

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

California Energy Commission

DOCKETED

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In the Matter of:

Rulemaking to Consider Modification of
Regulations Establishing a Greenhouse
Gases Emission Performance Standard For
Baseload Generation of Local Publicly
Owned Electric Utilities

Docket No. 12-OIR-1

**SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY
SAN JUAN PARTICIPANTS AND CITY OF ANAHEIM
COMMENT**

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I. INTRODUCTION.

The Southern California Public Power Authority (“SCPPA”)¹ participants in the San Juan Project (“SCPPA San Juan Participants”)² and the City of Anaheim (“Anaheim”)³ appreciate this opportunity to comment on topics raised in the Notice of Rulemaking Workshop (“Notice”) dated December 20, 2012, in the captioned proceeding.

In the Notice, the Commission seeks comments on four filing and notification options regarding publicly owned utility (“POU”) investments in plants that do not comply with the greenhouse gas emission performance standard (“EPS”) in the Commission’s EPS Regulation.⁴

In this comment, the SCPPA San Juan Participants and Anaheim review the existing

¹ SCPPA is a joint powers authority. The members are Anaheim, Azusa, Banning, Burbank, Cerritos, Colton, Glendale, Los Angeles Department of Water and Power, Imperial Irrigation District, Pasadena, Riverside, and Vernon. This comment is sponsored by Anaheim, Azusa, Banning, Colton, Glendale, and Imperial Irrigation District.

² SCPPA holds a 41.8 percent interest in San Juan Project Unit 3. The SCPPA members which participate in San Juan Unit 3 through SCPPA are the Imperial Irrigation District and the cities of Azusa, Banning, Colton, and Glendale.

³ Anaheim holds a 10.04 percent ownership interest in San Juan Project Unit 4.

⁴ 20 California Code of Regulations (“CCR”) §§2900-2913.

comprehensive enforcement program that is set forth in sections 2908 through 2911 of the EPS Regulation and then examine each of the four options that are presented for comment in the Notice. The SCPPA San Juan Participants and Anaheim recommend that the Commission retain without modification the enforcement program as specified in sections 2908 through 2911 of the EPS Regulation without modification. The existing public notice requirements in section 2908 of the EPS Regulation together with the existing provisions in section 2909 regarding compliance filings, section 2910 regarding compliance review, and section 2911 regarding compliance investigations are adequate and effective for enforcement of the EPS Regulation.

If the Commission nevertheless decides that further consideration of Options 1 through 4 is warranted, Options 1 and 2 should be considered only if they were more narrowly drafted to apply only to baseload facilities that do not meet the EPS. Option 3 should be rejected even if more narrowly drafted because implementation would be impractical. Option 4 should be considered only as an alternative compliance pathway to be utilized at the discretion of a POU and only as narrowly drafted.

The Notice also requests that POUs “provide a brief status update on their activities related to investments to meet environmental and regulatory requirements for the non-compliant facilities they have an ownership interest in.”⁵ This comment provides the status update that is requested in the Notice.

Additionally, the Notice requests comments on a proposed change to section 2913 of the EPS Regulation regarding petitions for exemptions from the EPS Regulation. The proposed change would substitute the word “investment” for the term “covered procurement” in section 2913. The change is necessary to avoid the implication that an investment that is the subject of a petition for exemption would be a “covered procurement” under the Commission’s regulation.

⁵ Notice, p. 5.

For the reasons discussed below, the SCPPA San Juan Participants and Anaheim support the proposed revision to section 2913.

II. ADDITIONAL FILING OR NOTIFICATION OPTIONS ARE UNNECESSARY.

The Commission requests written comments on four options for additional filing and notification requirements. The four options are unnecessary. Additionally, they are overly broad as stated in the Notice. The options should be considered only if they were more narrowly drafted. Even then, the third option should be rejected as impractical, and the fourth option should be considered only as an alternative compliance pathway to be used by a POU at the POU's discretion.

A. Sections 2908 Through 2911 of the EPS Regulation Are Fully Adequate to Enforce the EPS.

The existing provisions in sections 2908 through 2911 of the EPS Regulation are fully adequate for enforcement of the EPS Regulation. A review of sections 2908 through 2911 of the EPS Regulation demonstrates that these sections constitute a comprehensive and effective scheme for enforcing the EPS Regulation.

