

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

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

California Energy Commission

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**M-S-R PUBLIC POWER AGENCY, SOUTHERN CALIFORNIA PUBLIC POWER
AUTHORITY-SAN JUAN PARTICIPANTS, CITY OF ANAHEIM, AND LOS ANGELES
DEPARTMENT OF WATER AND POWER COMMENTS ON THE
JANUARY 29, 2013 WORKSHOP**

Pursuant to the e-mail notice provided by Lisa DeCarlo, Senior Staff Counsel, on January 30, 2013, the M-S-R Public Power Agency (M-S-R),¹ Southern California Public Power Authority-San Juan Participants (SCPPA-SJP), City of Anaheim (Anaheim), and the Los Angeles Department of Water and Power (LADWP) (collectively, the POU Parties) provide these comments to the California Energy Commission (CEC or Commission) on the issues presented in the December 20, 2012 Notice of Rulemaking Workshop (Workshop Notice). The POU Parties also comment on issues raised by Stakeholders in their most recent written comments in response to that notice and during the January 29, 2013 Rulemaking Workshop, related to potential revisions to the Emissions Performance Standard (EPS) Regulation.² The POU Parties and the Natural Resources Defense Counsel (NRDC) and Sierra Club (Joint Petitioners) made efforts with both phone discussions and written proposals via email exchanges

¹ M-S-R Public Power Agency is a joint powers agency whose members are the Modesto Irrigation District, the City of Santa Clara, and the City of Redding. M-S-R holds a 28.8 percent ownership interest in San Juan Project Unit 4.

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

since the most recent workshop to reach a mutually acceptable compromise. The POU Parties desired to work with Joint Petitioners in presenting comments together to the CEC signaling a proposed settlement for the CEC's consideration. Unfortunately, we were unable to find a common ground for expanding the scope of the EPS Regulation that also protected POU ratepayers from undue and unnecessary burdens, and the potential pitfalls associated with increased monitoring and reporting requirements.

I. INTRODUCTION

California has a robust and effective EPS Regulation. The objectives of Senate Bill (SB) 1368 and the EPS Regulation have been realized, including the objective to reduce greenhouse gas (GHG) emitting resources,³ to encourage investments in zero- or low-carbon generating resources,⁴ and to establish a policy to reduce the emission of GHGs.⁵ As evidenced by both the oral and written comments made by M-S-R, the SCPPA-SJP, Anaheim, and LADWP, the POU Parties are taking active and aggressive steps to implement early divestiture from their significant economic interests in non-EPS compliant facilities. Furthermore, during the course of this proceeding now spanning over a year, a lengthy record has been created that demonstrates the fact that the POU Parties' practices are consistent with both the underlying legislation and the EPS Regulation. Notably, this voluminous record is completely devoid of any evidence of non-compliance by a POU. Accordingly, the Commission should conclude this proceeding with a finding that the current EPS Regulation should not be revised.

³ SB 1368 Legislative Counsel's Digest, Section 1(b).

⁴ SB 1368 Legislative Counsel's Digest, Section 1(e).

⁵ SB 1368 Legislative Counsel's Digest, Section 1(h).

II. SCOPE OF COMMENTS

The POU Parties do not believe that there has been a demonstration that revisions are required to the EPS Regulation to meet the objectives of SB 1368. Throughout the course of this proceeding, the POU Parties have testified during workshops and have filed several rounds of comments on matters regarding potential revisions to the EPS Regulation, with the most recent comments being submitted in response to the December 20, 2012 Notice of Workshop. In written comments submitted individually by M-S-R, LADWP, and the Northern California Power Agency (NCPA), and jointly by SCPPA-SJP and Anaheim, the POU Parties clearly articulated the many reasons why the existing scope of the EPS Regulation is sufficient, why additional “notice and filing” provisions are unwarranted, and why the Commission should neither establish a requirement for “major investments” or “investments to meet environmental or other regulatory requirements,” nor further attempt to define those terms. The efficacy of the EPS Regulation, and further evidence of its sufficiency, was elaborated orally by representatives for the POU during the January 29, 2013 Workshop. No additional information or data has been presented to the Commission that refutes the conclusion that the current EPS Regulation should remain unchanged. Neither has any new evidence been introduced that demonstrates that any POU has failed to comply with the EPS Regulation.

