April 24, 2007

California Energy Commission Dockets Unit
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
Attn: Docket No. 06-OIR-1

Docket Clerk

Re: Docket No. 06-OIR-1

Please find attached the *Comments, Objections, and Recommendations of the California Municipal Utilities Association on the Notice of Proposed Acton for Adoption of Regulations Establishing and Implementing a Greenhouse Gases Emission Performance Standard for Local Publicly Owned Electric Utilities.* These comments were also submitted electronically at docket@energy.state.ca.us on April 24, 2007.

If you have any questions or comments, please contact me at (916) 326-5314.

Sincerely,

Bruce McLaughlin
for the California Municipal Utilities Association

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, OBJECTIONS, AND RECOMMENDATIONS OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION ON THE NOTICE OF PROPOSED ACTION FOR ADOPTION OF REGULATIONS ESTABLISHING AND IMPLEMENTING A GREENHOUSE GASES EMISSION PERFORMANCE STANDARD FOR LOCAL PUBLICLY OWNED ELECTRIC UTILITIES

April 24, 2007

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Table of Contents

1 Introduction

In response to the Notice of Proposed Action ("NOPA") submitted by the California Energy Commission ("CEC" or "Commission") for Docket No. 06-OIR-1 and published by the Office of Administrative Law on March 9, 2007, for adoption of an emissions performance standard ("EPS") pursuant to Senate Bill 1368 ("Proposed Regulations"), the California Municipal Utilities Association ("CMUA") hereby files these written Comments, Objections, and Recommendations ("NOPA Comments") that are specifically directed at the CEC's proposed action.

CMUA actively participated in all workshops held prior to the NOPA and submitted many written and oral comments, recommendations, and objections during that time. None of those documents were cited in the Initial Statement of Reasons, despite the fact that much of the materials included therein were used to support the Proposed Regulations. CMUA will cite repeatedly to its workshop comments, incorporates them by reference in this document, and includes them as attachments to these NOPA Comments for addition to the official record in this rulemaking.

In these NOPA Comments, CMUA makes many comments based upon the standards for clarity, consistency, and authority as mandated for regulations by the Administrative Procedure Act ("APA"). (Gov't Code § 11340, *et seq.*) CMUA describes below the meaning of those terms as they are interpreted by California law and as they will be used herein.

Pursuant to the APA, "clarity" means that the regulation is "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (Gov't Code § 11349(c)) "A regulation shall be presumed *not* to comply with the "clarity" standard if any of the following conditions exists: (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or (3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or (4) the regulation uses language incorrectly . . . .; or (5) the regulation presents information in a format that is not readily understandable by persons "directly affected" . . . ." (1 Cal. Code Regs. § 16(a))

The APA requirement for "consistency" means that the regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (Gov't Code § 11349(d)) Under the proper legal standard of review, a court will determine whether the agency reasonably interpreted its legislative mandate when deciding that the challenged regulation was necessary to accomplish the purpose of the statute. In other words, "the court will determine whether the regulation is reasonably designed to aid a statutory objective." (*Benton v. Board of Supervisors*, 226 Cal.App.3d 1467, 1479 (1991))

The APA requirement for "authority" shall be presumed to exist only if an agency cites a California constitutional or statutory provision which: (1) expressly permits or obligates the agency to adopt the regulation; or (2) grants a power to the agency which impliedly permits or obligates the agency to adopt the regulation in order to achieve the purpose for which the power was granted. (Gov't Code § 11349(b); 1 Cal. Code Regs. § 14)

2 Comments on the Initial Statement of Reasons ("ISOR")

2.1 Statement of Specific Purpose and Rationale

Comment 1: The CEC has the statutory duty to consider all relevant issues in regard to publicly owned electric utilities and lacks the authority to adopt regulations for EPS *enforcement* based solely on the fact that they are the same as those adopted by the CPUC for LSEs.

The CEC's statutory obligation to adopt an EPS in Public Utilities Code § 8341(e) is distinct from the statutory obligation to adopt enforcement regulations in Public Utilities Code § 8341(c). The statutory requirement for CEC consistency with the CPUC applies only to the actual EPS itself, i.e., the 1100 pound per MWh standard. In sharp distinction, the statute recognizes that the CPUC and POUs are fundamentally different and that different enforcement regulations may, in fact, be required. (*See Comments of the California Municipal Utilities Association Regarding Compliance*, filed in 06-OIR-1 on December 13, 2006; *California Municipal Utilities Association Comments Regarding Implementation of SB 1368 and Enforcement Issues*, filed in 06-OIR-1 on December 13, 2006) It behooves the CEC to implement the correct rules pursuant to its duty under the APA and then communicate with the CPUC if standardization between the two agencies is desired. To that end, the CPUC has the ability to amend its rules in a more expeditious and administratively simple manner than the CEC.

2.2 Documents and Reports Relied Upon

Comment 2: CMUA supplied substantial input through written comments that were filed during noticed workshops and these comments should be added to the official rulemaking file for 06-OIR-1.

CMUA supplied a substantial amount of documentation in Rulemaking 06-OIR-1 including a final filing that effectively included professional opinions from plant engineers, copies of contracts, examples of maintenance activities, and project approvals by public agency governing bodies. These documents provided substantial evidence to support many of the CEC's Proposed Regulations. CMUA includes these documents as attachments to these NOPA

Comments to ensure that they are included in the rulemaking file as required by Government Code § 11347.3(b)(6).

2.3 Consideration of Reasonable Alternatives, Including Those That Would Lessen Any Adverse Impact on Small Business

Comment 3: The Commission did not adequately consider CMUA's alternative proposals and has no basis to conclude that the Proposed Regulations will have no effect on small businesses.

The ISOR states that "no party has otherwise identified or brought to the attention of the Commission any reasonable alternatives." (ISOR at 2) CMUA disputes that conclusion and points to CMUA's filings attached to these NOPA Comments that are replete with alternative regulatory language and supporting reasoning. In particular, the CMUA filings pointed out the ambiguity in the regulation's definition of a new ownership investment in Proposed Regulation § 2901(j)(4)(A) and offered alternative language. This section in the Proposed Regulations may be interpreted to prohibit necessary activities on power plants that are routinely performed by small businesses located in California. The CEC did not mention or apparently consider these affects in preparing the ISOR or Financial Impact Statement ("FIS").

2.4 Impact on Business

Comment 4: The Commission did not adequately consider the economic impacts on businesses in California, and it did not cite any facts, testimony, documents, or other evidence to support a finding that no effect will occur.

All state agencies adopting, amending or repealing regulations, are required to identify and assess the impact of those regulations on businesses and/or individuals. (Gov't Code §§11346.3(a), 11346.5(a)) The purpose of this requirement is to identify the general types of private sector impacts that may result from the proposed regulation by identifying affected parties and the potential cost impact. "Persons shall be presumed to be "directly affected" [by a regulation] if they incur from the enforcement of the regulation a detriment that is not common to the public in general. (1 Cal. Code Regs. § 16(b)(4)) The APA requires the agency to specifically *cite* "[f]acts, testimony, documents, or other evidence" to support its finding of no adverse economic impact. (Gov't. Code, § 11346.2(b)(5)) No cost-savings studies were

incorporated into the administrative record to support the CEC's findings that would constitute substantial compliance to the APA. CMUA knows of no data request or questions posed by the Commission during this rulemaking that would support a finding on the issue of cost impacts to businesses.

In Section A of Form 399 on estimated private sector cost impacts, the CEC stated that no impacts would occur. The CEC's only reasoning for this response was that "[s]ellers of non-EPS compliant electricity are not completely foreclosed from selling electricity." CMUA believes that the CEC reached this conclusion because it did not properly comply with the APA by not adequately considering all affected businesses and cost impacts.

In regard to private businesses that are sellers of electricity, certain affected power plants may be located within geographic zones in which POUs have local capacity requirements. A non-compliant powerplant within that zone would be precluded from providing baseload generation to POUs within that zone. Cost impacts to that seller may include the loss of a price premium for providing needed capacity within a constrained zone and increased transmission costs to sell the power out of state. An example of an affected seller may be a "small business" that operates a generation unit on the site of its manufacturing facility. (*See* Gov't Code § 11342.610)

Other small businesses that the CEC did not take into account are those providing support services to POUs that may be adversely affected by the Proposed Regulation's definition of a new ownership investment in § 2901(j)(4)(A). As will be discussed further below, § 2901(j)(4)(A) may be reasonably and logically interpreted to proscribe expenditures for necessary activities on power plants that are routinely performed by businesses located in California. This includes such illustrative activities as consulting engineers, welders, painters, mechanics, sheet metal workers, electricians, carpenters, and non-destructive testing technicians. Many of these may also be small businesses.

During rulemaking 06-OIR-1 the Commission did not request, nor did it collect, any information from POUs that would support making a determination on the creation or elimination of businesses in California. The Commission did not request or collect any information from POUs concerning the types, sizes, or locations of businesses that are routinely used to perform activities at POU power plants. The CEC provided no indication that it even considered these impacts at all, and therefore, it did not comply with the APA by estimating the

total number of businesses that are likely to be impacted by the regulation, providing a brief description of the type of businesses impacted, estimating the number or percentage of total businesses that are small businesses, or estimating the number of new businesses that may be created, and/or eliminated as a result of the regulation. (Gov't Code § 11346.3(b)(1))

Comment 5: The Commission did not adequately consider the economic impacts on POUs, and it did not cite any facts, testimony, documents, or other evidence to support a finding that a minimal effect will occur.

During rulemaking 06-OIR-1 the Commission did not request, nor did it collect, any information from POUs that would support making a determination of no cost impacts to POUs. The APA requires the NOPA to contain a "statement of the potential cost impact of the proposed action on private persons or businesses directly affected . . . ." (Gov't Code § 11346.5(a)(9)) Furthermore, the APA also requires that State agencies proposing to adopt any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals, including the ability of California businesses to compete with businesses in other states. (Gov't Code § 11346.3(a))

For example, the inability of POUs to contract long term for system or market power inhibits POUs ability to reduce price risk to POU customers. As the Commission is well aware, short-term contracts expose ratepayers to price fluctuation that long-term contracts avoid. Prior to the adoption of these regulations, POUs could use long-term system or market purchases to reduce price volatility. With the adoption of these regulations, POUs can no longer use long-term system or market contracts to protect POU ratepayers from the risk of price fluctuation. Therefore, POUs would need to purchase a hedging product to protect their ratepayers from these risks. The price of the hedge is an additional cost that is a direct result of the regulation. These additional costs to the POUs are then transferred to POU ratepayers through increases in rates. The Commission needs to consider these significant additional costs directly related to the adoption of these regulations.

CMUA understands that the Legislature may have decided that imposing additional costs on the generation and procurement of power to achieve these greenhouse gas reduction goals is an acceptable cost. Nonetheless, it is incorrect to assume no cost implications from the adoption of these regulations. The Commission must acknowledge the significant additional costs

imposed upon POU ratepayers and adopt the most effective and least burdensome regulations to achieve the legislative goals of SB 1368.

3 Comments on the Discussion of Specific Requirements

3.1 Section 2901(a): Definitions of capacity factor

CMUA's objections specifically directed at the CEC's Proposed Action	
Comment 6: In their entirety, the Proposed Regulations lack clarity because § 2901(a) and § 2901(k) may be interpreted inconsistently with the statute and the legislative intent by adding an ambiguous term, permitted capacity, into the regulatory language.	
CMUA's Recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	"Annualized plant capacity factor" means the ratio of the annual amount of electricity produced, measured in kilowatt hours, divided by the annual amount of electricity the powerplant could have produced if it had been operated at its maximum permitted capacity during all hours of the year, expressed in kilowatt hours."
Reasoning supporting CMUA's alternative	The CPUC Workshop Report indicated that all parties acknowledged that the EPS does not apply to peaker plants. The Proposed Regulations confuse this matter by using imprecise language in sections 2903, 2904, and 2905 (i.e., "annual average") and incorporating the term "permitted capacity" from Proposed Regulation § 2901(k). Accordingly, the Proposed Regulations are unclear as to what type of permit is relevant to the definition of "permitted capacity." For example, does this refer to an operational permit received from the CEC that limits a unit's output capacity rating, or does it also encompass a permit from a local air quality board that might limit the number of hours a unit may operate? Therefore, the Regulations are ambiguous as to whether the CEC intends to apply the EPS to peaker plants that will operate more than 60% of the *hours allowed under an air permit*, even though these hours will be much less than 60% of the hours in a year. This latter result is not a reasonable interpretation of the legislative mandate, it is not *necessary* to accomplish the purpose of the statute, and it is not reasonably designed to aid a statutory objective.
Reference and authority in SB 1368 supporting CMUA's alternative	""Baseload generation" means electricity generation from a powerplant that is designed and intended to provide electricity at an annualized plant capacity factor of at least 60 percent." (Cal. Pub. Util Code § 8340(a)) "What is baseload: The bill currently only applies to contracts for baseload power. Baseload power is defined as electricity generation from a power plant that is *designed to provide electricity at least 60 percent of the total hours in year (a 60% capacity factor)*. Baseload power contracts are for power that is

	intended to be operating to meet demand night and day and throughout the year. This is different from peak power, which is intended to be available only at those times of the day and year when demand spikes. Baseload power generally comes from more efficient power plants and tends to be cleaner and cheaper than peak power." (UTILITIES AND COMMERCE COMMITTEE ANALYSIS OF SB 1368, as amended August 30, 2006, page E) (emphasis added)
Reference in D.07-01-039 supporting CMUA's alternative	"By limiting the application of the EPS to long-term commitments, rather than short-term transactions, and to baseload powerplants, rather than to those designed to be used for load shaping or peaking, the adopted EPS protects California ratepayers from long-term reliability risks while minimizing potential adverse impacts on short-term reliability and associated costs. " (Finding of Fact 92) "In order to determine whether the plant is "designed and intended" to provide electricity at an annualized plant capacity factor of at least 60 percent, LSEs should include historical plant capacity factors for the underlying facility or facilities in their documentation of whether the EPS applies to a new long-term financial commitment (other than new plant construction)." (Conclusion of Law 53) "The Merriam-Webster Online Dictionary defines annualize as: "to calculate or adjust to reflect a rate based on a full year." We therefore find it reasonable to define the term "annualized" to mean "annual average" as EPUC/CAC suggest, but with a significant caveat. The annual average must be calculated in a manner that is consistent with today's decision, that is, it must be based on the annual production of the underlying facility, and not just what might be delivered under a specific contract with an LSE." "At the same time, we note that today's adopted EPS is purposely designed to both protect California ratepayers from long-term reliability risks while minimizing potential adverse impacts on short-term system reliability and associated costs. This has been accomplished by limiting the application of the EPS to long-term commitments, rather than short term transactions, and to baseload powerplants, rather than to those designed to be used for load shaping or peaking." (p.100)

3.2 Section 2901(j): Definitions of new ownership investments

Comment 7: SB 1368 does not authorize the CEC to exercise jurisdiction over existing owned facilities of POUs absent the entering of a new legal relationship by the POU.

In D.07-01-039, the CPUC found that the "new ownership investment" trigger includes investments in retained generation. (D.07-01-039 at 5, 7, 41-54) However, CMUA affirms here

its consistently stated position in agreement with Southern California Edison that capital expenditures in existing utility-owned power plants are not new ownership investments according to SB 1368. CMUA filed comments in this docket that outlined the legal arguments demonstrating that the legislative intent as indicated by the adopted language of SB 1368 does not pertain to existing utility-owned power plants. (*Comments of the California Municipal Utilities Association on the CEC White Paper and Workshop – Triggering and Interpretations of SB 1368*, December 13, 2006) CMUA expressly incorporates those comments by reference and requests the CEC to provide responses to CMUA's recommendations in answers to Questions 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 3.9, 3.10, 3.11, and 3.12.

Furthermore, CMUA points to the most obvious of distinctions. The CEC has no jurisdiction over the operation of POU powerplants while the CPUC controls virtually every aspect of IOU activities concerning their retained generation. At the very least, this distinction allows and possibly mandates differences between CPUC and CEC regulations concerning the extent of authority over powerplant operations and the approval of capital expenditures for utility-owned powerplants.

CMUA's objections specifically directed at the CEC's Proposed Action
Comment 8: In their entirety, the Proposed Regulations lack clarity because §§ 2901(j)(1), (3), and (4) may be interpreted inconsistently with the statute and the legislative intent. The regulation can, on its face, be reasonably and logically interpreted to have more than one meaning. The directly affected POUs are left to surmise and conjecture on: (1) the definition of "investment;" and (2) whether the term "any investment" should be interpreted literally (i.e., one dollar?). These terms are defined neither in the regulation nor in SB 1368. This unclear regulation presents information that is not readily understandable by the "directly affected" POUs. **Comment 9: In their entirety, the Proposed Regulation lack clarity because § 2901(j)(4)(A) may be interpreted inconsistently with the statute and the legislative intent. The regulation can, on its face, be reasonably and logically interpreted to have more than one meaning. The directly affected POUs are left to surmise and conjecture on: (1) the definition of the phrase "extend the life;" (2) the baseline from which a purported life extension is calculated; and (3) the scope and types of activities that would trigger this regulation. These terms are not defined in the regulation *and not even used in SB 1368*. This unclear regulation presents information that is not readily understandable by the "directly affected" POUs.**

Comment 10: In their entirety, the Proposed Regulations lack clarity because § 2901(j)(4)(A) may be interpreted inconsistently with the statute and the legislative intent. POUs are left to surmise and conjecture on whether this subsection prohibits power plant owners from: (1) performing necessary and beneficial activities such as routine maintenance, repair, and replacements; (2) modifications or installations to achieve environmental improvements; or (3) expenditures to comply with legal or regulatory obligations.

Comment 11: If Proposed Regulation § 2901(j)(4)(A) is intended to prohibit those activities listed in Comment 10, it directly conflicts with the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies. The *failure* of a POU to perform those activities listed in Comment 10 will *actually increase* financial risks for future pollution-control costs and *actually cause* future reliability problems in electricity supplies.

Comment 12: The determination that Proposed Regulation § 2901(j)(4)(A) is reasonably necessary to effectuate the purpose of the statute is not supported by substantial evidence. Neither the CEC nor any party provided any evidence to support this subsection. CMUA provided substantial evidence based on the opinions of technical experts to demonstrate that this subsection cannot be understood, followed, implemented, or enforced.

Comment 13: The Proposed Regulation § 2901(j)(4)(A) lacks authority and no California constitutional or statutory provision expressly or impliedly permits or obligates the CEC to adopt this regulation.

Comment 14: The determination that Proposed Regulation § 2901(j)(4)(A) is reasonably necessary to effectuate the purpose of the statute is not supported by substantial evidence. This subsection is inconsistent with SB 1368 because an expenditure that adds a 5 year life extension is not a long term financial commitment in regard to an existing facility owned by a POU.

Comment 15: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures for activities performed pursuant to a generating unit manufacturer's approved *periodic maintenance schedule.* If so, it is in direct conflict with the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies.

Comment 16: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures for activities performed pursuant to a plant owner's adopted *preventive maintenance program.* If so, it is in direct conflict with the statutory objectives of reducing potential financial risks for

future pollution control costs and future reliability problems in electricity supplies.

Comment 17: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures for activities performed pursuant to a plant owner's *predictive maintenance program.* If so, it is in direct conflict with the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies.

Comment 18: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures for *corrective maintenance* to repair damage incurred during powerplant operation. If so, it is in direct conflict with the statutory objective of reducing potential future reliability problems in electricity supplies. (e.g., generator rewind due to insulation breakdown, foreign object damage ("FOD") to the rotating group of a generating unit, generator or steam turbine replacement due to reliability/safety concerns associated with inclusions in the bore of the rotor)

Comment 19: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures for mechanical modifications of a generating unit to incorporate a manufacturer's service bulletin that is designed to prevent a catastrophic failure that has occurred in other generating units of similar model and vintage. If so, it is in direct conflict with the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies.

Comment 20: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures for corrective or restorative activities that are discovered by non-destructive testing ("NDT"). If so, it is in direct conflict with the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies. (e.g., the repair of a corroded steam pressure vessel of a generating unit)

Comment 21: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures that are designed and intended to reduce *air emissions of prescribed criteria pollutants to comply with a federal or state statute or regulation.* If so, it is in direct conflict with the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies.

Comment 22: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures that are designed and intended to reduce *air emissions of prescribed criteria pollutants in accordance with a voluntary action initiated by the plant owner.* If so, it is in direct conflict with the statutory objectives to reduce potential financial risks for future pollution control costs and future reliability problems in electricity supplies.

Comment 23: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures that are designed and intended to achieve *environmental improvements unrelated to air emissions to comply with a federal or state statute or regulation.* If so, it is in direct conflict with the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies. (e.g., once-through cooling, wastewater treatment)

Comment 24: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures that are designed and intended to achieve *environmental improvements unrelated to air emissions in accordance with a voluntary action initiated by the plant owner.* If so, it is in direct conflict with the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies. (e.g., once-through cooling, wastewater treatment)

Comment 25: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures for the installation of equipment necessary to reduce *emissions of greenhouse gases* in accordance with a voluntary action initiated by the plant owner. If so, it is in direct conflict with the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies. (e.g., a progressive project to reduce GHG emissions in the POU's strategic plan for AB 32 compliance)

Comment 26: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures for the installation of equipment necessary to remediate a recognized occupational safety hazard on a generating unit in accordance with a regulation or mandatory directive from Cal-OSHA. If so, it is in direct conflict with the statutory objective of reducing potential future reliability problems in electricity supplies.

Comment 27: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures that are designed and intended to improve the heat rate, efficiency, and/or reliability of a generating unit. If so, it is in direct conflict with the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies. (e.g., turbine rotor having improved blade design, improved fuel nozzles, variable speed drive motors, variable pitch fans, generator excitation replacement to improve reliability or increase response of generator, condenser re-tubing, etc.)

Comment 28: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures for the installation or replacement of a system that is designed and intended to improve reliability, efficiency, or other benefits such as the increased ability to change load providing transmission system benefits. If so, it is in direct conflict with the statutory objectives of

reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies. (e.g., installation of a distributed control system ("DCS"))

Comment 29: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures to return a generating unit to service after a forced outage due to mechanical reasons. If so, it is in direct conflict with the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies. (e.g., repairs associated with a plant fire, turbine failure due to FOD)

Comment 30: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures to return a generating unit to service after a forced outage caused by an act of God. If so, it is in direct conflict with the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies. (e.g., earthquake, flood, or lightning strike)

Comment 31: It is unclear whether Proposed Regulation § 2901(j)(4)(A) is triggered by expenditures for the installation or repair of Continuous Emission Monitoring Equipment ("CEMS") if it is required in order to comply with mandatory greenhouse gas reporting under AB 32. If so, it is in direct conflict with the statutory objectives of reducing potential financial risks for future pollution control costs and future reliability problems in electricity supplies.

Comment 32: It is unclear whether Proposed Regulation § 2901(j)(4)(A) requires a POU to either seek and obtain case-by-case approval for every necessary and beneficial activity or shut down the powerplant within 30 days of an adverse Commission decision on EPS compliance. If so, it is inconsistent with SB 1368 because it falsely accelerates and actually causes the financial and reliability risks that the statute seeks to prevent. (e.g., plant maintenance, addition of emission controls, repairs, compliance with subsequent regulations, statutes, or court orders)

CMUA's Recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	<u>**Alternative 1, amendments to § 2901(j)**</u> § 2901(j) "New ownership investment" means<u>, except as provided in subsection 5 below, the original financial commitment for a capital expenditure</u>: (1) for the construction of a new powerplant; (2) for the acquisition of a new or additional ownership interest in an existing <u>non-deemed compliant</u> powerplant previously owned by others; (3) 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) in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility as of the effective date of this chapter that:

(A) increases the emission rate as defined in section 2903(a); or

(B) results in an increase of greater than 10% in the rated capacity of the powerplant; or

(C) is designed and intended to convert a non-baseload generation powerplant to a baseload generation powerplant.

(5) A new ownership investment does not include expenditures in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility as of the effective date of this chapter that are designed and intended:

(A) to perform normal maintenance, repair, and replacement to preserve plant reliability or prevent asset deterioration; or

(B) to comply with legal or regulatory requirements; or

(C) to achieve environmental improvements.