Section 2908 requires a POU to post a notice whenever its governing body is to deliberate in public on a covered procurement. Section 2908(a) requires that the POU must provide the notice to the Commission so that the Commission may post the notice on its website.⁶ Section 2908(b) requires that when the POU distributes to its governing body information related to a covered procurement's compliance with the EPS for consideration at the noticed public meeting, the POU must make the information available to the public and to the Commission for posting on the Commission's website.⁷ Sections 2908(c) and (d) specify in

⁶ 20 CCR §2908(a).

⁷ 20 CCR §2908(b).

detail the information that must be made publicly available about a proposed covered procurement.

A POU may enter into a covered procurement upon finding that the covered procurement meets the EPS. Section 2909 of the EPS Regulation requires that the POU submit a compliance filing to the Commission within ten business days after entering into the covered procurement.

The compliance filing must contain an attestation that is described in section 2909(a) as follows:

- (a) An attestation, signed under penalty of perjury by an agent of the local publicly owned electric utility authorized by its governing body to sign on its behalf; that:
 - (1) the governing body has reviewed and approved in a noticed public meeting both the covered procurement and the compliance filing;
 - (2) based on the governing body's knowledge, information or belief, the compliance filing does not contain a material misstatement or omission of fact;
 - (3) based on the governing body's knowledge, information or belief, the covered procurement complies with this Article; and
 - (4) the covered procurement contains contractual terms or conditions specifying that the contract or commitment is void and all energy deliveries shall be terminated no later than the effective date of any Commission decision pursuant to Section 2910 that the covered procurement fails to comply with this Article.⁸

Section 2910 of the EPS Regulation provides that after a POU submits a compliance filing attesting to the fact that a covered procurement meets the EPS, the Executive Director of the Commission shall review the compliance filing and make a recommendation to the Commission about whether the covered procurement meets the EPS. Section 2910 contains provisions for the Executive Director to obtain additional information about the covered procurement from the POU if the Executive Director finds that the POU's compliance filing is incomplete.

⁸ 20 CCR §2909(a).

Section 2910 further requires that, upon receiving the Executive Director's recommendation about whether a POU's proposed covered procurement meets the EPS, the Commission shall consider the Executive Director's recommendation and issue a decision within thirty days, with the decision becoming effective thirty days after the date of the decision.⁹

The Commission may conduct an investigation at any time under section 2911 of the EPS Regulation to determine whether a POU is complying with the EPS. The Commission may require the production of information and documents beyond what was made available to the public during the POU's consideration of a covered procurement and beyond the information submitted with the POU's section 2909 compliance filing to the Commission.

Given the comprehensive structure of the existing scheme for enforcement of the EPS, there is no need for adopting any additional filing or posting requirements to enforce SB 1368.

B. Option 1, Requiring a POU to Provide a URL Link to the Agenda for the Public Meeting of the POU at Which any Investment in a Non-EPS Compliant Plant Is Being Deliberated, Would Reach Beyond the Scope of the EPS Regulation and Exceed the Authority of the Commission Under SB 1368 Unless More Narrowly Drafted.

Option 1 for a new filing and notification requirement is described in the Notice as follows:

Option 1: This option would entail a POU providing a URL linked to the agenda for the public meeting of the POU at which any investment in a non-EPS compliant plant is being deliberated in advance of each business meeting. The URL would be provided no later than three days prior to the meeting and would be posted on the Energy Commission's website. This option would not require the Energy Commission to post back-up information on its website, nor would it distribute the URL and back-up information to a listserv.¹⁰

⁹ 20 CCR §2910.

¹⁰ Notice, p. 3-4.

Option 1 is overly broad as the option is written in the Notice. It would impose a requirement on POU's that would go beyond the scope of the EPS Regulation. By its terms, the EPS that is established in the EPS Regulation "applies to any baseload generation, regardless of capacity, supplied under a covered procurement."¹¹ However, Option 1 reaches beyond baseload generation to require a POU to provide a URL link to the agenda for a public meeting in which a POU considers "any investment in a non-EPS compliant plant." The EPS is 1100 pounds (0.5 metric tons) of carbon dioxide per megawatt hour of electricity.¹² Thus, by extending the Section 2908 notice requirements to "any investment in a non-EPS compliant plant," Option 1 would reach beyond baseload power plants to reach investments in peaking plants or any other non-baseload plant that would not comply with the EPS.