In an effort to avoid reiterating the many oral and written comments that have been made on the record in this proceeding, the POU Parties do not restate their positions regarding the issues raised in the December 20, 2012 Workshop Notice, specifically, why additional “notice and filing” provisions are unwarranted and why the Commission should not establish a requirement for “major investments” or “investments to meet environmental or other regulatory requirements.” Rather, the POU Parties focus these comments on presenting a unified position on the notice of expenditures outside the scope of the EPS Regulation. Despite the clearly stated

reasons that have been articulated throughout this proceeding, and the proceeding record which shows no need to revise the regulations, the POU Parties propose a compromise in the event the CEC makes a finding that a further notification requirement is necessary. Additionally, the POU Parties respond to issues raised for the first time in the January 22, 2013, written comments of NRDC and Sierra Club⁶ and orally during the January 29, 2013 Workshop.

III. PROPOSED COMPROMISE ON NOTIFICATION OF EXPENDITURES IN NON-EPS COMPLIANT FACILITIES

In their written and oral workshop comments, NRDC/Sierra Club advocated for adoption of both a “notice” requirement under Option 2 and a “reporting” requirement that would be an expansion of Option 3 as presented in the Commission’s Workshop Notice.⁷ The proposed notice and reporting provisions would require the inclusion of new definitions in the Regulation.⁸ In their comments, NRDC/Sierra Club state that “advanced notice of contemplated major investments and those intended to meet environmental and/or other regulatory requirements benefits all stakeholders by allowing for sufficient lead time to vet whether the investment is consistent with SB 1368 and avoid improper expectation and eleventh hour disputes.”⁹ Despite this stated reason, placing interested parties on a service list for POU governing board meetings where such expenditures would be addressed would be insufficient according to NRDC/Sierra Club, because the Commission has a role in the enforcement of the regulation and the broader public should know what transpires.¹⁰ In their written comments prior to the Workshop, and again during oral comments on the record, the POU Parties – individually and collectively –

⁶ Sierra Club and NRDC Comments on January 29, 2013 Notice of Rulemaking Workshop, January 22, 2013 (Sierra Club/NRDC Comments).

⁷ Sierra Club/NRDC Comments, p. 1.

⁸ Sierra Club/NRDC Comments, p. 1.

⁹ *Id.*, pp. 2-3.

¹⁰ Hearing Transcript, January 29, 2013, Public Workshop, p. 97, *l.* 19.

articulated the myriad reasons why submission of a prospective report that identifies potential future investments in non-compliant facilities does nothing to further the objectives of SB 1368 or ensure compliance with the EPS Regulation, and should be rejected. Those arguments are not reiterated herein.

In their comments, the POU Parties opposed additional notice and reporting requirements. It is important to note that the POU Parties are united in their belief that additional notice and reporting requirements are unwarranted and that the divergence of POU opinions on the various options speaks volumes about the many concerns and potential pitfalls associated with those options. While the POU Parties continue to believe that the scope of the current EPS Regulation is sufficient and that the objectives of SB 1368 are being met under the existing Regulation, if the Commission makes a finding that an additional notification requirement is necessary with regard to emission-related expenditures at non-EPS compliant facilities in order to better meet the objectives of SB 1368, the POU Parties propose a compromise¹¹ that would encompass the spirit of the Staff's proposed Option 2.

The POU Parties believe that this compromise position reflects the oral acknowledgment of NRDC and Sierra Club that the facilities at issue are limited to the existing non-EPS compliant baseload facilities owned by the POU's.¹² In order to reduce confusion and the ambiguity associated with arbitrary and overly expansive terms, the POU's propose that the notice provision apply to "an ownership investment over \$5.0 million to meet environmental or

¹¹ As noted both orally during the January 29 Workshop, and in Ms. DeCarlo's January 30 communication, "The Lead Commissioner strongly encourages stakeholders to reach agreement on as many outstanding issues as feasible and to present such agreements in the provided comments."