Alternative 2, amendments to § 2901(j) and addition of § 2901(q)

§ 2901(j) "New ownership investment" means the original financial commitment for a capital expenditure:

(1) for the construction of a new powerplant;

(2) for the acquisition of a new or additional ownership interest in an existing non-deemed compliant powerplant previously owned by others;

(3) 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) in an existing, non-deemed compliant powerplant owned in whole or part by a local publicly owned electric utility as of the effective date of this chapter that:

(A) is designed and intended to upgrade one or more generating units; or

(B) results in an increase of greater than 10% in the rated

	capacity of the powerplant; or (C) is designed and intended to convert a non-baseload generation powerplant to a baseload generation powerplant. § 2901(q) "Upgrade" means any modification made for the primary purpose of increasing the electric generation capacity of a baseload electric generation facility. "Upgrade" does not include routine or necessary maintenance, installation of emission control equipment, installation, replacement, or modification of equipment that improves the heat rate of the facility, or installation, replacement, or modification of equipment for the primary purpose of maintaining reliable generation output capability that does not increase the heat input or fuel usage as specified in existing generation air quality permits as of the effective date of this section, but may result in incidental increases in generation capacity.
Reasoning supporting CMUA's alternative	The "any investment" language in Proposed Regulation § 2901(j) lacks clarity because it may reasonably and logically be interpreted in more than one way. Furthermore, the term "investment" is not defined in the statute or the Proposed Regulations. POUs are left to wonder whether the word "investment" includes only capital appropriations or whether it also encompasses activities that are expensed. Furthermore, the Proposed Regulations do not provide definitional criteria to guide POUs in the determination of what types of financial appropriations constitute an "investment." Black's Law Dictionary defines the term as "the placing of capital or laying out of money in a way intended to secure income or profit from its employment." When does the CEC consider that a financial appropriation is not an investment? The use of the word "any" is equally as troublesome, and particularly when the Proposed Regulations are read in their entirety due to the definitional ambiguity of the word "investment." CMUA asks – does the CEC really intend to mean that an "investment" of "any" amount will trigger the EPS? The CEC provides no guidance on whether there is a minimum value such as a fixed dollar amount or a percentage of the cost of a new generating unit. In light of the ambiguities of the Proposed Regulations when read in their entirety, POUs cannot reasonably determine which activities and which financial commitments are subject to regulation. It is also unclear whether the CEC intends that each successive appropriation for the same powerplant project will constitute a separate "investment" that is subject to a compliance filing. For example, when a POU constructs a new powerplant, it typically makes many separate capital appropriations for that same project. The POU may have separate capital appropriations for the power island, the substation, the balance of plant, and many other large expenditures. There is no doubt that the construction of a new powerplant is subject to the EPS. However, the legislative mandate of ensuring that this powerplant is EPS-compliant may be met by reviewing the initial financial commitment and there

	is no need to review "any" and every successive "investment" for the very same project. (Pub. Util. Code § 8341(c)(3)) Accordingly, CMUA has proposed that a "new ownership investment means the *original financial commitment for a capital expenditure* to construct a new power plant." The Proposed Regulations state that for a non-deemed compliant plant, a new ownership investment is "any investment that is designed and intended to extend the life of one or more generating units by five years or more." (§ 2901(j)(4)(A)) This lacks clarity and is not understandable to CMUA members who are the parties that are directly affected by the regulation. As evidenced by the comments above, this subsection may be reasonably and logically interpreted to have more than one meaning. CMUA members do not understand whether or not the Proposed Regulations intend to proscribe expenditures for maintenance, repair, and other necessary activities that are typical and ongoing in the power industry for the purpose of maintaining electrical system reliability. CMUA members do not understand whether or not the Proposed Regulations intend to prohibit expenditures that are undertaken to reduce emissions of any pollutant in furtherance of California's environmental goals. An expressly stated legislative goal of SB 1368 is to reduce potential exposure to *future* reliability problems. (SB 1368, Section 1(j)) However, as written, § 2901(j)(4)(A) may be reasonably and logically interpreted to *prohibit* activities that are in direct support of this objective. If POUs are forbidden from maintaining existing facilities, this will artificially create and accelerate reliability problems. For example, under one possible interpretation of the Proposed Regulations, a POU would trigger the EPS by repairing a generating unit that suffered a forced outage resulting from a mechanical failure. This is because the forced outage effectively ended the plant's life and any activity to restore the failed generating unit to service would "extend the life" of the plant. Therefore, the POU would be faced with a Hobson's choice – i.e., do not perform the maintenance activity and decommission the plant immediately, or do the repair which triggers the EPS and then be forced to shut the plant down within 30 days of the adverse Commission decision requiring EPS compliance. Both choices would cause immediate and future reliability problems. In another example that was actually discussed with CEC staff, CMUA asked whether an *unrelated* legal or regulatory event could signify the end of a plant's life as defined in § 2901(j)(4)(A). CMUA posed the possible scenario in which a new prescriptive federal regulation was passed that required power plant owners to install by a certain date, a small device to reduce mercury emissions. CMUA was told by CEC staff that under the Proposed Regulation, the federal compliance date would signify the end of the plant's life and would trigger a "life extension" *if the POU complied with the federal regulation by installing the pollution control device!* The POU would be faced with another Hobson's

	choice with the same result as above, i.e., the premature and instantaneous creation of a reliability problem. This result is in direct contravention to the expressly stated legislative mandate to prevent reliability problems. Therefore, this interpretation by CEC staff is inconsistent with the statute it seeks to implement and the Proposed Regulation would be considered invalid by the courts. Government Code section 11350(b)(1) states that the court may invalidate a regulation if it finds "[t]he agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute . . . that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence." (*see also* Gov't Code § 11342.2; *Pulaski v. California Occupational Safety and Health Standards Board*, 75 Cal. App. 4th 1315 (1999); *Esberg v. Union Oil Co.*, 28 Cal. 4th 262 (2002)) In regard to these artificially imposed reliability problems, the CEC may not reasonably suggest that the POU has the option of pursuing the case-by-case reliability exemption in Proposed Regulation § 2912. First of all, the case-by-case review will not suffice in the forced outage scenario and reliability problems will still occur. Secondly, as a result of the ambiguity of § 2901(j)(4)(A), the CEC may expect to see hundreds of separate petitions per year if the Proposed Regulation requires POUs to request case-by-case exemptions for every activity involving maintenance, repair, and the like. Another expressly stated legislative goal of SB 1368 is to reduce potential financial risk for *future* pollution control costs. (SB 1368, Section 1(i)) However, as written, § 2901(j)(4)(A) may be reasonably and logically interpreted to *prohibit* activities that are in direct support of this objective. If POUs are forbidden from maintaining existing facilities or installing pollution control equipment, this will artificially create current pollution problems and increase the compliance costs in future years. In terms of environmental improvements, CMUA can think of no legislative purpose to placing a disincentive on power plant owners to voluntarily reduce emissions of criteria pollutants or GHGs. Yet, a reasonable and logical interpretation of the Proposed Regulation would encourage this perverse result. The CEC has no authority to put a temporary deleterious hiatus on necessary or beneficial actions to improve the environmental performance of existing power plants. SB 1368 is touted as a bridge to the more permanent scheme that will be implemented by AB 32. The CEC is required to either continue, modify, or replace the EPS when an enforceable GHG cap is in place under AB 32. (Pub. Util. Code § 8341(f)) Therefore, many power plants that currently exist will continue to operate under the AB 32 scheme as the POUs use operational and mechanical improvements as well as market mechanisms to meet their utility-specific load-based caps. Since certain facilities that currently exist will and must be used under the AB 32 scheme, the prudent utility practice is to maintain and improve these assets. This directly achieves the statutory goal of reducing future reliability and financial risks and is a consistent interpretation of SB 1368 and AB 32 working together. (*People V. Black*, Cal. 3d 1, 8 (1982)

	(statutes that were enacted during the same legislative session that relate to the same subject should be interpreted in a consistent manner) By prohibiting maintenance activities and environmental improvements, the Proposed Regulations exceed the scope of SB 1368 by preventing activities that would comport with the legislative purpose of SB 1368 to reduce future problems. "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." (*Morris v. Williams*, 67 Cal. 2d 733, 748 (1967)) The regulation will be invalidated if it exceeds the statutory power of the CEC, regardless of whether it "is wise or reasonable as a matter of policy." (*Agricultural Labor Relations Bd.* v. *Superior Court,* 16 Cal. 3d 392, 419 (1976)) "It is fundamental that an administrative agency may not usurp the legislative function, no matter how altruistic its motives are." (*San Joaquin v. State Bd. of Equalization*, 9 Cal. App. 3d 365, 374 (1970)) Proposed Regulation § 2901(j)(4)(A) does *not* comply with the "clarity" standard because "the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute . . . the regulation uses language incorrectly . . . [and] the regulation presents information in a format that is not readily understandable by persons "directly affected" . . . ." (1 Cal. Code Regs. § 16(a)) CMUA provided comments to the CEC from many experts (1 Cal. Code Regs. § 10(b)(2)) to demonstrate the ambiguity of the "5-year life extension" criterion and CMUA incorporates those arguments herein by reference. (*Post-Workshop Comments of the California Municipal Utilities Association*, filed in 06-OIR-1 on February 5, 2007) In fact, the concept of a discrete life extension activity is rarely, if ever, used in the power industry except for nuclear plants that are subject to re-licensing. There is no comparable occurrence for fossil-fueled plants. The U.S. Energy Information Agency ("EIA") no longer uses a discrete calculation to determine whether the life of a plant is extended when it compiles its annual analysis of available generation capacity. Up until 1998, the EIA employed a computer model that used exogenous data received from plant operators to determine if the powerplant's capacity would be "extended" past a certain timeframe. At that time, the EIA Glossary defined "Life extension" as the "[r]estoration or refurbishment of a plant to its original performance without the installation of new combustion technologies. Life extension results in 10 to 20 years of plant life beyond the anticipated retirement date, but usually does not result in larger capacity." CMUA makes note that an activity adding 5 years to a plant's "life" would not be considered a "life extension" by the EIA. However, this was all changed in 1999 with the advent of markets and competition in the electric industry. The EIA computer model was changed to calculate the availability of future capacity based solely on operational cost and not by some arbitrary date or plant age. Accordingly, "Fossil-fired steam plant retirements and nuclear retirements are calculated endogenously within the

	[computer] model. *Plants are assumed to retire when it is no longer economical to continue running them.* Each year, the model determines whether the market price of electricity is sufficient to support the continued operation of existing plants. If the expected revenues from these plants are not sufficient to cover the annual going forward costs, *the plant is assumed to retire if the overall cost of producing electricity can be lowered by building new replacement capacity.* The going-forward costs include fuel, operations and maintenance costs and annual capital additions, *which are plant specific based on historical data.* The average capital additions for existing plants are $11 per kilowatt (kW) for oil and gas steam plants, $6 per kW for combined-cycle plants, and combustion turbines, $15 per kW for coal plants and $18 per kW for nuclear plants (in 2004 dollars). *These costs are added to existing plants regardless of their age.*" (Assumptions to Annual Energy Outlook 2006, *Fossil Fuel-Fired and Nuclear Steam Plant Retirement,* at 77)(emphasis added) Moreover, the EIA considers that utilities are constantly maintaining plants and making the economic determination whether to retire them or not. Rather than considering "Life Extension" at discrete points, the EIA now makes this determination annually. The EIA assumes that plants will require annual expenditures for capital improvements such as replacing components in order to keep them running. As long as the revenues are sufficient to cover these expenditures and other operating costs then the plant is assumed to remain in service. (*notes from a telephone conversation with Jeff Jones on March 16, 2007*, Office of Integrated Analysis and Forecasting, Energy Information Administration) The CPUC stated its goal as finding the best and most workable approach to identifying changes that would increase GHG emissions over the long term. On the one hand, this standard does not comport with SB 1368 since its goal is not emission reduction. The stated goal of SB 1368 is to reduce financial and reliability risk. On the other hand, if the CPUC determined that reduced emissions over the long term will then result in reduced financial or reliability risks, its adopted rules are entirely inconsistent with that standard. For example, an investment that arguably extends the life of a plant by 5 years and/or increases the capacity may actually enable lower GHG emissions over the long term. This is particularly true for coal plants that would pursue IGCC or begin retrofitting for sequestration. Therefore, there is absolutely no workable regulation that uses "life extension" as a criterion. In CMUA's understanding, the most relevant statutory scheme to the EPS is the federal New Source Review ("NSR") for modifications to powerplants. The NSR regulations are triggered by objectively discrete events and the regulations are replete with definitions and explanations. The definition turns on the comparison of the project cost with the cost of a new plant and/or the quantity of emission increases. Nonetheless, the NSR is a highly litigated regulation that has seen several revisions and is the subject of many continuing court battles in numerous jurisdictions. The CEC's proposed "life extension"

	criterion is substantially more subjective than the NSR criteria and even more interpretive problems should be anticipated. A considerable ambiguity in § 2901(j)(4)(A) involves the critical issue of maintenance and repair. The methodologies and paradigms of maintenance have significantly changed over the last decade, and in large part due to competition in the market place. In large part, maintenance activities have changed from reactive to proactive strategies. Reactive maintenance strategies react to breakdowns and respond with corrective actions. Proactive maintenance, on the other hand, comprises planned procedures and the use of monitoring devices to repair or replace equipment *in order to avoid the breakdown*. Proactive maintenance strategies include preventive maintenance (using a comprehensive and routine schedule for inspections, checks, and replacements), reliability-centered maintenance (using actions planned in advance to eliminate frequent failures), and predictive maintenance (using condition monitoring devices to identify problems before failure). This latter form of maintenance, since it is based upon the actual condition of a component, *extends*[?] the useful life of many components that would otherwise have been replaced pursuant to a planned schedule. (*Maintenance strategy for a coal-based steam power plant equipment: a graph theoretic approach*, JOURNAL OF POWER AND ENERGY, Vol. 218 (2004), at 619, 620) A POU must select the best maintenance strategy that achieves the required reliability for its owned powerplants. This decision involves several aspects such as investment required, safety and environmental problems, failure causes, mean time between failures and the mean time to repair. The reliability-centered maintenance ("RCM") methodology is probably the most widely used technique at this time by balancing the need for functional integrity while minimizing maintenance costs. RCM utilize a function analysis in concert with a risk analysis to prioritize and schedule maintenance actions. (*Can we make maintenance decisions on risk analysis results?*, JOURNAL OF QUALITY IN MAINTENANCE ENGINEERING, Vol. 8, No.1 (2002), at 78) As written and apparently interpreted by some CEC staff, § 2901(j)(4)(A) forces POUs to reject these beneficial proactive types of maintenance and return to reactive strategies, since the former activities will effectively "extend the life" of the generating unit. Unfortunately, this will adversely impact plant reliability, increase costs as plants suffer unscheduled outages, and achieve the exact opposite result that was contemplated by the SB 1368. The quality of maintenance directly affects a plant's operational reliability, the cost-effectiveness of its operations, and the ultimate costs to ratepayers. (*Enhancement of maintenance management through benchmarking*, JOURNAL OF QUALITY IN MAINTENANCE ENGINEERING, Vol. 6 (2000), at 225) Proactive maintenance strategies are necessary for fossil-fired powerplants to maintain "their steady operations, and their sudden [shut]downs might invite an expensive [corrective maintenance action], an excessive penalty for users and a serious abasement of the social trust." (*Optimal preventive maintenance*

policies for a shock model with given damage level, JOURNAL OF QUALITY IN MAINTENANCE ENGINEERING, Vol. 11 (2005), at 218)

The failure to perform maintenance and repair also creates other problems besides reliability concerns. Other attributes affecting the maintenance criticality are safety, environmental, and efficiency. Chief of these is the safety of the work force involved in the operation of plant. Powerplants have many components that could cause severe injury or death if they are not maintained properly and suffered a catastrophic failure. These include high pressure steam vessels, hydrogen cooling systems, boiler combustion chambers, and turbines rotating at very high speeds. Age, design and even the failure propagation effect of the machine on adjoining machines could affect worker safety. (*Maintenance strategy for a coal-based steam power plant equipment: a graph theoretic approach*, JOURNAL OF POWER AND ENERGY, Vol. 218 (2004), at 622; *Enhancement of maintenance management through benchmarking*, JOURNAL OF QUALITY IN MAINTENANCE ENGINEERING, Vol. 6 (2000), at 224)

Reactive maintenance strategies will invariably result in higher cost and greater reliability risks than if the POU performed routine proactive maintenance. Considerable displaced power costs will result when the plant is allowed to remain online and eventually fails. The lost capacity must be purchased or made up from other units within the system. This is in conflict with the legislative intent of SB 1368.

Notes specific to CMUA's proposed alternative 2

CMUA's proposed alternative 2 replicates exactly the definition of "upgrade" from the new EPS statute from the State of Washington that has been passed by the Washington State Legislature and delivered to the Governor on April 20, 2007 for signing. ("Senate Bill 6001") This legislation started out virtually as a SB 1368 clone and was amended several times to correct much of the troublesome and ambiguous language in the California law. In particular, Senate Bill 6001 clearly evidences the Washington legislature's intent to grandfather *all existing powerplants*. It is also clear that the Washington EPS (1100 pounds per MWh) is triggered by an "upgrade" to an existing baseloaded (60% capacity factor) powerplant. Senate Bill 6001 provides a definition that provides significant guidance on what an "upgrade" is . . . and isn't. CMUA notes that an "upgrade" does not include most of the activities listed as necessary and beneficial expenditures in CMUA's alternative regulatory language proposed in the *Post-Workshop Comments of the California Municipal Utilities Association*. (pp. 7, 8, and 25)

CMUA now proposes this "upgrade" definition as additional alternative language for § 2901(q) in conjunction with replacing § 2901(j)(4)(A). CMUA, of course, recognizes that an enrolled Washington statute has no persuasive *legal* authority for interpreting an existing California law. Yet, CMUA believes that the two laws have the same "roots" and that the "upgrade" definition and

	exception are actually consistent with the legislative intent of SB 1368 and the language in D.07-01-039. Furthermore, there is a relevant policy argument to support the adoption of this language. On February 26, 2007, the governors of five western states (California, Washington, Oregon, Arizona, New Mexico) signed the Western Regional Climate Action Initiative ("WRCAI") stating the need to collaborate "to develop climate change policies that provide consistent approaches to recognize and give credit for actions to reduce GHG emissions." (WRCAI at 2) This collaboration between WRCAI states shall include such actions as: (1) setting a regional goal to reduce emissions from the states collectively, consistent with state-by-state goals; (2) developing a design for a regional market-based mechanism to achieve the regional GHG reduction goal; and (3) participating in a multi-state GHG registry to enable tracking, management, and crediting for entities that reduce GHG emissions, consistent with state GHG reporting mechanisms and requirement. (WRCAI at 2) The policy point is clear, the five western states are moving together to develop and implement regionally consistent goals and programs. Therefore, proposed alternative language should be promoted that is both reasonably designed to aid a statutory objective of SB 1368 *and* is consistent with a comparable climate change law of another WRCAI state.
Reference and authority in SB 1368 supporting CMUA's alternative	There is no statutory reference to a time limitation for the definition of a "new ownership investment." On the contrary, the legislative goals would encourage prudent utility practices that will reduce future risks by performing maintenance, repair, and improving environmental performance. (i) A greenhouse gases emission performance standard for new long-term financial commitments to electrical generating resources *will reduce potential financial risk to California consumers for future pollution-control costs.* (j) A greenhouse gases emission performance standard for new long-term financial commitments to electric generating resources *will reduce potential exposure of California consumers to future reliability problems in electricity supplies.* SB 1368 Section 1 (emphasis added)
Reference in D.07-01-039 supporting CMUA's alternative	"[W]e note that today's adopted EPS is purposely designed to both protect California ratepayers from long-term reliability risks while minimizing potential adverse impacts on short-term system reliability and associated costs. This has been accomplished by limiting the application of the EPS to long-term commitments, rather than short term transactions, . . ." (p.100) "We must, therefore, conclude that the Legislature intended to prevent those investments made by owners with long-term effects, such as *repowering and alterations* intended to extend the life of the plant by five years or more." (p.50) However, the CPUC presents a paucity of discussion and lends no support for this conclusion.

	The CPUC includes *no discussion or evidentiary support* for establishing a 5 year term for a life extension, except that one party suggested it. "We also believe it would be arbitrary to try to set a dollar level threshold for new ownership investments, as NRDC and others recommend. However, their suggestion that the EPS be triggered by refurbishments that significantly extend the plant life does have merit." (p.52) "Specifically, in addition to new baseload plant construction or the acquisition of new ownership interest in an existing plant owned by others, we will define "new ownership investments" to include any investment that is intended to extend the life of one or more units of an existing baseload powerplant for five years or more, or results in a net increase in the existing rated capacity of that powerplant." (p.52) To its credit, the CPUC stated that maintenance and environmental improvements did not trigger the EPS. "Among these suggestions, we 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, as CCC suggests. 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.*" (pp.51-52) (emphasis added)

3.3 Section 2901(o) and CMUA proposed Section 2901(p): Definitions of system energy

CMUA's objection specifically directed at the CEC's Proposed Action	
Comment 33: Proposed Regulation § 2901(o) lacks clarity and may be interpreted inconsistently with the statute and the legislative intent by adding an ambiguous term, "system energy," into the regulatory language. **Comment 34: Proposed Regulation § 2901(o) lacks clarity. It uses the term "system energy" in an inappropriate manner that does not have the same meaning as generally familiar to those "directly affected" by the regulation. This unclear regulation presents information that is not readily understandable by the "directly affected" POUs and confuses the industry-standard terms of art "system energy" and "unspecified resources."**	
CMUA's recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	(o) "System energy" means energy purchased from ~~unspecified resources~~ a known portfolio of resources operated by a system owner that is documented and tracked for emission levels and other compliance with these regulations.

	(p) "Unspecified energy" means energy purchased from unspecified resources.
Reasoning supporting CMUA's alternative	"System energy" is a term of art used to describe energy purchases from an electric system that contains a defined set of resources. Unlike market energy, which can come from any source or undefined sources, system energy comes from a system operator such as the Sacramento Municipal Utility District or the Bonneville Power Administration. Regardless of whether or not the Commission's regulations accept long-term contracts for system energy, the regulations should use accurate definitions consistent with commonly understood terms in the electric industry. Using definitions that are different from those in use in the industry causes unnecessary confusion by the very people who are directly affected by the regulations. The APA stresses the importance of clarity and consistency in the regulations. (Gov't Code § 11349(c), (d)) Using a term in a different way than it is commonly understood in the industry creates inconsistency and confusion, the opposite of clarity and consistency. Therefore, the definition of system energy should be changed to reflect the definition commonly used in industry and a new definition should be added for unspecified energy.
Reference and authority in SB 1368 supporting CMUA's alternative	The statute clearly refers to "unspecified sources" in Pub. Util. Code § 8341(d)(8). System energy could at most only be described as a subset of unspecified energy. The regulations should be consistent with the statute and reference unspecified energy.
Reference in D.07-01-039 supporting CMUA's alternative	Reliance upon the CPUC's decision on this matter is misplaced. The CPUC's misuse of the term "system energy" is located only in a CPUC decision. CPUC decisions may be easily changed by a subsequent decision. On the contrary, the CEC is adopting regulations and modifying regulations requires opening a new rulemaking proceeding. Therefore, it is very important for the Commission to create regulations with clear and consistent definitions that are "easily understood by those persons directly affected by them." (Gov't Code § 11349(c), (d))

3.4 Section 2902: GHG Emission Performance Standard

3.4.1 Section 2902(a): EPS set at 1100 pounds per MWh

CMUA supports setting the EPS at 1100 pounds per MWh, as provided in the Proposed Regulations.

3.4.2 Section 2902(b): Implementation of EPS requirement

CMUA's objection specifically directed at the CEC's Proposed Action	
Comment 35: In its entirety, the Proposed Regulation § 2902 lacks clarity and may be interpreted inconsistently with the statute that it seeks to implement.	
CMUA's recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	(b) Unless otherwise specified in this Article, no local publicly owned electric utility shall <u>enter into</u> ~~participate in~~ a covered procurement if greenhouse gases emissions from the powerplant(s) subject to the covered procurement exceed the EPS. § 2902
Reasoning supporting CMUA's alternative	The term "participate" is unclear and is inconsistent with the statutory language which states that a POU "shall not enter into" a covered procurement that exceeds the EPS. The EPS should be a gateway standard that is applied at the entry of a covered procurement, as decided by the POU. Then the CEC shall review the POU's information to ensure compliance. This should not be an ongoing or open–ended analysis by the CEC. This same ambiguity occurs in Proposed Regulation § 2910 discussed below. This clarification is needed because the combination of Proposed Regulation §§ 2910 and 2902(b) may be interpreted in a way that the POU's actions will be open to continuing review. However, the statute is clear, the EPS applies to the covered procurement at the time the POU enters into it.
Reference and authority in SB 1368 supporting CMUA's alternative	§ 8341(a) "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 . . . ." (emphasis added) § 8341(c)(3) "In determining whether a long-term financial commitment is for baseload generation, the Energy Commission shall consider the design of the powerplant and the *intended use* of the powerplant, ..." (emphasis added)
Reference in D.07-01-039 supporting CMUA's alternative	"A gateway screen approach is the most practicable and enforceable manner in which to determine EPS compliance." (Finding of Fact 157) "A gateway screen approach to determining compliance with the interim EPS is reasonable and should be adopted." (Conclusion of Law 41) "In addition, as discussed further below, the interim EPS will be applied on a "gateway" basis, thereby providing LSEs with the flexibility to operate their facilities differently than originally designed or intended in order to address unanticipated short-term system reliability needs." (pp. 100, 102)

	"[T]his approach applies a series of questions / criteria to first establish whether or not the LSE's financial commitment represents a covered procurement subject to the EPS. If it is, then the commitment is screened to ensure that it meets the performance level of the standard, e.g., that the associated GHG emissions rate does not exceed 1,100 lbs of CO_2 per MWh. Once the financial commitment successfully passes through the gateway screen, the LSE has demonstrated EPS compliance for that particular commitment. Ongoing Commission review or monitoring of the facilities underlying that commitment is not required." (pp. 26-27, 151) "Applying the interim EPS on a gateway basis also provides LSEs with the flexibility to operate their facilities differently than originally designed or intended in order to address unanticipated short-term reliability needs." (Finding of Fact 93)

3.4.3 Section 2902(c): Evaluating system resources

CMUA's objection specifically directed at the CEC's Proposed Action	
Comment 36: Proposed Regulation § 2902(c) is inconsistent because it conflicts with SB 1368 and is not reasonably designed to aid a statutory objective by failing to provide any opportunities for evaluating system or other non-unit specific resources.	
CMUA's recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	For purposes of applying the EPS to contracts with multiple powerplants, in order to comply with these regulations outright, each specified powerplant must be treated individually for the purpose of determining the annualized capacity factor and net emissions, and each powerplant must comply with the EPS. However, any applicant may propose to the commission, a system power contract based on averaging powerplant emissions, provided that no more than 25% of the individual powerplants exceed the EPS, and provided further that no powerplants are added to the system that do not meet the EPS. The Commission may rule on such applications on a case by case basis, and may approve such a proposal if it finds based on record evidence that the proposal furthers the intent and meets the requirements of SB 1368.
Reasoning supporting CMUA's alternative	Limiting carbon emissions of system contracts will provide an incentive to other systems to improve or maintain lower carbon profiles in order to sell into the California market. This incentive will further the goals of both SB 1368 and AB 32 by providing a strong signal to other systems to improve their carbon profile. The Proposed Regulations contain a complete ban on these products, which offers no real way for these systems to provide long-term power to California. If there is no chance of compliance, there is very little incentive to make improvements in the near term. In addition, given the small

	amount of higher carbon energy allowed by the Proposed Regulations, system contracts will not allow the construction of new higher carbon sources of energy. Furthermore, the ultimate discretion is left to the CEC such that if an incentive is not achieving the goals of SB 1368, the CEC need not approve the contract.
Reference and authority in SB 1368 supporting CMUA's alternative	The Public Utilities Code clearly requires the CEC to find solutions for using unspecified sources of power by specifically identifying the unspecified sources as an area for the CEC to address. If the legislature intended to prohibit all contracts with unspecified resources, the legislature would have stated so directly. In this instance, the legislature clearly did not and specifically requested the CEC to find a resolution consistent with the intent of the statute. (Pub. Util. Code § 8341(d)(8))

3.5 Section 2906: Substitute energy

CMUA's objection specifically directed at the CEC's Proposed Action	
Comment 37: Consistent with CMUA's Comment 36 that provides an opportunity for POUs to use system contracts for long-term power purchases, the following amendments are recommended to § 2906.	
CMUA's recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	**Alternative 1, § 2906 Substitute Energy** (a) Except as provided for below, a contract with a term of five years or more that includes the purchase of system or unspecified energy is not compliant with the EPS, unless a specific approval is obtained from the Commission pursuant to Section 2902(c). (b) A new contract for covered procurement from identified powerplants may contain provisions for the seller to substitute deliveries of energy under any of the following circumstances: (1) The substitute energy only comes from one or more identified powerplants, each of which is EPS-compliant. (2) For specified contracts with non-renewable resources or dispatchable renewable resources, or a combination of each, system or unspecified energy purchases for each identified powerplant are permitted up to 15% of forecast energy production of the identified powerplant over the term of the contract, provided that the contract only permits the seller to purchase system or unspecified energy under either of the following conditions: (A) The identified powerplant is unavailable due to a forced outage, scheduled maintenance or other temporary unavailability for operational or efficiency reasons; or (B) To meet operating conditions required under the contract, including, but not limited to, provisions for the number of start-ups, ramp rates,

	or minimum number of operating hours. (3) For specified contracts with intermittent renewable resources, the amount of system or unspecified energy is limited such that total purchases under the contract, whether from the intermittent renewable resource or from system or unspecified energy, do not exceed the total expected output of the identified renewable powerplant over the term of the contract. The proposed change allows for the very limited use of unspecified contracts when permitted under the proposed regulations § 2902(c). Should the Commission decide not to allow any use of system or unspecified contracts, CMUA requests that the Commission change the reference to "system energy" to "unspecified energy" to avoid confusion and to use terms consistent with the way they are used in the industry. This change would provide clarity to those entities most directly affected by the regulations. The alternative change is provided below. **Alternative 2, § 2906 Substitute Energy** (a) Except as provided for below, a contract with a term of five years or more that includes the purchase of ~~system~~ unspecified energy is not compliant with the EPS. (b) A new contract for covered procurement from identified powerplants may contain provisions for the seller to substitute deliveries of energy under any of the following circumstances: (1) The substitute energy only comes from one or more identified powerplants, each of which is EPS-compliant. (2) For specified contracts with non-renewable resources or dispatchable renewable resources, or a combination of each, ~~system~~ unspecified energy purchases for each identified powerplant are permitted up to 15% of forecast energy production of the identified powerplant over the term of the contract, provided that the contract only permits the seller to purchase ~~system~~ unspecified energy under either of the following conditions: (A) The identified powerplant is unavailable due to a forced outage, scheduled maintenance or other temporary unavailability for operational or efficiency reasons; or (B) To meet operating conditions required under the contract, including, but not limited to, provisions for the number of start-ups, ramp rates, or minimum number of operating hours. (3) For specified contracts with intermittent renewable resources, the amount of ~~system~~ unspecified energy is limited such that total purchases under the contract, whether from the intermittent renewable resource or from ~~system~~ unspecified energy, do not exceed the total expected output of the identified renewable powerplant over the term of the contract.

