STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

In re:	)	
	)	**DECISION REGARDING**
AGENCY: CALIFORNIA ENERGY	)	**DISAPPROVAL OF**
COMMISSION	)	**A RULEMAKING**
	)	**ACTION**
	)	**(Gov. Code, sec. 11349.3)**
RULEMAKING ACTION: Adopt	)	
Sections 2900, 2901, 2902, 2903, 2904,	)	
2905, 2906, 2907, 2908, 2909, 2910, 2911,	)	**OAL File No. 07-0601-04S**
2912, and 2913 of Title 20 of the	)	
California Code of Regulations	)	

SUMMARY OF RULEMAKING ACTION

This rulemaking action is intended to carry out the duties of the California Energy Commission (CEC) pursuant to SB 1368 (Statutes of 2006, Chapter 598) to establish a greenhouse gases emission performance standard for all baseload generation of local publicly owned utilities and to adopt regulations to enforce SB 1368. The regulations adopted by CEC and submitted for review by the Office of Administrative Law (OAL) would add Chapter 11, entitled "Greenhouse Gases Emission Performance Standard," to Title 20 of the California Code of Regulations. This new chapter consists of Article 1, entitled "Provisions Applicable to Powerplants 10 MW and Larger," and Article 2, entitled "Provisions Applicable to Powerplants Under 10 MW (Reserved)." ("MW" means megawatts). The Article 1 provisions for larger powerplants concern scope, definitions, greenhouse gases emission performance standard, compliance with the emission performance standard, annual average carbon dioxide emissions, annual average electricity production, substitute energy, request for commission evaluation of a prospective procurement, public notice, compliance filings, compliance review, compliance investigation, case-by-case review for reliability or financial exemptions, and case-by-case review for pre-existing multi-party commitments. Article 2, however, contains no regulations for smaller powerplants. It simply reserves space for any regulations the CEC may adopt in the future that would be applicable to smaller powerplants. In response to CEC's request, OAL has provided an expedited review of this rulemaking action.

SUMMARY OF DECISION

On June 29, 2007, the Office of Administrative Law disapproved the above-referenced rulemaking action. The reasons for the disapproval are summarized here and explained in detail below.

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

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

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

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

DISCUSSION

The adoption of these regulations by the California Energy Commission must satisfy requirements established by the part of the California Administrative Procedure Act ("APA") that governs rulemaking by a state agency). Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure is subject to the APA unless a statute *expressly* exempts the regulation from APA coverage. Moreover, Public Utilities Code section 8341(e)(2) specifically provides: "The greenhouse gases emission performance standard [established by the Energy Commission for all baseload generation of local publicly owned electric utilities] shall be adopted by regulation pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code)."

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by the Office of Administrative Law ("OAL") for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

The enabling statutes for this rulemaking action require the CEC to establish a greenhouse gases emission standard applicable to long-term financial commitments by local publicly owned electric utilities for any baseload generation[1], and specify that *no* local publicly owned electric utility may enter into a long-term financial commitment unless any supplied baseload generation complies with the standard, and require the commission to adopt regulations to enforce the statute. The pertinent statutory provisions specifically say:

> *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 standard established . . . by the Energy Commission, pursuant to subdivision (e), for a local publicly owned electric utility. [Emphasis added. Pub. Util. Code, sec. 8341(a).]
>
> On or before June 30, 2007, the Energy Commission . . . , shall establish a greenhouse gases emission performance standard *for all baseload generation* of local publicly owned utilities . . . . Enforcement of the greenhouse gases emission performance standard shall begin immediately upon the establishment of the standard. . . . . [Emphasis added. Pub. Util. Code, sec. 8341(e).]
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> The Energy Commission shall adopt regulations for the enforcement of this chapter with respect to a local publicly owned electric utility. [Pub. Util. Code, sec. 8341(c)(1).])

These provisions do not give the Energy Commission discretion to alter the scope of the performance standard required to be established by the statute. Rather, the plain language requires the adoption of the emission performance standard for all baseload generation, requires enforcement of the standard to begin immediately, prohibits long-term commitments by any local publicly owned electric utility that do not comply with the standard, and requires the Commission to adopt regulations for the enforcement of the chapter.