¹² Hearing Transcript, January 29, 2013, Public Workshop, p. 15, *ll.* 21-25; Matt Vespa of Sierra Club: "... just to be clear on the scope of what we're talking about, it's reporting on non-deemed compliant power plants that provide baseload generation that exceed the EPS. So, we're talking about a real finite number, you know, Navajo, San Juan, IPP."

regulatory requirements specifically related to emission controls at a non-EPS compliant baseload facility.”

By using the term “environmental or regulatory requirements specifically related to emission controls at a non-EPS compliant baseload facility,” the notice requirement succinctly addresses those matters that directly impact the EPS Regulation and the scope of SB 1368. This would also reduce the need to review filings that are associated with non-emission related expenses, would retain the legislatively mandated scope of the EPS to baseload generation, and would remove non-emission related regulatory requirements from consideration. Furthermore, due to the vast number of expenditures that could be implicated and the challenges presented with attempting to define those expenditures (outside of the existing scope of the Regulation that addresses “covered procurements”), the POU Parties propose that the threshold of emissions control investments at issue be expenditures in excess of \$5 million. The POU Parties believe that this number more adequately reflects a “significant investment” than the \$250,000 proposed by NRDC and Sierra Club.¹³ For purposes of perspective, over the last five years the San Juan Generating Station (SJGS) Annual Capital Budgets have averaged \$90.8 million per year, while the total San Juan Plant Budgets have averaged \$594 million per year. For 2013, the plant-wide capital budget is \$91.2 million and the total budget is \$598 million.¹⁴ Consistent with this order of magnitude, the San Juan Participation Agreement imposes additional approval requirements for capital expenditures exceeding \$5 million (see §18.4.2). A threshold of \$250,000 would imply that the notice provision would apply to any capital item greater than 0.3% of the capital budget. The POU Parties respectively submit that 0.3% of an annual capital budget is not a “significant” amount under any reasonable interpretation of the statute or regulations.

¹³ Sierra Club/NRDC Comments, p. 4.

¹⁴ These numbers are based on 2009 – 2013 San Juan Annual Budgets prepared by the Public Service Company of New Mexico (PNM), the operating agent for the SJGS.

Accordingly, if the Commission were to make a finding that a notice requirement is in fact necessary for specified investments in non-EPS compliant facilities, the POU's propose the following:

Option 2: This option would be ~~an expansion~~ a revision to of the existing public notice requirements for covered procurements (in Section 2908 of the regulations) to include a notification requirement for ownership investments over \$5.0 million to meet environmental or regulatory requirements specifically related to emission controls. ~~"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 such investments are being deliberated by the POU's Governing Board and the public meeting materials that are provided to the POU's Governing Board related to such ~~back-up information related to the investments' compliance with EPS.~~ The URL would be provided at least three days prior to the meeting, or within 24-hours in instances where special meetings are called under the provisions of Government Code Section 54956, and would require the Energy Commission to post the URL and public materials that are posted by the POU ~~back-up information~~ on the Energy Commission's website and notify the listserv.

In order to incorporate the revised Option 2 into the EPS Regulation, Section 2908 should be revised to read:

Section 2908 Public Notice

Each local publicly owned electric utility shall post notice in accordance with Government Code Section 54950 et seq. whenever its governing body will deliberate in public on a covered procurement or an ownership investment over \$5.0 million to meet environmental or regulatory requirements specifically related to emission controls at a non-EPS compliant baseload facility.

(e) For an ownership investment to meet environmental or regulatory requirements specifically related to emission controls at a non-EPS compliant baseload facility, the documentation made available at the time of posting pursuant to Subsections (a) and (b) shall be the same documentation that is made publicly available to the POU's Governing Body for purposes of the deliberation.