Reference and authority in SB 1368 supporting CMUA's alternative	In developing and implementing the greenhouse gases emission performance standard, the Energy Commission shall address long-term purchases of electricity from unspecified sources in a manner consistent with this chapter. (Pub. Util. Code § 8341(e)(8))

3.6 Section 2908: Public notice

Comment 38: CMUA supports Proposed Regulation § 2908.

CMUA supports the Proposed Regulations on notice as they are substantially similar to the joint proposal of CMUA-NRDC filed in 06-OIR-1, and included in these NOPA Comments. This self-imposed obligation demonstrates the POUs' persuasion toward openness and portends a reduced scope, duration, and administrative burden of the CEC's after-the-fact review. Accordingly, this full-disclosure by the POUs from the initial stages of considering a covered procurement supports the CEC Proposed Regulation § 2910 having a 30 day timeframe.

CMUA provided numerous examples of the breadth and scope of publicly available information for procurements considered by POUs in 06-OIR-1. (*Post-Workshop Comments of the California Municipal Utilities Association*, filed February 5, 2007). The examples include agendas, board recommendations, and actual copies of contracts. These materials provide ample evidence of the availability of official documentation to substantiate the details of the covered procurement and the veracity of the POU's compliance filing.

3.7 Section 2910: Compliance review

CMUA's objection specifically directed at the CEC's Proposed Action
Comment 39: CMUA supports Proposed Regulation § 2910 to the extent it is consistent with SB 1368 by including the principles of: (1) an after-the-fact review of POU self-certifications; (2) acknowledging that POUs may lawfully begin receiving energy deliveries upon entering the covered procurement; and (3) having an expedited process for properly completed compliance filings. **Comment 40: Proposed Regulation § 2910 should be amended to provide that any Commission decision should result in a formal determination of EPS compliance/non-compliance that becomes effective 30 days after the determination.**

Comment 41: Proposed Regulation § 2910 should be amended to provide a process whereby any party may within a reasonable time period appeal an adverse decision to the Commission.	
CMUA's recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	(a) The executive director shall review each compliance filing and make a recommendation to the full Commission on whether the covered procurement complies with this Article. The executive director may, within 14 days after receipt of a compliance filing, notify the local publicly owned electric utility in writing that the compliance filing was not complete, and shall specify what information is missing from the filing. The Commission shall consider the executive director's recommendation and shall, within 30 days after receipt of a complete compliance filing, issue a decision on whether the covered procurement described in the compliance filing complies with this Article. (b) Within 10 days of the decision made pursuant to subsection (a), any person may appeal the decision. (c) If no party appeals a Commission decision pursuant to subsection (b) above, then the Commission decision shall become final and effective thirty (30) days after the Commission reaches such determination.
Reasoning supporting CMUA's alternative	CMUA filed substantial documentation including comments, recommendations, and record support for EPS self-certification by POUs. (*Post-Workshop of the California Municipal Utilities Association*, filed in 06-OIR-1 on February 5, 2007) Those comments are incorporated by reference herein and should be included in the rulemaking file. Due process and the importance of grid reliability gravitate toward providing POUs with an expedited appeal process that doesn't require an action in the superior court. These Proposed Regulations provide no effective date for the CEC decision, therefore, CMUA must assume that the effective date may be as early as the date of the decision. CMUA's filed comments and proposed language providing for a 30 day gap between the CEC's decision date and effective date so that the POU have adequate time to procure substitute power. (*Post-Workshop of the California Municipal Utilities Association*, filed in 06-OIR-1 on February 5, 2007) These comments are incorporated by reference herein and should be included in the rulemaking file.

Reference and authority in SB 1368 supporting CMUA's alternative	The Energy Commission shall adopt regulations for the enforcement of this chapter with respect to a local publicly owned electric utility. (Pub. Util. Code § 8341(c)(1))
Reference in D.07-01-039 supporting CMUA's alternative	The CPUC decision discussed at length the different treatment that it would afford the electric service providers as opposed to the investor owned utilities. "[S]ubsection (2) does not require that we review long-term financial commitments that are proposed to be entered into by an electric service provider or community choice aggregator, but only states that we "may" do so. Therefore, in adopting rules and procedures to ensure compliance with the EPS, pursuant to § 8341(b)(3), we have the flexibility under the statute to consider a range of procedural vehicles for use by those LSEs for whom we do not currently have a procurement pre-approval process in place. With certain exceptions, we provide for "after-the-fact" EPS compliance submittals for electric service providers, community choice aggregators and small electrical corporations. We concur with AReM, Constellation and others that EPS compliance procedures that do not require Commission pre-approval are appropriate for those LSEs who are not required to submit procurement plans or procurement contracts for pre-approval under current Commission procedures. We believe that the documentation and other requirements adopted today provide reasonable safeguards against the risks to ratepayers of potential non-compliance by an LSE that files an after-the-fact compliance showing. At the same time, this approach avoids creating new pre-approval requirements and associated administrative complexity for the Commission's regulation of the procurement practices of these entities." [pp. 159-160] "Under § 8341(a), LSEs must comply with SB 1368 if they enter into any long-term financial commitment involving baseload generation, irrespective of whether (or how) this Commission reviews and approves such commitments. Under §§ 8341(a) and (b), in adopting rules and procedures to ensure compliance with the EPS, we have the flexibility under the statute to consider a range of procedural vehicles for use by those LSEs for whom we do not currently have a procurement pre-approval process in place." [Conclusion of Law 42] The CPUC recognizes that procurement pre-approval is not required by SB 1368 for any LSEs other than the IOUs. (pp.159-160)

3.8 Section 2911: Compliance investigation

CMUA's objection specifically directed at the CEC's Proposed Action	
Comment 42: Proposed Regulation § 2611 is inconsistent with SB 1368 and is not reasonably designed to aid a statutory objective. It fails to incorporate the gateway concept and permits a review of a covered procurement after the CEC has already determined the procurement was entered lawfully by the POU.	
CMUA's recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	In relation to § 2911, CMUA supports the recommended additions provided in the *Comments by the Los Angeles Department of Water and Power on the Implementation of SB 1368 Emission Performance Standard* filed electronically in this docket on April 20, 2007. Within 30 calendar days of the submission of a compliance filing, a covered procurement approved or pending under Section 2910 may be the subject of a complaint or investigation proceeding under this Section if and only if it is claimed that the covered procurement materially and consistently exceeds the emissions standards required by this Chapter or that the compliance filing contains a material misrepresentation of fact concerning the probability that the covered procurement would meet such standards. The complaint procedure shall be heard on an expedited basis with a decision within 90 days of the filing of the complaint or request for investigation.
Reasoning supporting CMUA's alternative	The ISOR says this "creates a complaint and investigation process which ensures that compliance can be verified, if necessary, after a commitment has been made and, in some cases, been found compliant" [p.9] This is contrary to the legislative intent which places the requirement on the POU at the time it enters the covered procurement.
Reference and authority in SB 1368 supporting CMUA's alternative	§ 8341(a) "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 . . . ." (emphasis added) § 8341(c)(3) "In determining whether a long-term financial commitment is for baseload generation, the Energy Commission shall consider the *design* of the powerplant and the *intended* use of the powerplant, ..." (emphasis added)

Reference in D.07-01-039 supporting CMUA's alternative	"In addition, as discussed further below, the interim EPS will be applied on a "gateway" basis, thereby providing LSEs with the flexibility to operate their facilities differently than originally designed or intended in order to address unanticipated short-term system reliability needs." (pp. 100, 102) "[T]his approach applies a series of questions / criteria to first establish whether or not the LSE's financial commitment represents a covered procurement subject to the EPS. If it is, then the commitment is screened to ensure that it meets the performance level of the standard, e.g., that the associated GHG emissions rate does not exceed 1,100 lbs of CO_2 per MWh. Once the financial commitment successfully passes through the gateway screen, the LSE has demonstrated EPS compliance for that particular commitment. Ongoing Commission review or monitoring of the facilities underlying that commitment is not required." (pp. 26-27, 151) "Applying the interim EPS on a gateway basis also provides LSEs with the flexibility to operate their facilities differently than originally designed or intended in order to address unanticipated short-term reliability needs." (Finding of Fact 93)

3.9 Section 2911: CMUA's proposed addition of § 2911(b)

CMUA's objection specifically directed at the CEC's Proposed Action	
Comment 43: Proposed Regulation § 2911 should be amended to provide a process whereby parties may seek compliance guidance from the CEC prior to entering the covered procurement.	
CMUA's recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	§ 2911(b) A publicly owned electric utility may request that the Commission evaluate a prospective procurement for compliance with the EPS. A request for evaluation shall be treated by the Commission as a request for investigation under Chapter 2, Article 4 of the Commission's regulations. The Commission shall consider the emissions attributed to a system or portfolio by using the calculation methodology developed for accounting for such emissions by the California Global Warming Solutions Act of 2006 in Division 25.5 of the Health and Safety Code (beginning with section 38500) or, until that regulation is adopted, any other method the Commission deems appropriate.
Reasoning supporting CMUA's alternative	The CEC should not deter a POU from seeking assistance to ensure that a covered procurement is in compliance with the EPS. This is directly in harmony with the statutory goal of reducing the potential for future financial and reliability risks.

Reference and authority in SB 1368 supporting CMUA's alternative	The Energy Commission shall adopt regulations for the enforcement of this chapter with respect to a local publicly owned electric utility. (Pub. Util. Code § 8341(c)(1))
Reference in D.07-01-039 supporting CMUA's alternative	"[W]e do not currently require electric service providers, community choice aggregators or the small electrical corporations to submit procurement plans or power purchase contracts to the Commission for pre-approval. For these entities, we establish today an annual advice letter filing by which they can attest "after-the-fact" that they are in compliance with the EPS. They can also request Commission pre-approval of covered procurements as EPS-compliant (but are not required to) by advice letter." (p.27) "As discussed in this decision, an electric service provider, community choice aggregator or small electrical corporation should also be permitted to file an Advice Letter requesting Commission pre-approval of a new financial commitment as EPS compliant." (Finding of Fact 165)

3.10 Section 2913: Proposed addition of § 2913

CMUA's objection specifically directed at the CEC's Proposed Action	
Comment 44: Proposed Regulation § 2913 should be added to provide a process whereby POUs may comply with pre-existing contractual obligations.	
CMUA's recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	**§ 2913 Case-by-Case Review for Pre-existing Contractual Commitments** (a) A local publicly owned electric utility may petition the Commission for an exemption from application of this chapter for covered procurements or categories of covered procurements required under the terms of a contract or ownership agreement that was in place on or before January 1, 2007. In order to qualify for an exemption under this section, the local publicly owned electric utility must demonstrate that: (1) the covered procurements or categories of 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 covered procurements; the publicly owned electric utility shall not be required to divest its interest in the contract or

	ownership agreement in order to avoid such covered procurements. (b) Upon receipt of a petition under this section, the executive director shall review and make a recommendation to the full Commission on whether to grant the petition. The executive director shall, within 14 days after receipt of a petition, notify the local publicly owned electric utility in writing of any additional information needed to review the petition. The executive director's failure to notify the petitioner within said time period shall deem the petition complete. The Commission shall consider the executive director's recommendation and shall issue a decision on whether to grant the petition within 30 days after receipt of the complete petition.
Reasoning supporting CMUA's alternative	Several publicly owned utilities have ownership interests, either by themselves or through membership in a joint powers authority, in existing power plants that will not meet the EPS. While existing contracts for the energy associated with these plants is not directly implicated by the plant's inability to meet the EPS, ongoing maintenance, service, and environmental upgrade activities could be argued to be "covered procurements" under the Proposed Regulations if CMUA's alternatives are not adopted. POUs contractually committed to participate in these activities are, in light of the ambiguities in the Proposed Regulations, faced with the prospect of breaching their contractual obligations, forgoing their significant financial investment in the powerplant and related transmission facilities, or being out of compliance with the CEC regulations. One of the most notable examples is the San Juan Power Plant located in New Mexico. Of immediate concern to the POUs with ownership interests in San Juan units are expenditures on the powerplant that are mandated by the terms of the contracts creating those ownership interests, including those stemming from a court ordered consent agreement. Participants are required pursuant to their ownership agreements to make "new investments" in the powerplants to finance the environmental upgrades mandated by the Environmental Protection Agency ("EPA") consent agreement. Under the proposed regulations, the publicly owned utilities' mandatory participation in the necessary upgrades could trigger a covered procurement which would mandate the powerplant's compliance with the emissions standards. This situation arises due to the language in Proposed Regulation § 2901(j)(4)(A) that defines a covered procurement to include new investments that extend the life of the powerplant more than five years.
Reference and authority in SB 1368 supporting CMUA's alternative	"In adopting and implementing the greenhouse gases emission performance standard, the Energy Commission, in consultation with the Independent System Operator, shall consider the effects of the standard on system reliability and overall costs to electricity customers. (Pub. Util. Code § 8341(e)(7))

4 Comments on the Supporting Material for the Fiscal Impact Statement ("FIS")

4.1 Statement of the Mandate

Comment 45: The FIS failed to conduct, as required by Government Code § 11346.5(a)(5), *any* analysis of whether or not the Proposed Regulations impose a mandate on local agencies.

Staff stated that "[i]t is unclear what constitutes a new program or an increased level of service, and staff could not find a definition of either term, but it does not appear that the proposed regulations will have either of these effects." (FIS at 1) CMUA is unsure how to interpret this statement since on its face, it appears to signify that the CEC has failed to perform the financial impact analysis required by law. Case law is replete with guidance for the definitions of "new programs" and "increased level of service" and it is unclear why CEC staff did not review such cases as *San Diego Unified School District v. Commission on State Mandates*, 33 Cal. 4th 859 (2004), *City of Richmond v. Commission on State Mandates*, 64 Cal.App.4th 1190 (1998), *City of Sacramento v. State of California*, 50 Cal.3d 51 (1990), and *County of Los Angeles v. State of California*, 43 Cal.3d 46 (1987).

Regardless of this statement, the FIS notes that "it does not appear that the proposed regulations will have either [a new program or an increased level of service]." (FIS 1) Despite the fact that the FIS further notes that a "Fiscal Impact Analysis has been performed" (FIS at 1), there is nothing in the FIS that supports the conclusions contained therein, nor the assertion that the "regulations merely provide direction regarding certain purchases." (FIS at 1)

Since the FIS does not include a proper analysis of the prospective effects, CMUA is unable to provide substantive comments. Therefore, the CEC must draft a new FIS in accordance with the statutory requirements and provide parties sufficient opportunity to respond as required by the APA.

In defining the parameters under which the proposed regulations will be implemented, the FIS summarizes SB 1368. Included in that summary is the following statement "[t]hese investments include the construction or purchase of high-emissions baseload powerplants, as well as entering into contracts of five years or longer with such powerplants for baseload energy." This background statement does not address provisions of SB 1368 regarding new

ownership investments in *existing* powerplants, which is a significant part of the proposed regulation and which directly impacts the financial implications associated with the proposed regulation.

4.2 Working Data, Assumptions, and Calculations – Scope of Economic and Fiscal Analysis

Comment 46: The CEC did not substantially comply with the cost assessment required by the APA.

The FIS rightly acknowledges that the economic costs considered are "those that could lead to an increase in the projected revenue requirements of the utilities, and thus, the electricity costs for utility customers." (FIS at 2) The FIS then states that the administrative costs will be limited to verification and reporting. However, the paragraphs that follow do not provide any evidence to support this conclusion, and in fact, cannot. The regulations will compel all regulated entities to undertake an entirely new program to address electricity procurement as required by the regulations, which includes significant "front end" review and research *before* a long term financial commitment may even be brought before a POU's governing body.

The FIS then states that "[a]ny attempt to evaluate the interaction of these regulations with the future implementation of AB 32 (2006, ch. 488) would be speculative at this point, and will be deferred to the Energy Commission's re-evaluation of these regulations after an enforceable GHG emissions limit is adopted." However, the FIS then goes on to state that, "SB 1368 was passed in part to ensure that IOUs and POUs did not enter into long-term financial commitments with resources that would require additional significant financial costs once AB 32 was implemented. Any near-term costs incurred for avoiding long-term financial commitments with resources that exceed the emission performance standard are more than likely outweighed by the costs to comply with AB 32 that would otherwise be incurred had the POUs entered into long-term financial commitments for high-emission resources." (FIS at 2) Therefore, according to the CEC's own statements, the FIS engages in "speculation" by asserting that costs to avoid long-term financial commitments will be outweighed by the costs of AB 32 compliance.

Since the CEC made "an initial determination that the action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states," Government Code § 11346.5(a)(8)

requires that the CEC "shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support its initial determination."

There is no record to support the conclusions set forth in the FIS. The CEC cited no document that would enable it to make any determination. During this rulemaking, the CEC made no information requests to the POUs, conducted no analysis of prospective POU resource planning activities, made no inquiries regarding how those current planning activities would be impacted by the regulations, and accordingly, can make no findings based on any evidence to support such a conclusory and speculative statement.

Comment 47: The CEC did not consider whether performing necessary and beneficial expenditures on some non-deemed compliant plants could, in fact, be the most effective method to reduce potential future pollution-control costs and future reliability risks.

The CEC collected no information to determine whether or not POUs were including certain non-deemed compliant plants in their compliance plans for AB 32. In that manner, the POU's would be in compliance with SB 1368's statutory objective of reducing future pollution control and reliability risks by entering into financial commitments to improve their powerplant efficiencies and reduce emissions.

The statute prohibits a POU from entering into a long-term financial commitment that will incur new cost obligations that the POU doesn't currently have. However, if the POU already owns the plant, then AB 32 is the law that will add costs, just like any other new environmental law. And, in anticipation of AB 32 and in compliance with SB 1368, the POU will make the most economically sound decisions for its future operations. By January 1, 2008, the statewide cap will be known, and as a result of their participation in R.06-04-009, POUs are becoming more informed about their future allocations. POUs will not be making decisions in an informational vacuum during the next 2-5 years. In short order, the POUs will know their load-based requirements under AB 32 and will be able to actually calculate and compare costs between plant improvements and plant deterioration. It is premature for the CEC to make any conclusions that prohibit POUs from maintaining their generating assets.

Invariably, there may be a POU that does eventually decide to divest and seek to sell its ownership interest in a higher emitting powerplant. In that case, prudent utility practice would require the POU to maintain the powerplant in a condition that will earn the greatest return on its

investment. It would be imprudent and irresponsible to allow the asset valued at many hundreds of millions of dollars to deteriorate. It is this latter practice that would actually violate the legislative goal of SB 1368.

4.3 Working Data, Assumptions, and Calculations – Anticipated Economic Costs Resulting from the Proposed Regulations

Comment 48: The CEC did not consider all the increased costs that may result from the Proposed Regulations.

The FIS blandly notes that there are only three instances under which the Proposed Regulation could result in increased costs. (FIS at 3) With regard to the first instance – "prohibition on the purchase of existing high emissions resources," the FIS concludes that "even in the absence of regulations, local publicly owned electric utilities would not be anticipated to purchase *existing* high-emission resources that provide baseload energy at a lower cost than EPS-compliant alternatives." (FIS at 3) The rationale supporting this statement fails to address two important factors; availability of scarce resources and transmission constraints. Adoption of an emissions performance standard means that there will be a greater demand for all resources that can meet the standard. Further, transmission constraints will always impact an entities purchasing options. Accordingly, these two factors cannot be segregated from the broader discussion of financial impacts, and the FIS is devoid of any discussion on this point.

The second factor noted in the FIS is the "prohibition on new long-term contracts or extensions of existing contracts with high emission resources." The discussion regarding the conclusion that "no costs are likely to result from precluding such contracts" fails to account for the ambiguously expansive § 2901(j)(4)(A) of the Proposed Regulations.

As written, the "life extension" criterion in Proposed Regulation § 2901(j)(4)(A) will prohibit the POU from performing necessary and beneficial expenditures on non-deemed compliant plants. However, these activities may be the most effective method to reduce potential financial risks in the future. The CEC did not collect any information from POUs to make any determination.

In addition to the costs resulting from the expansive definition of § 2901(j)(4)(A), the prohibition on using very reliable system and market purchases for long-term contracts also

creates an additional potential cost to POUs. The CEC has not collected any information on the prices for supplementary hedging products to replace the price hedging aspect of long-term system and market contracts. As the CEC is aware, reliance upon short-term energy purchases can expose a POU to substantial price fluctuations. In order to protect their ratepayers against these potential price swings, many POUs use long-term energy purchases. Many of these long-term energy purchases involve system or market power. Since these products can no longer be used for a long-term hedge, POUs will need to purchase another product. The CEC has conducted no analysis of these additional costs nor has it collected any data to support a finding on anticipated economic costs from additional price and supply hedging products.

Comment 49: The CEC did not evaluate or even consider the economic effect of the "life extension" clause in Proposed Regulation § 2901(j)(4)(A).

The FIS does not even consider the new ownership investment restriction as described by 2901(j)(4)(A). "State agencies proposing to adopt, amend, or repeal any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements." (Gov't Code §§11346.3(a)) The purpose of this requirement is to identify the general types of private sector impacts that may result from the proposed regulation by identifying affected parties and the potential cost impact. "Persons shall be presumed to be "directly affected" [by a regulation] if they - incur from the enforcement of the regulation a detriment that is not common to the public in general. (1 Cal. Code Regs. § 16(b)(4)) The APA requires the agency to specifically *cite* "[f]acts, testimony, documents, or other evidence" to support its finding of no adverse economic impact. (Gov't. Code, § 11346.2(b)(5)) No cost-savings studies were incorporated into the administrative record to support the CEC's findings that would constitute substantial compliance to the APA.

The CEC must assess the following impacts during the rulemaking process: "the impact on business, with consideration of industries affected . . . [t]he creation or elimination of jobs within the State of California . . . [t]he creation of new businesses or the elimination of existing businesses within the State of California; and . . . [t]he expansion of businesses currently doing business within the State of California." (Gov't Code § 11346.3) CMUA knows of no data request or questions posed by the Commission during this rulemaking that would support a

finding on the issue of cost impacts to businesses as a result of Proposed Regulation §2901(j)(4)(A).

Comment 50: The CEC did not evaluate or even consider the economic effect of the "life extension" Proposed Regulation in § 2901(j)(4)(A) and POUs will incur significant costs if POUs must allow plants to deteriorate or must be shut down.

Proposed Regulation § 2901(j)(4)(A) states that "any investment that is designed and intended to extend the life of a plant by five years" will trigger the application of the EPS. However, the Proposed Regulations lack clarity when read in their entirety and do not provide a baseline for calculating when a powerplant's life will end or when it will be extended. Does § 2901(j)(4)(A) prohibit expenditures for maintenance? Does the section prohibit POUs from performing environmental improvements or complying with legal obligations pursuant to court order that are unrelated to SB 1368? Does § 2901(j)(4)(A) prevent POUs from complying with regulatory or statutory requirements such as safety regulations? CMUA contemplates that POUs will incur substantial economic burdens resulting from these Proposed Regulations. The CEC has failed to review the economic cost impact of the Proposed Regulations in light of this ambiguous requirement.

4.4 Working Data, Assumptions, and Calculations – Anticipated Administrative Costs Resulting from the Proposed Regulations

Comment 51: The CEC did not properly evaluate the administrative effect on POUs nor did the CEC even consider the administrative effect of the "life extension" Proposed Regulation in § 2901(j)(4)(A).

The FIS concludes that "during the life of these regulations, the estimated costs are limited to administrative costs." (FIS at 4). The FIS lists only three tasks that will need to be undertaken by the POUs in response to the proposed regulations, and notes that:

> The administrative costs of complying with these requirements are expected to be minimal, as the majority of the proposed investments will not require substantial, if any, resources in order to verify compliance nor the production of documents (other than *pro forma* documents) that are only necessary because of these regulations." (FIS at 4).

This statement is unsupported by the record. There is no discussion to support such a conclusion, no information was sought from the POUs in order to assess the extent to which the proposed regulations would add administrative costs above and beyond those already included in

the electricity procurement function of the POUs, and no evidence is provided upon which the CEC could substantiate this conclusion.

The FIS concludes that for the state's three largest POUs, no more than 0.15 person/years of non-technical staff is required for compliance. There is no evidence to support the actual number of hours needed to research and locate appropriate electricity contracts, nor why verification of emissions compliance of a prospective investment would only involve non-technical staff administrative time.

Further, the FIS incorrectly notes that for the "Southern California Public Power Authority ("SCPPA") and the Northern California Power Agency ("NCPA"), which will be acting on behalf of their members, 0.10 person/years each are assumed." Neither SCPPA nor NCPA will be acting on behalf of their members in making energy procurement decisions. Each POU has its own governing body that must make an attestation regarding their knowledge that a covered procurement complies with the proposed regulations; not only can this responsibility not be borne by a third party, but SCPPA and NCPA cannot make such an attestation for procurements of which they are not a part.

Finally, the FIS incorrectly notes that the burden will be even lower for smaller POUs. The FIS does not acknowledge the fact that these smaller entities have fewer personnel resources, including both the technical and non-technical staff necessary to undertake the entire process of identifying potential procurements that will comply with the proposed regulation, which will then result in an even greater financial burden on these entities.

The Conclusion (FIS at 5) that "no economic impact to local agencies is anticipated from the adoption of these regulations over the next five years," was reached without any record evidence or support. Further, the record is totally devoid of any evidence to support the conclusion that "the administrative costs to the state's publicly owned electric utilities to implement these regulations is conservatively estimated at $175,000 per year." (FIS at 4)

Proposed Regulation § 2901(j)(4)(A) states that "any investment that is designed and intended to extend the life of a plant by five years" will trigger the application of the EPS. However, the Proposed Regulations lack clarity when read in their entirety and do not provide a baseline for calculating when a powerplant's life will end or when it will be extended. Does § 2901(j)(4)(A) prohibit expenditures for maintenance? Does the section prohibit POUs from performing environmental improvements or complying with legal obligations pursuant to court

order that are unrelated to SB 1368? Does § 2901(j)(4)(A) prevent POUs from complying with regulatory or statutory requirements such as safety regulations? CMUA contemplates that POUs will incur substantial administrative burdens resulting from these Proposed Regulations. The CEC has failed to review the administrative cost impact of the Proposed Regulations in light of this ambiguous requirement.

4.5 Economic Impact on Businesses – Costs to Sellers of Electricity

Comment 52: The CEC did not properly evaluate the cost to sellers of electricity.

The CEC's conclusion that the Proposed Regulations impose no significant economic impact on sellers of electricity is unsubstantiated. (FIS at 5) Further, a reference to the fact that the POUs are a "small share of the Western US market's demand for wholesale electricity" not only appears to "piecemeal" the potential impacts of the adoption of an emissions standard, but fails to recognize both the potential scarcity of compliant energy sources, and whether or not those available sources are obtainable with existing transmission facilities and rights.

5 Conclusion

CMUA respectfully requests the Commission to consider and incorporate CMUA's recommendations into newly revised Proposed Regulations, including CMUA's proposed alternative language identified above. Furthermore, CMUA requests responses to all NOPA Comments included herein, as required by Government Code § 11346.9(a)(3).

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Respectfully submitted,

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6 Attachments

6.1 Comments of the California Municipal Utilities Association – Compliance Issues

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 (October 30, 2006)

COMMENTS OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION REGARDING COMPLIANCE

December 13, 2006

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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 (October 30, 2006)

COMMENTS OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION REGARDING COMPLIANCE

In order to address compliance with the California Energy Commission's ("Energy Commission") emission performance standard (EPS) for publicly owned utilities (POU), we must look at the governing structure and public processes used by POUs to adopt resource plans and make resource procurement decisions. POUs perform these functions in public and in compliance with laws like the Brown Act. For POUs, the projects covered by SB 1368 are already subject to a public review and approval process because these decisions are brought to the POU governing boards. Review by the Energy Commission then becomes a second and in some cases third level of public review of the long-term commitment for baseload generation. It is in this public environment that the POUs propose a compliance filing process wherein the Energy Commission can verify and ensure compliance with SB 1368.

