

**INITIAL COMMENTS ON THE SECOND SET OF
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

MAY 19, 2003

**INITIAL COMMENTS ON THE SECOND SET OF
DRAFT GENERAL DUTY STANDARDS OF
RELIANT ENERGY COOLWATER, INC., RELIANT ENERGY ELLWOOD,
INC., RELIANT ENERGY ETIWANDA, INC., RELIANT ENERGY
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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 second set of 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. Reliant believes that it currently operates its California generating facilities in such a manner that it complies with the apparent intent of all six proposed General Duty Standards.

On May 9, the Committee issued the second set of draft General Duty Standards (Standards 4 through 6) as a supplement to the Generator Maintenance Standards that have been adopted with certain revisions and as an addition to the earlier set of General Duty Standards (Standards 1 through 3), requesting comments by May 19.²

III. COMMENTS

Reliant appreciates the idea behind the General Duty Standards: quickly implement six 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, as with the first three General Duty Standards, the three new 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 Standards Are Not Authorized by SB 39XX

Proposed Standards 4 and 5, regarding 1) scheduling and withholding of facility output and compliance with the FERC-imposed must-offer requirement, and 2) maintaining reasonable logs, respectively, are not authorized by SB 39XX. As the May 9 Committee letter states (at 3), proposed Standard 4 is designed to regulate or enforce

² The Committee also requested comments on all six of the proposed General Duty Standards as a whole (May 9 letter at 3). The Committee's minor editorial changes to proposed Standards 1 through 3 do not resolve the concerns expressed by Reliant in its initial comments filed on April 23. Accordingly, Reliant incorporates those comments by reference as if set forth fully herein.

“three specific business practices.” SB 39XX does not authorize the Committee to regulate or enforce business practices; it authorizes the Committee to establish operation and maintenance standards. Since the Committee’s stated purpose in proposing Standard 4 goes well beyond what the Committee is clearly authorized to do under its controlling statute, proposed Standard 4 cannot be adopted.

Similarly, nothing in SB 39XX authorizes the Committee to establish a requirement for “reasonable logs.” Accordingly, proposed Standard 5 should not be adopted.³

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

Section 1(c) of the statute clearly states that the Commission should apply to FERC for enforcement authority through the Participating Generator Agreement (“PGA”). For the Committee instead to adopt the proposed Standard 4, which contains clear references to FERC’s must-offer requirement and other FERC-jurisdictional matters (such as wholesale rates), as a new 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 PGAs 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. § 824, *et seq.* As such, the enforcement of the PGAs is subject to exclusive FERC jurisdiction, as are the establishment of wholesale rates. *See Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988); *see also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953

³ Reliant notes that the Committee has already adopted detailed standards on logbooks. Thus, this “general” standard appears redundant and unnecessary – another reason it should not be adopted.

(1986). The authors of SB 39 XX recognized the jurisdictional limitations associated with Commission enforcement authority, and thus directed that implementation of the standards should be through application to FERC. The Committee cannot avoid the exclusive jurisdiction of the FERC by attempting to impose standards on the establishment of wholesale rates or enforcement of FERC orders and tariffs as its own standard. Thus, the Committee should not adopt proposed Standard 4. Beyond the fact that it is clearly contrary to the language of SB 39XX, its adoption will only lead to unnecessary jurisdictional arguments.

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

Proposed Standards 5 and 6 are so vague as to be unworkable. In addition, it is unclear how the operation and maintenance of a facility can impact the business practices sought to be regulated by proposed Standard 4. 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 Standard 6 that it must operate and maintains its facility in a manner that satisfies “the legislative finding that each facility is an essential facility providing a critical and essential good to the California 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 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.⁴ Such vague standards provide no notice to generators, are thus unworkable, and consequently offend due process. They should not be adopted.

Proposed General Duty Standard 6 Does Not Comport With the Intent of SB 39XX

Proposed Standard 6, that all Facilities “shall be operated and maintained in a reasonable and prudent manner ... while satisfying the legislative finding that each facility is an essential facility providing a critical and essential good to the California public” is, like proposed Standards 1 and 2, another paraphrase and rewording of the legislative findings from SB 39XX. In SB 39XX, the Legislature directed that based on

⁴ 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).

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 (recently revised), and Logbook Standards on April 1. The Committee should redouble its efforts to complete its work and comply with SB 39XX.

IV. CONCLUSION

Reliant appreciates the idea behind the second set of draft General Duty Standards. Reliant respectfully submits, however, that the second set of 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: May 19, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the **INITIAL COMMENTS ON THE SECOND SET OF 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 May 19, 2003, at Washington, D.C.

(electronically signed)

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