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Electricity Committee's Explanation of Changes to Regulations Establishing and Implementing a Greenhouse Gases Emission Performance Standard for Local Publicly Owned Electric Utilities in Response to the Office of Administrative Law's Disapproval Decision.

On July 29, 2007, the Office of Administrative Law disapproved the Energy Commission's proposed Greenhouse Gases Emission Performance Standard rulemaking action on the following grounds:

A. It is unclear whether procurements involving powerplants under 10MW [megawatts] are covered by or exempt from the greenhouse gases emission performance standard established by the CEC. Consequently, the regulations fail to satisfy the Clarity standard of Government Code section 11349.1

B. The rulemaking record does not demonstrate that the exemption from the greenhouse gases emissions performance standard for investments in generating units added to a deemed-compliant powerplant that results in an increase of less than 50MW is reasonably necessary to implement, interpret, or make specific Public Utilities Code sections 8340 and 8341. Consequently, the exemption fails to satisfy the Necessity standard of Government Code section 11349.1.

C. It is not clear whether the exemption from the greenhouse gases emissions performance standards for investments resulting in an increase of no more than a 10% increase in rated capacity is limited to investments for routine maintenance.

D. The record does not show that the public has been given an opportunity to comment on the evidence the CEC is relying upon to demonstrate that the exemption from the greenhouse gases emission performance standard established by 2901(j)(4)(B) is reasonably necessary to implement the purpose of Public Utilities Code sections 8340 and 8341.

This document addresses and, where appropriate, identifies changes to the regulatory language to resolve the noted deficiencies. The full text of the express terms, including the proposed changes, is attached at the end of this document.

A. Section 2900 lacks clarity.

The Commission determined that given the tight deadline for establishing and implementing these regulations, and administrative constraints, it was necessary to focus the Commission's efforts to enforce SB 1368 and the emission performance standard on powerplants with the greatest greenhouse gases emissions. This was determined to be facilities of 10 MWs or larger. The Energy Commission has determined that power plants under 10 megawatts in size do not contribute a substantial amount of greenhouse gases, even when these emissions are aggregated. Because SB 1368 requires the Commission to undertake a new role in overseeing the activities of POUs, it is important that the Commmission craft these regulations in a manner that allows this oversight to be carried out using the resources at this agency's disposal. If it is determined, after implementation of these regulations, that there is a need for oversight of these de minimis facilities, we have reserved space in Article 2 of the regulations to do so.

Therefore, the provisions requiring the reporting of covered procurements and the submittal of supporting documents to the Energy Commission do not apply to baseload facilities less than 10 MW in capacity. These provisions include sections 2908 Public Notice, 2909 Compliance Filings, and 2910 Compliance Review. Nevertheless, all parties agree that the emission performance standard set forth in section 2902(a) applies to any baseload generation, regardless of capacity, supplied under a covered procurement. Therefore, the Electricity Committee proposes the following change to section 2900 to clarify the scope of the regulations:

§ 2900 Scope

This Article ~~only~~ applies to covered procurements entered into by local publicly owned electric utilities. The greenhouse gases emission performance standard established in section 2902(a) applies to any baseload generation, regardless of capacity, supplied under a covered procurement. The provisions requiring local publicly owned electric utilities to report covered procurements, including Sections 2908, 2909, and 2910, apply only to covered procurements involving powerplants 10MW and larger.

B. The rulemaking record does not demonstrate the necessity of section 2901(j)(3).

Section 2901(j)(3) exempts from the greenhouse gases emission performance standard investments in generating units added to a deemed-compliant powerplant that results in an increase of less than 50 MW. In determining that this provision conforms with SB 1368 and is necessary to carry out the purposes of that statute, the Energy Commission relied in part on the CPUC's analysis of this issue:

> SB 1368 provides that all CCGT powerplants "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 greenhouse

gases emission performance standard."... A CCGT powerplant that is ***deemed*** compliant does not have to demonstrate actual compliance with the adopted EPS standard, but is instead treated ***as if*** it met the EPS standard and is excused from making an affirmative showing of compliance. Reading §8341(d)(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(d)(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." 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(d)(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.

Another canon of statutory construction, however, requires us to avoid interpretations of law that would lead to an absurd result. The purpose of SB 1368 would be thwarted if existing CCGT are deemed to be permanently in compliance regardless of any subsequent changes to the facilities. One could argue that if units are added to an existing deemed-compliant CCGT powerplant — thereby increasing its capacity from 50 MW to 250 MW — the additional units are nevertheless "deemed compliant" and do not have to demonstrate actual compliance. Under this construction, an LSE or non-LSE owner could circumvent the EPS simply by adding units that are operationally dependent on one or more existing units within a previously deemed-compliant CCGT powerplant. We should avoid construing the statute to achieve this absurd result. The deemed-compliant status is given to existing CCGT powerplants, and extending the exemption to units that did not exist at the time of the passage of the statute is contrary to the purpose and the intent of the law.