The following comments address the charge in SB 1368 that the Energy Commission "adopt regulations for the enforcement of this chapter with respect to a

local publicly owned electric utility."[1] The discussion begins by looking at the statutory requirements contained in SB 1368 regarding POUs, then highlights the differences in governing structures from the investor owned utilities (IOU) and ends with a proposal for compliance based upon the statutory structure and governing structure of POUs. The final section also responds to specific questions posed in Chapter 5: Compliance & Enforcement Alternatives of the *Staff Issue Identification Paper: Implementation of SB 1368 Emissions Performance Standard* ("Staff Paper").

I. THE ENERGY COMMISSION IS TASKED BY SB 1368 WITH ENSURING POU COMPLIANCE WITH ITS EMISSION PERFORMANCE STANDARD

SB 1368 gives the Energy Commission the responsibility to develop a compliance mechanism for POUs.[2] The compliance mechanism must address the fundamental tenet in SB 1368, that POUs not enter into long-term financial commitments for baseload generation that exceeds the EPS established by the Energy Commission.

> No load-serving entity or 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. . .[3]

Issues regarding the correct emission performance standard (EPS), what commitments are covered under SB 1368 as well as the determination of "baseload generation" are covered in other California Municipal Utilities Association filings. Regardless of how those other terms are interpreted, the Energy Commission needs to ensure POU compliance with the requirements of SB 1368 and the soon to be adopted regulations.

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[1] Cal. Publ. Util. Code §8341(c)(1). SB 1368 will become law on January 1, 2007.

[2] "The Energy Commission shall adopt regulations for the enforcement of this chapter with respect to a local publicly owned electricity utility." Cal. Publ. Util. Code §8341(c)(1).

[3] Cal. Publ. Util. Code §8341(a).

II. THE ENERGY COMMISSION HAS CONSIDERABLE FLEXIBILITY IN CREATING A COMPLIANCE PROGRAM FOR POUS

Public Utilities Code Section 8341(c)(2) recognizes that the POUs and IOUs have different structures and therefore, compliance mechanisms are permitted to be different.

> The Energy Commission *may*, in order to ensure compliance with the greenhouse gases emission performance standard by local publicly owned electric utilities, apply the procedures adopted by the commission to verify the emission of greenhouse gases from baseload generation pursuant to subdivision (b)[4].

Here, the legislature clearly provided that a separate agency, the Energy Commission, address POU compliance with SB 1368. In addition, the different governing structures of POUs and IOUs leads to development of different compliance mechanisms.

A. The CPUC already pre-approves IOU procurement plans and contracts and thereby, provides certainty of timely recovery of procurement costs.

Unlike POUs, the California Public Utilities Commission (CPUC) approves procurement plans and contracts of the IOUs. Recent legislation has created CPUC approval of both IOU procurement plans and power contracts, and provides pre-authorization for IOUs giving IOUs certainty regarding cost recovery for those approved resources and contracts.

> (c)The commission shall review and accept, modify, or reject each electrical corporation's procurement plan. . . .
>
> (1) . . . Any purchases made in compliance with the commission-authorized process shall be recovered in the generation component of rates.
>
> . . .
>
> (3) . . . The commission shall provide for expedited review and either approve or reject the individual contracts submitted by

[4] Cal. Publ. Util. Code §8341(c)(2) (emphasis added).

the electrical corporation to ensure compliance with its procurement plan. . . .

(d) A procurement plan approved by the commission shall accomplish each of the following objectives:

(1) Enable the electrical corporation to fulfill its obligation to serve its customers at just and reasonable rates.

(2) Eliminate the need for after-the-fact reasonableness reviews of an electrical corporation's actions . . .

(3) Ensure timely recovery of prospective procurement costs incurred pursuant to an approved procurement plan.

. . .

(5) Provide for just and reasonable rates, with an appropriate balancing of price stability and price level in the electrical corporation's procurement plan.[5]

Because the CPUC is already reviewing IOU procurement plans and contracts, it is logical for the CPUC to also review those same procurement plans and contracts for compliance with the EPS. In fact, in SB 1368 the legislature recognized the current review structure and put this CPUC pre-review requirement into the statute.

> The commission shall not approve a long-term financial commitment by an electrical corporation unless any baseload generation supplied under the long-term financial commitment complies with the greenhouse gases emission performance standard established by the commission . . . [6]

Thus, SB 1368 directs the CPUC to review compliance with SB 1368 in its procurement and contract review process.

B. POU governing boards provide procurement review and rate setting for POUs

For POUs it is their governing boards that set procurement policy and set policy for or approve contracts subject to SB 1368. It is also the POUs governing

[5] Cal. Publ. Util. Code §454.5 (c) & (d).

[6] Cal. Publ. Util. Code §8341(b)(1).

boards' responsibility to set rates. POUs are defined in Public Utilities Code Section 9604 as a municipality or municipal corporation furnishing electric service, a municipal utility district furnishing electric service, a public utility district furnishing electric service, an irrigation district furnishing electric service, or a joint powers authority that includes one of these agencies and owns generation or transmission or furnishes electric service over its own or its member's electric distribution system. Therefore, POUs are either municipalities, joint powers authorities or special districts.

The CPUC ensures compliance with SB 1368 of IOUs and energy service providers (ESPs). Both ESPs and IOUs are for profit entities than are not required to make their procurement decisions in public. Once the IOUs make their decisions, the IOUs take their procurement plans and proposed contracts to the CPUC for review and approval. ESPs to a lesser extent provide resource adequacy and renewable portfolio standard information to the CPUC where their acquisitions are reviewed for compliance with those standards. Conversely, POUs are public entities where most resource decisions that would be subject to the requirements of SB 1368 are already conducted in public. Special districts are defined in the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 as "an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries".[7] As such, POU governing boards are responsible for approving electric supply plans and the rates that are required to cover the costs of those electric resources whether owned or purchased through contract. POU decisions by law take place in a public and transparent process.

III. POU GOVERNING BOARDS SHOULD BE RESPONSIBLE FOR COMPLYING WITH THE REQUIREMENTS OF SB 1368

Because governing boards are responsible for setting the policy for and/or approving POU procurement decisions, it is POU governing boards that should be the entities charged with ensuring compliance with the requirements of SB 1368.

[7] Cal. Gov. Code §56036(a).

A. POU governing boards must approve contracts and investments in new baseload generation that are covered by SB 1368.

At the current time, governing boards approve the long-term financial commitments in baseload generation covered by SB 1368. For example, the Sacramento Municipal Utility District's (SMUD) publicly elected governing board must act on all construction and maintenance services competitive contract awards that exceed $5 million dollars.[8] This dollar amount covers all major resource additions for baseload generation. In addition, SMUD's board must act on all purchases, sales and exchanges of electricity for terms longer than three years.[9]

The Los Angeles Department of Water and Power's (LADWP) governing board must act on all competitive contract awards that exceed $150,000 dollars. This dollar amount covers all resource additions for baseload generation. In addition, LADWP's board must act on all purchases, sales and exchanges of electricity for terms longer than eighteen months. For agreements longer than three years, the City Council must act.

The City of Riverside's Public Utility Board and/or City Council must approve all competitive contract awards that exceed $50,000. Riverside Public Utilities' Council-approved "Power Resources Financial Risk Management Policy" provides that the Public Utilities Board and/or the City Council retain ultimate authority for all power supply transactions except as otherwise delegated therein. The Public Utilities Director has the authority to enter into individual transactions with a term up to 24 cumulative months, not to exceed five calendar years.

Because POU governing boards make resource planning and procurement decisions and/or set the policies governing such actions by their POU, they are in the best position to ensure that these commitments meet the requirements of SB 1368.

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[8] SMUD Board Policy No. BL-7, Delegation to the GM with Respect to Procurement, at 3 (June 3, 2004).

[9] SMUD Board Resolution No. 03-07-12 as revised by Resolution No. 03-12-06.

B. POU governing boards must act in compliance with applicable legal requirements.

SB 1368 places a new legal requirement on governing boards of POUs regarding procurement by stating, "No . . . local publicly owned electric utility may enter into a long-term financial commitment unless any baseload generation supplied . . . complies with the greenhouse gases" EPS.[10] This legal requirement applies to POUs regardless of any action taken by the Energy Commission. General principles of law require that government agencies and special districts comply with the law.[11] Many governing boards have explicit policies requiring that they act in compliance with the law.

SMUD Board Policy delegating to SMUD's General Manager procurement responsibility includes a policy that "procurement shall take place in accordance with applicable legal requirements".[12] Furthermore, the SMUD Board policies for conduct commits the SMUD Board and its members to "lawful conduct". Specifically, "Board members shall conduct themselves in accordance with all laws".[13]

Because POUs are required to act in accordance with applicable law and many POU governing boards already have specific policies to act in accordance with the law, POUs are already obligated to conduct the operations of their POU in accordance with the mandates of SB 1368.

Therefore, in the case of POUs the Energy Commission's compliance check would be the second or in the case of LADWP the third public board level review of long-term financial commitments for baseload generation. It is because of this double

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[10] Cal. Publ. Util. Code §8341 (a).

[11] Administrative agencies have only such powers as are conferred by law creating them and may not act in excess of those powers. *20th Century Ins. Co. v. Quackenbush*, 64 Cal.App.4th 135, 139 (1998), *Weber v. Board of Retirement of Los Angeles County Retirement Assn.*, 62 Cal.App.4th 1440, 1446 (1998), *Larson v. State Personnel Bd.*, 28 Cal.App.4th 265, 273-274 (1994), *General Telephone Co. v. Public Utilities Comm.*, 34 Cal.3d 817, 823-825 (1983).

[12] SMUD Board Policy No. BL-7, Delegation to the GM with Respect to Procurement at 1 (June 3, 2004).

[13] SMUD Board Policy No. GP-7, Board Members' Code of Conduct, at 1 (April 6, 2006).

or triple layer of review that compliance for POUs should differ from compliance for IOUs.

IV. ENSURING POU COMPLIANCE WITH THE ENERGY COMMISSION'S EPS

A. Expanding the list of compliance attributes (Question 5.1 – Are there additional attributes of a compliance mechanism that should be considered?)

The goal of this rulemaking process should be to create a program that is effective but does not create by itself additional burdens and therefore, additional costs to ratepayers. The Staff Paper identifies four compliance attributes. Those attributes are Effectiveness, Provide Transparency, Minimize Uncertainty and Administrative Ease.[14] We recommend that an additional consideration be included in that list. The additional attribute is Eliminate or Minimize Contracting Burden. Additional burdens placed upon contracts and the contracting process by the implementation of SB 1368 will result in higher costs to ratepayers. Higher costs due to the inability to contract long term for non-complying resources cannot be avoided, but higher costs due to lack of clarity in the standard, administrative complexity and unnecessary burdens placed upon POUs and their ability to contract will create additional costs for those contracts can be avoided.

The second aspect of minimizing contracting burden is reduce duplicative reporting and regulation. The California Air Resources Board is initiating a process to develop regulations for mandatory reporting of greenhouse gas emissions under AB 32.[15]

> 38530. (a) On or before January 1, 2008, the state board shall adopt regulations to require the reporting and verification of statewide greenhouse gas emissions and to monitor and enforce compliance with this program.

[14] Staff Paper at 19.

[15] Cal. Publ. Util. Code § 38530(a), (effective as of January 1, 2007).

(b) The regulations shall do all of the following:

. . .

(2) Account for greenhouse gas emissions from all electricity consumed in the state, including transmission and distribution line losses from electricity generated within the state or imported from outside the state. This requirement applies to all retail sellers of electricity, including load-serving entities as defined in subdivision (j) of Section 380 of the Public Utilities Code and local publicly owned electric utilities as defined in Section 9604 of the Public Utilities Code.

. . .

(4) Ensure rigorous and consistent accounting of emissions, and provide reporting tools and formats to ensure collection of necessary data.

(5) Ensure that greenhouse gas emission sources maintain comprehensive records of all reported greenhouse gas emissions.[16]

The reporting requirements of both agencies should be created such that duplicative efforts are avoided. We note that under AB 32 the probable first year of data collection will most likely be 2008 with reporting to the California Air Resources Board in 2009.

We would like to stress the importance of providing transparency and certainty in application of the EPS. Transparency and certainty are essential to establish a clear EPS wherein a POU can understand the requirements of that standard and can in most cases easily determine whether a proposed long-term financial commitment is covered by the requirements of SB 1368 and if so, whether that financial commitment meets the Energy Commission's EPS.

[16] Cal. Health & Safety Code § 38530(a) & (b).

B. Structure for an effective and efficient compliance process (Question 5.2 – Is this typology sufficient? Are there other approaches to compliance and verification that should be discussed?)

With these additional attributes in mind, we propose a compliance program with the following features:

1. Create a non-exclusive list of compliant baseload generators based upon publicly available information including the Energy Commission's own records on powerplants. This list could include facilities that are clearly in compliance, facilities that are borderline and facilities that clearly do not comply.

2. Require an annual filing by POUs explaining the long-term financial commitments for baseload generation entered into the previous year, if any. That filing could contain public governing board documents such as staff reports and governing board resolutions. Those documents could show the pertinent facts about the long-term financial commitment for baseload generation to demonstrate compliance of that commitment with the Energy Commission's EPS. The information needed to show compliance of a long-term financial commitment that is a new or renewed contract for baseload generation could include:

    a. The term of the contract and any options to extend that contract.

    b. The facility(ies), unit(s) or other source(s) of the energy, if known.

    c. An explanation showing how the new or renewed contract complies with the Energy Commission's EPS.

    d. A description of the design or operation of the energy source(s) showing that those source(s) are baseload.

Long-term commitments that are a new ownership investment in baseload generation should include:

a. A description of the planned powerplant or the purchased asset specifying the power generating equipment, power source (i.e. fuel type, wind, biomass) and any supplemental fuel source.

b. For non-renewable resources, the heat rate or emissions profile of the facility.

c. An explanation showing how the new ownership investment complies with the Energy Commission's EPS.

3. Verification of compliance could be shown by any of the following methods:

   a. Governing board documents showing the information described above, or

   b. Mandatory emission reporting and verification provided to the California Air Resources Board, or

   c. Land use or air quality permits for the owned or contracted asset(s), or

   d. Continuous emissions monitoring data provided to the air district, or

   e. An "in camera" document review by the Energy Commission at the POU, or

   f. Other verifiable documents showing compliance of the long-term financial commitment with the Energy Commission's EPS.

4. A voluntary consultation process for assets, contracting opportunities or research and development projects where the POU would like to obtain a compliance decision from the Energy Commission prior to POU action. The voluntary prior consultation and decision process should take no longer than 60 days and should provide a decision that the POU can rely upon. The Energy Commission decision on compliance should be similar to an Internal Revenue Service Letter Ruling or a Fair Political Practices Commission advice letter, in that the entity with the ruling can rely upon that ruling without the fear of a later contrary determination or change in policy.

C. Responses to compliance questions 5.3 through 5.15 and 5.22 in the Staff Paper.

The Staff Paper asks a number of questions about the compliance filing concept. The following responds to those questions:

1. Question 5.3 -- Are there potential problems with self-certification that are not considered above?

There are no problems with compliance filings or self-certification. This section of the Staff Paper does not take into account the initial public review and action by POU governing boards. Governing boards of POUs have an obligation to comply with applicable laws including those governing open meetings such as the Brown Act. Footnote 4 in the Staff Paper fails to recognize this important distinction between IOUs and POUs. Many POU governing boards are elected, composed of elected representatives or appointed by elected representatives. These POUs are also

either government entities or agencies of the state. Thus, once a requirement is set the first responsibility for compliance should rest with the governing boards who will be taking a considerable risk if they decide not to comply with the requirements of SB 1368.

2. Question 5.4 – Are there existing models of self-certification from other industries that should be considered?

Yes, there are numerous examples of effective compliance filing programs. One example is in the solid waste area. Cities are required to adopt "source reduction and recycling elements" (SRRE's) as part of their state-mandated solid waste management plans[17]. The SRRE's are subject to regulatory review of the Integrated Waste Management Board. Once the SRRE is adopted by the city, the city files annual reports. In this case the Energy Commission is adopting the EPS, but the POUs are responsible for complying with the law and could follow a similar process by adopting annual compliance filings.

Another example is the self-certification of qualifying facilities who provide justification for their status as a qualifying facility and file that information with the Federal Energy Regulatory Commission (FERC). This program relieves FERC of opening a proceeding to evaluate each qualifying facility application saving regulatory time for matters where the standards or requirements are in question.

Furthermore, bond financing used to finance individual generation project construction or purchase, or general bonds for POU operations require disclosure statements signed by a responsible individual on behalf of the POU that the POU is operating in compliance with applicable laws. False or incorrect statements in bond disclosure documents carry significant penalties that provide a strong disincentive for POUs to ignore the requirements of SB 1368 and the Energy Commission's EPS.

3. Question 5.5 – Even given self-certification, is there a need for a mechanism that audits compliance filings? If so, what auditing mechanism (e.g., data requests from Energy Commission staff, independent auditing) would be appropriate?

[17] See Cal. Pub. Res. code Sections 41000 et seq.

To ensure compliance the Energy Commission could review the filings of the POUs for compliance. Should the Energy Commission see something it questions or a concern it could request additional supporting documentation within 90 days of filing. The supporting documentation could include any of the following documents that may already exist and be able to clarify any question the Energy Commission may have.

a. The California Air Resources Board is required to develop a reporting and verification program and documents produced as a part of this program may provide sufficient information, or.

b. The California Climate Action Registry has an audit process that may be used to provide an independent review, or

c. Air districts receive CEMS and source test data and requirement emissions calculations, or

d. An in camera review of documents could be used to avoid the need to address confidential filings.

Existing and planned verification programs under AB 32 should be used to provide additional documentation whenever the Energy Commission wants to perform an additional review of a compliance filing. The current auditing process used by the California Climate Action Registry would provide sufficient information to the auditors to also certify compliance of new long-term financial commitments for baseload generation. Should the California Air Resources Board develop similar procedures for verifying the reporting information, that process could be used to confirm the information provided by the POUs. AB 32 requires, "on or before January 1, 2008, the state board shall adopt regulations to require the reporting and *verification* of statewide greenhouse gas emissions and to monitor and *enforce compliance* with this program."[18]

4. Question 5.6 - Should prior review and approval be required of all procurement that is subject to the standard?

No. Governing board review of long-term financial commitments subject to SB 1368 includes public notice and open meetings. Please note that Energy

[18] Cal. Pub. Res. Code §38350 (a), (emphasis added), (effective as of January 1, 2007).

Commission pre-approval is really double and in some instances triple approval for POUs. Since POUs need to obtain approval for these actions from their governing boards, Energy Commission approval would be a second public review and approval of a long-term financial commitment. Thus, pre-approval is essentially requiring two different government agencies to approve the same proposal against the same standard.

A clear and easily understandable standard will go a long way to aiding compliance by governing boards facing the question of whether a long-term financial commitment meets the Energy Commission's EPS and the public in its review of publicly available information or within a public POU governing board meeting. A transparent EPS within a transparent governing board review process will provide the customers of the POU and the public in general an opportunity to be informed about POU actions subject to SB 1368.

Prior Energy Commission approval would create a new requirement and second approval against the same Energy Commission EPS for power contracting. Additional requirements add costs and create a disincentive for counterparties to work with POUs. Delays associated with regulatory review of contracts can chill a POU's ability to move nimbly in the market and complete transactions that comply with SB 1368. Therefore, only in those situations where the POU feels that consultation with the Energy Commission to obtain pre-approval would be helpful, should it be used. Energy Commission pre-approval for the sake of pre-approval will add an unnecessary layer of review and potentially additional costs to ratepayers when clear standards could make a compliance determination relatively simple.

5. Question 5.7 – How could prior review and approval be structured so as to minimize delays? How can it best be meshed with existing reporting to the Energy Commission by the POUs and the Energy Commission's decision-making processes?

Promulgation of a detailed standard for compliance that resolves issues of interpretation ahead of time is the best way to minimize confusion and delay. In this way, the need for prior approval can be avoided, as effective compliance can be achieved by POU governing boards.

Prior consultation and approval with the Energy Commission should be used only at the election of the POU for long-term financial commitments that involve different or unusual provisions where the POU is concerned that compliance is not clear. In such instances, consultation should occur within the shortest possible time, we recommend not exceeding 60 days. Opportunities for long-term financial commitments can be fleeting, time or price sensitive. Extended review time could significantly impact the price or availability of the opportunity.

6. Question 5.8 – Does a preferred standard require performance monitoring for the purpose of assessing compliance for certain resources? What type of resources? What data might be needed to evaluate the compliance of these resources?

Performance monitoring should not be required of non-research or development projects. Long-term financial commitments in the form of contracts should be reviewed by the POU at the outset and compared to the standard. Re-evaluation of a contract over time would pose a considerable problem for contracting parties. Therefore, performance monitoring should only be required for research and development projects that may propose novel carbon reduction or containment strategies. Contracts with existing facilities or new facilities should have an emissions profile that can be compared to the Energy Commission's EPS. Performance monitoring should only apply to a project where the emissions profile is unknown or in question due to its status as a research or demonstration project.

7. Question 5.9 – Is self-certification a reasonable option for new construction, repowerings and purchases of existing facilities? If so, what if any actions on the part of the POU would constitute self-certification? Is there a (legal) need for a certificate filing?

Yes. For new construction and purchases of existing facilities detailed air quality permit information including emission rates and estimates of annual emissions will be available. Whether a "repower" will be subject to review under SB 1368 is covered by another CMUA filing. Nonetheless, any alteration to the equipment or control apparatus which will significantly increase or affect the kind or amount of air

contaminants emitted would require a new or revised air permit for that emission source.[19]

To demonstrate compliance, the POU could provide air permitting documentation, or resolutions or staff reports from governing board actions. The analysis required to obtain an air permit would provide sufficient information to determine and if necessary, demonstrate compliance with the Energy Commission's EPS. The purchasing or building POU could include a copy of the application for the air quality permit, authority to construct, permit to operate or equipment description for commonly installed equipment such at a General Electric Frame 7 combustion turbine in combined cycle configuration for the facility in its annual compliance filing. The POU could also include a copy of the documents used by the governing board in reaching its decision on compliance of the long-term financial commitment with the Energy Commission's EPS.

8. Question 5.10 – If there are multiple sources of data that can establish eligibility under the standard, should the Energy Commission specify which data are required or preferred?

Clarity regarding the data needed to show compliance with the Energy Commission's EPS should be set by the Energy Commission. It is important that both the governing board and the Energy Commission are looking at the same data in making a determination regarding compliance with the Energy Commission's EPS. Nonetheless and because of the variation between air districts and other data sources, the regulations need to provide some flexibility regarding the type of data that can be used to show compliance with the Energy Commission's EPS. Not all circumstances will be contemplated prior to completing the work on these regulations. Some flexibility in the regulations will allow both the POUs and the Energy Commission to tailor the information to the situation where standard information would provide misleading results.

[19] See San Joaquin Valley Air Pollution Control District, Regulation I, Rule 1020, Section 3.5.

The regulations could provide a list of initial sources of information say the configuration of the generating resource. If the configuration of the generating resource would not provide an accurate determination of the generating resource's emissions or operation, then the emissions data or air permit for the facility would be used. If the emissions data or air permit would provide misleading information, then the operating history of the facility should be used, etcetera.

9. Question 5.11 – Are there specific circumstances under which self-certification may not be an appropriate compliance mechanism for these resources? Are there instances when there may not be sufficient data filed with the Energy Commission or local permitting authorities, or otherwise available so as to allow for self-certification? For example, can filings with AQMDs misleadingly indicate that (a) the facility should be subjected to the EPS screen when it actually shouldn't, or (b) fails to meet the pass the EPS screen when it actually does so? If so, are there other data to support self-certification or would a review mechanism be necessary?

The POUs do not anticipate that insufficient or conflicting data would preclude accurate self-certification. POUs and their staffs would resolve any such uncertainties prior to committing to the resource, knowing that their governing boards and the CEC could not find the resource in compliance absent such clarity. Compliance with the law is important to POUs. Therefore, POUs will take compliance with SB 1368 seriously. POUs would resolve any such uncertainties just as they currently resolve other issues on price or resource characteristics before the POU makes a very large, long-term financial and reliability commitment to a resource the POU plans to use to service its load.

This question is asked in the context of physical resources. For physical resources information such as the equipment type and configuration along with the heat rate should be available. Equipment configuration and heat rate are often a key determinant for the planned operation of a facility i.e. peaking or baseload. Although a facility's air permit may allow baseload operation, the configuration may clearly indicate the actual operation of the facility. For facilities like cogeneration applications where additional information such as process steam use are important to show compliance with the Energy Commission's EPS, the POU could obtain additional information including calculations to demonstrate compliance.

10. Question 5.12 – Is self-certification sufficient for unit-contingent contracts where historical emissions data is readily available? If not, what financial or performance data should be submitted as part of the compliance and verification process?

Self-certification is the best approach for all circumstances, including unit contingent purchases. Unit specific contracts with historical emissions data should be sufficient to show compliance with the Energy Commission's EPS. The focus of the Energy Commission's EPS is on emissions not financial arrangements. No additional data should be required.

11. Question 5.13 – Should the Energy Commission maintain a list of existing facilities that meet the EPS for the purpose of determining the eligibility of resources? Should the list also include those facilities that do not meet the EPS given available data?

Given the amount of information publicly available regarding the emissions of existing powerplants in the western United States and the vast quantities of information held by the Energy Commission regarding powerplants in California, this exercise should be straightforward for a great number of facilities. A list of clearly compliant and clearly non-compliant facilities would enhance the ability of POUs to know whether a long-term financial commitment meets the Energy Commission's EPS.

12. Question 5.14 – If data is unavailable, e.g., a contract is signed with an existing unlisted unit whose thermal load is unknown, how should a determination be made?

It is incumbent on the POU to get the needed information to determine compliance. For cogeneration facilities where the thermal data is not readily available to the Energy Commission and therefore, not included on the list, the POU can get thermal load information to confirm that the specific unit meets the Energy Commission's EPS. Since the POU will be the purchasing entity, the POU will be able to get thermal load information and apply that information to the approved calculation method to confirm compliance with the Energy Commission's EPS.

13. Question 5.15 – If a facility is undergoing/has undergone modifications (to allow it to meet an emissions standard), and if publicly available data does not show how

modifications will change historical emissions sufficiently to meet the EPS, how should a determination be made?

If for some reason emissions information[20] is not available perhaps because the facility is so small that it does not trigger air permitting, the POU will need to obtain sufficient data to support a determination that the unit or facility meets the Energy Commission's EPS. The POU purchasing the resource or contracting with the resource can make accurate compliance information a requirement for the transaction to be completed. If the unit is experimental or a research project, the POU could request assistance from the Energy Commission or its staff.

14. Question 5.22 – What should the Energy Commission's position be on this issue (multiple short term contracts with the same resource) relative to POU procurement practices? Are regulatory provisions needed to prevent back-to-back contracts for the same resource of less than five years? Are there circumstances under which such contracts are justified? If so, how should a determination be made?

The situation described above appears to be a violation of public contracting called bid splitting. POUs are already prohibited from these types of activities.

Bid splitting should not be confused with a legitimate three-year contract followed by a new bid process or solicitation at the conclusion of that contract wherein the same party provides the energy or capacity for an additional three years. This subsequent three-year contracts would be the result of bidding or solicitations as opposed to a plan to avoid the Energy Commission's EPS.