In a situation where a state agency adopted an exemption for small employers from a statutory requirement that, according to the plain language, covered all employers, the Court of Appeal explained:

> " '[T]here is no agency discretion to promulgate a regulation which is inconsistent with the governing statute.' " (*Henning*, supra, 219 Cal.App.3d at pp. 757-758, 268 Cal.Rptr. 476.) Accordingly, we need not concern ourselves with whether the exemption is wise or reasonable as a matter of policy. If it transgresses the statutory power of the agency, it is invalid. (*California Assn. of Psychology Providers*, supra, 51 Cal.3d at pp. 11-12, 270 Cal.Rptr. 796, 793 P.2d 2; see also *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 419, 128 Cal.Rptr. 183, 546 P.2d 687, quoting *City of San Joaquin v. State Bd. of*

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[1] "Baseload generation" is defined by the statute as "electricity generation from a powerplant that is designed and intended to provide electricity at an annualized plant capacity factor of at least 60 percent." Public Utilities Code, sec. 8340(a).

> *Equalization* (1970) 9 Cal.App.3d 365, 374, 88 Cal.Rptr. 12 [" 'It is fundamental that an administrative agency may not usurp the legislative function, no matter how altruistic its motives are' "].) [*Pulaski v. California Occupational Safety and Health Standards Board* (1999) 75 Cal.App.4th 1315, 1341 90 Cal.Rptr.2d 54.]

OAL reserves jurisdiction to determine whether the provisions discussed below are authorized by and consistent with statute once the CEC has addressed the problems we describe and has provided the public with an opportunity to comment both on the clarified regulations and the CEC's demonstration that the clarified regulations are reasonably necessary to effectuate the purpose of SB1368.

A.

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

The regulations in this rulemaking action must satisfy the Clarity standard. Gov. Code sec. 11349.1. To do so, the regulations must be "written or displayed so that the meaning of [the] regulations will be easily understood by those persons directly affected by them. Gov. Code sec. 11349(c).

The CEC has adopted a greenhouse gases emission performance standard in this rulemaking action, but the article that contains the standard only applies to procurements involving powerplants 10MW and larger. Regulation section 2900 provides: "This Article only applies to covered procurements involving powerplants 10MW and larger." Consequently, the regulations in it do not apply to smaller powerplants. The green house gases emission performance standard adopted by the CEC is in the article. Subsection (a) of section 2902, provides: "The greenhouse gases emission performance standard (EPS) applicable to this chapter is 1100 pounds (0.5 metric tons) of carbon dioxide (CO2) per megawatt hour (MWh) of electricity." The plain meaning of these provisions read together is that the greenhouse gases emission performance standard adopted by the CEC *does not apply* to covered procurements involving powerplants less than 10MW.

In contrast, in the rulemaking record, the CEC takes the position that the greenhouse gases emission performance standard *does apply* to the smaller powerplants. With regard to this exemption, Southern California Edison commented that a similar small size exemption was explicitly rejected by the California Public Utilities Commission earlier this year in its corresponding regulations applicable to investor owned utilities as "contrary to the intention of the Legislature" and "potentially harmful to ratepayers," and asked the CEC to remove the 10MW exemption from these regulations. In response, the CEC explains that the smaller facilities are not exempt from the statute; rather, they are only exempt from Energy Commission oversight of their compliance with the statute, which itself prohibits long-term financial commitments in baseload generation that does not comply with the greenhouse gases emission performance standard established by the CEC.

> The Energy Commission believes the regulations meet the requirements of SB 1368. Because the Energy Commission has finite resources it is imperative that implementation of the EPS be as administratively simple as possible; the Energy Commission has determined that it is not currently administratively feasible to impose these regulations on small or de minimis sources. Nor does focusing the proposed regulations on facilities 10MW and larger "exempt" the smaller facilities from application of SB 1368. SB 1368 specifically 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 established by . . . the Energy Commission." (Pub. Utilities Code, section 8341(a).) The regulations do not change the requirements of SB 1368; they identify the methods the Energy Commission has determined are best suited to implement and enforce the EPS. POUs [Publicly Owned Utilities] will need to ensure that they are complying with SB 1368 even if certain activities do not fall under Energy Commission oversight. If it becomes necessary or administratively feasible to also oversee powerplants that are under 10MW, Article 2 is set aside to do just that in another rulemaking. [Final Statement of Reasons, p. 13.]

This response makes no sense unless the greenhouse gases emissions performance standard adopted by the CEC applies to the smaller facilities.

