

**INITIAL COMMENTS ON THE DRAFT GENERAL DUTY STANDARDS OF
RELIANT ENERGY COOLWATER, INC., RELIANT ENERGY ELLWOOD,
INC., RELIANT ENERGY ETIWANDA, INC., RELIANT ENERGY
MANDALAY, INC., AND RELIANT ENERGY ORMOND BEACH, INC.**

SUBMITTED TO THE

**CALIFORNIA ELECTRICITY GENERATION FACILITIES
STANDARD COMMITTEE**

ON

APRIL 23, 2003

INITIAL COMMENTS ON THE DRAFT GENERAL DUTY STANDARDS OF RELIANT ENERGY COOLWATER, INC., RELIANT ENERGY ELLWOOD, INC., RELIANT ENERGY ETIWANDA, INC., RELIANT ENERGY MANDALAY, INC., AND RELIANT ENERGY ORMOND BEACH, INC.

I. INTRODUCTION

Reliant Energy Coolwater, Inc., Reliant Energy Ellwood, Inc., Reliant Energy Etiwanda, Inc., Reliant Energy Mandalay, Inc., and Reliant Energy Ormond Beach, Inc. (collectively or individually, “Reliant”), submit these initial comments on the draft General Duty Standards issued by the California Electricity Generation Facilities Standards Committee (the “Committee”).¹ Reliant welcomes the opportunity to work with the Committee on the standards-setting process.

II. BACKGROUND

Relevant to this proceeding, Reliant owns approximately 3,800 MW of gas-fired generation at five generating facilities located in Southern California. Reliant acquired these facilities in 1998 from the Southern California Edison Company (“SCE”) as part of the restructuring of California’s electric utility industry pursuant to AB 1890. From their acquisition in 1998 through Spring 2001, these facilities were maintained under a contract with SCE. Beginning in Spring 2001, Reliant began to operate and maintain the generating facilities using its own forces. Reliant has been and currently is involved in an ongoing process to refine and improve its maintenance, logging and operating

¹ In submitting these initial Comments and otherwise participating in this proceeding, Reliant expressly reserves each and every, all and singular, its rights to challenge the legislation enacted in Chapter 19 of the 2000-2001 Second Extraordinary Legislative Session and the authority conferred on the Commission or Committee therein, as well as any requirement that the Commission may attempt to impose on Reliant pursuant to such authority or otherwise. Reliant’s submission of these initial Comments and its participation in this proceeding is purely voluntary, in no way implies its acceptance of, or acquiescence to, Commission jurisdiction over federally designated Exempt Wholesale Generators (“EWG”), and shall not operate as a waiver of any of the foregoing rights, or an admission that the Commission or the Committee possesses authority to impose any requirement on Reliant, its facilities or its operations, including, without limitation, authority to require Reliant to participate in this proceeding.

procedures. On April 16, the Committee issued the draft General Duty Standards as a supplement to the Generator Maintenance Standards that have been pending legal review since February 3, requesting comments by April 23.

III. COMMENTS

Reliant appreciates the idea behind the General Duty Standards: quickly implement three general principles of generator maintenance and operation to fill in for detailed standards that may not be ready for implementation before the summer peak season. However, that the proposed General Duty Standards are contrary to the clear language of SB 39XX, violate due process, are impermissibly vague and unworkable, and should therefore not be adopted. A better course of action would be for the Committee to redouble its efforts to complete its work in a timely fashion as directed by SB 39XX.

The Proposed General Duty Standards Do Not Comport With the Language of SB 39XX

The Committee has proposed three General Duty Standards. The first two, that all Facilities shall be maintained and operated 1) in a safe, reliable and efficient manner that promotes and protects the health and safety of California residents and the public; and 2) so as to be available to meet the demand for electricity and promote system reliability are so vague as to be unworkable. In fact, they are paraphrases and rewordings of the legislative findings from SB 39XX that the Committee cites in the draft Resolution attached to the April 16 letter. In SB 39XX, the Legislature directed that based on its findings, the Committee was to develop standards to achieve these objectives. These legislative findings, however, are not the standards – they represent the goals to be achieved by the standards. The Committee cannot merely adopt the Legislature’s findings as its standards. To do so would be to violate the intent of SB 39XX which is

for the Committee to develop standards to meet the Legislature's goals. The Committee has begun this work with the adoption of Generator Maintenance Standards on February 3 (still pending legal review), and Logbook Standards on April 1. The Committee should redouble its efforts to complete its work and comply with SB 39XX.