For example, under Option 1 as written in the Notice, SCPPA would be required to provide a link to the agenda for any public meeting at which SCPPA would consider any investment in SCPPA's Canyon Power Project, a 200 MW peaking power facility located in Anaheim that went into operation in 2012. The Project consists of four GE LM6000 simple cycle turbines that have state-of-the-art emission control equipment but which have emissions of carbon dioxide that exceed the EPS. The Canyon Power Project is a peaking plant. Under South Coast Air Quality District regulations, generation units at the Canyon Power Project are authorized to operate only 100-110 hours per month. Thus, the plant falls far short of being a "baseload generation facility," which is defined in the SB 1368 and EPS Regulation as "a power plant that is designed and intended to provide electricity at an annualized plant capacity factor of at least 60 percent."¹³

¹¹ 20 CCR §2900.

¹² 20 CCR §2902(a)/

¹³ PUC §8340(a); 20 CCR §2901(b).

As stated in the Notice, Option 1 would exceed the authority of the Commission under Senate Bill (“SB”) 1368.¹⁴ Public Utilities Code (“CPUC”) section 8341(c)(1) empowers the Commission to “adopt regulations for the enforcement of this chapter with respect to a local publicly owned electric utility.” The purpose of a reporting requirement is to facilitate enforcement of SB 1368. By its terms, SB 1368 establishes an EPS that applies only to “baseload generation”¹⁵ as defined in SB 1368. Thus, SB 1368 does not provide the Commission with authority to adopt a reporting requirement that extends to non-baseload generation power plants.¹⁶

Likewise, adopting a reporting regulation that would extend to non-baseload generation plants would be unlawful insofar as the extension to non-baseload generation would be unnecessary to enforce SB 1368. Under Government Code §11349(a), “necessity” is defined as being “the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record.”¹⁷ A regulation may be declared invalid if the regulation is not necessary “to effectuate the purpose of this statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation...”¹⁸

However, Option 1 might be more narrowly drafted by the Commission to reach only investments in baseload power plants which do not meet the EPS. Then, Option 1 would then reach “any investment” at a power plant such as the San Juan Generation Station (“San Juan”)

¹⁴ Stats.2006, Ch. 598 *codified* as Public Utilities Code §§8340-8341.

¹⁵ PUC §8341(a).

¹⁶ SB 1368 requires that the Commission adopt its EPS Regulation pursuant to the Administrative Procedure Act. PUC §8341(e)(2). Under the Administrative Procedure Act, “authority” means “the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation. Government Code §11349(b).

¹⁷ Government Code §11349(a).

¹⁸ Government Code §11350(b)(1).

that does not meet the EPS if the investment were deliberated at a public meeting of the governing board of a POU like SCPPA or Anaheim that has an ownership interest in the plant.

A myriad of investments are made at a plant such as San Juan every year. The SCPPA and Anaheim governing boards rarely deliberate on individual investments because there rarely is any question that investments at San Juan are for any purpose other than routine maintenance. Thus, rarely is there a need under the EPS Regulation for the governing boards to deliberate on whether an investment at San Juan is a “new ownership investment” and, hence, a “covered procurement” under the EPS Regulation.

The SCPPA and Anaheim governing boards do, however, deliberate on annual budgets that include information about the expenses including capital expenditures that are expected to be incurred at San Juan for the coming fiscal year. The information in the annual budgets about San Juan is based upon the annual budget that is prepared by the Operating Agent for San Juan, the Public Service Company of New Mexico (“PNM”), for each calendar year plus any forecasts of additional expenses that become available to SCPPA and Anaheim.

Option 1, as narrowed to reach only baseload power plants which do not meet the EPS, would require POUs such as SCPPA and Anaheim to provide a URL link to the agenda for meetings at which their governing boards would consider their annual budgets for San Juan as well as a link to the agenda for any other meeting at which the governing board would deliberate on an individual investment at the plant. Such an expansion of the public notice requirement is unnecessary, given the comprehensive compliance structure in sections 2908 through 2911 of the EPS Regulation. However, the expansion would be only modestly burdensome. Hence, the SCPPA San Juan Participants and Anaheim would not oppose Option 1 if the option were more narrowly drafted to reach only baseload power plants which do not meet the EPS and the Commission believes that Option 1, as more narrowly drafted, were warranted.

C. Option 2, Expanding the Public Notice Requirements for Covered Procurements in Section 2908 to “Major” Investments or “Investments to Meet Environmental or Other Regulatory Requirements,” Would Reach Beyond the Scope of the EPS Regulation and Exceed the Authority of the Commission Under SB 1368 Unless More Narrowly Drafted.