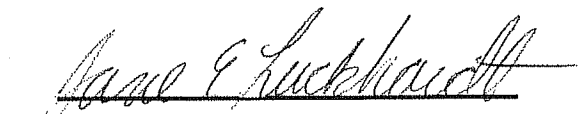
[20]Since the modification is defined as modifying the emissions of the unit or facility to meet an emissions standard, for all but very small units that modification would most likely be analyzed by the local air district. Although new source review is only triggered when a modification is determined to be major by either federal or local definitions, any alteration which will increase or affect the kind or amount of air contaminant emitted will require a modification to the air permit. For example, the San Joaquin Valley Air Pollution Control District defines alteration as "any addition to, enlargement of, replacement of, or any major modification or change in the design, capacity, process, or arrangement, or any increase in the connected loading of, equipment or control apparatus, which will significantly increase or affect the kind or amount of air contaminants emitted." San Joaquin Valley Air Pollution Control District, Regulation I, Rule 1020, Section 3.5 (June 1999). Therefore, most modifications that impact emissions will require a modification to an existing air permit. The analysis required to modify the air permit should be sufficient to determine whether the modified facility will meet the Energy Commission's EPS.

V. THE ENERGY COMMISSION'S SB 1368 COMPLIANCE PROGRAM SHOULD RECOGNIZE POU GOVERNING BOARD RESPONSIBILITIES BY CREATING A COMPLIANCE FILING PROGRAM

Given the POU governing board's responsibilities for procurement and rates, those governing boards should be the first review of a long-term financial commitment's compliance with the Energy Commission's EPS. Compliance filings should provide the Energy Commission with an opportunity to double check the POU governing boards and provide sufficient opportunity to review compliance.

Dated: December 13, 2006

Respectfully submitted,



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6.2 Comments of the California Municipal Utilities Association – Triggering

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 (October 30, 2006)

COMMENTS OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION ON THE CEC WHITE PAPER AND WORKSHOP – TRIGGERING AND INTERPRETATIONS OF SB 1368

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

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

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

Nonetheless, CMUA is concerned that many highly complex technical subjects

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

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

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

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

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

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

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

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

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

3. First time acquisition of a baseload facility;

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

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

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

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

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

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

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

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

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

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

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

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

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

In all cases, the words, phrases, and sentences of SB 1368 evidence a legislative intent to trigger the emission performance standard ("EPS") only when a publicly-owned electric utility ("POU") *enters* a *new legal relationship*. The essence of SB 1368 is Public Utilities Code section 8341(a) which states that "[n]o . . . local publicly owned electric utility may *enter* into a long-term financial commitment unless any baseload generation supplied under the long-term financial commitment complies with the greenhouse gases emission performance standard . . . ."[3]

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

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

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

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

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

[4] *See id.*

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

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

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

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

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

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

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

[6] *See Bodell, supra.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

associated time frame.

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

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

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

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

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

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

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

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

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

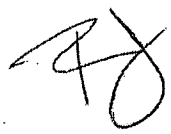
The answer to this question is entirely dependent upon the JPA's structure. See the answer to Question 3.3. Many JPAs create ownership-like interests in the respective JPA members. Other JPAs are structured whereby the JPA, as a separate governmental agency, has the ownership interest and the member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

III. CONCLUSION

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

Dated: December 13, 2006

Respectfully submitted,



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6.3 Comments of the California Municipal Utilities Association – Implementation and Enforcement Issues

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 (October 30, 2006)

CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION COMMENTS REGARDING IMPLEMENTATION OF SB 1368 AND ENFORCEMENT ISSUES

December 13, 2006

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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 (October 30, 2006)

CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION COMMENTS REGARDING IMPLEMENTATION OF SB 1368 AND ENFORCEMENT ISSUES

Pursuant to the direction provided by Commissioner Byron at the December 8, 2006 *Electricity Committee Workshop on Greenhouse Gases Emission Performance Standard for Implementing Senate Bill 1368*, the California Municipal Utilities Association (CMUA) offers these comments on implementation of Senate Bill (SB) 1368 related to enforcement issues, and provides responses to the questions raised by the California Energy Commission (CEC or Energy Commission) in the *Staff Issue Identification Paper: Implementation of SB1368 Emissions Performance Standard, issued November 27, 2006* (Staff Issues Paper).

I. INTRODUCTION

SB 1368 authorizes the Energy Commission to adopt regulations to enforce the greenhouse gases (GHG) emissions performance standard (EPS) authorized in SB 1368, with respect to local publicly owned electric utilities (POUs). SB 1368 added §§ 8341(c)(1) and 8341 (e)(1) to the Public Utilities code.

Pub. Util. Code § 8341(c)(1) provides that "the Energy Commission shall adopt regulations for the enforcement of this chapter with respect to local publicly owned electric utilities." Pub. Util. code § 8341(e)(1) states, "[e]nforcement of the [EPS] shall begin immediately upon the establishment of the standard."

These comments (1) address the CEC's legal scope of authority with regard to enforcement regulations; (2) discuss proposed enforcement provisions consistent with this enforcement authority and the intent of SB1368; (3) discuss the transparency of the POU contract approval t for long-term financial commitments; and (4) respond to enforcement issues raised in the Staff Issues Paper.

II. THE ENERGY COMMISSION'S ENFORCEMENT POWERS ARE LIMITED BY LAW

The Energy Commission's enforcement powers are limited to those granted in the Administrative Procedure Act (APA), Public Resources Code sections 25000, *et seq.* (Warren-Alquist Act), and SB 1368. "Administrative agencies have only those powers conferred on them, either expressly or impliedly, by the Constitution or by statute, and administrative actions exceeding those powers are void."[1]

The APA (Cal. Gov. Code § 11340 et seq.) sets forth administrative procedures to be followed by certain state agencies in California, and rulemaking actions taken by the CEC are subject to its provisions.[2] The APA broadly defines covered 'regulations' as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."[3] The APA further defines a state agency's authority as the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.[4] The regulations to be promulgated by the CEC pursuant to § 8341(c)(1) are clearly within these definitions.

A state agency's authority to adopt regulations is limited by two factors: (1) the statutory authority which created the agency; and (2) the statutory authority that enables the agency to adopt regulations pursuant to statutes the agency is charged with

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[1] Terhane v. Superior Court 76 Cal.Rptr.2d 841, 872-873 (1998).

[2] Cal. Pub. Res. Code § 25213.

[3] Cal. Gov. Code § 11342.600

[4] Cal. Gov. Code § 11349.

administering.[5] Therefore, regulations promulgated by the Energy Commission are valid if they are within the scope of the legislation that created the state agency (Warren-Alquist Act) and within the scope of authority conferred by the legislation charging the agency with a duty, in this case, SB 1368.

The Warren-Alquist Act: Pursuant to the APA, in order to ascertain the scope of authority of a state agency, it is necessary to review the authority granted in the enabling legislation. Pub. Res. Code sections 25000, et seq., the Warren-Alquist State Energy Resources Conservation and Development Act, established the Energy Commission. This enabling legislation also set forth specific powers of the CEC. Specifically, § 25213 provides that "[t]he commission shall adopt rules and regulations, as necessary, to carry out the provisions of this division [Energy Conservation and Development] in conformity with the provisions of the [APA]." Unless an action is specifically authorized under SB1368, the CEC's enforcement authority is limited by the provisions of the Warren-Alquist Act.

Senate Bill 1368: Here, the second source of the Energy Commission's enforcement authority is the legislation charging the Energy Commission with administering the law, SB 1368. SB 1368 adds Pub. Util. Code § 8341(c)(1), which provides that *"the Energy Commission shall adopt regulations for the enforcement of [the EPS] with respect to local publicly owned electric utilities."* SB 1368 also provides that "[e]nforcement of the [EPS] shall begin immediately upon the establishment of the standard." Pub. Util. Code § 8341(e)(1). Nothing else in SB 1368 authorizes enforcement action, or authorizes the imposition of monetary fines or penalties on POUs.

The Legislature, in SB 1368, did not authorize any specific enforcement mechanisms, despite its clear ability to do so. For example, in Pub. Res. Code § 25321, the legislature expressly granted the Energy Commission enforcement authority with respect to the data collection requirements for the Integrated Energy Policy Report. In that

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[5] See Cal. Gov. Code § 11342.1: "[E]ach regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law," and § 11342.2: "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."

legislation, the CEC is specifically authorized to use "enforcement measures," including monetary penalties.

In this case, the Energy Commission has no authorization to impose a penalty of any sort on the POUs. SB 1368 is completely devoid of any express authorization to impose financial penalties of any kind. Neither can the statute be interpreted to implicitly allow for the imposition of a financial penalty, as that would violate Govt. Code § 11145, which prohibit the CEC from adopting or enforcing "any rule or regulation a violation of which can result in the imposition of a fine . . . unless a statute specifically authorizes the imposition of such fine . . . for a violation of the rule or regulation."

III. CEC ENFORCEMENT PROVISIONS SHOULD BE SOLELY INJUNCTIVE IN NATURE

A. CEC Enforcement Should be Limited to Injunctive Relief.

While SB 1368 does charge the Energy Commission with enforcing certain provisions, it does not expressly provide the Energy Commission with the authority to impose any kind of financial or other penalty on the POU. Accordingly, regulations should be carefully drafted in order to insure that they are not punitive in nature, thereby exceeding the CEC's authority. Therefore, the POUs recommend that all CEC enforcement actions be injunctive, following closely the type of proceedings generally available to parties seeking to challenge actions taken by governmental entities. As discussed more fully below, POUs and their governing bodies remain subject to enforcement compliance mechanisms resulting from their actions as governmental agencies.

As a practical matter, it is imperative to keep in mind that POUs are all subject to oversight by their individual governing bodies. These governing bodies are comprised of either elected or appointed officials. Simply put, each POU is governed by its own version of a public utilities commission, and therefore, is subject to close and ongoing regulation. These elected, locally accountable regulatory authorities are charged with overseeing POU activities and, as public agencies, are subject to stringent rules and requirements, including insuring that their actions are not contrary to the law. As a rule, POU action to enter into a long-term financial commitment for baseload generation of the type contemplated in SB 1368 will be approved by the local regulatory authority during a public meeting, and only

after a public review process. This is, *by law*, a transparent process. Furthermore, any information that might not be immediately publicly available is generally available through the Public Records Act.[6]

Since local regulatory authorities are government bodies, any SB 1368 enforcement actions should be modeled after existing California laws applicable to cities, counties and other public agencies, rather than any enforcement mechanisms that may be used by the California Public Utilities Commission (CPUC) for the oversight of investor owned utilities. For instance, because POUs are already governed by PUC-equivalent bodies, adding CPUC enforcement mechanisms to the mix would result in duplicative and unduly burdensome enforcement in the POU context. Notably, SB 1368 carefully distinguishes between investor owned utilities – which must follow rules promulgated by the CPUC – and POUs. For example, in the Legislative Counsel's Digest of SB 1368, the legislature specifically notes that SB 1368 "would prohibit the [CPUC] from approving any long-term financial commitment by an electrical corporation unless any baseload generation supplied under the long-term financial commitment complies with the [standard]." There is no similar direction with regard to the CEC. That is because the CPUC is *already* required to approve investor owned utility long-term financial commitments, whereas the CEC does not have such a charge with respect to POUs. This distinction is vital because it serves to emphasize the fact that the Legislature acknowledged the special characteristics of POUs as locally accountable governmental entities.

Accordingly, it is appropriate for any enforcement mechanism to follow the traditional local government model and provide for injunctive relief, not penalties. Specifically, if a POU is found not in compliance with SB 1368, any CEC enforcement procedure against the POU should be modeled after a traditional writ of mandate. A writ of mandate is an action compelling a government body to perform its legal duty, and may be issued to compel a governmental agency to perform an act which the law specifically enjoins as a duty resulting from an office.[7] A writ of mandate may issue if the following requirements are met: (1) lack of plain, speedy and adequate remedy in the usual course of law; and (2) a clear beneficial right of the petitioner to performance of that duty.[8]

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[6] Cal. Govt. Code § 6250 *et seq.*

[7] Cal. Code Civ. Proc. § 1085

[8] Cal. Code Civ. Proc. § 1086

If, for example, a POU has a contract that does not comply with SB 1368, the Energy Commission or any interested party may file a writ of mandate to compel compliance with the standard. The writ requires the petitioner (*e.g.*, the Energy Commission) to show that it: (1) has a beneficial interest; (2) that the POU has the ability to perform that duty; (3) that the POU failed to perform its duty or abused it discretion; and (4) that the Energy Commission has no other plain, speedy and adequate remedy. The Legislature has already determined that such enforcement actions are appropriate for enforcing public agency compliance; the CEC should follow that model here. However, as more fully set forth below, it is important to note that this is not the only enforcement mechanism to which the POU is subject.

B. POUs Are Subject To Stringent Compliance And Enforcement Mechanisms.

POUs are subject to enforcement mechanisms to insure compliance with the law – including SB 1368 – even though the CEC has limited enforcement powers over the POUs. POUs are subject to strict and stringent enforcement mechanisms as it pertains to contract compliance. As noted above, POUs are governmental agencies subject to regulation by their local regulatory authorities. As a practical matter, any long-term financial commitment – especially for a new ownership investment – will go through a transparent public process. Each transaction will be thoroughly vetted by the POU's staff before being presented to the local regulatory authority for approval. Part of the "packet" of information presented to the governing board would include background information on the proposed investment or project, including why the project is necessary, and that it is in compliance with all relevant laws. This latter attestation is especially important where the financial commitment will entail third party financing (in the case of POUs, this would likely mean the issuance of bonds). The local governing body would have to approve the disclosure statements for the issuance of bonds, which disclosure would include a warranty of compliance with all applicable laws –including SB 1368. Such financing would also be subject to federal securities laws, which include severe penalties for violations.

Furthermore, even in the absence of a CEC enforcement action, contracts

entered into that do not comply with the law (any law, and not just SB 1368), would be voidable. The governing bodies of POUs are public officials directly answerable to their local constituency. These governing bodies will exercise due diligence to ensure they do not burden the POU with a contract that may not be lawful.

IV. RESPONSES TO STAFF ISSUES PAPER QUESTIONS REGARDING ENFORCEMENT

Set forth below are the questions raised in Chapter 6 of the Staff Issues Paper and responses to those questions based on the legal discussion set forth above.

Question 6.1: *Is there agreement that an enforcement mechanism should be identified in the regulations?*

SB 1368 specifically provides that the Energy Commission should adopt regulations regarding the enforcement of the statute. Accordingly, there is no reason why an enforcement mechanism should not be identified in the regulation, and every reason to include a clearly defined mechanism up front. However, as noted above, such a regulation cannot include fines or penalties. Rather, any such regulation should be similar in scope to the types of mechanisms already established for enforcement of governmental entity compliance, after an opportunity to cure.

Issue 6.2: Prior Review of Contracts

Under a scenario where POUs obtain approval of their contracts before they are entered into, one option for enforcement (where a contract is deemed non-compliant) would be for the Energy Commission to instruct the POU that they are not allowed to enter into that contract. This determination could be made using the existing Complaints and Investigations process outlined in the California Code of Regulations, title 20, section 1230 et seq., or could be made under a new tailor-made process for SB 1368 compliance determinations.

Question 6.2(a): *Are there any other options for enforcement under this scenario?*

As discussed above, the CEC lacks the authority to impose penalties on the POUs. Regardless, POUs are subject to enforcement and compliance in other venues, including at the local level.

Title 20, section 1230 et seq. should not be utilized for SB 1368 enforcement. The provisions of Title 20, section 1230 et seq. have broad applicability, but clearly

contemplate investigation and enforcement of provisions pertaining to power plant siting and site certification, which specifically allow for the imposition of civil penalties. These provisions are clearly distinguishable from the regulations regarding enforcement under SB 1368, and SB 1368 does not authorize the CEC to use them for SB 1368 enforcement.

Due to the unique nature of SB 1368, and the fact that the CEC is charged with promulgating enforcement regulations that are separate and distinct for POUs than for other load serving entities, any complaint and investigation process should be specifically tailored to the POUs, and should include, when applicable, an opportunity to cure.

Furthermore, SB 1368 addresses *entering into* long-term financial commitments for baseload generation, and does not contemplate ongoing performance monitoring of such commitments, and accordingly, the investigation process outlined in Title 20 would be inapplicable.

> *Another option would be to use an Order to Show Cause to require a POU to appear before the Energy Commission and explain why an enforcement action should not be taken. If the POU persisted despite an Energy Commission determination of noncompliance, then one enforcement option would be for the Energy Commission to seek judicial enforcement; most likely in the form of a permanent injunction.*
>
> ***Question 6.2(b):*** *Are there any other options for enforcement under this scenario?*

Before fully developing something similar to an Order to Show Cause (OSC) process, the "enforcement action" contemplated for the POU must be fully defined, including provisions for an opportunity to cure. Something similar to an OSC may be appropriate, in that it would provide for an opportunity to be heard, but the form of the OSC should allow for a "paper process" whereby the Energy Commission sets forth its allegations, including the grounds upon which it bases its belief that the POU is not in compliance with the statue and a procedure for a written response to the same.

> ***Issue 6.3: Prior Review of "New Ownership Investments"***
>
> *Under a scenario that has the POUs obtaining prior approval for new ownership investments in baseload generation, one enforcement option would be for the Energy Commission to declare the proposed investment noncompliant (in the manners discussed above), and instruct the POU that they are prohibited under SB 1368 from making that investment. If the POU persisted, one option for further enforcement would be for the Energy Commission to seek judicial enforcement.*

Question 6.3: *Are there any other options for enforcement under this scenario?*

The CEC should not involve itself in pre-approval of POU contracts or ownership investments. The POU governing bodies, and not CEC staff, have the technical and legal expertise to determine whether long-term financial commitments are compliant with SB 1368. The governing bodies of POUs are also directly answerable to their local constituents for their actions; this creates a further incentive to comply with all applicable laws. POUs are not without considerable mechanisms that would encourage, or if necessary, compel compliance, not the least of which is the threat of significant financial penalties associated with long-term investment financings for contracts that are not in compliance with *all* relevant laws and regulations, not just SB 1368. The "fear" that once such an agreement is entered into California ratepayers are exposed to too great a risk is simply unfounded.

Issues 6.4-6.6 Review of Executed Contracts

Enforcement becomes more complicated if Energy Commission compliance review occurs after contracts have already been executed. Enforcement to deter or correct noncompliance under such a scenario may work best by employing two different measures: a penalty measure and a corrective measure. A penalty measure might reduce the likelihood that a POU would risk entering into a noncompliant contract if the penalty was of sufficient weight to act as a deterrent. It is unclear what form this penalty could take. Monetary penalties have not been specifically provided for under SB 1368 and there does not appear to be independent authority under the Warren-Alquist Act to put them in place for this purpose. One possibility would be to require any POU determined to have entered into a noncompliant contract to thereafter undergo prior review of all contracts.

Questions 6.4: *Are penalties the right approach? If so, what types of penalties would be appropriate?*

The CEC is prohibited by law from imposing financial penalties of any kind. SB 1368 does not authorize penalty measures and therefore, they should not be employed.

Once noncompliance is detected it should be quickly corrected and the POU brought back into compliance with SB 1368 and supporting regulations. One option would be to require the POU to cancel the noncompliant contract. The POUs have stated that this may not be an easy or quick task. For due process purposes, they would possibly have to allow the contracting facility time to correct the non-conformance with the EPS. It is unclear whether this potential requirement could be removed with a contract provision allowing the POU automatic

termination if the subject facility is found not to comply with the EPS. Even if a POU could legally terminate a contract, doing so may not be practical for reliability reasons. It could take some time to find another source of electricity to replace the noncompliant source.

Question 6.5: *Are there any other approaches to quickly correct a noncompliant contract?*

SB 1368 requires that the POU be in compliance at the time the long-term financial commitment is made. It does not provide for ongoing contract monitoring. As a practical business matter, POUs will make every effort to avoid entering voidable contracts, which means they are also going to make every effort to insure that contracts may be terminated if the counterparty is not complying with the provisions SB 1368. POUs can cancel the noncompliant contracts, but must do so under the normal contracting provisions, which will likely require opportunities to cure from the counterparty. There are approaches that will allow for correction for noncompliance, should that occur; this will be addressed in contract provisions, not unlike contracts for renewable resources that require the counterparty to attest to the fact that the energy provided comes from a renewable source.

Question 6.6: *Does after-the-fact enforcement satisfy the Statute's goals of reducing California's exposure to costs associated with future regulation of greenhouse gases and "potential exposure of California consumers to future reliability problems in electricity supplies?"*

"After the fact enforcement" is a misnomer that ignores the intensive and transparent public process that is employed before a POU enters into a long-term financial commitment of the type contemplated under SB 1368. The local governing body is already engaging in a full review of the commitment and is aware of the legal ramifications (which are more severe for most financings than what the CEC is authorized to impose) before approving the transaction. An additional layer of regulatory oversight will not aid this process, nor it is necessary or even contemplated under SB 1368.

Issue 6.7: Review of Completed "Investment" Transactions

As in after-the-fact review of contracts, enforcement of the EPS after a new ownership investment has already been made can be complicated. As discussed above, instituting a penalty might be useful in deterring noncompliant investments. If such deterrence should fail, however, corrective action would be required. In order for the noncompliance to be corrected, either the facility would have to be made compliant (reduce its emissions to the standard) or the POU would have to somehow retrieve its investment. Parties have argued, however, that once an

investment is made in a noncompliant facility the damage has been done and no action could fully correct the harm caused.

Question 6.7: *Are penalties an appropriate initial enforcement mechanism? If so, what types of penalties could serve as an effective deterrent under this scenario? Is it possible to fully correct an investment in a noncompliant facility after it has been made? If so, how?*

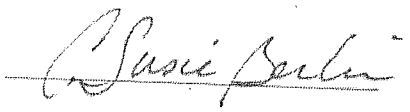
As stated above, the CEC has no authority to impose penalties. Neither SB 1368, nor the CEC's enabling legislation authorize the CEC to impose financial penalties on POUs. The CEC is further prohibited under by Govt. Code § 11145 from even adopting a regulation, a violation of which could result in the imposition of a fine. California law already provides for enforcement mechanisms for governmental entities; these mechanisms are just as applicable to long-term financial commitments for baseload generation as they are for any other investment decision made by the governing body of the local government.

V. CONCLUSION

In preparing the proposed regulations for implementation of SB 1368, specifically with regard to enforcement, CMUA respectfully requests Energy Commission Staff to incorporate the legal analysis and responses set forth herein.

Dated: December 13, 2006

Respectfully submitted,



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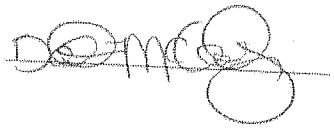
CERTIFICATE OF SERVICE

I certify that the following is true and correct:

On December 13, 2006, I served an electronic copy of the attached: **CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION COMMENTS REGARDING IMPLEMENTATION OF SB 1368 AND ENFORCEMENT ISSUES** on all known parties to Docket No. 06-0IR-1, or their attorneys of record, that have provided copies of their e-mail addresses.

Executed this 13th day of December 2006, at San Jose, California.



Katherine McCarthy

6.4 Joint Proposal by the California Municipal Utilities Association and NRDC

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

JOINT PROPOSAL BY THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION AND THE NATURAL RESOURCES DEFENSE COUNCIL ON PROPOSED EPS COMPLIANCE REGULATIONS

In this joint filing, CMUA and NRDC ("Stakeholders") offer proposed language to replace selected sections in the CEC Staff Proposed Regulations to Implement SB 1368. The Stakeholders have worked diligently over the last two weeks to discuss and craft proposed amendments to sections 2920, 2921, 2922, and 2930.

Although considerable progress has been made, complete consensus was not achieved on sections 2921 and 2922. CMUA proposed an NRDC accepts, as a matter of compromise, the self-certification of the local publicly owned electric utility and commencement of delivery of power prior to Energy Commission determination of whether or not the covered procurement complies with the greenhouse gases EPS. However, NRDC believes that a penalty provision is necessary for Section 2921 and will be offering additional comments on this section. NRDC proposed and CMUA accepts, as a matter of compromise, that Energy Commission review of covered procurements in section 2922 should be mandatory and not discretionary. Additionally, the Stakeholders agree that the preferable time line should be sufficient to permit a proper review by the Commission and that it should not be unreasonably extended. The Stakeholders, however,

were unable to agree on the exact administrative processes to achieve these goals.

Therefore, the Stakeholders offer this joint proposal for sections 2920, 2921, and 2930 and will offer additional comments on section 2922 in each of their respective filings in this docket.

§2920 Public Notice

Each local publicly owned electric utility shall post notice in accordance with the Ralph M. Brown Act whenever its governing body will deliberate in public on a covered procurement.

(a) At the posting of the notice of a public meeting to consider a covered procurement, the local publicly owned electric utility shall notify the Energy Commission of the date, time and location of the meeting so the Energy Commission may post the information on its website. This requirement will be satisfied if the local publicly owned electric utility provides the Energy Commission with the URL that links to this information.

(b) Upon distribution to its governing body of information related to a covered procurement's compliance with the EPS, for its consideration at a noticed public meeting, the publicly owned electric utility shall make such information available to the public and shall provide the Energy Commission with an electronic copy of the document for posting on the Energy Commission's website. This requirement will be satisfied if the local publicly owned electric utility provides the Energy Commission with the URL that links to the documents or information regarding other manners of access to the documents.

(c) For a covered procurement involving a new or renewed contract with a term of five years or more, the documentation made publicly available at the time of posting pursuant to subsections (a) and (b) shall include at a minimum:

(1) A description of the terms of the contract and option(s) to extend the contract;
(2) A description and identification of the unit(s) or the power plant(s) providing energy under the contract, including power generation equipment and fuel type;
(3) a description of the design or operation of the energy source(s) so as to indicate whether or not they operate to supply baseload generation;
(4) an explanation as to how the contract is compliant with the EPS; and
(5) supporting documents or information which allow for assessment of compliance with the standard, including, but not limited to, staff assessments and reports to the local publicly owned electric utility's governing body, planned or historical production and fuel use data, and applicable historical continuous emissions monitoring data.

(d) For a covered procurement involving a new ownership investment, the documentation made available at the time of posting pursuant to subsections (a) and (b) shall include at a minimum:

(1) For new construction or purchase of an existing generation unit or power plant, a description and identification of the planned power plant or the purchased asset specifying the power generating equipment, power source (i.e., fuel type, wind, biomass), any supplemental fuel source and any historical production and fuel use data.
(2) For incremental investment, which is defined to be a covered procurement as defined in Section 2901(d), a description of the modifications to the unit(s) and their impact on generation capacity, carbon dioxide emissions, and planned operation.
(3) For non-renewable resources, the heat rate or carbon dioxide emissions profile of the power plant, and the source of this information.

§2921 Compliance Filings

Within ten (10) business days after a local publicly owned electric utility enters into a covered procurement, the local publicly owned electric utility shall submit a compliance filing to the Energy Commission regarding the covered procurement. The compliance filing shall contain one paper copy, with original signature, and, if feasible, an electronic copy of the following:

(a) An attestation, signed by an agent of the local publicly owned electric utility authorized by the 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 the Energy Commission's greenhouse gases EPS, 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 Energy Commission decision pursuant to section [2922] that the covered procurement fails to comply with the Energy Commission's greenhouse gases EPS.

(b) The relevant documentation for the covered procurement as listed in either section 2920(c) or (d).

§2922 Compliance and Enforcement

CMUA and NRDC will file separate comments on this section.

§2930 Case-by-Case Review for Reliability or Financial Exemptions

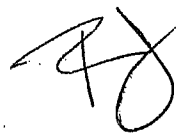
A local publicly owned electric utility may petition the Commission for an exemption from application of this chapter to a particular long-term financial commitment. The Commission shall provide a response to the local publicly owned electric utility within sixty (60) days of the application's filing. In order to be entitled to such an exemption the local publicly owned electric utility must demonstrate that:

(a) the long-term financial commitment to a non-compliant power plant is necessary to address system reliability concerns; or

(b) extraordinary circumstances, catastrophic events, or threat of significant financial harm will arise from implementation of this chapter due to unforeseen circumstances not previously contemplated in the establishment of these regulations.

