effectuate the purpose of SB 1368. Therefore, CMUA's recommended language for Proposed Regulation § 2901(j)(4) complies with the "necessity" standard as required by Government Code § 11349.1 and should be adopted by the CEC and approved by the OAL.

²⁶ SB 1368, Section 1, (h) (stating that "[t]he establishment of a policy to reduce emissions of greenhouse gases, including an emissions performance standard for all procurement of electricity by load-serving entities, is a logical and necessary step to meet the goals of the Energy Action Plan II and the Governor's goals for reduction of emissions of greenhouse gases").

4 Conclusion

CMUA respectfully requests the Commission to consider and incorporate CMUA's recommended language into newly revised Proposed Regulations.

Dated: July 30, 2007

Respectfully submitted,



Bruce McLaughlin, Esq.
Braun & Blasing, P.C.
915 L Street, Suite 1270
Sacramento, CA 95814
(916) 326-5812
(916) 441-0468 (facsimile)
mclaughlin@braunlegal.com

Attorneys for the California Municipal Utilities Association

APPENDIX

Conforming copy of CMUA's recommended language that provides a more effective and less burdensome alternative

§ 2900 This Article applies to covered procurements entered into by local publicly-owned electric utilities. The requirements of Sections 2908, 2909, and 2910 apply only to covered procurements involving powerplants 10MW and larger.

§ 2901(j) "New ownership investment" means:

- (1) Any investments in construction of a new powerplant;
- (2) The acquisition of a new or additional ownership interest in an existing non-deemed compliant powerplant previously owned by others;
- (3) Any investment in generating units added to a deemed-compliant powerplant, if such generating units result in an increase of 50 MW or more to the powerplant's rated capacity; or
- (4) Any investment in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility that:
 - (A) is designed and intended to extend the life of one or more generating units by five years or more, not including routine maintenance;
 - (B) is designed and intended to convert a non-baseload generation powerplant to a baseload generation powerplant; or
 - (C) results in an increase in the rated capacity of the powerplant except for capacity increases incidental to investments designed and intended to:
 - (i) preserve plant reliability or prevent asset deterioration;
 - (ii) comply with legal requirements; or
 - (iii) achieve environmental improvements.