Since, as described above, the language of regulation section 2900 conflicts with the CEC's description of its effect, OAL finds that the regulation does not satisfy the Clarity standard of Government Code section 11349.1. Cal. Code Regs., Tit. 1, sec. 16(a)(2) provides that in such a case OAL shall presume the regulation fails to satisfy the Clarity standard.

B.

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

A regulation must satisfy the Necessity standard of Government Code section 11349.1. To satisfy this standard the record of the rulemaking proceeding must demonstrate that the regulation is reasonably necessary to effectuate the purposes of the statutes it implements, interprets, or makes specific.

> "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality

> of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion. [Gov. Code, sec. 11349(a).]

As discussed above, Public Utilities Code section 8341 specifically provides that no local publicly owned electric utility may enter into a long-term financial commitment unless any resulting baseload generation complies with the greenhouse gases emission performance standard established by the CEC. The statute defines "[l]ong term financial commitment" to mean "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." Pub. Util. Code, sec. 8340(j).

New regulation section 2901(j) defines the statutory term "new ownership investment," in part, by excluding certain investments that would otherwise be commonly understood to be included in the term "new ownership investment." Subsection (j)(3) of this section 2901exempts specified investments from the definition of "new ownership investment," and, consequently, from the regulations. It provides that "new ownership investment" means: "Any investment in generating units added to a deemed-compliant powerplant, if such generating units result in an increase of 50MW or more to the powerplant's rated capacity." This has the effect of exempting investments resulting in an increase of less than 50MW in a powerplant's rated capacity from compliance with the greenhouse gases emissions performance standard.

The CEC cites to Public Utilities Code sections 8340 and 8341 as the statutes that this exemption implements, interprets or makes specific. The record, however, fails to demonstrate by substantial evidence that this exemption is reasonably necessary to effectuate the purpose of these statutes. The "substantial evidence" test was added to the Necessity standard by Chapter 1573, Statutes of 1982 (AB2820). The following letter from Assemblyman Leo McCarthy to Speaker Willie Brown summarized the "substantial evidence" test as used in the Necessity standard:

> The principal addition AB 2820 makes to what we approved in AB 1111 in 1979 is a specific level of evidence that an agency must meet to demonstrate the need for a particular regulation. The standard is substantial evidence taking the record as a whole into account.
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> That standard is a familiar one in the law and has been given a definite interpretation by the courts in the past. Our intent is that an agency must include in the record facts, studies or testimony that are specific, relevant, reasonable, credible and of solid value, that together with those inferences that can rationally be drawn from such facts, studies or testimony, would lead a reasonable mind to accept as sufficient support for the conclusion that the particular regulation is necessary. Suspicion, surmises, speculation, feelings, or incredible evidence is not substantial.
>
> Such a standard permits necessity to be demonstrated even if another decision could also be reached. This standard does not mean that the particular regulation necessarily be 'right' or the best decision given the evidence in the record, but that it be a reasonable and rational choice. It does not mean that the only decision permitted is one that OAL or a court would make if they were making the initial decision. It does not negate

> the function of an agency to choose between two conflicting, supportable views.
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> The proposed standard requires the assessment to determine necessity to be made taking into account the totality of the record. That means the standard is not satisfied simply by isolating those facts that support the conclusion of the agency. Whatever in the record that refutes the supporting evidence or that fairly detracts from the agency's conclusion must also be taken into account. In other words, the supporting evidence must still be substantial when viewed in light of the entire record." (Legislature of California, Assembly Daily Journal, 208th Sess. 13,663-34 (1982).)

With regard to the demonstration of the need for this particular regulation, the record says only the following: "This section [2901] provides definitions necessary to understand the key terms used in the regulations. Initial Statement of Reasons, p. 3. This does not constitute "substantial evidence" that this exemption is needed to effectuate the purpose of these statutes. Consequently, this exclusion fails to satisfy the Necessity standard of Government Code Section 11349.1.

Additionally, in this instance the public has not been provided with a meaningful opportunity to comment on this provision because the CEC has not made the explanation and supporting evidence as to why the exclusion is needed to implement the statutes available for public comment during this rulemaking process. Consequently, this material must be made available for public comment to satisfy the requirements of Government Code section 11346.8(d), which provides:

> No state agency shall add any material to the record of the rulemaking proceeding after the close of the public hearing or comment period, unless the agency complies with Section 11347.1. This subdivision does not apply to material prepared pursuant to Section 11346.9.

C.