Dated: February 2, 2007

Respectfully submitted,



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6.5 Post-Workshop Comments of the California Municipal Utilities Association

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

POST-WORKSHOP COMMENTS OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION

February 5, 2007

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Table of Contents

1 Definitions and acronyms

06-OIR-1 – CEC docket to implement SB 1368 for POUs

AB 32 – Assembly Bill 32, the California Global Warming Solutions Act of 2006 (Stats. of 2006, Chapter 488)

Brown Act – The Ralph M. Brown Act which mandates open meetings for local governments.

CARB – California Air Resources Board

CCGT – combined cycle gas turbine

CCR – California Code of Regulations

CEC – California Energy Commission

CMUA – California Municipal Utilities Association

CPUC – California Public Utilities Commission

EPS – Emission Performance Standard

EPS Rules – The regulations that will be adopted by the CEC to implement the EPS and SB 1368.

GHG – Green house gases

IOU – Investor owned utilities

LADWP – Los Angeles Department of Water & Power

LSE – Load serving entity

NCPA – Northern California Power Agency

NRDC – Natural Resources Defense Council

POU – A publicly owned electric utility as defined in section 96014(d) of the Public Utilities Code.

PRC – California Public Resources Code

PUC – California Public Utilities Code

R.06-04-009 – The CPUC rulemaking for implementing SB 1368 for LSEs.

SB 1368 – Senate Bill 1368

SCPPA – Southern California Public Power Authority

SMUD – Sacramento Municipal Utility District

2 Introduction

These comments are provided in response to a request by Commissioner Byron made at the 06-OIR-1 workshop on January 18, 2207. Commissioner Byron requested the participants to comment on the recently adopted decision in R.06-04-009 hereinafter identified as "D.07-01-039" or "Decision." CMUA commends ALJ Gottstein for the manner in which she conducted the rulemaking, sought data to support her decisions, and received input from myriad parties, even the non-jurisdictional parties such as CMUA, NCPA, and SMUD. For the most part, her opinion is articulate, correct, and well-reasoned. However, even the most carefully crafted decision can nary be right on all things. CMUA does disagree with some of the conclusions and interpretations as discussed below.

CMUA respectfully requests the CEC, as an independent agency responsible for interpreting the law and drafting rules according to the Administrative Procedure Act ("APA"), to refrain from adopting each and every legal determination, interpretation, or policy determination of the CPUC in an attempt to be "consistent." CMUA points out that "consistent" does not mean identical.

The Legislature created a two-prong process for the implementation of SB1368; one prong that directs the CPUC to create and enforce a standard for its jurisdictional LSEs, and a totally separate prong whereby the Energy Commission is charged with setting and enforcing the standard for publicly owned electric utilities. While SB 1368 requires that the Energy Commission standard be consistent with the CPUC standard, it does not require that they be identical. Accordingly, the Energy Commission is <u>not required</u> to adopt an identical standard for POUs as the standard adopted by the CPUC for its jurisdictional entities, and all claims to the contrary must be rejected.

In SB 1368, the Legislature clearly acknowledged the fact that the state's POUs are not to be treated exactly the same as the CPUC-jurisdictional entities by requiring the Energy Commission, and not the CPUC, to adopt the EPS for the POUs. Had the Legislature wanted *the same* standard to apply to both the POUs and the CPUC-jurisdictional entities, it would have either simply authorized the CPUC to adopt standards for POUs, or in the alternative require the Energy Commission to adopt the same standard. The Legislature did neither. Instead, the Legislature directed that "the [EPS] established by the Energy Commission for local publicly owned electric utilities shall be *consistent* with the standard adopted by the [CPUC] for load-serving entities."[1]

[1] PUC § 8341(e)(1) (emphasis added).

In order to meaningfully recognize the use of the term *consistent* rather than identical, the Energy Commission must acknowledge that there may be instances in which the standard applicable to POUs is necessarily different. That is not to say that the standard does not *adhere to the same principles*[2] as is required in order for it to be consistent. The POUs have characteristics that distinguish them from the IOUs and other CPUC-jurisdictional entities. For example, POUS have publicly elected or appointed governing bodies, open and public processes for contract review, a greater need for smaller powerplants, and different use of unspecified contracts, to name a few.

In making a determination that the standard for POUs would be adopted by the CEC and not the CPUC, the legislature clearly recognized distinctions of this sort. Acknowledging these differences allows the Energy Commission to adopt a standard and accompanying processes for POUs that are consist with those adopted by the CPUC, without being bound by each and every specific conclusion reached by the CPUC.

In D.07-01-039, the CPUC has acknowledged this two-prong system. In discussing a proposal by SMUD to include a finding in the CPUC decision that would recognize the differences in the procurement practices between publicly-owned utilities and LSEs, the CPUC specifically noted that "the CEC – not this Commission – is responsible for adopted EPS rules that will be applicable to SMUD and other publicly-owned utilities."[3] The CPUC goes on to say that nothing in their "decision is intended to suggest that the CEC may not consider unique circumstances facing these entities with respect to how an EPS will apply" to publicly owned electric utilities.

The POUs note that there may be instances where POUs and the CPUC jurisdictional LSEs are so similarly situated that application of a consistent standard may in fact be synonymous with an identical standard. However, that is not to say that the Energy Commission is required to adopt the same standard "across the board" for the POUs as the CPUC adopts for its jurisdictional LSEs.

Any interpretation of SB 1368 that is read otherwise would render the entirety of § 8341(e)(1) meaningless, as the Energy Commission would be pre-prescribed to do little more than rubber-stamp the Standard developed and adopted by another agency. Clearly, this was not the intent of the Legislature. It is entirely lawful for the Energy Commission to adopt a standard for POUs under § 8341(e)(1) that is consistent with the CPUC standard – fully adhering to the same underlying principles – without being identical to the CPUC standard.

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[2] Random House College Dictionary, 1975.

[3] *See* D.07-01-039 at 152.

3 Overview of Rules proposed by CMUA

Included below is a complete redlined version of CMUA's proposed regulations. Except as noted here, these proposed rules are substantially the same as those proposed in the *Pre-Workshop Comments of the California Municipal Utilities Association on the CEC-Staff Proposed EPS Regulations.*[4]

Section 2908 is newly amended to reflect the CPUC's position on renewable firming and system resources expressed in D.07-01-039 as a result of comments filed by SMUD and PG&E. Section 2908.5 is added to suggest a methodology for utilizing unspecified sources. The language in sections 2920, 2921, and 2930 are exactly as filed in the *Joint Proposal by the California Municipal Utilities Association and the Natural Resources Defense Council on Proposed EPS Compliance Regulations.*[5] Section 2922 is newly added to propose language that implements the principles stated in Chapter 7 of these Comments.

Chapter 11. Greenhouse Gases Emission Performance Standard
Article 1. Provisions Applicable to Electrical Generating Resources 10 MW and Larger

§2900 Scope

(a) This article only applies to long-term financial commitments entered into by local publicly-owned electric utilities for baseload generation supplied by Electrical Generating Resources 10MW and larger that is used to serve the utility's retail electricity customers. ~~and long-term financial commitments in such facilities.~~ The requirements of this article apply at the time the utility enters the long-term financial commitment.

(b) This article shall be re-evaluated and continued, modified, or replaced when an enforceable greenhouse gases emissions limit is established and in operation that is applicable to local publicly owned electric utilities.

§2901 Definitions

(c) This article only applies to long-term financial commitments entered into by local publicly-owned electric utilities for baseload generation supplied by Electrical Generating Resources 10MW and larger that is used to serve the utility's retail electricity customers. ~~and long-term financial commitments in such facilities.~~ The requirements of this article apply at the time the utility enters the long-term financial commitment.

[4] Filed in 06-OIR-1 on January 9, 2007.

[5] Filed in 06-OIR-1 on February 2, 2007.

(d) This article shall be re-evaluated and continued, modified, or replaced when an enforceable greenhouse gases emissions limit is established and in operation that is applicable to local publicly owned electric utilities.

§2901 Definitions

(a) "Annualized capacity factor" means the ratio of the annual amount of electricity produced, measured in kilowatt hours, divided by the annual amount of electricity the unit could have produced if it had been operated at its maximum permitted capacity, expressed in kilowatt hours.

(b) "Baseload generation" means electricity generation from a power plant that is designed and intended to provide electricity at an annualized~~, rolling year~~ capacity factor of at least 60 percent.

(c) "Combined-cycle natural gas" means a power plant that employs a combination of one or more gas turbines and steam turbines in which electricity is produced in the steam turbine from otherwise lost waste heat exiting from one or more of the gas turbines.

(d) "Covered procurement" means:

(1) A new ownership investment in a power plant which includes the procurement of baseload generation from that same power plant, or

(2) A new contract commitment (including renewal contracts) with a term of five years or more~~greater~~ which includes the procurement of baseload generation from~~with~~:

(A) a ~~baseload generation facility, unless the~~ power plant ~~facility~~ that is not deemed-compliant, or

(B) any units added to a ~~deemed-compliant facility~~ power plant if the additional unit results in an increase of 50 MW or more to the power plant's rated capacity.

(e) ~~A~~ "Deemed-compliant ~~facility~~power plant" means any combined cycle natural gas power plant that was in operation or had an Energy Commission final permit decision to operate as of~~by~~ June 30, 2007.

(f) "Local publicly owned electric utility" means a "local publicly owned electric utility" as defined in Public Utilities Code section 9604.

(g) "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.

(h) "Necessary or beneficial expenditure" means a capital expenditure intended to perform maintenance, ensure operational reliability or safety, preserve power plant asset value, comply with legal or regulatory requirements, or achieve environmental improvements.

(i) "New ownership investment" means the original financial commitment for a capital expenditure:

(1) ~~Any capital outlay~~ to construct ~~a~~in new power plant ~~construction~~;
(2) ~~The~~ to acquire~~sition of~~ a new or additional ownership interest ~~or lease~~ in an existing power plant previously owned by others, excluding a deemed-compliant power plant;
(3) to construct ~~A~~any units added to a deemed-compliant ~~facility~~ power plant, if such units results in an increase of 50 MW or more to the power plant's rated capacity; or
(4) ~~Any new capital outlay~~ in a POU's own existing, non-CCGT power plant that is not a necessary or beneficial expenditure and:
(A) is intended to extend the operation of one or more units beyond their current design life ~~of one or more units~~ by five years or more,
(B) results in a net increase in the rated capacity of the power plant, or
(C) is intended to convert a ~~non-baseload~~ power plant that does not supply baseload generation to a power plant that does supply baseload generation~~plant~~.

(j) "Power plant" means a facility for the generation of electricity, and includes one or more generating units at the same location.

(k) "Rated capacity" means the power plant's maximum rated output under specific conditions designated by the manufacturer and usually indicated on the nameplate physically attached to the generator.

(l) "Renewable power plant" means any hydroelectric power plant or a power plant generating electricity using a resource, fuel, or technology as defined in the most recent edition of the Energy Commission's Renewables Portfolio Standard Eligibility Guidebook, without reference to deliverability criteria.

§2902 Greenhouse Gases Emission Performance Standard

The greenhouse gases emission performance standard (EPS) applicable to this chapter is 1100 pounds of (~~0.46~~ 0.50 metric tons) carbon dioxide (CO2) per megawatt hour of electricity.

§2902.5 Necessary or Beneficial Expenditures for Utility Owned Power Plants

The requirements of this article are not intended to inhibit the reliable operation of existing power plants or prevent a publicly owned electric utility from following prudent utility practices in regard to its owned power plant assets.

(a) Maintenance is any action that restores a failed unit to an operational condition or preserves a unit's operational status. Maintenance actions have an effect on a power plant's reliability, safety, availability, downtime, and cost of operation and therefore expenditures for power plant maintenance are not covered procurements. This includes any expenditure for corrective, preventive, predictive, and reliability-based maintenance. A maintenance expenditure is not a covered procurement as a result of a publicly owned electric utility following prudent utility practices to replace aged or failed equipment with currently available high efficiency and high reliability technologies even though the

expenditure may result in an extension of the current design life or increase in rated capacity.

(b) Expenditures that are designed and intended to preserve plant asset value by preventing deterioration or restoring a power plant to its original condition are not covered procurements.

(c) Expenditures to comply with legal or regulatory requirements are not covered procurements.

(d) Expenditures to comply with contractual obligations incurred before the effective date of this article are not covered procurements.

(e) Expenditures that are designed and intended to achieve environmental improvements are not covered procurements. Environmental improvements include, but are not limited to, the prevention, reduction, and elimination of pollution or nuisances resulting from power plant operations. An environmental improvement expenditure designed and intended to reduce a power plant's greenhouse gases emission rate is not a covered procurement.

§2903 EPS Compliance Calculations

The EPS applies to the emissions rate (pounds of CO2 per MWh) of base load generation supplied under a long-term financial commitment. The emission rate of baseload generation is the quotient of the net power plant emissions (pounds of CO2) resulting from the production of baseload generation divided by the amount of baseload generation supplied (MWh) under the long-term financial commitment.

Unless otherwise specified, a power plant~~facility~~'s compliance with the EPS shall be determined by dividing the power plant~~facility~~'s annualized carbon dioxide emissions in pounds by the power plant~~facility~~'s annualized net electricity production in MWh.

(a) A power plant~~facility~~'s annualized carbon dioxide emissions shall be calculated by summing the annualized quantity of each fuel used at the power plant~~facility~~ directly attributable to electricity production, assuming all carbon in the fuels is converted to carbon dioxide. Fuels are those used in the boiler, combustion turbine, reciprocating or other engine, or fuel cell, including primary and secondary fuels, backup fuels, and pilot fuels. Fuels used in ancillary equipment (e.g., fire pumps, emergency generators, vehicles) are not to be included.

(b) A power plant~~facility~~'s annualized net electricity production in MWh shall be the net electricity available for use at a commercial or industrial process onsite or at a host site, or sale or transmission from the power plant~~facility~~.

§2904 Cogeneration Facilities

A cogeneration ~~facility~~power plant's compliance with the EPS shall be determined by dividing the ~~facility~~power plant's annualized carbon dioxide emissions by the ~~facility~~power plant's annualized equivalent net electricity production. Cogeneration is the combined production of useful heat and electricity, or combined heat and power.

(a) A cogeneration ~~facility~~power plant's annualized carbon dioxide emissions shall be calculated by summing the annualized quantity of each fuel used on site at the ~~facility~~power plant

directly attributable to electricity production and industrial or commercial process, assuming all carbon in the fuels is converted to carbon dioxide. Fuels are those used in the boiler, combustion turbine, reciprocating or other engine, or fuel cell, including primary and secondary fuels, backup fuels, and pilot fuels. Fuels used in ancillary equipment (e.g., fire pumps, emergency generators, vehicles) are not to be included.

(b) A cogeneration ~~facility~~power plant's annualized equivalent net electricity production in MWh shall be the net electricity available for use at a commercial or industrial process onsite or at a host site, or for sale or transmission from the ~~facility~~power plant, plus the useful thermal energy, converted to MWh equivalent by dividing the useful thermal energy, in million British Thermal Units (mmBTU) by 3.414 mmBTU/MWh. Useful heat, or thermal energy, output of a topping cycle cogeneration unit is that which is made available to an industrial or commercial process (net of any heat contained in condensate return and/or make up water); used in a heating application (e.g., space heating, domestic hot water heating); or used in a space cooling application (e.g., thermal energy used by an absorption chiller). The useful thermal energy of bottoming cycle cogeneration is that used by an industrial process.

(c) For bottoming cycle cogeneration, the useful thermal energy of cogeneration is that used by all associated industrial processes. The annualized carbon dioxide emissions shall be calculated by summing the annualized quantity of each fuel used on site that is directly attributable to the supply of baseload generation to a utility.

§2905 Offsets~~Biomass, Biogas or Landfill Gas Energy Facilities~~

[Reserved]

~~(a) Facilities using biomass, biogas, or landfill gas as fuel(s) are determined to be compliant with the EPS. Biomass fuels are agricultural and wood wastes and digester and landfill gases that would otherwise be disposed of utilizing open burning, forest accumulation, landfill, flaring, spreading, or composting.~~

~~(b) Non-RPS-eligible facilities that use biomass, biogas or landfill gas in combination with other fuel(s) shall determine compliance with the EPS by calculating carbon dioxide emissions from the fuels other than other biomass, biogas or landfill gas.~~

§2906 ~~Facilities that~~Activities to Sequester, Capture, or Reduce Carbon Dioxide Emissions from Power plants

(a) If a ~~facility~~power plant sequesters its carbon dioxide emissions in accordance with a sequestration program, the emissions calculation of that ~~facility~~power plant, for the purposes of this chapter, shall not include the carbon dioxide emissions successfully sequestered. If a ~~facility~~power plant provides documentation that a reasonable and technically feasible carbon dioxide injection project will result in a permanent sequestration of CO_2 once the injection project is operational, the ~~facility~~power plant can determine EPS compliance by presenting projections (and documenting those projections) of net emissions over the life of the power plant.

(b) The EPS shall not prohibit activities intended to advance the science or technology for reducing the emission rate of a power plant supplying baseload generation.

(c) The EPS shall not apply to any activity of a utility that would be defined as qualified research under 26 U.S.C. § 41(d) if that activity had been undertaken by a taxpayer.

§2907 Renewable Power plants~~rtfolio Standard Eligible Facilities~~

For the purpose of EPS compliance:

(a) ~~Renewable Portfolio Standard-eligible (RPS-eligible) facilities, as defined in the most recent edition of the Renewables Portfolio Standard Eligibility Guidebook, is~~ are Renewable power plants are determined to be compliant with the EPS.

(b) Power plants that are not renewable power plants that use biomass, biogas, biodiesel, or landfill gas in combination with other fuel(s) shall determine compliance with the EPS by dividing the power plant's annualized carbon dioxide emissions in pounds from the fuels other than biomass, biogas, biodiesel, or landfill gas by the power plant's annualized net electricity production.

§2908 ~~Unspecified Power~~ Firm Contracts

~~A contract of five years or more for unspecified baseload power is not compliant with the EPS.~~

Contract commitments for baseload generation with a term of five years or more may contain provisions for the seller to substitute deliveries from specified powerplants with energy purchases from unspecified resources such as system or market power under the following circumstances:

(a) The long-term contract for baseload generation is with one or more specified powerplants or units, each of which is compliant with the EPS specified in these regulations.

(b) For specified contracts with non-renewable resources or dispatchable renewable resources (or a combination or each), substitute energy purchases of system or market power for each specified powerplant or unit are permitted up to 15% of forecast energy production of the specified powerplant over the term of the contract. The long-term contract for baseload generation must only allow the seller to substitute system or market power under either of the following conditions:

(1) The contract permits the seller to provide system or market power when the powerplant is unavailable due to a forced outage, scheduled maintenance or other temporary unavailability for operational or efficiency reasons; or
(2) The contract permits the seller to provide system or market power to meet operating conditions required under the contract, such as provisions for number of start-ups, ramp rates, minimum number or operating hours, etc.

A "dispatchable" renewable resource for the purpose of these regulations is one that is not defined as "intermittent" under subsection (c) below.

(c) For specified contracts with intermittent renewable resources such as solar, wind and run-of-river hydroelectricity, the amount of substitute energy purchases from unspecified resources is limited such that the total purchases under the contract, whether from the intermittent renewable resource or from substitute unspecified resources, do not exceed the total expected output of the specified renewable powerplant over the term of the contract.

§2908.5 Unspecified Sources

(a) Long-term contract commitments for baseload generation from unspecified sources are permitted under the following conditions:

(1) The average greenhouse gas emissions of the seller's system or other portfolio of power supply assets are calculated as a system average and that average does not exceed the EPS. The Commission will consider the emissions attributed to a system or portfolio by using the calculation methodology developed for accounting for such emissions by the California Global Warming Solutions Act of 2006 in Division 25.5 of the Health and Safety Code (beginning with section 38500). Until that method is adopted, applicants may propose alternate methods which the Commission in its discretion may approve or deny.

(2) The seller's system or portfolio cannot contain more than 20% of the individual power supply assets that when evaluated on their own would exceed the EPS.

(3) Sales under the contract terminate upon the addition to the seller's system or portfolio of any resources that when evaluated by themselves would exceed the EPS.

(b) A publicly owned electric utility may request that the Commission evaluate a system or portfolio for compliance with the EPS. A request for evaluation shall be treated by the Commission as a request for investigation under Chapter 2, Article 4 of the Commission's regulations. The Commission shall consider the emissions attributed to a system or portfolio by using the calculation methodology developed for accounting for such emissions by the California Global Warming Solutions Act of 2006 in Division 25.5 of the Health and Safety Code (beginning with section 38500) or, until that regulation is adopted, any other method the Commission deems appropriate.

§2908.6 Exchange Transactions

For exchange transactions, the annualized capacity factor shall be determined on the basis of net energy retained by an exchanging utility.

§2909 Applicability of the Emission Performance Standard to Qualifying Facilities

The emission performance standard shall not apply to any qualifying small power production facility or qualifying cogeneration facility, as defined by 16 U.S.C. §796 (17-18), that is the subject of a must-take provision pursuant to 16 U.S.C §824a-3.

§2920 Public Notification

~~Each local publicly owned electric utility shall provide public notice any time it deliberates undertaking a long-term financial commitment that is or may be subject to the EPS.~~

~~(a)Upon scheduling a public meeting at which proposed long-term financial commitments are to be considered, the utility shall inform the Energy Commission of the date, time and location of the meeting so that the Commission may make the information available on its website. This requirement may be satisfied by providing the Energy Commission the URL at which this information is to be made available.~~

(a) ~~Upon producing documents to be provided the public for discussion of or comment on a proposed investment, the utility shall provide the Energy Commission with an electronic copy of each document for posting on the Commission website. This requirement may be satisfied by providing the Energy Commission the URL at which the documents are available, or by providing details regarding how the documents may otherwise be accessed by the public.~~

Each local publicly owned electric utility shall post notice in accordance with the Ralph M. Brown Act whenever its governing body will deliberate in public on a covered procurement.

(a) At the posting of the notice of a public meeting to consider a covered procurement, the local publicly owned electric utility shall notify the Energy Commission of the date, time and location of the meeting so the Energy Commission may post the information on its website. This requirement will be satisfied if the local publicly owned electric utility provides the Energy Commission with the URL that links to this information.

(b) Upon distribution to its governing body of information related to a covered procurement's compliance with the EPS, for its consideration at a noticed public meeting, the publicly owned electric utility shall make such information available to the public and shall provide the Energy Commission with an electronic copy of the document for posting on the Energy Commission's website. This requirement will be satisfied if the local publicly owned electric utility provides the Energy Commission with the URL that links to the documents or information regarding other manners of access to the documents.

(c) For a covered procurement involving a new or renewed contract with a term of five years or more, the documentation made publicly available at the time of posting pursuant to subsections (a) and (b) shall include at a minimum:

(1) A description of the terms of the contract and option(s) to extend the contract;
(2) A description and identification of the unit(s) or the power plant(s) providing energy under the contract, including power generation equipment and fuel type;
(3) a description of the design or operation of the energy source(s) so as to indicate whether or not they operate to supply baseload generation;
(4) an explanation as to how the contract is compliant with the EPS; and
(5) supporting documents or information which allow for assessment of compliance with the standard, including, but not limited to, staff assessments and reports to

the local publicly owned electric utility's governing body, planned or historical production and fuel use data, and applicable historical continuous emissions monitoring data.

(d) For a covered procurement involving a new ownership investment, the documentation made available at the time of posting pursuant to subsections (a) and (b) shall include at a minimum:

(1) For new construction or purchase of an existing generation unit or power plant, a description and identification of the planned power plant or the purchased asset specifying the power generating equipment, power source (i.e., fuel type, wind, biomass), any supplemental fuel source and any historical production and fuel use data.
(2) For incremental investment, which is defined to be a covered procurement as defined in Section 2901(d), a description of the modifications to the unit(s) and their impact on generation capacity, carbon dioxide emissions, and planned operation.
(3) For non-renewable resources, the heat rate or carbon dioxide emissions profile of the power plant, and the source of this information.

§2921 ~~Annual~~ Compliance Filing

~~On or before February 15th of each year, each local publicly owned electric utility shall submit a compliance filing to the Energy Commission. The compliance filing shall contain one paper copy, with original signature, and, if feasible, an electronic copy of the following:~~

~~(a) An attestation, signed by an authorized agent of the governing board of local publicly owned electric utility under penalty of perjury, that~~

~~(1) the signatory has reviewed, or caused to be reviewed, the compliance submittal, and~~
~~(2) based on the signatory's information, knowledge or belief, the compliance filing does not contain an untrue statement of a material fact or omits to state a material fact necessary to make the statements true.~~

~~(b) A listing of all the covered procurements, excluding those that fall under §2905(a) or §2907, entered into by the utility during the previous calendar year, if any. Each entry shall include the following information:~~

~~(1) For new or renewed contracts of five years or longer:~~

~~(A) the terms of the contract and options to extend the contract;~~
~~(B) the unit(s) or facility(ies) providing energy under the contract;~~
~~(C) a description of the design or operation of the energy source(s) so as to indicate whether or not they are baseload;~~
~~(D) an explanation as to how the contract is compliant with the EPS;~~
~~(E) supporting documents or information which allow for assessment of compliance with the standard, including but not limited to staff~~

~~assessments and reports to the utility's governing board, planned or historical production and fuel use data, and continuous emissions monitoring data.~~

~~(2) For new ownership investment~~

~~(A)For new construction or purchase of an existing generation unit or facility, a description of the planned powerplant or the purchased asset specifying the power generating equipment, power source (i.e. fuel type, wind, biomass), any supplemental fuel source and any historical production and fuel use data.~~

~~(B) For incremental investment which is defined to be a covered investment per Section 2900(a), a description of the modifications to the unit(s) and their impact on generation capacity, emissions, and planned operation.~~

(A) ~~For non-renewable resources, the heat rate or emissions profile of the facility, and the source of this information.~~

Within ten (10) business days after a local publicly owned electric utility enters into a covered procurement, the local publicly owned electric utility shall submit a compliance filing to the Energy Commission regarding the covered procurement. The compliance filing shall contain one paper copy, with original signature, and, if feasible, an electronic copy of the following:

(a) An attestation, signed by an agent of the local publicly owned electric utility authorized by the 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 the Energy Commission's greenhouse gases EPS, 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 Energy Commission decision pursuant to section 2922(e) that the covered procurement fails to comply with the Energy Commission's greenhouse gases EPS.

(b) The relevant documentation for the covered procurement as listed in either section 2920(c) or (d).

§2922 Compliance and Enforcement ~~Investigation~~

~~The Energy Commission may on its own motion, or as a result of a request from a member of the public, staff, or other agency, conduct a complaint or investigation proceeding, or both, pursuant to Chapter 2, Article 4 of these regulations, to determine a POU's compliance with this chapter. In conducting such a proceeding, the Energy Commission may require the production of~~

~~information and documents beyond those made available to the public during consideration of the investment or submitted with the Annual Compliance Filing, including, but not limited to, contracts, staff assessments and reports to the utility's governing board, land use and air quality permits, continuous emissions monitoring data, and other information and documents which aid in assessing compliance with this chapter.~~

(a) Within fifteen (15) days of receiving a completed compliance filing made pursuant to section 2921, the Committee shall conduct an initial review and make a written determination that either:

(1) the covered procurement is compliant with the Energy Commission's greenhouse gases EPS; or
(2) the covered procurement is not compliant with the Energy Commission's greenhouse gases EPS; or
(3) additional information is needed in which case the Committee shall direct staff to notify the local publicly owned electric utility within 5 days to obtain the necessary supplemental information. Staff shall identify the supplemental information required and forward the request to the publicly owned electric utility within ten (10) days after the Committee's determination. Upon receipt of the supplemental information from the local publicly owned electric utility, staff shall immediately transmit the supplemental information to the Committee for further consideration pursuant to subsection 2922(b).

