

**BEFORE THE CALIFORNIA ELECTRICITY GENERATION FACILITIES
STANDARDS COMMITTEE**

Related Case: California Public Utilities Commission Rulemaking 02-11-039

**COMMENTS OF EL SEGUNDO POWER LLC, LONG
BEACH GENERATION LLC, CABRILLO POWER I LLC,
AND CABRILLO POWER II LLC (COLLECTIVELY, WEST
COAST POWER) ON THE PROPOSED GENERAL DUTY
STANDARDS**

April 23, 2003

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In response to the invitation of Carl Wood, the Presiding Officer of California Electricity Generation Facilities Committee (“Committee”), presented in his letter of April 16, 2003, and as part of a continuing effort to work cooperatively with the Committee, El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC (collectively, West Coast Power¹ (“WCP”)) offer the

¹ WCP is a convenient way to refer collectively to the limited liability corporations that own and operate the Encina power plant, previously owned by San Diego Gas & Electric Company (SDG&E) and now known as Cabrillo Power I, 13 combustion turbines in the San Diego area also previously owned by SDG&E (now named Cabrillo Power II), and the El Segundo and Long Beach power plants previously owned by Southern California Edison Company. The entities owning and operating these plants have each been determined by the Federal Energy Regulatory Commission to be exempt wholesale generators as defined under federal law and, pursuant to the provisions of federal law, are engaged “*exclusively* in the business of owning or operating, or both owning and operating, . . . eligible [electric generating] facilities and selling electric energy at *wholesale*.” (15 U.S.C. § 79z-5a(a)(1) (emphasis added).)

following comments on the proposed General Duty Standards.²

Subject to two crucial reservations, WCP finds the proposed General Duty Standards to be unobjectionable, at least with regard to Exempt Wholesale Generators (“EWGs”) like WCP. Viewed in the proper light, the standards may provide a way for the Committee to fulfill its obligations under SB 39XX without encroaching on areas reserved for exclusive federal jurisdiction. Viewed in another light, however, the generality of the standards could create a significant enforcement problem and a potential for interpretations that would run afoul of proper jurisdictional boundaries.

WCP’s first reservation is its repeated concern that the state lacks jurisdiction over EWGs, and thus neither the Legislature nor the Committee can lawfully impose standards in this area on EWGs. However, WCP has also consistently tried to work with the Committee and the California Public Utilities Commission (“CPUC”) in an effort to find ways to carry out the intent of SB 39XX without creating jurisdictional conflicts. Furthermore, although Commissioner Wood’s letter states that “participants

² By voluntarily submitting these comments, West Coast Power is not in any way conceding that the Committee or the California Public Utilities Commission (“CPUC”) has jurisdiction over, or can lawfully compel a response to the Committee’s process or CPUC’s rulemaking by, WCP, the four named limited liability corporations, their affiliates, or the generating plants that they own and operate. WCP expressly reserves the right to challenge fully, in an appropriate forum, the relevant portions of SB 39XX and any requirement the Committee or the CPUC may attempt to impose on WCP, the four named LLCs, their affiliates, or other wholesale generators. Nothing in these comments constitutes a waiver of such rights, including these entities’ rights to seek relief in federal court for violations of federal law or the United States Constitution. WCP makes this express reservation pursuant to the provisions of *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 420 (1984); see *United Parcel Service v. California Public Utilities Comm’n*, 77 F.3d 1178, 1182 (9th Cir. 1996). Furthermore, WCP and the four LLCs do not consider themselves to be respondents in the CPUC’s rulemaking, because they are not “public utilities” as defined in the Public Utilities Code.

need not submit comments to the Committee on implementation and enforcement” of the proposed standards, the proposed standards will not exist in isolation. Issues concerning implementation, enforcement, and interpretation of the proposed standards are central to the jurisdictional dilemma that the comments of WCP and others have repeatedly highlighted.

As mentioned above, however, the proposed General Duty Standards might also be interpreted in a way that presents an acceptable solution to this persistent jurisdictional dilemma. The key to this breakthrough—*i.e.*, the possibility that the proposed General Duty Standards could serve to solve the jurisdictional dilemma while allowing the Committee to fulfill the functions SB 39XX assigns to it—is the subject of WCP’s second reservation.