IV. RESPONSE TO ISSUES RAISED BY NRDC AND SIERRA CLUB

A. Changed Definitions for New Ownership Investments

For the first time in this proceeding, NRDC and Sierra Club proposed in their January 22, 2013, comments that the current definition of new ownership investment in Section 2901(j) be

revised so that “new ownership investment” would include “(5) Any investment needed to meet environmental or other regulatory requirements to the extent that they extend the legal operating life of the facility by five years or more.”¹⁵ This proposal is wholly outside the scope of issues raised in the December 20, 2012 Workshop Notice and should be rejected.

The proposal should also be rejected on the grounds that it is totally without merit and unsupported by any operational or practical evidence. There is no industry practice associated with the “legal operating life” of a facility. Neither is there a basis for creating the new term “extend the legal operating life of a facility” in the context of the EPS Regulation. This extra-statutory restriction is ambiguous and would create confusion with regard to the normal operations of an electric generation facility.

It is important to recognize that the CEC correctly has not asked for comments or discussion on the issue of investments that “extend the life” versus “extend the *legal operating life*” or “*regulatory life*” of a facility. In fact, looking at the language of the current Regulation and the underlying legislation of SB 1368, it is clear neither the California Legislature nor the CEC specifically identified a concept relating to a “legal operating life” or “regulatory life” of a facility. In fact, SB 1368 simply stated that a “‘long-term financial commitment’ means either a new ownership investment in baseload generation or a new or renewed contract with a term of five or more years, which includes procurement of baseload generation.”¹⁶ It is imperative to use the simple, common-sense reading of this language: SB 1368 made clear it was meant to act as a bar against either new ownership investments or new/renewed contract commitments that provided five or more years of additional high emission electricity.

¹⁵ Sierra Club/NRDC Comments, p. 5.

¹⁶ Public Utilities Code Section 8340(j).

The CEC further clarified this concept, again with plain and simple English allowing for common-sense reading under Section 2901(j), and the POU Parties have abided ever since. Section 2901(j) did not further qualify the concept of “life” with terms such as “physical life” or “operational life” versus “legal operating life” or “regulatory life.” It also did not focus on the “life” of the facility as a whole but rather the “life” of a single part of that facility: namely, a generating unit. The intent of the regulation is clear: it means to focus on extraordinary expenditures that go beyond routine maintenance to give additional longevity (specifically, five or more years beyond expected longevity) to a generating unit to provide additional years of electricity from that unit.

B. Mandatory Commission Evaluation of a Prospective Procurement

Based on Joint Petitioners’ position that all “investments to meet environmental and other regulatory requirements should be reviewed on a case-by-case basis to determine whether they are considered a covered procurement,” NRDC/Sierra Club propose that Section 2907¹⁷ be revised to include a mandatory “request” for a Commission evaluation of a “prospective investment needed to meet environmental or other regulatory requirements.”¹⁸ The POU Parties oppose any revisions to the EPS Regulation that would place anybody other than the POU governing boards in the role of making determinations regarding prospective procurements. If a POU has questions regarding whether or not a prospective procurement is a covered procurement as defined in the Regulation, they may avail themselves of the existing provisions of Section 2907. However, a mandatory “review” – especially one that is totally undefined with regard to both scope and criteria – is inappropriate.

¹⁷ 20 CCR § 2907.

¹⁸ Sierra Club/NRDC Comments, p. 5.

As public agencies, POU's make their decisions openly and publicly, and the POU's fully understand and appreciate the public's right to information. However, POU's must still operate in an environment that involves making business decisions, working with partners and co-owners, and responding to critical issues in real-time. Accordingly, the POU Parties are concerned with the implications of a "reporting" process that involves "lead time" for third party review, or a "requested review" by the CEC that would require third party pre-approval of a POU decision. To that end, the POU Parties appreciate the Commission's confirmation that should a notice requirement be invoked, the role of the agency vis-à-vis such notice will be to collect and disseminate the information to the listserv, and that no "review and approval" process is envisioned.¹⁹

The Commission – and any third party – continues to have the right at any time to bring a complaint pursuant to Section 2911²⁰ of the Regulation if they believe that a POU has violated the EPS Regulation. The processes currently contained in the EPS Regulation for addressing potential uncertainties regarding covered procurements (Section 2907) and alleged violations by a POU (Section 2911) are sufficient to meet the objectives of the statute and provide assurances of accountability to the Commission and the public.

