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08-WHCE-1

BEFORE THE CALIFORNIA ENERGY COMMISSION

DATE JAN 22 2010

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Order Instituting Rulemaking to Implement the
Waste Heat and Carbon Emissions Reduction
Act

Docket 08-WHCE-1

COMMENTS OF THE ENERGY PRODUCERS AND USERS COALITION, COGENERATION ASSOCIATION OF CALIFORNIA, AND CALIFORNIA COGENERATION COUNCIL

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In response to the updated regulations and notice dated January 13, 2010, the Energy Producers and Users Coalition (EPUC), Cogeneration Association of California, and California Cogeneration Council file these comments to address the legality of the Energy Commission's implementing regulations.

INTRODUCTION AND SUMMARY

The Waste Heat and Carbon Emissions Reduction Act (AB 1613) seeks to promote reliance on small combined heat and power (CHP) facilities meeting a minimum overall efficiency standard of 60% (measured in high heating value (HHV)). Despite this unambiguous legislative directive, the Energy Commission's AB 1613 implementation regulations, have established a minimum efficiency threshold of 62%.¹ This deviation fails to comply with accepted canons of statutory interpretation. It also will limit the emission reductions that will be realized by the state contrary to the stated objectives of the statute. As explained below, to ensure consistency with AB 1613, the Energy Commission's implementing regulations must set the program's efficiency standard at 60% (HHV).

THE ENERGY COMMISSION'S AB 1613 DRAFT REGULATIONS FAIL TO CARRY OUT STATUTORY DIRECTIVE

The Energy Commission's implementation regulations fail to effectuate the purpose of the statute. AB 1613 provides that in order for a CHP system to participate in the statute's program, it "*shall meet,*" at a minimum, a 60 percent efficiency standard. The draft regulation twists this interpretation, suggesting

¹ See Section III(c) of Proposed Guidelines for Certification of Combined Heat and Power Systems Pursuant to the Waste Heat and Carbon Emissions Reduction Act, Public Utilities Code, Section 2840 et seq.

instead that a CHP system must meet an efficiency standard set by the Commission, which cannot be lower than 60 percent but may be higher. Application of long-standing principles of statutory interpretation cannot sustain the Commission's reading.

The first step in statutory interpretation is to focus on the plain language of the statute.² The literal meaning of the statute must comport with its purpose.³ Where the plain language is unambiguous, "*judicial inquiry is complete.*"⁴ In fact, the plain or common sense meaning is rejected only where it would lead to an absurd result.⁵ In addition, statutes must be harmonized, internally and with each other, to the extent possible.⁶ In other words, an agency must "*adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature.*"⁷

Applying the rules of statutory interpretation to AB 1613 requires the Energy Commission to first focus on the plain language of the statute.⁸ Section 2843 of the Public Utilities Code unambiguously states that an eligible CHP facility need only meet a minimum efficiency of 60% in order to qualify for AB 1613 benefits:

An eligible customer-generator's combined heat and power system shall meet an oxides of nitrogen (NO_x) emissions rate standard of 0.07 pounds per megawatt-hour and a minimum efficiency of 60 percent. A minimum efficiency of 60 percent shall be based on 100-percent load.

² *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *Bell Atlantic Telephone Cos. v. Federal Communication Comm'n*, 131 F.3d 1044, 1047 (D.C.Cir. 1997).

³ *Lakin v. Watkins Assoc. Industries*, 6 Cal. 4th 644, 658 (1993).

⁴ *Rubin v. United States*, 449 U.S. 424, 430 (1981).

⁵ See *United States v. Granderson*, 511 U.S. 39, 47 (1994) (dismissing an interpretation that would lead to an absurd result); *Dewsnup v. Tim*, 502 U.S. 410, 427 (1992) ("we should avoid construing the statute in a way that produces such absurd results"); *Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989) (where literal reading of statutory term leads to odd result, it is appropriate to examine legislative intent).

⁶ *Moyer v. Workmen's Comp. Appeals Bd.*, 10 Cal.3d 222, 230 (1973).

⁷ *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1868); *King v. St. Vincent's Hosp.*, 502 U.S. 215 (1991). See also *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (where the statutory language is ambiguous, the agency has room to interpret its meaning as long as it is reasonable and consistent with the statutory purpose and legislative history); *James Madison Ltd. V. Ludwig*, 82 F.3d 1085, 1093 (D.C. Cir. 1996) (preferring interpretation of provision that allowed harmony with other provisions over the interpretation that would create conflict with other provisions in the statute); *Hudson Motor Car Co. v. Hertz*, 121 F.2d 326 (6th Cir. 1941) ("*It is an elementary rule of statutory construction that all parts of a statute should be considered together and not any one part by itself, and a survey of all acts of the legislature on the subject is indispensable even though the words are plain, for the true meaning of any part is that which best harmonizes with the entire subject and with every other part of the statute or statutes in pari material.*")

⁸ *Mercer v. Dept of Motor Vehicles* (1991) 53 Cal. 3d 753, 763.)