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

As discussed above, the statute prohibits a local publicly owned electric utility from participating in a covered procurement if the greenhouse gases emission from the power plant exceeds the emission performance standard adopted by the CEC. Newly adopted regulation section 2901(j)(4)(B), however, defines the statutory term "new ownership investment" so as to create an exemption from the greenhouse gases performance standard for an otherwise covered investment that results in an increase of no more than a 10% increase in the rated capacity of a powerplant.

It is not clear whether this exemption is absolute, or whether it only applies to routine maintenance. The text appears to create an absolute exemption. It provides that "[a]ny investment in an existing, non-deemed compliant powerplant owned in whole or part by a

local publicly owned electric utility that . . . results in an increase of greater than 10% in the rated capacity of the powerplant" is not "[n]ew ownership investment," and thus is exempt from the greenhouse gases emission performance standard established by the CEC. In the final statement of reasons, however, the CEC explains the effect of the provision as follows: "The Energy Commission determined that allowing an increase of up to 10% in rated capacity without triggering the necessity to comply with the regulations was necessary to allow for routine maintenance and was still in keeping with SB 1368." Final Statement of Reasons, p. 14. This appears to limit the exemption to investments needed for routine maintenance. Since the language of regulation section 2901(j)(4)(B) conflicts with the CEC's description of its effect, the regulation does not satisfy the Clarity standard of Government Code section 11349.1. Cal. Code Regs., Tit. 1, sec. 16(a)(2) provides that in such a case OAL shall presume the regulation fails to satisfy the Clarity standard.

D.

The record does not demonstrate that the public has been given an opportunity to comment on the evidence the CEC is relying upon to demonstrate that the 10% exemption from the greenhouse gases emission performance standard established by 2901(j)(4)(B) is reasonably necessary to implement the purpose of Public Utilities Code sections 8340 and 8341.

The record does not demonstrate that the public has been given an opportunity to comment on the evidence the CEC is relying upon to demonstrate that the exemption established by 2901(j)(4)(B) (discussed above in part C) from the greenhouse gases emission performance standard of long-term financial commitments is reasonably necessary to implement the purpose of Public Utilities Code sections 8340 and 8341. The initial statement of reasons says only that the definitions section, which includes the exemption, "provides definitions necessary to understand the key terms used in the regulations." Initial Statement of Reasons, p. 3. It says nothing to specifically explain why an exemption from the performance standard for an investment resulting in no more than a 10% increase in a powerplant's rated capacity is reasonably necessary to carry out the statute. The record indicates that this is the only explanation of the need for this exemption that the CEC has made available for public comment.

We note that after the close of the opportunity for public comment, in the final statement of reasons, in response to comments the CEC discloses for the first time that it has determined that this exemption is necessary to ensure that publicly owned utilities are not prohibited from maintaining the operation of their power plants simply because there might be an incidental increase in capacity resulting from such maintenance. The disclosure of that determination for the first time after the close of public comment in this instance prevented the public from having a meaningful opportunity to comment the CEC's basis for the regulation. It is not fair to allow the CEC to add this determination or the information it relies upon for the determination to the record without giving the public an opportunity to comment on it. Consequently, this determination and information must be made available for public comment to satisfy the requirements of Government Code section 11346.8(d) and the purposes of the APA -- meaningful opportunity for public participation and effective judicial review.

OAL reserves jurisdiction to determine whether the record contains substantial evidence to support the determination that the exemption established by 2901(j)(4)(B) is reasonably necessary to effectuate the purposes of SB1368 until the regulation's clarity problems have been resolved and the public as had an opportunity to comment on the CEC's demonstration that the clarified exemption is reasonably necessary to effectuate the purpose of SB1368.

For these reasons OAL disapproved the above-referenced rulemaking action

We note that the Form 400 submitted to OAL in this filing is signed by Jackalyne Pfannenstiel, the chair of the commission. The line on the form for the typed name and title of the signatory, however, is blank. The name and title of the person who signs the form must be typed on the form to satisfy the requirements of Cal. Code Regs. Tit. 1, sec. 6.

We also note that in this filing the Form 400 with final regulations attached are listed on the Table of Contents and were included in the closed rulemaking record. Please be advised that Government Code section 11347.3 does not require the final text to be included in the rulemaking record.

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Date: July 2, 2007

MICHAEL McNAMER
Senior Counsel

for: Susan Lapsley
Director

Original: Jackalyne Pfannenstiel, Chair
cc: Lisa DeCarlo, Senior Counsel