(b) Within fifteen (15) days of the publicly owned electric utility's submission of the supplemental information pursuant to section 2922(a)(3), the Committee shall conduct a secondary review and make a written determination that either:

(1) the covered procurement is compliant with the Energy Commission's greenhouse gases EPS; or
(2) the covered procurement is not compliant with the Energy Commission's greenhouse gases EPS.

(c) In making its determination, the Committee may require the production of information and documents beyond those required in section 2920 or 2921, including, but not limited to, contracts, staff assessments and reports to the local publicly owned electric utility's governing body, land use and air quality permits, applicable historical continuous emissions monitoring data, and other information and documents which aid in assessing compliance with this chapter.

(d) Within ten (10) days of the Committee determination made pursuant to subsection (a) or (b) above, any person may appeal the Committee determination to the full Commission. The appealing party shall file a letter of appeal stating why the Committee's determination is inconsistent with the emissions performance standard, the statute establishing that standard, or the Commission's regulations. The letter of appeal, along with supporting documentation, and the Committee's written determination shall be sent to the Commission's Public Adviser. Within twenty-one (21) days of receiving the letter of appeal and supporting documentation, the Public Adviser shall arrange for the appeal to be presented to the Commission at a regularly scheduled Business Meeting. The Public Adviser

shall inform the appealing party in writing of the Business Meeting date and the procedures for participating in the Business Meeting. The appealing party shall be responsible for presenting the appeal to the Commission during the Business Meeting. Unless otherwise determined during the course of the Business Meeting, the Commission shall determine the appeal during the Business Meeting.

(e) If no party appeals a Committee determination made pursuant to subsection (a) or (b) above, then the Committee determination shall become the decision of the Commission and shall be effective thirty (30) days after the Committee reaches such determination. Any Commission decision made pursuant to subsection (d) above shall become effective thirty (30) days after the date of such decision.

§2930 Case-by-Case Review for Reliability or Financial Exemptions

A publicly owned electric utility~~POU~~ may petition the Commission for an exemption from application of this chapter to a particular long-term financial commitment. The Commission shall provide a response to the utility within 60 days of the application's filing. In order to be entitled to~~For~~ such an exemption the local publicly owned electric utility~~POU~~ must demonstrate that:

(a) the long-term financial commitment to a non-compliant ~~facility~~power plant is necessary to address system reliability concerns; or

(b) extraordinary circumstances, catastrophic events, or threat of significant financial harm will arise from implementation of this chapter due to unforeseen circumstances not previously contemplated in the establishment of these regulations.

Article 2. Provisions Applicable to Electrical Generating Resources Under 10 MW

[Reserved]

4 Section 2901: Regulations Defining New Ownership Investments

- **CMUA request 1: The CEC should adopt different regulations than the CPUC for utility-owned power plants based on the substance of the comments provided by CMUA.**

- **CMUA request 2: The CEC should not utilize a test for "new ownership investment" based on the extension of the life of a plant.**

- **CMUA request 3: The CEC should not utilize a test for "new ownership investment" based solely on increased capacity without more clearly stating the standards.**

- **CMUA request 4: The CEC should propose draft regulations based upon the reasonable alternatives presented by CMUA in regard to necessary or beneficial expenditures.**

- **CMUA request 5: The CEC should immediately open a new rulemaking if it is unable to effect workable regulations to permit necessary or beneficial expenditures by POUs within the existing timeline of Docket 06-OIR-1.**

In D.07-01-039, the CPUC found that the "new ownership investment" trigger includes investments in retained generation.[6] CMUA, here, affirms its earlier stated position in agreement with Southern California Edison that capital expenditures in existing utility-owned power plants are not new ownership investments according to SB 1368. CMUA filed comments in this docket that outlined the legal arguments demonstrating that the legislative intent as indicated by the adopted language of SB 1368 does not pertain to existing utility-owned power plants.[7] Furthermore, CMUA points out the clear distinction in that the CEC has no jurisdiction over the operation of POU power plants while the CPUC controls virtually every aspect of IOU activities concerning their retained generation. At the very least, this distinction allows and possibly mandates a difference between the extent of authority and approval of capital expenditures in existing utility-owned power plants by the CPUC's and CEC's rules.

Of primary concern to CMUA is the CPUC's position to "define "new ownership investments" to include any investment that is intended to extend the life of one or more units of an

[6] D.07-01-039 at 5, 7, 41-54.

[7] *Comments of the California Municipal Utilities Association on the CEC White Paper and Workshop – Triggering and Interpretations of SB 1368*, filed in 06-OIR-1 on December 13, 2006.

existing baseload powerplant for five years or more, or results in a net increase in the existing rated capacity of that powerplant."[8] Unfortunately, the CPUC offered no guidance and little discussion on these two tests for identifying a new ownership investment. The CPUC record is devoid of what would rise to the level of substantial evidence for the CEC to adopt and support a similar conclusion that these two tests are necessary to effectuate the purpose of the statute.[9] Even more so, the CEC is obligated by the Administrative Procedure Act to show that its proposed regulations would either be more effective or as effective and less burdensome than any proposed reasonable alternatives.[10]

The CPUC states in D.07-01-039 that it was "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."[11] Yet, the Decision offers virtually nothing to support that the two tests are the "best" or even "workable." The CEC has no record support to demonstrate the necessity for this rule.[12]

In the following sections of this chapter, CMUA offers discussion, examples, and documents to demonstrate that the CPUC tests are neither the "best" nor "workable." Furthermore, CMUA proposes section 2902.5 dealing with necessary or beneficial expenditures as a reasonable alternative to the CPUC tests, in the event that the CEC follows the CPUC's legal interpretation that capital expenditures in existing owned-power plants constitute new ownership investments.

4.1 Staff-proposed regulation section 2901(a)(4)(A): 5 year extension test.

The most problematical of the two tests is the "5 year extension" test because it cannot be objectively determined. Even still, the 5 year timeframe is completely arbitrary and cannot be mirrored from the time frame in SB 1368 for determining whether a *contract* for the procurement of baseload is a long-term financial commitment or not. The CPUC stated in D.07-01-039 that the definition of long-term financial commitments is asymmetrical, but, the CPUC offered no support in its decision that the 5 year time frame is appropriate for triggering a "new ownership investment."

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[8] D.07-01-039 at 53.

[9] Gov't Code § 11349(a); 1 Cal. Code Regs. § 11; 1 Cal. Code Regs. § 10(b).

[10] Gov't Code § 11346.5(a)(13); Gov't Code § 11346.2.

[11] D.07-01-039 at 52.

[12] Gov't Code § 11349(a); 1 Cal. Code Regs. § 11.

Furthermore, this language is ambiguous and fails because the proposed rule lacks clarity.[13] The "5 year extension" time requirement has absolutely no connection to the CPUC's stated objective of "identifying changes in an existing powerplant that would increase the expected level of GHG emissions from the facility over the long-term." As will be shown below, in many if not most cases the capital expenditures that *might* [?] trigger the "5 year" test would potentially decrease a power plant's expected level of emissions and/or emission rate due to various increases in efficiencies.

4.1.1 A determination of plant life is subjective

The determination of plant life is totally subjective and may be affected by myriad factors. The CEC Staff-Proposed regulations do not provide direction on whether the "life" of a plant means the mechanical, economic, or regulatory life. Furthermore, the CEC Staff-Proposed regulations do not identify the baseline for a plant's life, i.e., from what date is the extension of life measured? In this section, CMUA offers expert opinion to demonstrate the ambiguity of the "5-year" test.[14]

Mr. Ken Speer,[15] states that there are basically three instances when this subject is discussed by power plant owners. The first is during the development period and the determination is unique to the utility and the plant being developed (i.e., the plant needs to last "x" years until something else will replace it). Otherwise, the plant is generally "assumed" to last at least 30 years. Yet, this assumption is *no more than an assumption* and history has shown that the boiler/turbine plants have easily lasted 40 to 50 years.

The second time plant life gets discussed is around the 30-year time frame when the utility is assessing whether the plant is safe and reliable enough to continue to operate and whether it will need major capital expenditures to keep it operating. These assessments generally indicate that one or two components would need replacing to keep the plant operating. In Mr. Speer's experience,

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[13] Gov't Code § 11349(c) "Clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.

[14] "The CEC must provide information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion." 1 Cal. Code Regs. § 10(b)(2). "An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question." *Id.*

[15] Ken Speer, Manager of Generation, Silicon Valley Power; B.S. Mechanical and Nuclear Engineering, University of California; Registered Mechanical Engineer; 26 years in the electric utility industry; positions held include Director Resource Development (PG&E), Plant Manager Contra Costa Power (PG&E), Manager Geothermal Generation (PG&E), Director Projects (DENA).

the components that need replacement have been turbine/generator rotors that were forged in the 50's, 60's and early 70's. The forging were done using open hearth technology and metallurgy that resulted in impurities being concentrated in the center of the bore. Over time the impurities developed cracks that jeopardized the integrity of the shaft. New technologies have evolved using electric furnaces and different metallurgies that have eliminated this problem. The second problem area has been boiler sections that were exposed to very high temperatures over time and needed replacement (natural gas plant only). In a gas turbine, many different components of the engine have *different* life expectancies and are generally replaced as a part of planned maintenance occurring routinely and progressively over time. In coal plants, major boiler sections are replaced as part of the maintenance program due to the erosive nature of coal.

The other instances that cause POUs to discuss plant life are varied. These could be the expected life of the fuel supply, changes in technology and the economics of the new technology, regulatory changes that affect the economics of the plant, and the like. Fuel supply would primarily be an issue for a geothermal or coal plant, particularly a mine-mouth coal plant. The San Juan Plant, for instance, has a coal supply that is estimated to last another 40-50 years. At the end of that period an evaluation would be made to determine if using a rail car delivery would make economic sense.

An example of new technology would be the combined cycle natural gas plant that has replaced the boiler turbine natural gas plant. Although, combined cycle technology has been available since the 1960's, it wasn't until the gas turbine technology matured and natural gas prices increased that caused the boiler/turbine plant to be replaced by the combined cycle plant.

Lastly, Mr. Speer states that regulatory changes can cause a plant to reach the "end of its life." The regulatory change may require significant capital expenditures or impact the performance that makes the plant uneconomic. This, in fact, may be the situation with SB 1368. Therefore, this presents a compelling reason for the CEC to implement reasonable rules lest POUs are forced to cancel needed capital expenditures and a significant number of baseloaded power plants are shut down or allowed to deteriorate.

Mr. Dan McCann[16] states that the term plant "life" is used primarily for financial analysis and contracting purposes. He states that with proper maintenance the actual plant life, as with any mechanical or electrical item, is extremely difficult to determine. Therefore, at Mr. McCann's utility, the determining factor in assessing whether a plant or unit it at the end of its useful life is a financial

matter. The POU must determine whether or not it is cost-effective to maintain the plant due to technological advances in efficiency and/or emissions and maintain regulatory compliance. He cautions, however, that any regulations that will deter from the prudent maintenance and upkeep of a facility will be counterproductive resulting in a reduction in system reliability and the ability to properly and efficiently operate the electric system.

Mr. Fred Fletcher[17] and Mr. Bruno Jeider[18] state that for Burbank Water & Power, "plant life extension" is generally a complex engineering determination that contemplates a capital project specifically undertaken to extend the life of a power plant by making very significant replacements well beyond normal maintenance and repair. The project typically includes a well-defined scope of work that is the product of an engineering analysis and a rigorous inspection of the power plant. It is not possible to extend the life of a plant without such rigorous engineering evaluation.

Mr. Saifuddin Mogri[19] agrees that capital expenditures are basically made on three criteria: obsolescence; regulatory requirements; or economics. Generally, these expenditures are necessary for the purpose of operating the power plant in a safe and reliable manner and to provide the POU's customers with affordable electrical power. Therefore, these expenditures are routinely taken to improve plant reliability and performance and not expressly to extend the life of the plant beyond some arbitrary date.

4.1.2 Routine maintenance and repair may effectively "extend" plant life

Mr. McCann points to the absurdities that could result from the "5 year" test. Literally speaking, proper maintenance and repair of a power plant may effectively "extend" the life of a plant.[20] As shown in Exhibit 1, these activities are routinely large enough to require a capital expenditure which must be approved by the POU's board. Mr. McCann states that older and inefficient plants will be phased out naturally, in an orderly manner, as newer technology becomes

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[16] Power Scheduling/Operations Manager, Riverside Public Utility; 41 years experience in the operations of electric utilities with SCE, City of Riverside, City of Anaheim, and the CAISO.

[17] Assistant General Manager, Burbank Water & Power; MBA, University of South Dakota; BSEE, South Dakota School of Mines and Technology; Professional Electrical Engineer in California and South Dakota; 33 years in electric utility industry.

[18] Power Resources Manager, Burbank Water & Power; BS in Engineering, Walla Walla College; MSEE, Washington State University; MBA, University of British Columbia; over 30 years in electric utility industry.

[19] External Generation Department, LADWP; BSEE and MSEE, University of Texas at Austin; MBA, University of La Verne; over 25 years in the electric utility industry.

available or the ability to upgrade existing plants with newer technology is developed. Forcing currently operating plants and units to shut down due to the fact that maintenance or repair is considered to extend the life of the plant can lead to generation shortages and result in degraded system reliability. He also refers to the CAISO's stated need for particular amounts of generation in specific locations. If existing generation is forced into early retirement, adding generation *in certain locations* will be as critical as obtaining the necessary replacement of generating resources. This will most likely result in longer lead times for construction of new generation, thereby making the well-planned and orderly transition extremely important. The only other possible "fix" is additional transmission, which cannot be constructed any sooner than generation.

The "5 year" test is irrational in regard to maintenance and repair activities. For example, a POU authorizes a capital expenditure for a predictive maintenance system that utilizes self-diagnostic transducers, data acquisition and analysis equipment, and other sensors that will predict failure or alert operators to high stress conditions. This is cost-effective because power plant components will be replaced prior to failure based on their actual condition, or operations will be adapted in real time to reduce stresses. This does away with the removal and replacement of components using a solely time-based regimen. This new system is "intended" and expected to enable the power plant to run economically and efficiently for longer than using the old maintenance procedures. Is this a new ownership investment subject to the EPS and CEC review?

Mr. Fletcher and Mr. Jeider believe that this capital decision is purely a matter concerning operations and maintenance ("O&M"). Proper maintenance seeks to obtain the best service life of the various components. The purpose is to insure that the plant does not fail unexpectedly. Mr. Speer concurs that a capital expenditure of this type would be based upon reducing the costs operating the plant and not extending the life of the plant. He says that a capital expenditure such as this will reduce O&M dollars by maintaining the equipment on condition and reduce the likelihood of in-service failures that result in more expensive repairs and forced outage time (i.e., whenever a unit is forced out of service it is almost always more expensive to purchase the power from the market or the plant would not have been operating). Mr. McCann states that since this expenditure is intended to increase the availability and operating reliability of a power plant, actions such as this should be encouraged as a means to increase system reliability, and not hindered by regulations that act as stumbling blocks to the efficient and stabile operation of the electric system.

[20] By example, Mr. McCann says that proper maintenance should not be considered extending the life of a plant any

In another example,[21] a baseloaded simple cycle power plant that is merely 10 years old when it suffers an unplanned outage due to a catastrophic bearing failure in the compressor section. At the time of this mandatory repair, the POU finds that the manufacturer offers newly available bearings with improved metallurgies that reduce friction and will prolong the unit's time between overhauls. These new bearings are designed and forecast to last 10 years longer than bearings made with the original materials. Since the unit is already disassembled for this repair, the POU authorizes a new capital expenditure to upgrades all the bearings. Is this a new ownership investment?

Mr. Fletcher and Mr. Jeider argue that this should not be viewed as a life extension measure. They note that there are so many parts to a even a simple cycle power plant that the replacement of bearings, even if all the bearings were replaced, would not meaningfully increase the life of a plant. Even blade replacement is considered normal maintenance by Burbank Water & Power. For instance, in the case of a General Electric 7FA gas turbine, blade replacements are performed every 24,000 hours of operation. Burbank expects that technology will improve blade life but this only extends the period between replacements. Life is determined by the cost to continue operation versus replacement.

Mr. McCann says that this is a very common occurrence and that this is the manner in which new design and development is generally conducted. This can lead to new and improved design and technology, ultimately resulting in vastly improved products. Mr. Speer agrees that this scenario is almost always the case during maintenance. Equipment manufacturers are continuously trying to improve their products and anytime maintenance is performed, the owner generally incorporates the upgrades to improve the operation of their plant. In addition, gas turbines have many parts that have a limited life to them. Mr. Speer says that the decision to invest in a new rotor or boiler section, for example, is based upon the economics and improvement of replacing the component. The utility will decide that a new turbine rotor may improve the efficiency by x% and therefore it has a value associated with the efficiency improvement. Or, the utility may calculate the economic benefit of replacing a boiler section because it will reduce the number of forced outages. None of these determinations are made in terms of extending the life of the plant – although that may be their eventual result.

more than replacing the water pump is considered extending the life of an automobile.

[21] *See* Exhibit 2 for a capital expenditure similar to this example.

4.2 Staff-proposed regulation section 2901(a)(4)(B): Increased capacity test.

The increased capacity test is not as problematical as the "5 year" test, since increased capacity can generally be objectively calculated and verified. But in the same manner as the "5 year" test, the increased capacity test may deter activities that would improve reliability, safety, fuel efficiency, and environmental performance.

Mr. Richard Smith[22] offers an example of a 10 year old power plant in which a steam turbine rotor is destroyed due to foreign object damage that causes a catastrophic failure of the unit. The steam turbine can be repaired, but because of the economics, it is more cost-effective to replace the entire unit. The manufacturer now offers the replacement unit with a better seal design, thermal coating, etc. that allows the reinstalled unit to generate an additional 10 MW of power output. Because the original steam turbine rotor is no longer in production, it will actually take longer to special order the original rotor which puts out less power. Is this a new ownership investment that is subject to the CEC EPS and review?

Mr. McCann, Mr. Fletcher, Mr. Jeider, Mr. Smith, and Mr. Speer are in agreement that the decision to undertake this recommended replacement should not be hindered by regulatory requirements or approval processes. This upgrade will result in improving system reliability and it would be very counterproductive to mandate the continued use of outdated equipment, which would not improve the emissions from a particular unit. Mr. Speer articulates further that using a mere capacity increase as a test is wrong to trigger the EPS. He states that a trigger is improper if it prohibits the owner of a power plant from performing an upgrade/component replacement that would create efficiency improvements.

4.3 Legally required capital expenditures on existing power plants

Some POUs own power plants jointly with other public entities via a joint powers authority ("JPA"). An example of this is M-S-R, a minority owner in the San Juan Generating Station.[23] This is a coal plant and the emission rate undoubtedly exceeds what will be the CEC's EPS. The plant, however, requires routine maintenance and repair. Pursuant to the joint ownership and operation agreements, each owner is obligated to pay its share of the costs for these activities as may be

[22] Senior Engineer- Electric Resource Planning and Development, Modesto Irrigation District; BS, Mechanical Engineering; 14 years in the electric utility industry.

[23] *See* Comments of the M-S-R Public Power Agency on the Implementation of SB 1368 Emission Performance Standard and Implementing Regulations, filed in 06-OIR-1 on February 2, 2007.

approved by the project owners as a whole.[24] M-S-R, as a minority owner of the station, does not have the sole right to veto any expenditures approved by the majority of the owners. This is not an isolated occurrence and the CEC regulations must recognize and accommodate this situation, programmatically. It is unlawful for M-S-R to violate the operating agreement, and yet if it unreasonable to subject these expenditures to the CEC EPS and review. Due to the nature of these expenditures, i.e., maintenance, repair, and improvement, it also seems unreasonable to subject M-S-R or any other POU in like circumstance to obtaining a case-by-case exemption.

4.4 CMUA proposed regulation section 2902.5: - Necessary or beneficial expenditures

In D.07-01-039, Finding of Fact 31 states that:

> "Requiring that every replacement of equipment or addition of pollution control equipment would trigger compliance with the EPS does not recognize that the plant and its operation may remain essentially unchanged and such alternations may not even increase the level of expected emissions from the facility over the long-term. More importantly, this approach could reduce powerplant reliability as old parts are repaired rather than replaced."

At the very least, the CEC regulations must incorporate a similar qualifier for new ownership investments as provide by the CPUC decision. To the extent that the CEC follows the CPUC's interpretation of a new ownership investment, CMUA offers a higher road than the CEC Staff-Proposed section 2901(a). Included in Chapter 3 above are CMUA proposed regulation sections 2901(h), 2901(i), and 2902.5. CMUA offers these as reasonable alternatives to the CEC Staff-Proposed regulations.

[24] *See* Exhibit 3. Received from Martin Hopper, Electric Division Manager, Silicon Valley Power; BA Sc. Civil Engineering; 25 years in the electric utility industry.

5 Section 2902: The Greenhouse Gas Emission Performance Standard

- **CMUA request 6: The CEC should establish an EPS at a rate no lower than 1100 pounds of carbon dioxide per megawatt hour.**

In its January 2, 2007 *Staff Proposed Regulations for Implementing the Greenhouse Gases Emission Performance Standard for Local Publicly Owned Electric Utilities* (Proposed Regulations), Energy Commission Staff proposed an EPS of 1,000 pounds of carbon dioxide per megawatt hour (lbs. CO_2/MWh) for the publicly owned electric utilities. At that time the CPUC draft decision in R.06-04-009 had also proposed a 1,000 lbs. CO_2/MWh standard for the CPUC-jurisdictional LSEs. On January 2, 2007 CMUA filed extensive comments in the CPUC's docket on the draft decision, addressing this issue.[25] CMUA also filed pre-workshop comments on this issue in this docket on January 9, 2007. In both sets of comments, CMUA addressed the technical and operational reasons why the actual emissions Standard should be no lower than *1,100* lbs. CO_2/MWh and why the 1,000 lbs. CO_2/MWh fails to account for actual data reflecting the types of power plants utilized by smaller utilities, like those utilized by the publicly owned electric utilities.

On January 26, 2007, the CPUC issued D.07-01-039 adopting an interim performance standard for the CPUC-jurisdictional LSEs. In D.07-01-039, acknowledging comments on the proposed decision, the adopted an emissions performance standard of 1,100 lbs. CO_2/MWh. Specifically, the CPUC noted that allowing a "small amount of leeway" above the 1,000 threshold "would more appropriately take into account smaller-sized CCGTs utilizing newer technologies."[26]

Furthermore, while originally speaking in favor of the 1,100 lbs. CO_2/MWh standard, during the January 11, 2007 Energy Committee Workshop, the Natural Resources Defense Council noted that it was "convinced by a lot of the comments here today, and I don't think there's a huge difference between 1000 and 1100 pounds in terms of the greenhouse gas impact of these plants."[27]

CMUA maintains that the preponderance of evidence provided in the CMUA filings in this docket (as well as those submitted in the CPUC proceeding) clearly indicates that a 1,100 lbs. CO_2/MWh standard complies with the direction in SB1368. A standard of not lower than 1,100 lbs. CO_2/MWh is consistent with the intent of SB 1368. A stated intent of the legislation is to reduce

[25] Comments in the CPUC's R.06-04-009 were filed by the Northern California Power Agency.

[26] *Id.* at 69-70.

the risk of financial exposure to the compliance costs associated with future GHG emissions laws.[28] Adopting an EPS standard of not lower than 1,100 lbs. CO_2/MWh that allows the efficient operation of California's smaller utilities, including those utilized by the state's publicly owned electric utilities that serve approximately a quarter of the retail electric customers in the state, would not open the flood-gates to high polluting power plants. The 1,100 lbs. CO_2/MWh standard advocated by CMUA, and adopted by the CPUC in D.07-01-039 does not expose the state and its ratepayers to greater financial exposure to future compliance costs, but as discussed above is, a high enough level to add considerably to the overall reliability of the state's electric utilities, especially smaller utilities. The evidence clearly shows that a 1,100 lbs. CO_2/MWh Standard protects against harm of unwarranted financial risks, avoids backsliding, *and* enables the publicly owned utilities (and indeed all of the state's load serving entities) to operate efficiently and reliably.

The publicly owned electric utilities also suggested that the Energy Commission standard be measured using International Organization for Standardization (ISO) standard and protocols to address plant degradation issues, as well as instances where plants identical plants located in different locations result in disparate emissions levels. A detailed review of the emissions performance levels shows that while a great number of powerplants would not meet a 1,000 lbs. CO_2/MWh standard, that same data indicates that a 1,100 lbs. CO_2/MWh standard is reasonable level that would allow the efficient operation of powerplants that meet the objectives of smaller energy providers and the intent of SB 1368. CMUA also notes that the Natural Resources Defense Council has opposed the use of the ISO standards, but does support the adopton of a 1,100 lbs. CO_2/MWh standard.[29] Accordingly, CMUA favors the adoption of the 1,100 lbs. CO_2/MWh standard over the consideration of using the ISO protocols and standards for measuring actual emissions.

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[27] January 11, 2007 Hearing Transcript at p. 102; NRDC also noted that it favored the adoption of an identical standard for the Energy Commission and the CPUC.

[28] SB 1368, Section 1(j).

[29] January 11, 2007 Electricity Committee Workshop Transcript at p. 102. Furthermore, while the transcripts are not yet available from the January 18, 2007 Electricity Committee Workshop, during that workshop, NRDC reiterated its support for the 1,100 lbs. CO_2/MWh standard. CMUA believes that PG&E also expressed support for the 1,100 lbs. CO_2/MWh standard, and would forgo utilizing ISO standards and protocols if the 1,100 lbs. CO_2/MWh standard is adopted.

6 Sections 2908 and 2908.5: Firming Contracts and Unspecified Sources

- **CMUA request 7: The CEC should establish regulations to permit the use of unspecified power from systems or other sources, and CMUA believes that the statute specifically directs the Commission to do so.**

- **CMUA request 8: The CEC should implement the methods and provisions in CMUA's proposed regulation sections 2908 and 2908.5.**

- **CMUA request 9: The CEC should immediately open a new rulemaking if it is unable to effect workable regulations for the use of unspecified sources by POUs within the existing timeline of Docket 06-OIR-1.**

6.1 Section 2908: Firming Contracts

Substantially in response to SMUD's comments filed in R.06-04-009, D.07-01-039 created a workable construct for firming unit specific, renewable and intermittent resource contracts. CMUA agrees with the changes to D.07-01-039 in these areas and supports their adoption and implementation in regulations by this Commission. In Chapter 3 above, CMUA has included proposed regulations developed to implement the concepts incorporated in the Decision. These proposed regulations are intended only to implement these concepts and not to modify or expand upon the firming contracts permitted in the Decision.

6.2 Section 2908.5: Contracts from Unspecified Sources

The Decision specifically recognized the potential differences in contracting practices for long-term unspecified resources between the load serving entities regulated by the CPUC and the POUs. SB 1368 allows POUs to enter into contracts for long-term power which originates from unspecified sources. This section will explain that conclusion.

SB 1368 adopted Public Utilities Code Section 8341(e)(8), which mandates that the Energy Commission "shall address long-term purchases of electricity from unspecified sources in a manner consistent with this chapter" in "developing and implementing the greenhouse gases emission performance standard, . . .". Parties active in the CPUC rulemaking as well as Docket 06-OIR-1 agree that "unspecified sources" refers to power purchase contracts not tied to any particular generating source.[30]

[30] *See* CPUC Decision No. 07-01-039 at 11.