The common sense meaning of this language is that all CHP under the scope of the regulation that have at least a 60% efficiency standard should benefit from the statute. The section does not say that the CHP system shall meet “the standard set by the Energy Commission” but specifies a statutory value that sets the program’s minimum threshold.

In interpreting AB 1613, the Energy Commission must also ensure that the literal meaning of the statute is harmonized with other provisions of the statute.⁹ This means that where the statute references the 60% standard in different places, the language should be read together in a manner that effectuates the plain meaning of the statutory language. As the Supreme Court has determined,

*Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme —because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.*¹⁰

Importantly, Section 2843(e)(2) provides a credit to CHP meeting a 60% efficiency standard:

*An eligible customer-generator’s combined heat and power system that **meets the 60-percent efficiency standard** may take a credit to meet the applicable NOX emissions standard of 0.07 pounds per megawatt-hour.*

Once again, this section does not say that the credit will go to a CHP system that an efficiency standard set by the Energy Commission; it requires the system to meet “the 60-percent efficiency standard” contemplated by the program. Thus it is unreasonable for the Energy Commission regulations to rely on a 62% minimum efficiency threshold. Doing so would effectively establish two separate CHP efficiency thresholds, which would be an absurd result.

Finally, under accepted canons of statutory interpretation, the Energy Commission must implement the statute in a manner accords with the statute’s purpose and the meaning. With respect to this task, Section 2843(a) requires the Energy Commission’s regulations to reduce waste energy and optimize the efficient use of waste heat. As demonstrated by the chart attached as Appendix A, use of a 62% efficiency standard rather than a 60% efficiency standard will decrease the waste heat and emission reductions that will be realized by this statute.

⁹ *Lakin v. Watkins Assoc. Industries*, 6 Cal. 4th 644, 658 (1993); *Moyer v. Workmen’s Comp. Appeals Bd.*, 10 Cal. 3d 222, 230 (1973).

¹⁰ *United Savings Association v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988).

The attached graph illustrates how the use of a 62% efficiency standard rather than 60% will decrease the scope of CHP emission reductions that will be recognized by this statute. The graph plots several curves, each of which represents a separate heat and power (SHP) benchmark for the efficiencies that would occur if a load were served by SHP alternatives rather than CHP. The curves differ only in the reference used for electric power; the dark blue curve represents a 7,219 Btu/kWh reference; the light blue represents an 8,300 Btu/kWh benchmark and the green represents an 8,800 Btu/kWh benchmark. All three benchmarks use an 80% boiler for a separate heat production reference.

The graph demonstrates two points. First, changes to the electric reference heat rate will change the position of the double benchmark curve. It is no secret that selection of the electric reference heat rate is a very contentious issue or that there are different theories that could support each of the selected heat rates. Importantly, the Energy Commission's own evaluation supports a marginal heat rate of 8,358 Btu/kWh:

*The power plant supplying the utility grid shall be assumed to have an efficiency of 40.8 percent or a heat rate of 8,358 Btu/kWh on a HHV basis after transmission and distribution losses have been subtracted.*¹¹

Second, regardless of the electric reference heat rate used in the double benchmark, the curves help clarify which CHP emission reductions will be recognized and promoted under the regulations.

The graph demonstrates that even with a 60% efficiency standard, the statute will overlook several emission-reducing CHP. With the movement from a 60 to 62% efficiency threshold, there would be a much greater amount of facilities that would be overlooked despite their contribution to the state's efforts. The green, light blue and dark blue shaded region represents beneficial CHP under the related double benchmark standards that would be excluded from the program using a fixed efficiency standard of 60%. The red shaded region above each curve represents the additional facilities that would be overlooked, using the relevant SHP benchmark, if the standard is raised to 62%. In short, the chart illustrates why a 62% efficiency standard fails to "optimize" waste heat and emission reductions.

CONCLUSION

The Energy Commission is obligated to give effect to the language of AB 1613 in its implementing regulations. As demonstrated above, the change from 60% to 62% is a significant deviation that conflicts directly with the language of the statute as well as its objectives. We urge the Energy Commission to reconsider this change.

¹¹ CEC's July 2009 Draft AB 1613 Regulations, at Section III(g).

Respectfully submitted,

A handwritten signature in cursive script that reads "Evelyn Kahl".

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/s/ Beth Vaughan

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Appendix A

Combined Heat and Power (CHP) Carbon Emission Reduction Potential