The Notice describes Option 2 for an additional filing and notification requirement as follows:

Option 2: This option would be an expansion of the existing public notice requirements for covered procurements (in Section 2908 of the regulations) to include ‘major’ investments or ‘investments to meet environmental or other regulatory requirements.’ This would require a POU to provide a URL that links to the agenda of the public meeting at which investments are being deliberated and the back-up information related to the investments’ compliance with EPS. The URL would be provided at least three days prior to the meeting and would require the Energy Commission to post the URL and back-up information on the Energy Commission’s website and notify the listserv.¹⁹

Like Option 1, Option 2 as described in the Notice is overly broad. The Option would expand the existing public notice requirements in section 2908 for covered procurements to include “major” investments and “investments to meet environmental or other regulatory requirements” that are far beyond the scope of EPS Regulation and the Commission’s authority under SB 1368.

For example, SCPPA invested in a new headquarters building in 2012. For SCPPA, the investment in the headquarters building was a major investment even though the investment was made at very attractive terms. Expanding section 2908 to impose a public notice requirement for SCPPA governing board deliberations about “major” investments would reach SCPPA’s investment in its new headquarters building. That would go far beyond the scope of the EPS Regulation and the authority of the Commission under SB 1368, and it would be unnecessary.

Likewise, expanding the public notice requirements in section 2908 to reach “investments to meet environmental or other regulatory requirements” that are not covered procurements

¹⁹ Notice, p. 4.

would go beyond the scope of the EPS Regulation and the authority of the Commission of SB 1368. For example, the installation of fish ladders at a hydroelectric facility under Federal Energy Regulatory Commission orders or the installation of safety related equipment at a power plant under Occupational Safety and Health Administration regulations would constitute “investments to meet environmental or other regulatory requirements,” but they would be unrelated to the purpose of the EPS Regulation and SB 1368.

However, like Option 1, Option 2 might be more narrowly drawn to constitute a proposal to extend the public notice requirements of section 2908 beyond covered procurements only to “major” investments or “investments to meet environmental or other regulatory requirements” at baseload powerplants like San Juan that do not meet the EPS. The more narrowly drawn version of Option 2 would fit more closely within the scope of SB 1368 and the EPS Regulation insofar as it would be limited to investments at baseload plants like San Juan that do not meet the EPS.

Even as more narrowly drawn, Option 2 is unnecessary given the comprehensive compliance structure in sections 2908 through 2911 of the EPS Regulation. However, POU governing boards’ deliberations about “major investments” and “investment to meet environmental or other regulatory requirements” baseload powerplants like San Juan tend to occur rarely because such investments are rare events. The rarity of the deliberations would result in a redrafted Option 2 being only modestly burdensome on POU. Hence, the SCPPA San Juan Participants and Anaheim would not oppose a redrafted Option 2 if the Commission believed it were warranted.

D. Option 3, Requiring Annual Filings that Prospectively Identify “Major” Investments in Non-EPS Compliant Facilities or “Investments to Meet Environmental or Other Regulatory Requirements, Would Exceed the Scope of the EPS Regulation and the Authority of the Commission Unless More Narrowly Drafted and Could Not Be Implemented Effectively.

Option 3 is described in the Notice as follows:

Option 3: This option would have a POU provide an annual filing that prospectively identifies “major” investments in non-EPS compliant facilities and/or “investments to meet environmental or other regulatory requirements,” for the upcoming year. The filing would contain a description of the investment and what it is intended to do, the costs, and an indication of when a decision to move forward is expected. This annual filing would supplement the existing filing requirement under Section 2909 of the regulations.²⁰

As worded in the Notice, Option 3 suffers from the same defect as Options 1 and 2: it is overly broad. Like Option 1, Option 3 would reach investments in non-baseload plants as well as baseload plants. It would require POUs to make an annual filing that prospectively identifies “major” investments in peaking plants such as the Canyon Power Project. Imposing an annual filing requirement that would apply to non-baseload facilities would exceed the scope of EPS regulation and go beyond the authority of the Commission under SB 1368.

Like Option 2, Option 3 would reach beyond covered procurements to reach all of a POU’s “investments to meet environmental or other regulatory requirements,” including investments that do not involve emissions at all, let alone emissions that exceed the EPS. Requiring an annual filing that prospectively identifies “investments to meet environmental or other regulatory requirements” that are not covered procurements would exceed the scope of the EPS regulation, would go beyond the authority of the Commission under SB 1368, and would be unnecessary to implement SB 1368.