Therefore, we require that when additional generating units are added to a deemed-compliant CCGT baseload powerplant resulting in an increase of 50 MW or more to the powerplant's rated capacity, those additional units must demonstrate compliance with the EPS. 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. In this way, we avoid the absurd result

> of creating a loophole that would allow for the installation of an unlimited amount of new capacity at an existing CCGT powerplant without any demonstration that that new capacity complies with the EPS. On the other hand, by 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(d)(1) with respect to retained generation. 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(d)(1) a legal effect distinct from the other provisions of the statute.

California Public Utilities Commission, "Interim Opinion on Phase 1 Issues: Greenhouse Gas Emissions Performance Standard", Decision 07-01-039, January 25, 2007, pp. 57-61 (footnotes omitted). The CPUC's decision was identified as a document relied upon in our Initial Statement of Reasons for this rulemaking.

The Energy Commission agrees with the CPUC's analysis of and conclusion that the 50MW exemption in section 2901(j)(3) is necessary to carry out the purposes of SB 1368. Additionally, SB 1368 directs the Energy Commission to ensure that the greenhouse gases emission performance standard is consistent with that adopted by the CPUC. (Public Utilities Code, §8341(e)(1).) In addition to being necessary to carry out the provisions of SB 1368, the Energy Commission believes that the 50 MW exemption in section 2901(j)(3) is necessary to meet the consistency requirement of SB 1368.

On July 11, 2007 we issued a notice to all interested parties setting a workshop to discuss this and the other issues identified by OAL and requesting written comments. We received two comment letters representing several interested parties, including the California Municipal Utilities Association (CMUA), the Sacramento Municipal Utility District, the Northern California Power Agency, the Natural Resources Defense Council, the Union of Concerned Scientists, and Sierra Club California. All of these parties expressed agreement that section 2901(j)(3) was necessary to carry out the provisions of SB 1368. No comments were received challenging the necessity of this provision, nor were any such comments made at the August 2, 2007, workshop.

C. Section 2901(j)(4)(B) does not satisfy the clarity standard.

Section 2901(j)(4)(B) exempts from the greenhouse gases emissions performance standard investments resulting in an increase of no more than 10 percent in rated capacity. Our justification for this exemption is that it is needed to ensure that POUs are able to maintain their power plants in working order. Without such minimal flexibility,

POUs might be prohibited from maintaining power plants that do not meet the EPS, and such power plants would start to deteriorate, further contributing to pollution and reliability problems. The Energy Commission does not believe that it was the intent of SB 1368 to result in the deterioration of existing power plants.

In order to better conform the proposed exemption with the underlying need and explanation of that need, the Energy Commission proposes the following changes to section 2901(j)(4)(B):

§2901 Definitions
(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) results in an increase ~~of greater than 10%~~ in the rated capacity of the powerplant, not including routine maintenance; or
(C) is designed and intended to convert a non-baseload generation powerplant to a baseload generation powerplant.

This proposed change ensures that POUs will have the flexibility necessary to properly maintain their facilities.

D. The rulemaking record does not demonstrate that the public has been given an opportunity to comment on the evidence the Energy Commission relied on in its determination that section 2901(j)(4)(B) is reasonably necessary to effectuate SB 1368.

As discussed above, the Energy Commission, based in part on comments received by various parties, determined that allowing POUs to perform routine maintenance on facilities without triggering application of the EPS was reasonably necessary to effectuate the provisions of SB 1368.

The record is replete with comments from the POUs that if they are not allowed to perform routine maintenance on their facilities, then reliability, safety, and efficiency will degrade. SB 1368 is not intended to shut down currently operating power plants or lead to their deterioration; its focus is ensuring that substantial investments are not made that would lead to further costs when AB 32, or a similar program establishing a greenhouse gases emissions limit, is implemented.

In its most recent comments, CMUA, an umbrella organization representing dozens of California municipal utilities, has submitted comments on several occasions noting that without an exemption for routine maintenance, existing plants that do not meet the EPS would deteriorate and emissions would likely increase as a result. (Comments of CMUA, July 30, 2007, pp. 11-12; see also Comments of the California Municipal Utilities Association on the CEC White Paper and Workshop – Triggering And Interpretations Of SB 1368, December 13, 2006, pp. 3-5.) The Los Angeles Department of Water and Power has also submitted comments identifying the need to allow for routine maintenance to ensure that power plants can be maintained to prevent degradation that would impair reliability, safety, or efficiency. (Additional Comments of the Los Angeles Department of Water and Power on the Implementation of SB 1368 Emission Performance Standard, December 14, 2006, pp. 2-3 and 6-7.)

Routine maintenance may include replacing parts when they wear out. New parts are sometimes made better than previous iterations and improvements in some parts (e.g., turbine blades) can lead to an increase in efficiency and capacity. (Transcript of the August 2, 2007, Committee Workshop, pp. 39-40.) The Energy Commission determined that it is necessary to ensure that POUs are not prohibited from maintaining the operation of their power plants simply because there might be an incidental increase in capacity resulting from such maintenance. Allowing for routine maintenance, even when it may incidentally result in an increase in capacity, strikes an appropriate balance and is fully in keeping with SB 1368.