This Commission may and in fact is required to address long-term contracts for unspecified sources. The term "shall address" is mandatory, not discretionary.[31] It requires this Commission to deal with or discuss, via a concrete measure, the long-term purchases of electricity from unspecified sources in a manner consistent with SB 1368.[32]

The CPUC chose to deal with or discuss this same issue, in essence, by side-stepping it based in large part on the fact that it is highly unlikely the IOUs will need to enter into long-term contracts for power from unspecified sources.[33] In doing so, the CPUC explicitly recognized the same may not be true of POUs:

> "During our interagency consultations on SB 1368, CEC staff has indicated that the publicly owned electric utilities may not be similarly situated, i.e., they have entered into a significant amount of contracts of five years or greater with unspecified power in recent years and may be planning to do so in the future. *Nothing in today's decision is intended to suggest that the CEC may not consider unique circumstances facing these entities with respect to how an EPS that will apply to them should address unspecified contracts.*"[34]

This candid recognition by the CPUC makes eminent good sense. SB 1368 does not require this Commission to act identically to the CPUC, a fact this CPUC language acknowledges. The only portion of the statute that comes close is that concerning the applicable EPS, i.e., the quantitative standard for GHG emissions. Section 8341(e)(1) provides in part that in establishing the EPS for "all baseload generation of local publicly owned electric utilities" this Commission shall establish an EPS that "shall be consistent with the standard adopted by the [CPUC] for load-serving entities." Even this statutory language mandates only that the CPUC and this Commission adopt *consistent*, not *identical* EPSs.

More importantly, Section 8341(e)(8) requires this Commission to address long term power from unspecified sources in a manner *consistent with the statute itself*, and *not* in a manner consistent with the CPUC's treatment of that issue.

In addressing long-term purchases of power from unspecified sources in a manner consistent with SB 1368, this Commission should rely upon settled rules of statutory construction.

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[31] It is presumed that the word "shall" in a statute is ordinarily mandatory. *People v. Standish* (2006) 38 Cal.4th 858, 870, modified on unrelated issues in *People v. Standish* (2006) 2006 Cal. LEXIS 9876.

[32] *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 796-97 (9th Cir. 2003).

[33] CPUC Decision No. 07-01-039 at 141.

[34] CPUC Decision No. 07-01-039 at 141-42, n. 175 (italics added).

It should seek to ascertain the intent of the legislature so that the purpose of SB 1368 may be effectuated. It should interpret the law in a reasonable and common sense fashion that leads to wise policy, not mischief and absurdity. It should also seek to give "significance, if possible, to every word or part, and harmonize the parts by considering a particular clause or section in the context of the whole."[35] "Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible. . . . Interpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided. . . . ".[36] This Commission should consider "matters such as context, object in view, evils to be remedied, legislation on the same subject, public policy, and contemporaneous construction."[37]

Applying these principles leads to the certain conclusion that, taking into account the differing circumstances faced by POUs versus IOUs and the plain language of the statute, this Commission can and should adopt a policy that the EPS may be applied to contracts for power from unspecified sources by measuring compliance in the context of the contract overall rather than specific generation units.

First, is one of the declared intents of the statute, which is to decrease greenhouse gas emissions while still providing reliable power for Californians.[38] As long as the EPS is met as a whole by an unspecified source contract, that intent is met.

Second, the CPUC's own contemporaneous construction of SB 1368, as reported in footnote 175 of Decision No. 07-01-039, is that this Commission need not adopt the same approach to unspecified sources as the CPUC adopted. This construction is correct and in fact is the only possible construction, given the structure of the statute, which specifically provides separate, if at times parallel, responsibilities for the CPUC and this Commission.

Third, the plain language of the statute, as its various parts are harmonized, demonstrates that this application of the EPS to unspecified source contracts is absolutely consistent with legislative intent. The Legislature clearly intended to allow procurement of power from unspecified sources. If it did not, the Legislature would not have mandated that this Commission "address long term purchases of electricity" from unspecified sources. Instead, it would have forbidden such purchases. Instead, the plain meaning of Section 8341(e)(8) is that such purchases are allowed, but

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[35] Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law § 115.

[36] *California Mfrs. Assn. v. Public Utilities Com.*, 24 Cal.3d 836, 844 (1979).

[37] Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law § 115.

in implementing SB 1368, this Commission must be certain that such purchases are consistent with the statute.

In thus allowing purchases of power from unspecified sources, the Legislature also certainly knew that for *specified* sources, where the generating unit could be identified, SB 1368 would indeed require the EPS to be applied to individual, specific baseload units. This is clear from the definition of "baseload generation" in Section 8340(a), which references, in the singular "a powerplant," as well as from Section 8341(a), which requires long-term financial commitments for baseload generation to comply with the applicable EPS (whether adopted by the CPUC or this Commission.).

The only way to harmonize Section 8341(e)(8) with these provisions concerning *specified* sources is to recognize that the Legislature knew that the EPS could *not* apply to individual generating units in unspecified source contracts. By definition, long-term contracts with unspecified sources, which as demonstrated above the Legislature intended to allow, must be entered into without being able to identify the specific plant in question, since by definition power from an unspecified source is delivered without the ability to identify the plant or plants of origin. Thus, the only way to measure EPS compliance for such contracts is to do so in relation to the contract as a whole.

Fourth and finally, to simply disallow contracts for unspecified sources would both fail to meet the legislative intent and result in reading Section 8341(e)(8) out of the statute. In other words, such an interpretation leads to that section being "surplusage."[39] This Commission may not do that under settled rules of statutory interpretation.

6.3 Proposed Regulatory Treatment of Unspecified Sources

The simple reality of the California energy market is that California imports power and those imports are necessary to serve California's load. The POUs have demonstrated their current and future use of long-term contracts with unspecified resources to reliability serve their load.[40] The task presented to this Commission in SB 1368 is to address power from unspecified resources in such a manner that is consistent with the statute. CMUA recognizes the concerns expressed by NRDC

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[38] SB 1368, uncodified § 1(j).

[39] *California Mfrs. Assn. v. Public Utilities Com.*, 24 Cal.3d 836, 844 (1979).

[40] *See* Exhibit 4. The publicly owned utilities estimate they will enter into approximately three unspecified contracts per year that are not firming contracts otherwise covered by the CPUC's Decision. This small number of contracts allows the Commission to evaluate these contracts or specific systems without putting an undue burden on the Commission's

regarding "cleaning up dirty resources" and importing those resources into California and those of the Independent Energy Producers for a level playing field for instate and out-of-state generators. CMUA also understands the difficulties encountered in previous efforts to quantify emissions from system or market purchases. That does not mean however that all future efforts are doomed to failure. Rather the Commission must undertake and succeed at the task of specifying how long term contracts from unspecified resources must comply with SB 1368 because that is precisely what that law requires. CMUA is concerned about the financial risk faced by California ratepayers by shifting a power supply option from a long-term option to a short-term option. SB 1368 is focused on protecting ratepayers from financial risk. The Commission should be well aware, shifting power purchasing to the short-term market is not without financial risk to California's ratepayers.

Furthermore, CMUA is concerned with the limitations on this Commission to address issues resolved in Phase 2 of the CPUC's proceeding in the greenhouse gas rulemaking. Whereas the CPUC can modify its treatment of system and market contracts in a subsequent decision, this Commission would have to adopt new regulations to affect the same result. Further, POUs need to continue to contract for long-term system purchases so as to best serve their customers without interruption. Therefore, we feel it is imperative that the regulations provide a construct for evaluating and allowing the use of system contracts or other market driven products in ways that satisfy the Commission's EPS. CMUA proposes two methods of addressing long-term baseload contracts: (1) a specific proposal to allow system contracts that meet specified conditions; and, alternatively (2) a process whereby systems or portfolios of unspecified sources can be evaluated by the Commission for compliance with the EPS.

CMUA's specific proposal would have the real potential impact of reducing the amount of noncompliant resources imported into California due to the restrictions it imposes on adding any noncompliant power plants to the system providing the power under the contract. These restrictions would also limit the amount of non-compliant power that could be included in the system portfolio, limiting the exposure of California ratepayers to any "dirty" power and limiting the concerns about creating an uneven playing field for generators.

If the Commission rejects all long-term contracts with system or other unspecified resources, the real result is a shift into the unregulated short-term market wherein the imports have no emission restrictions and could very well include higher levels of noncompliant resources. In

resources but also providing an important long-term purchase option to reduce the economic exposure to ratepayers. *See* Exhibit 4.

addition, much of the power sold by out of state suppliers is system or market supplied power, so a significant source of supply is foreclosed to California – a bad thing for our reliability and economy. Sellers of such contracts that desire long term certainty would sell their product elsewhere. California ratepayers would be subject to less long term power availability and the price fluctuations inherent in the short-term market that is subject to wide variations as demonstrated by the impact of hurricane Katrina on fuel and thus power prices. Subjecting ratepayers to additional cost uncertainty flies in the face of the very purpose of SB 1368, to protect California's ratepayers from additional costs.

7 Principles for compliance and enforcement mechanisms.

- **CMUA request 10: The CEC should not adopt any form of pre-approval of POU covered procurements.**

- **CMUA request 11: The CEC should adopt regulations acknowledging that POUs shall self-certify their covered procurements and may begin energy deliveries prior CEC review.**

- **CMUA request 12: The CEC should adopt public notice regulations no more stringent than section 2921 proposed by CMUA-NRDC.**

- **CMUA request 13: The CEC should adopt compliance filing regulations no more stringent than section 2921 proposed by CMUA-NRDC.**

- **CMUA request 14: The CEC should expressly acknowledge that existing CEC confidentiality rules apply to these regulations.**

- **CMUA request 15: The CEC review process of covered procurements should include a "fast track" process that expeditiously identifies covered procurements that are clearly compliant or non-compliant.**

- **CMUA request 16: The CEC review process by a Committee should result in a formal determination of EPS compliance/non-compliance that becomes effective 30 days after the determination.**

- **CMUA request 17: The CEC should provide a process whereby parties may within a reasonable time period appeal adverse Committee decisions to the full Commission.**

The primary purpose of Chapter 7 is to provide the Commission with record support for regulations incorporating a reasonable after-the-fact review of POU covered procurements, as opposed to a pre-approval methodology used for IOU procurements that is expressly required by, and pre-existed, SB 1368.[41] Moreover, the CPUC recognizes that procurement pre-approval is not required by SB 1368 for any LSEs other than the IOUs.[42]

The CEC Staff-Proposed Regulations incorporate an up-front notice requirement and an annual compliance filing for POUs. CMUA agrees with Staff that this proposal is in complete harmony, and not inconsistent with SB 1368. The Commission would be acting within its lawful

[41] PUC § 8341(b)(1); D.07-01-039 at 154-157.

discretion to implement the Staff-Proposed Regulations substantially as presented. CMUA, on the other hand, sought to understand certain concerns expressed by NRDC and the two organizations worked collaboratively to formulate proposed language for sections 2920, 2921, and 2930 that may represent a proper balance between a pre-approval process and a regulatory scheme having only an annual filing.

CMUA believes that its members and NRDC are in significant agreement concerning certain principles of ensuring compliance and enforcing SB 1368 by the Commission. Yet, the two organizations were unable to achieve consensus on exact language for section 2922 in the short time frame allotted by the schedule for Docket 06-OIR-1.

7.1 Section 2920: Public Notice

All POUs are all subject to the Brown Act which establishes minimum standards for any meeting conducted by local legislative bodies, such as a POU's governing board or city council.[43] The Legislature, through the Brown Act, established a presumption in favor of open meetings but then balanced this with certain needs for confidential debate and information gathering by local legislative bodies.[44]

The CMUA-NRDC proposed regulations require the POU to make a significant amount of EPS-related information available to the public. The proposed rules require that when the POU "distribute[s] to its governing body of information related to a covered procurement's compliance with the EPS, for its consideration at a noticed public meeting, the [POU] shall make such information available to the public and shall provide the Energy Commission with an electronic copy of the document for posting on the Energy Commission's website."[45] This is a more stringent requirement than the CEC Staff-Proposed regulations, which placed no requirements on the POU's posting. This self-imposed obligation demonstrates the POUs' persuasion toward openness and portends a reduced scope, duration, and administrative burden of the CEC's after-the-fact review. Accordingly, this full-disclosure by the POUs from the initial stages of considering a covered procurement supports the CEC establishing a "fast track" process as suggested below by CMUA.

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[42] D.07-01-039 at 159-160.

[43] Gov't. Code § 54950 et seq. Some legislative bodies are subject themselves to *more stringent* processes that are contained within their city charters or other locally adopted practices. *See* Gov't. Code § 54953.7.

[44] Gov't. Code § 54953 (a); *Boyle* v. *City of Redondo Beach*, 70 Cal.App.4th 1109, 1116 (1999); *Cohan* v. *City of Thousand Oaks*, 30 Cal.App.4th 547, 555 (1994).

CMUA provides examples of the breadth and scope of publicly available information for procurements considered by POUs. Most POUs post their agendas and board packets on the web and archive materials.[46] The examples include agendas, board recommendations, and actual copies of contracts. These materials, although voluminous, are attached in their entirety as evidence of open meetings. To demonstrate that not only large POUs follow these open meeting rules, the examples are offered from a full spectrum of sizes of POUs including: Los Angeles (approx. 5,667 MW) in Exhibits 10 through 13;[47] M-S-R, a joint powers agency comprised of three POUs (representing approx. 1,375 MW) in Exhibit 14;[48] Riverside (approx. 544 MW) in Exhibits 18 and 19;[49] Burbank (approx. 294 MW) in Exhibits 8 and 9;[50] Palo Alto (approx. 181 MW) in Exhibits 15 through 17;[51] Azusa (approx. 60 MW) in Exhibits 5 through 7;[52] and the City of Shasta Lake (approx. 32 MW) in Exhibits 20 and 21.[53]

7.1.1 Example 1: a description of processes followed by the City of Los Angeles

Los Angeles is a charter city and its meetings are conducted in accordance with the Brown Act, the Los Angeles City Charter, and the Los Angeles Administrative Code. In regard to its long-term procurements, every contract longer than 3 years is required by Los Angeles City Charter Section 373 and Los Angeles Administrative Code Section 10.5 to be reviewed and approved by both the LADWP Board and the LA City Council. Both the board and council have subcommittees that also review proposed contracts. There is opportunity for public comment at each step along the way as described below:[54]

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[45] CMUA-NRDC proposed regulation section 2921(c), (d).

[46] *See e.g.*, an agenda and a recently approved renewable energy contract for the City of Azusa: http://www.ci.azusa.ca.us/city_clerk/PDF/Agendas2006/RSeptember%2018,%202006embedded.doc; and, http://www.ci.azusa.ca.us/UtilityBoardPDFs/2006/UB%20Agenda%207-24-06%20(Embedded).DOC.

[47] Received from Dirk Broersma, Deputy City Attorney for the City of Los Angeles.

[48] Received from Richard Smith, MID.

[49] Received from Gary Nolff, Assistant Director of Resources, Riverside Public Utilities Dept.

[50] Received from Fred Fletcher, Burbank Water & Power.

[51] Received from Karl E. Knapp, Senior Resource Planner, City of Palo Alto Utilities; Ph.D.

[52] Received from Bob Tang, Assistant Director, Resource Management, Azusa Light and Water; BSEE, University of Sao Paulo; MS & PhD – Electrical Engineering, UCLA; 16 years of experience in energy industry.

[53] Received from Paul Eichenberger, General Manager for City of Shasta Lake Utility.

[54] Notes from Dirk Broersma, Deputy City Attorney for the City of Los Angeles.

1. The initial review and approval of a contract is conducted by the Contracts Committee of the LADWP Board. There is opportunity for public comment at the committee hearing. Public notice is provided at least 72 hours prior to committee meeting.

2. The next review and approval is conducted by the full LADWP Board. There is opportunity for public comment at board hearing and public notice is provided at least 72 hours prior to board hearing. In addition, the board package, including a board letter, resolution and contract are posted on the LADWP website, www.ladwp.com at least 72 hours prior to meeting.

3. The next level of review and approval is accomplished by the Energy and Environment Committee of the Los Angeles City Council. As required, an opportunity is made available for public comment at council committee hearing and public notice is provided at least 72 hours prior to council committee hearing. In addition, the council agenda, the board package which includes the board letter, resolution and contract, and the city attorney report and ordinance are posted on the City of Los Angeles website, www.lacity.org , 72 hours prior to council meeting.

4. Finally, the contract must be reviewed and approved by the full Los Angeles City Council. This meeting also has an opportunity for public comment at City Council. Public notice is provided at least 72 hours prior to council meeting. The council agenda, board package, board letter, resolution and contract, and city attorney report and ordinance are posted on City of Los Angeles website, www.lacity.org, 72 hours prior to council meeting.

7.1.2 Example 2: A description of processes followed by the City of Palo Alto

The City of Palo Alto offers an exemplary model in the conduct of its utility business and in particular its contract review and approval process.[55] Generally, the Palo Alto Municipal Code defines the scope of authority of the Council and the city manager as it relates to energy contracts entered into by the City. In terms of energy purchases (term of contract, total financial commitment, appropriation limits, etc.), the Council has the authority to approve most types energy contracts. Palo Alto employs a "laddering strategy" - purchasing portions of its power requirements periodically (~3 yrs) through an RFP process. Suppliers are pre-qualified in terms of business and financial/creditworthiness criteria and the parties separately negotiate EEI contracts and exhibits/schedules. When there's a need for a product, a bid process to solicit the best price for a quantity of power/delivery terms for future delivery is conducted. By ordinance, the names of the suppliers and the total financial commitment per contract are specified; the ordinance goes into effect 30 days after its adoption. By this ordinance, the city manager is delegated the authority to sign the contract. By authorization on file with the City Clerk, the city manager delegates to the

[55] Notes from Grant Kolling, City Attorney for the City of Palo Alto.

director of utilities or her delegate the authority to execute individual purchase confirmations. There are risk management protocols that must be observed.

In accordance with the Brown Act, a detailed staff report and the proposed contracts are delivered to the Council (or made available for review at the city clerk's office, if the materials are voluminous) 72 hrs prior to the Council's regular meeting. The information is also posted to the City's website at the time the Council packet is dispatched to the Council in the U.S. mail. Copies of the materials are placed at a table in the Council Chambers on the day of the meeting, typically several hours before the Council's meeting. A report of the city attorney, if it's an attorney-client confidential and privileged communication, if any, is placed in the Council packet, but the public does not gain access to that information. The same process applies to any Council committee meeting that would consider energy contracts or other energy investments (e.g., renewable energy contracts).

Whenever Palo Alto's Utilities Advisory Commission ("UAC") deliberates on an energy contract matter as it relates to long-term planning and policy issues, the same process applies, except that the matter/materials are posted to the City's website 5 days before the UAC meets. In effect, the public could have enjoyed the opportunity to review paper on an energy contract up to several weeks in advance of the final action to be taken by the utility's "governing body," the Council.

Regarding "entering into" and "approving contracts," the City of Palo Alto takes the position that the date on which the Council approves the contract (by minute order/consent calendar approval or adoption of a resolution or ordinance) is the date the City enters into/approves the contract. A local agency's ordinance/resolution/rules/etc. may cause this principle to be modified.

Regarding public input on matters before the Council, public communications with the Council on any matter are effected in person at a regular meeting or by mail or email. In the case of Palo Alto, the Council takes public comments very seriously and the Council may: (1) defer action on a matter and request staff to confer with such person and obtain his/her expertise before the Council will take action on a matter; or (2) approve action subject to conferring with such person and obtain his/her expertise. The point is, generally, the Council regularly receives feedback from the public; often the Council or the Mayor or a Council Member will refer those comments directly to staff for response to the sender and/or the Council before the matter is taken up at the meeting.

7.2 Section 2921: Compliance Filing

The CEC Staff-Proposed Regulations incorporate an annual compliance filing. The CMUA-NRDC proposed regulations require the POU to submit a compliance filing to the CEC within ten days of entering a covered procurement. The submission includes actual copies of the relevant material described in section 2921(c) or (d) that was considered in the POU's public meeting. The compliance filing also includes an attestation that the representations made in the filing are true and correct.

7.2.1 Attestation

CMUA disagrees with the need for any language that implicates a penalty for perjury. Clearly, any authorized employee who knowingly submits an attestation containing false information or representations would be subject discipline and possible termination by the POU. Moreover, Government Code § 6203 may be implicated which states that "[e]very officer authorized by law to make or give any certificate or other writing is guilty of a misdemeanor if he makes and delivers as true any certificate or writing containing statements which he knows to be false."

7.2.2 Confidential information

Despite the openness of transactions as discussed above, there is upon occasion, some information that is not disclosed to the public by various POUs. Specifically, the Brown Act recognizes an exception from the open meeting requirements in which the local legislative has a demonstrated need for confidentiality.

Many POUs take the position that very little information concerning energy contracts is appropriately exempt from disclosure under the Public Records Act, and nothing in the EEI or the NAESB contracts is deemed confidential.[56] However, information that can be considered financial, trade secret, or proprietary business data is exempt from disclosure under the Public Records Act. This is consistent with the CEC regulations governing disclosure of Energy Commission records are found at Title 20, California Code of Regulations, section 2501 *et seq.*

Exhibit 22 is a copy of a typical Confidentiality Agreement, this one between SCPPA and a renewable energy developer. In the Recital at page 1, the agreement states that certain information must remain confidential "in order for both parties to effectively compete in the marketplace." In

[56] Notes from Grant Kolling.

this case, there is a modicum of information of which the POU is legally bound to maintain confidentiality.

7.3 Section 2922: CEC Mechanisms for Ensuring Compliance with the EPS

CMUA presents here certain principles that should guide the Commission in drafting workable and reasonable compliance regulations. CMUA has attempted to craft language that implements these principles, although, the words should not override the principles as outlined below.[57] Any CEC regulations should incorporate these principles. CMUA expects that Staff will review and assess compliance filings as they are submitted. CMUA, however, proposes that a binding compliance determination is made by a CEC committee. For ease in the discussion below, this will be called the EPS Committee.

7.3.1 Mandatory review of all covered procurements

As stated in the joint CMUA-NRDC filing on February 2, 2007, NRDC proposed and CMUA accepted, as a matter of compromise, that Energy Commission review of covered procurements in section 2922 should be mandatory and not discretionary. The burden and expeditious nature of this review should be guided by the openness of the POU information provided in section 2921.

7.3.2 Energy deliveries may begin upon entering the covered procurement

A second fundamental principle of the joint CMUA-NRDC filing was that CMUA proposed and NRDC accepted, as a matter of compromise, that the POU's self-certification and commencement of delivery of power would occur prior to the mandatory Energy Commission determination of whether or not the covered procurement complied with the CEC's EPS.

7.3.3 Level 1 review – a "fast track" process

The EPS Rules should encourage POUs to proactively manage their long-term financial commitments by providing an initial "fast track" process to identify covered procurements that clearly do or do not comply with the CEC's EPS. By example, a contract with a renewable resource or with a low-emission CCGT could constitute a clearly compliant covered procurement.[58] A clearly

[57] *See* Exhibit 23 for a flow chart illustrating these principles.

[58] *See e.g.*, Exhibits 4, 6, 11, and 13.

non-compliant covered procurement could be a sole source contract with a non-CCGT power plant that significantly exceeded the EPS.

This "fast track" is an expeditious but thorough review that will achieve the necessary goals of SB 1368 and minimize delay, administrative burden, and uncertainty for counter parties to contracts. The "fast track" will result in one of three determinations from the EPS Committee: (1) the covered procurement is clearly compliant; (2) the covered procurement is clearly non-compliant; or (3) additional information is needed.[59] CMUA anticipates that CEC Staff could create simple forms that that may be more akin to a check list of required information to facilitate the assessment of clearly compliant covered procurements. The availability of a "fast track" process will provide an incentive for POUs to contract with clearly compliant sources and submit sufficient information to the CEC in a timely manner. CMUA proposes that a "fast track" process could and should be completed within 15 days of the POU submitting a completed compliance filing.

7.3.4 Level 2 review - a more extensive review when required

In some cases and for some reasons, the EPS Committee may be unable to make a "fast track" determination. It may be due to the complicated nature of the covered procurement, the lack of data on the underlying sources of baseload generation, or insufficient information in the POU's compliance filing. Therefore, the need for this more extensive review does not signify that a covered procurement is necessarily non-compliant. The secondary process will result in one of two determinations from the EPS Committee: (1) the covered procurement is compliant; or (2) the covered procurement is non-compliant.

CMUA proposes that this two-level review is in harmony with SB 1368 and meets the needs of the Commission, the POUs, NRDC, and the public. The more extensive review complements the "fast track" and ensures that all covered procurements receive the level of review commensurate with their complexity. This effectively guarantees the least administratively burdensome method for the CEC to ensure 100% compliance with its EPS.

7.3.5 Appeal process

The EPS Committee may make a determination of compliance or non-compliance at either level 1 or level 2 reviews. Therefore, POUs or other persons must have the opportunity to appeal

[59] This is substantially similar to the existing CEC process for certifying eligible renewable energy resources and determining whether the eligible renewable energy resources qualify for funding under the Renewable Energy Program.

the EPS Committee's determination to the full Commission. CMUA proposes language that closely follows the CEC Renewable Committee appeal process. CMUA proposes that absent an appeal, the determination of the EPS Committee is the decision of the Commission and becomes effective 30 days after it is made. Similarly, a decision of the full Commission on appeal is effective 30 days from that decision. The purpose for a 30 day interval is in the case of a decision finding non-compliance, the POU must have time to alert counter parties and secure replacement energy before terminating the covered procurement.

7.4 Section 2922: CEC mechanisms for enforcement of the EPS

Pursuant to sections 1231 through 1237 of the CEC's existing regulations, the Commission may initiate an investigation to determine a POU's compliance with SB 1368.

7.4.1 A POU has an independent requirement to comply with the CEC's EPS

In D.07-01-039, the CPUC states that the requirement to comply with CPUC's EPS is the obligation of the LSE and exists "irrespective of whether (or how) [the CPUC] reviews and approves such commitments."[60] CMUA agrees with the CPUC and believes that the same concept is applicable to POUs in regard to the Commission's EPS.

7.4.2 A non-compliant covered procurement will be terminated by the terms of the contract

Pursuant to CMUA's proposed regulation section 2921(a)(4), a POU must file an attestation with its compliance filing that requires "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 Energy Commission decision pursuant to section 2922(e) that the covered procurement fails to comply with the Energy Commission's greenhouse gases EPS." CMUA's proposed regulation section 2922(e) establishes the effective date of the CEC decision at 30 days after that decision is made.

[60] D.07-01-039 at 159.

8 Conclusion

CMUA respectfully requests the Electricity Committee to incorporate the principles, comments, and proposed language presented in these Comments into the draft regulations that will be included in the Notice of Proposed Action for this rulemaking.

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Respectfully submitted,

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10 Exhibits

10.1 LADWP Board – approval letter for routine maintenance and repair

10.2 LADWP Board – approval letter for additional repairs after the beginning of maintenance

10.3 San Juan Project Participation Agreement

10.4 Table of estimated covered procurements by POUs in next 5 years

10.5 City of Azusa - Agenda for meeting to consider a power purchase agreement

10.6 City of Azusa - Recommendation to the Board for entering a power purchase agreement

10.7 City of Azusa – copy of a power purchase contract

10.8 City of Burbank – Staff recommendation for entering a power purchase agreement

10.9 City of Burbank – copy of a power purchase agreement

10.10 LADWP – Recommendation to the Board for a power purchase agreement

10.11 LADWP – Resolution for a power purchase contract

10.12 LADWP – Ordinance for a power purchase contract

10.13 LADWP – copy of a power purchase agreement

10.14 M-S-R – Agenda and power purchase agreement

10.15 City of Palo Alto – Resolution for entering a power purchase agreement

10.16 City of Palo Alto – Staff recommendation to enter a power purchase agreement

10.17 City of Palo Alto – Copy of a power purchase agreement

10.18 City of Riverside – Minutes for entering a power purchase agreement

10.19 City of Riverside – copy of a power purchase agreement

10.20 City of Shasta Lake – agenda for entering a power purchase agreement

10.21 City of Shasta Lake – copy of a power purchase agreement

10.22 SCPPA – Confidentiality Agreement

10.23 Flow Chart for CMUA's proposed regulation section 2922