Like Options 1 and 2, Option 3 might be more narrowly drawn to apply only to “major investments” or “investments to meet environmental or other regulatory requirements” at baseload plants that do not meet the EPS, but there are other problems with Option 3. The option may be impossible to implement effectively, at least for the SCPPA San Juan Participants and Anaheim in connection with their participation in San Juan. Participants in San Juan do not

²⁰ Notice, p. 4.

prepare the annual budget for San Juan. Instead, the Operating Agent prepares the annual budget and, not less than ninety days prior to the beginning of each calendar year, submits the budget to the San Juan Engineering and Operating Committee for review and approval. Depending upon the date by which the Commission would require a POU participant in San Juan to provide an annual filing that prospectively identifies “major” investments in non-EPS compliant facilities or “investments to meet environmental or other regulatory requirements” for the upcoming year, participants in San Juan such as the SCPPA San Juan Participants and Anaheim may not have the information that would be required to make the annual filing to the Commission.

Additionally, any annual filing that prospectively identifies investments in non-EPS compliant facilities would be exposed to being incomplete. During the course of a year, investments may come to be required even though the investments were not foreseen prior to the beginning of the calendar year.

The Commission already has in place a comprehensive and effective compliance program in sections 2908 through 2911 of the EPS Regulation. Thus, Option 3 is unnecessary. Given the practical problems with complying with Option 3, the option should be rejected even if it were drafted more narrowly.

E. Option 4, Requiring a POU to Provide an Annual Filing that Contains an Attestation that Financial Commitments Entered into During the Prior Calendar Year Are in Compliance With the EPS, Should Be Considered Only as Optional at the Election of the POU and as Narrowly Drafted.

The Notice describes Option 4 as follows:

Option 4: This option would entail a POU providing an annual filing (similar to what the CPUC requires of LSEs) that contains a description of the investment, what it was intended to do and the costs, along with an attestation that the financial commitments entered into during the prior calendar year are in compliance with the EPS. The investments reported to the Energy Commission could be defined as a “covered procurement” or could also include “major” investments or “investments to meet environmental or

other regulatory requirements.” This annual filing would replace the existing filing requirement.²¹

The description of Option 4 in the Notice states that the Option would be “similar to what the CPUC requires of LSEs.” Thus, it would be helpful to review what the California Public Utilities Commission (“CPUC”) requires of load serving entities (“LSEs”).

The CPUC recognized that there are different types of LSEs that are subject to the CPUC’s jurisdiction. In addition to the three largest electrical corporations, namely, Southern California Edison Company (“SCE”), Pacific Gas & Electric Company (“PG&E”), and San Diego Gas & Electric Company (“SDG&E”), there are also small electrical corporations, community service providers, and community choice aggregators (collectively, “small LSEs”).²²

The CPUC established one compliance process for the largest electrical corporations and another for the small LSEs. The largest electrical corporations are required to submit applications to obtain CPUC approval of all non-RPS covered procurements. The CPUC described the compliance process for the largest electrical corporations as follows:

For all non-RPS covered procurements, PG&E, SCE and SDG&E shall submit documentation to demonstrate compliance with the EPS through the non-RPS application process established by our procurement rules. This includes any request for a Commission finding of EPS compliance for covered procurements that employ geological formation injection for CO₂ sequestration. These applications shall be served on the service list in our Long-Term Procurement Rulemaking, R.06-02-013, or its successor proceeding. The Commission’s determination on these matters will address the compliance of the covered procurements with our EPS rules.²³

The small LSEs believed that requiring them to submit applications like the largest electrical corporations would be unduly burdensome. Accordingly, the small LSEs

²¹ Notice, p. 4.

²² CPUC Decision (“D”) 07-01-039, p. 154 (January 25, 2007).

²³ *Ibid*, p. 156.

recommended “that electric service providers, community choice aggregators and the small electrical corporations make a more simplified after-the-fact compliance showing.”²⁴

The CPUC concurred with the small LSEs “that EPS compliance procedures that do not require Commission pre-approval are appropriate for those LSEs....”²⁵ The Commission determined that “electric service providers, community choice aggregators and electrical corporations other than SCE, PG&E and SDG&E will be required to file an annual Attestation Letter, due by February 15 of each year, attesting to the Commission that the financial commitments it has entered into during the prior calendar year are in compliance with the EPS.”²⁶ The Attestation Letter must contain documentation showing for the prior year:

- (a) That the commitments were not “covered procurements” under the interim EPS rule and/or
- (b) For those that represent covered procurements, documentation demonstrating that such procurements are EPS-compliant, including any contracts with a term of five years or longer that include provisions for substitute energy purchases.
- (c) For any requested reliability-based exemptions that have been pre-approved by the commission, a reference to the application and Commission decision number.²⁷

Additionally, the Attestation Letter must contain a certification from an LSE officer certifying the following under penalty of perjury:

- (1) I have reviewed, or have caused to be reviewed, this compliance submittal.
- (2) Based on my knowledge, information, or belief, this compliance submittal does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements true.