C. Appropriate Level of the California EPS.

Despite being outside the scope of issues raised in the December 20, 2012, Workshop Notice, NRDC and Sierra Club claimed in their January 22, 2013 Comments that the State of Washington has stated its "intention to amend its EPS . . . to 970 lbs/MWhr," and that this "move

¹⁹ Hearing Transcript, January 29, 2013, Public Workshop, p. 60, *ll.* 10-20; quoting Melissa Jones (CEC), "To clarify, when staff developed these options we were looking at it as a notification role, so we would be providing URL and backup information as already required in the regulations. Of course, staff always has the option, if they see something, to initiate an investigation. But we don't see the Commission in an approval mode at all. It's not being submitted to us for approval. It's being submitted to us so that we can put notices out to other parties."

²⁰ 20 CCR § 2911.

demonstrates that the current EPS definition in California is clearly outdated and out of step with recent examination by our sister-state to the north.” (NRDC/Sierra Club Comments, p. 6) The POU Parties disagree. The parties to this proceeding responded to NRDC and Sierra Club’s prior calls for a lower EPS, and the Commission determined that no further information on that topic was necessary.²¹

Furthermore, Sierra Club and NRDC’s proffering of the Washington State proposal is without any clarification or explanation. Had the Washington statute itself been discussed, the clear differences between the California law and the Washington statute would have been made evident.²² The Washington law – like the federal Environmental Protection Agency proposal – is not analogous to the California law.

First, the Washington law provided an exemption for the Bonneville Power Administration. It further provided that its EPS law “does not apply to a coal-fired baseload electric generating [generation] facility in the event the department determines as a requirement of state or federal law or regulation that selective catalytic reduction technology must be installed on any of its boilers.”²³ This important provision was not mentioned in the Sierra Club/NRDC Comments.

Secondly, the Washington law specifically included language for review of the EPS every five years, whereas California’s SB 1368 provides that the EPS shall be reevaluated, continued or modified *once* when an enforceable greenhouse gases emissions limit is established and in operation.²⁴ SB 1368 further provides that the regulatory agency administering Assembly Bill 32, which authorized the GHG limit, the California Air Resources Board, provide input at

²¹ See the September 28, 2012 comments in response to August 31 Lead Commissioner Ruling.

²² <http://apps.leg.wa.gov/rcw/supdefault.aspx?cite=80.80.040>

²³ Id.

²⁴ Public Utilities Code Section 8341(f).

such time, which it recently did during this rulemaking proceeding.²⁵ Washington’s EPS law also repeatedly discusses the need for a “reasonable” approach, taking into consideration grid “system reliability” and “overall costs to electricity customers.”²⁶

Furthermore, NRDC/Sierra Club’s repeated call for an even lower EPS²⁷ are inconsistent with the conclusions and recommendations set forth in the December 2012 NRDC Report,²⁸ which calls for a state-specific standard for each state. In conclusion, it is improper to cite Washington’s EPS law in such a specific, narrow manner when the entirety of its EPS law provides a very different and arguably far more lenient approach than California’s EPS law.

D. Proposed Revision To Section 2913.

In the Workshop Notice, Staff asked for comments on whether or not to revise Section 2913²⁹ to replace the term “covered procurement” with “investment”. The POU Parties all supported such a revision in their written comments and outlined the reasons why such a revision was supported by sound public policy and administrative ease, without any changes to the substantive provisions affecting the underlying qualification for the limited exemption.

NRDC/Sierra Club did not comment on this issue in their written comments, but they raised objections to the proposal for the first time during the Workshop. During oral comments, it appeared that representatives from NRDC did not support the revision because it would not

²⁵ Email RE: Docket No. 12-OIR-1 Rulemaking to Consider Modification of Regulations Establishing a Greenhouse Gases Emission Performance Standard For Baseload Generation of Local Publicly Owned Electric Utilities, from Steven Cliff, California Air Resources Board, June 28, 2012. See also Tentative Conclusions and Requests for Additional Information, July 9, 2012, pp.6-7.