WCP’s second crucial reservation arises from an assumption suggested by the wording of the proposed standards. WCP assumes that the intent of the proposed General Duty Standards is to affirm existing obligations imposed on generators under federal, state, or local laws and regulations. This assumption is based on several elements of the standards. The paragraph following the statement of the standards, for example, makes clear that the proposed standards are not intended to “modify, delay, or abrogate” any existing laws or regulations. In addition, the standards appear to be designed to restate existing obligations. For example, the third standard reads, “All Facilities shall comply with the protocols of the California Independent System Operator [“CAISO”] for the scheduling of powerplant outages.” For EWGs, that obligation is already imposed by the Federal Energy Regulatory Commission (“FERC”) and by the

Participating Generator Agreements with the CAISO.³ Similarly, the second standard, which reads, “All Facilities shall be maintained and operated so as to be available to meet the demand for electricity, and promote electric supply system reliability,” also echoes obligations already imposed by FERC, through its orders and through the FERC-approved CAISO tariff (*i.e.*, generators are required to offer their power for sale in the CAISO’s electricity markets⁴; generators are required to schedule planned outages with the CAISO and to notify the CAISO of any unplanned outages⁵; generators may be subject to Reliability Must-Run contracts and are subject to emergency orders from the CAISO to run or to reduce generation to maintain system reliability and stability⁶). The first standard likewise repeats obligations that are already imposed on WCP’s plants by federal, state, and local laws and regulations on health, safety, and protection of the environment.

This view of the proposed standards also makes sense in terms of administrative economy. Why should the Committee attempt to duplicate the efforts of several other governmental agencies that are focused on achieving the same purposes as the Committee? Nothing in SB 39XX prevents the Committee from relying on the efforts

³ See the CAISO’s Outage Coordination Protocol, part of the CAISO’s FERC electric tariff. The Protocol may be viewed at <www.caiso.com/docs/2002/03/20/200203201008509285.pdf>.

⁴ See *Order Establishing Prospective Mitigation and Monitoring Plan for the California Wholesale Electric Markets* (2001) 95 FERC ¶ 61,115, pp. 61,355--61,357.

⁵ *Id.* at p. 61,355; see also CAISO’s Outage Coordination Protocol.

⁶ See the CAISO’s Dispatch Protocol, especially Part D10 on Emergency Operations and section DR10.2.6, which sets forth the obligations of Participating Generators to respond to the CAISO’s instructions during emergencies. The Protocol may be viewed at <www.caiso.com/docs/2002/02/12/2002021215381518908.pdf>.

of other agencies, and in light of the current need to cut the costs of state government, it is hard to imagine that the Legislature would oppose efforts to lower costs and to improve efficiency in government. It is much more efficient and logical for the Committee to rely on the efforts of other agencies and not to reinvent the wheel in this area.

Thus, to the extent that the proposed General Duty Standards merely affirm obligations and duties that are already imposed on WCP's plants and operations by federal law, FERC, the CAISO tariffs, the Participating Generator Agreements, and by state and local laws and agencies acting within the proper scope of their jurisdiction, the proposed General Duty Standards are unobjectionable.

However, *if* the proposed General Duty Standards are intended to go beyond these existing obligations and duties or to attempt to create a basis in state law for an obligation governed exclusively and preemptively by federal law, WCP requests the Committee to clarify its intent and to identify specifically the ways in which the proposed General Duty Standards are intended to exceed the requirements of existing law. To the extent that the proposed General Duty Standards go beyond existing law, the question of enforcement takes on much greater significance, since the general language of the proposed standards does not provide any way for a generator to determine whether it is in compliance with the standards.⁷

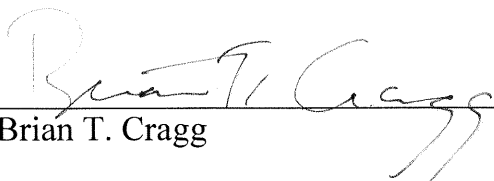
⁷ See *Connally v. General Construction Co.* (1926) 269 U.S. 385, 391 [“a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law”]; *In re Newbern* (1960) 53 Cal.2d 786, 792. This constitutional requirement applies to civil as well as criminal statutes. *E.g., Cramp v. Bd. of Public Instruction* (1961) 368 U.S. 278.

For these reasons, *if* the proposed standards are intended to go beyond the requirements of existing law, WCP cannot support the standards. Moreover, fundamental due process requires that the Committee should clarify its intent and give generators a fair opportunity to review, consider, and comment on the intended scope of the proposed General Duty Standards.

But if the proposed standards are intended only to affirm existing laws that already apply to EWGs, WCP concludes that the proposed General Duty Standards are unobjectionable and may provide a satisfactory approach to resolving the jurisdictional dilemma that has cast a persistent legal shadow over the Committee's and the CPUC's efforts to carry out the responsibilities that SB 39XX assigns to them.

Respectfully submitted this April 23, 2003 at San Francisco, California.

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