²⁴ *Ibid*, p. 157.

²⁵ *Ibid*, p. 160.

²⁶ *Ibid*, p. 161.

²⁷ *Ibid*, p. 173.

(3) Based on my knowledge, information, or belief, this compliance submittal contains all of the information required to be provided by Commission orders, rules, and regulations.²⁸

The CPUC required that the Attestation Letters filed by the small LSEs be “filed as an advice letter, subject to the Commission procedures governing advice letter filings, which include opportunity for protests and responses.”²⁹

The CPUC clearly believed that its provision for an “after-the-fact” filing of the Attestation Letters by small LSEs would mitigate the administrative burden that SB 1368 would otherwise impose on small LSEs. A similar procedure may mitigate the SB 1368 burden on POU.

However, the option to submit annual filings for the prior year should not be considered as a replacement for the existing filing requirement. Instead, if the Commission believes that Option 4 should be pursued, Option 4 should be considered only as an alternative that a POU could use in lieu of the existing filing requirement at the discretion of the POU. The option to submit annual reports for the prior calendar year would then be available an alternative compliance pathway, with a POU being permitted to elect either to make section 2910 filings as required under the existing regulation or, at the POU’s option, to make an annual filing for the prior year if the POU finds that doing so would be less burdensome.

Additionally, Option 4 should apply only to covered procurements to stay well within the scope of SB 1368 and the EPS regulation. If the Commission determined that it should apply, as well, to “major” investments and “investments to meet environmental other regulatory requirements,” Option 4 should be redrafted to apply narrowly to “major” investments and

²⁸ *Ibid*, pp. 161-162.

²⁹ *Ibid*, p. 162.

“investments to meet environmental other regulatory requirements” in baseload facilities that have emissions that exceed the EPS to avoid being overly broad.

F. Responses to Questions.

In addition to commenting on the four filing or notification options that were presented in the Notice, the Commission asked parties to address four related questions. The questions and SCPPA’s response are as follows:

- If the Energy Commission were to establish a requirement for “major” investments, how should the term be defined? By a dollar amount? By some other criteria?

The Commission should not attempt to define “major” investments. “Major” is a relative term. An investment is “major” as opposed to “minor” or “average” only in context. If, for example, Option 2 were to be reworded as discussed above and adopted, it should be left to the POU to determine whether or not an investment was “major” insofar as it would be the POU that would know the context of the investment.

- If the Energy Commission were to establish a requirement for “investments to meet environmental or other regulatory requirements,” is there any further definition of this term necessary?

The Commission should not attempt to define further the term “investments to meet environmental or other regulatory requirements.” The term is self-explanatory.

- Would the two terms above capture the kinds of investments that are of most concern to parties? If not, is there some other category, short of “all” investments, that would be needed to cover such investments?

Neither “major” investments nor “investments to meet environmental or other regulatory requirements” should be of concern to parties, at least in connection with the EPS Regulation or SB 1368. The only type of investments that should be of concern to parties in connection with the EPS Regulation and SB 1368 are covered procurements as defined in the EPS Regulation.

The Commission should not attempt to identify categories of investments beyond covered procurements.

- Is an attestation that POU investments in non-EPS compliant plants made during the prior year comply with the EPS sufficient to ensure that these investments are consistent with SB 1368?

The attestation together with the information that would be provided in the annual filing about investments during the prior year under Option 4 should be sufficient to ensure that the investments are consistent with SB 1368. Under Option 4, a POU would be required to submit more than an attestation that financial commitments that are entered during the prior year are in compliance with the EPS. A POU would also be required to provide “a description of the investment, what it was intended to do and the costs” along with the Attestation.³⁰

The CPUC found that providing the required documentation plus the attestation was sufficient to ensure compliance for the small LSEs, assuming the facts presented show compliance with the EPS. The CPUC stated in D.07-01-039:

Energy Division shall review each Attestation Letter and approve it if it contains all elements required by the EPS documentation requirement, includes a certification by the responsible corporate officers, and if the facts state in the Attestation Letter show compliance with the EPS. Energy Division approval of the advice letter means that the Attestation Letter is in compliance with these rules, and that any procurement *as reported in the Attestation Letter* complies with the requirements of the EPS program.³¹

Likewise, providing the documentation that would be required under Option 4 plus an attestation should be sufficient to ensure compliance by POUs that would elect to make annual filings for the prior year.