²⁶ Id.

²⁷ “. . . we recommended a lower level based on our own survey . . .” Sierra Club/NRDC Comments, p. 6.

²⁸ NRDC REPORT, December 2012, R: 12-11-A, Closing the Power Plant Carbon Pollution Loophole: Smart Ways the Clean Air Act Can Clean Up America’s Biggest Climate Polluters, authored by Daniel A. Lashof, Starla Yeh, David Doniger, Sheryl Carter, and Laurie Johnson.

²⁹ 20 CCR § 2913.

require a POU to make a determination that the investment at issue was a covered procurement, notwithstanding the fact that the terms of Section 2913 do not require such a finding.

Furthermore, and more troubling from a legal perspective, was an oral comment from Sierra Club that inferred that the entire provision should be revised so that no POU could utilize this option unless all other POUs act collectively with regard to any given investment at a non-deemed compliant facility.³⁰ Any such revisions would be unlawful and should be rejected. Each POU is an independent legal entity with a separate and distinct governing body. Each POU must operate as directed by its own governing body, and that governance must be wholly independent and free from outside influence. It is not only contrary to sound public policy, but it is unlawful to have a regulatory provision that would preclude M-S-R, for example, from being able to utilize a regulatory option simply because another entity failed to meet certain criteria.

The Commission should adopt the change to Section 2913 as suggested by Energy Commission staff in the Workshop Notice. This provision would provide for greater administrative efficiencies for both the POUs and the Energy Commission staff, as the POUs could utilize the provisions of this section without having to undertake deliberations regarding whether an investment is a covered procurement. Since Section 2913 specifically exempts covered procurements under its terms, it is not necessary for the POUs to go through such a process before availing themselves of this provision, nor for the Energy Commission to make such a determination when reviewing the request. This revision does nothing to alter the scope or applicability of the provision, but does provide for economic efficiencies in administrative processes for both the POUs and the CEC.

³⁰ Hearing Transcript, January 29, 2013, Public Workshop, p. 133, *l.* 11-14.

Proposed Revision to Section 2913:

Section 2913 Case-by-Case Review for Pre-Existing Multi-Party Commitments

(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 ~~investments-covered procurements~~ from application of this chapter if the local publicly owned electric utility demonstrates that:

(1) the ~~investments-covered procurements~~ 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 investments ~~covered procurements~~.

V. CONCLUSION

The POU Parties appreciate all of the time that the Commission has devoted to addressing the issues in this proceeding. All of the parties are in complete agreement that reducing GHG emissions is an important objective, and the POU Parties have been working on many fronts to see the goals of both SB 1368 and AB 32 met. Those efforts go far beyond compliance with the EPS Regulation. The objectives of SB 1368 are clearly working in that the state's electric utilities have been making strident efforts to lawfully divest of their interests in non-EPS compliant facilities. Coupled with the fact that no party in this entire proceeding has demonstrated that the current version of the EPS Regulation is either ineffective in meeting its stated objectives or that the POU Parties have failed to comply with all the provisions, the POU Parties believe that the EPS Regulation should remain unchanged except for the revision of section 2913 to substitute the term "investments" for "covered procurements".

If the Commission makes a finding that it is necessary to add a new notice requirement in order to meet the requirements of SB 1368, the addition should be limited to revising Section 2908 to add a notice requirement for ownership investments over \$5.0 million to meet environmental or regulatory requirements specifically related to emission controls at non-EPS compliant baseload facilities, as more specifically addressed above.

Finally, given the extensive and extraordinary efforts that the POU's have been making to lawfully and expeditiously divest of their interests in coal-fired generation, the POU's request that should any new notice requirement be imposed, that such requirement be deemed applicable only to facilities where the ownership interest is for greater than five years from the effective date of the regulatory revision. The POU Parties ask that any such revisions take effect no sooner than January 1, 2014 to allow the POU's to make further progress towards their long-term and ongoing divestiture efforts.

Dated: February 15, 2013

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