The third proposed Standard, that all Facilities should comply with the CAISO's protocols for the scheduling of power plant outages also does not comply with SB 39XX. Section 1(c) of the statute clearly states that the Commission should apply to FERC for authority to enforce the CAISO outage scheduling protocols through the Participating Generator Agreement ("PGA"). For the Committee instead to adopt the CAISO protocols as a new operation standard to be enforced by the Commission thus violates the clear language of SB 39XX.

It also violates the Supremacy Clause of the United States Constitution. The CAISO outage scheduling protocols are part of the CAISO Tariff which is on file with and approved by the FERC pursuant to its authority under the Federal Power Act, 16 U.S.C. § 792, *et seq.* As such, the enforcement of the CAISO outage scheduling protocols is subject to exclusive FERC jurisdiction. *See Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988); *see also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). The authors of SB 39 XX obviously recognized the jurisdictional limitations associated with enforcing the CAISO outage scheduling protocols and thus directed that implementation should be through application to FERC. The Committee cannot avoid the exclusive jurisdiction of the FERC by attempting to impose the CAISO protocols as its own standard. Thus, the Committee should not adopt this proposed third standard. Beyond the fact that it is clearly contrary to the language of

SB 39XX, its adoption will only lead to unnecessary jurisdictional arguments which will more than likely delay, rather than expedite, any process whereby the Commission may gain authority to enforce the CAISO outage protocols.

The Proposed General Duty Standards Are Vague and Do Not Provide Adequate Notice of Required Generator Behavior

The first two proposed standards, as noted above, are so vague as to be unworkable. They do not provide adequate notice to generators of the standards of behavior to which they will be held, and thus violate due process. It is axiomatic that an administrative rule must provide adequate notice to a party in order to pass constitutional muster. Even a generator with “extraordinary intuition or . . . the aid of a psychic,” *U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1357 (D.C. Cir. 1998), cannot divine what behavior is required by the first proposed standard that it must operate its facility in a manner that “promotes and protects the health and safety of California residents, businesses, employees and the public.” That is why the Legislature directed the Committee to develop clear standards to further this goal. The Generator Maintenance and Logbook Standards adopted to-date by the Committee run in the hundreds of pages and specify, to a fault, required behaviors. These General Duty Standards, which are to supplement those hundreds of pages, provide no notice of required behavior. The behavior required by these proposed standards cannot be contained in the previously adopted Generator Maintenance and Logbook Standards since these General Duty Standards are in addition to and supplement those earlier standards. They thus must require additional behavior beyond that contained in hundreds of pages of adopted Generator Maintenance and Logbook Standards. However, a generator has no way of knowing what that required

behavior is.² Such vague standards provide no notice to generators, are thus unworkable, and consequently offend due process. They should not be adopted.

² Also, such vague standards will be unenforceable by the Commission, particularly if the Commission intends to impose some form of penalty. The requirement that only specific regulatory prohibition can give rise to penalties emanates from the dictates of basic due process. *Satellite Broadcasting Co. v. F.C.C.*, 824 F.2d 1, 3 (D.C. Cir. 1987) (“Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”). As the D.C. Circuit has “made it clear that, ‘[i]n the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it - an agency may not deprive a party of property,’ particularly when ‘the interpretation is so far from a reasonable person’s understanding of the regulations that they could not have fairly informed [the regulated party] of the agency’s perspective.’” *U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998), quoting *General Electric Co. v. E.P.A.*, 53 F.3d 1324, 1328, 1330. See also *Rollins Envtl. Servs. v. E.P.A.*, 937 F.2d 649, 652 n. 2 (D.C. Cir. 1991) (“[A] regulation carrying penal sanctions must give fair warning of the conduct it prohibits or requires.”) (citation omitted).

IV. CONCLUSION

Reliant appreciates the idea behind the draft General Duty Standards. Reliant respectfully submits, however, that the proposed General Duty Standards are contrary to the clear language of SB 39XX, violate due process, are impermissibly vague and unworkable, and should therefore not be adopted. A better course of action would be for the Committee to redouble its efforts to complete its work in a timely fashion as directed by SB 39XX. Reliant looks forward to working with the Committee in developing appropriate and useful standards.

Respectfully submitted,

(electronically signed)

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Dated: April 23, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the **INITIAL COMMENTS ON THE DRAFT GENERAL DUTY STANDARDS OF RELIANT ENERGY COOLWATER, INC., RELIANT ENERGY ELLWOOD, INC., RELIANT ENERGY ETIWANDA, INC., RELIANT ENERGY MANDALAY, INC., AND RELIANT ENERGY ORMOND BEACH, INC.**, on the attached service list for R.02-11-039 by mailing a properly addressed copy by first-class mail with postage pre-paid to each party listed below and on the electronic service list maintained for this proceeding.

Executed on April 23, 2003, at Washington, D.C.

(electronically signed)
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