³⁰ Notice, p. 4

³¹ D.07-01-039, p. 162 (January 25, 2007) (emphasis in original).

III. STATUS UPDATE ON ACTIVITIES RELATED TO INVESTMENTS IN THE ENVIRONMENTAL AND REGULATORY REQUIREMENTS AT THE SAN JUAN GENERATING STATION.

In addition to requesting comments on additional filing and notification options, the Notice contains a request for “participating POUs” to provide “a brief status update on their activities related to investments to meet environmental and regulatory requirements for the non-compliant facilities they have an ownership interest in.”³²

The SCPPA San Juan Participants and Anaheim have undivided ownership interests in units at San Juan. On August 4, 2011, the United States Environmental Protection Agency (“US EPA”) issued a Federal Implementation Plan (“FIP”) mandating installation of Best Available Retrofit Technology (“BART”) pollution controls, specifically, Selective Catalytic Reduction (“SCR”) equipment, at San Juan.³³

The State of New Mexico Environment Department (“New Mexico”) is engaged in discussions with US EPA about an alternative to the FIP for San Juan to comply with federal regulations. New Mexico’s discussions with the US EPA are confidential. However, on January 18, 2013, PNM Resources, the parent company of PNM, released the attached news release (Attachment A) about the confidential discussions. PNM Resources states that as a result of the discussions PNM has taken steps to push costs related to SCR installation into later phases of the SCR installation project by temporarily suspending the work of its engineering, procurement, and construction contractor. Additionally, according to the news release, PNM has “put on hold” its plan to file a request with the New Mexico Public Regulation Commission for approval of the SCR project.

³² Notice, p. 5.

³³ *Approval and Promulgation of Implementation Plans; New Mexico; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determination.* EPA-R06-OAR-2010-0846 (August 4, 2011).

The SCPPA San Juan Participants and Anaheim believe that further information about the negotiations with US EPA will become publicly available soon. The SCPPA San Juan Participants and Anaheim will provide that publicly available information to the Commission as soon as possible after the information is released.

IV. REVISION OF SECTION 2913 OF THE EPS REGULATION TO SUBSTITUTE THE TERM “INVESTMENT” FOR THE TERM “COVERED PROCUREMENT” IN THE REGULATION.

The Notice contains a request for comments about revising section 2913 of the EPS Regulation to substitute the term “investment” for the term “covered procurement” in section 2913(a) as follows:

- (a) A local publicly owned electric utility may petition the Commission for an exemption from application of this chapter for ~~covered procurements~~ investments required under the terms of a contract or ownership agreement that was in place January 1, 2007. The Commission may exempt ~~covered procurements~~ investments from application of this chapter if the local publicly owned electric utility demonstrates that:
- (1) the ~~covered procurements~~ investments are required under the terms of the contract or ownership agreement; and
 - (2) the contract or ownership agreement does not afford the local publicly owned electric utility applying for the exemption the opportunity to avoid making such ~~covered procurements~~ investments.

In their July 27, 2012 Response to Tentative Conclusions and Request for Additional Information, the SCPPA San Juan Participants, Anaheim, and the M-S-R Public Power Agency (“M-S-R”) suggested that the Commission consider revising section 2913 to substitute “investments” in place of the words “covered procurements.”³⁴ The SCPPA San Juan

³⁴ Southern California Public Power Authority, M-S-R Public Power Agency, and City of Anaheim Response to Tentative Conclusions and Request for Additional Information, Docket No. 12-OIR-1, p. 17 (July 27, 2012).

Participants and Anaheim are pleased to see that the Commission is now considering the revision and strongly support the modification of section 2913.

As currently worded, section 2913 provides for a POU to petition the Commission for an exemption from the EPS Regulation “for covered procurements.” Thus, section 2913 as currently worded may be interpreted to imply that a POU that files a petition for exemption under section 2913 has found or admits that the subject investment is a covered procurement.

However, a POU may desire to petition for an exemption for an investment without reaching the question of whether the investment constitutes a covered procurement under the EPS Regulation. For example, a POU may desire to petition for an exemption for an investment that is required to meet an order by a federal agency such as the US EPA without incurring the expense or investing the resources to determine whether the investment is a new ownership investment that, under section 2901(j)(4)(A) of the EPS Regulation, “is designed and intended to extend the life of one or more generating units by five years or more.” Alternatively, to avoid any controversy, a POU may desire to petition for an exemption for an investment that is required to meet an order by a federal agency such as the US EPA even though the POU has already determined that the investment is not a covered procurement.

If an investment meets the terms of section 2913 insofar as the investment is “required under the terms of the contract or ownership agreement” and “the contract or ownership agreement does not afford the local publicly owned electric utility applying for the exemption the opportunity to avoid making such covered procurements,” then the POU should be permitted to obtain an exemption without reaching the question of whether the investment would constitute a “covered procurement” under the EPS Regulation. If the investment qualifies for an exemption, it is irrelevant whether the investment would be a “covered procurement” or not.

The proposed rewording of section 2913 to substitute the word “investment” for the words “covered procurement” would permit a POU to petition for exemption of an investment under section 2913 without reaching the question of whether the investment would constitute a covered procurement. In order for section 2913 to avoid the appearance of requiring a POU to make a determination of whether an investment is a “covered procurement” or not as a pre-condition to filing a petition for exemption under section 2913, the section should be revised as proposed in the Notice.

V. CONCLUSION.

For the reasons set forth above, the SCPPA San Juan Participants and Anaheim urge the Commission to retain sections 2908 through 2911 of the EPS Regulation without expanding the sections to impose new filing or notification requirements. If, nevertheless, the Commission elects to consider Options 1 through 4, Options 1 and 2 should be considered only if they were more narrowly drafted to apply only to baseload facilities that do not meet the EPS, Option 3 should be rejected even if more narrowly drafted because implementation would be impractical, and Option 4 should be considered only as an alternative compliance path to be utilized at the discretion of a POU and only as narrowly drafted.

The SCPPA San Juan Participants and Anaheim also urge the Commission to revise section 2913 of the EPS Regulation to substitute the term “investment” for the term “covered procurement” in section 2913 of the Regulations.

Respectfully submitted,

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CITY OF ANAHEIM**

Dated: January 22, 2013

ATTACHMENT A

For Immediate Release

Jan. 18, 2013

PNM Renews Support for Discussion of Alternative to Address Regional Haze at San Juan Generating Station

(ALBUQUERQUE, N.M.) – PNM Resources’ (NYSE: PNM) New Mexico utility, PNM, today announced renewed support for discussions that have resumed with the N.M. Environment Department (“NMED”) and the U.S. Environmental Protection Agency (“EPA”) to consider an alternative for San Juan Generating Station to comply with federal visibility rules.

Following the Nov. 29 expiration of the EPA’s 45-day administrative stay extension, PNM announced it would work to comply with the federal rule that requires installation of selective catalytic reduction (“SCR”) technology on all four units of SJGS.

Confidential discussions have since resumed. As a result, PNM has taken additional steps to push costs related to SCR installation into later phases of the project by temporarily suspending the work of its engineering, procurement and construction contractor. In addition, PNM’s plan to file a request with N.M. Public Regulation Commission for approval of the SCR project has been put on hold.

There is no timeline established for the discussions to reach a definitive agreement, although the September 2016 deadline for installation of SCRs underscores the importance of moving forward quickly.

“We are prepared to install the federally mandated technology, but believe renewed discussions hold potential for agreement on an alternative that could position New Mexico for broader environmental benefits while also reducing the cost impact for PNM customers,” said Pat Collawn, PNM Resources Chairman, President and CEO. “We are hopeful that the current discussions with NMED and EPA ultimately result in an agreement that can move the state’s energy future forward in a positive fashion.”

Background:

PNM Resources (NYSE: PNM) is an energy holding company based in Albuquerque, N.M., with 2011 consolidated operating revenues of \$1.3 billion, excluding First Choice Power. Through its regulated utilities, PNM and TNMP, PNM Resources has approximately 2,530 megawatts of generation capacity and serves electricity to more than 738,000 homes and businesses in New Mexico and Texas. For more information, visit the company’s Web site at www.PNMResources.com.

Safe Harbor Statement under the Private Securities Litigation Reform Act of 1995:

Statements made in this news release that relate to PNM’s expectations, projections and estimates are made pursuant to the Private Securities Litigation Reform Act of 1995. Readers are cautioned that all forward-looking statements are based upon current expectations and estimates, and PNM assumes no obligation to update this information.

(END)

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