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**BEFORE THE PUBLIC UTILITIES COMMISSION**
**OF THE STATE OF CALIFORNIA**

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| Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies. | ) | Rulemaking 06-04-009 (Filed April 13, 2006) |

**ENERGY RESOURCES CONSERVATION**
**AND DEVELOPMENT COMMISSION**
**OF THE STATE OF CALIFORNIA**

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| In the Matter of:<br><br>Order Instituting Informational Proceeding on a Greenhouse Gas Emissions Cap | ) | Docket 07-OIIP-01 |

# OPENING COMMENTS OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION ON MODELING-RELATED ISSUES

January 4, 2008

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**OPENING COMMENTS OF THE**
**CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION**
**ON MODELING-RELATED ISSUES**

In accordance with the Rules of Practice and Procedure of the Public Utilities Commission ("CPUC") of the State of California, the California Municipal Utilities Association ("CMUA") hereby files these Comments to Attachment A of the *Administrative Law Judges' Ruling Requesting Comments on Modeling-Related Issues* ("ALJ Ruling") issued November 9, 2007, in the R.06-04-009. CMUA also files these Comments with the California Energy Commission ("CEC") in Docket 07-OIIP-01. In these Comments, the CPUC and CEC will collectively be called the "Joint Agencies" and the California Air Resources Board will be called the "Board."

## I. PURPOSE FOR CMUA'S COMMENTS

CMUA is an organization that was established to represent the collective interests of publicly owned utilities ("POUs"). A core principle of importance to POUs is preserving the exercise of lawful authority granted and reserved to local governments.

## II. CMUA'S COMMENTS TO SPECIFIC QUESTIONS

**Q1. Does Attachment A cover all of the viable emissions reduction measures available in the electricity and natural gas sectors?**

By the very language of Attachment A, the answer to this first question can only be an emphatic "no." Attachment A begins with the following description of purpose.

> "Building on existing analysis surrounding energy efficiency potential, renewable energy development, and other emerging policy directives, this paper *aims to build consensus* regarding the principal opportunities for direct emissions reductions originating within *California's electricity and natural gas sectors*."[1]

Unfortunately, Attachment A concludes with the following paragraph.

> "[I]t also bears mentioning that existing control measures focus mainly on IOUs, and have little binding control on other types of LSEs throughout the state, such as publicly-owned utilities. Although these LSEs have been required to develop renewable and EE goals, they remain largely self-regulating under state law and thus

[1] Attachment A at 1 (emphasis added).

***not bound to compliance***. As such, existing targets set for such entities may be ***inherently less reliable***, however well-intentioned."[2]

These concluding remarks are untrue and counter productive toward building any consensus with the publicly owned utilities ("POUs"). As evidenced by the 2007 Integrated Energy Policy Report ("IEPR"),[3] the CEC does not hold to the same opinion as CPUC staff. The Joint Agencies should reject this aspect of staff's comments since POUs *are bound to comply* with laws concerning energy efficiency, renewable energy, and solar energy systems to the same extent as investor-owned utilities ("IOUs").

In its *Opening Comments on the Type and Point of Regulation Issues*, CMUA described the existing statutory law that *authorizes and requires* each POU to implement and enforce targets for renewable energy and energy efficiency. The authority and *duty* to establish targets for these activities is granted in statute to local agencies for the POUs. Likewise, the California Legislature included mandatory requirements for POUs in Senate Bill 1 dealing with solar initiative programs[4] and Senate Bill 1368 in regard to a greenhouse gas emission performance standard for new ownership investments in baseload generation.[5]

It is true that the Legislature has granted discretion to local agencies in developing the *details* for establishing these various programs. Local agencies, however, have no discretion to decide whether or not the programs are actually established. All POUs are required by law to: (1) implement a renewables portfolio standard that recognizes the Legislative intent encouraging renewable resources;[6] (2) implement a solar initiative program;[7] (3) identify all potentially achievable cost-effective electricity efficiency savings and establish annual targets for energy efficiency savings and

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[2] Attachment A at 13 (emphasis added).

[3] *See e.g.*, *2007 IEPR* at 163-174. The IEPR acknowledges that the POUs "are required by state law to implement a renewables portfolio standard, but are given flexibility in developing specific targets and timelines." *2007 IEPR* at 163. The POUs have been "more successful than investor-owned utilities from 2003 to 2006 in increasing Energy Commission-eligible renewable energy deliveries." *2007 IEPR* at 172. On a load-weighted average, the increase in renewable energy deliveries as a percentage of retail sales by the POUs has exceeded the IOUs by 3000 per cent (0.1% per year for the IOUs compared to 3.0% per year for the POUs). *2007 IEPR* at 172. To be fair, the IEPR states that should all future renewable contracts come on line, the percentage increase by IOUs and POUs will be substantially similar. *2007 IEPR* at 173-174. Yet, this goes further to demonstrate that POU targets are no less reliable than those set by the CPUC and staff has no reason or evidence to denigrate POU targets and performance.

[4] Senate Bill 1 requires POUs to implement solar programs "for the purpose of investing in, and encouraging the increased installation of, residential and commercial solar energy systems." CAL. PUB. UTIL. CODE § 387.5(a).

[5] CAL. PUB. UTIL. CODE § 8340-8341. The POUs must adhere to the same standard as the CPUC-jurisdictional entities, i.e., 1,100 pounds of $CO_2$ per MWh. *See* CAL. CODE REGS., tit. 3, § 2902.

[6] CAL. PUB. UTIL. CODE § 387.

[7] CAL. PUB. UTIL. CODE § 387.5.

demand reduction for the next 10-year period;[8] and (4) comply with the Emission Performance Standard for baseload generation set by the California Energy Commission.[9] Quite simply, *in choosing whether or not to perform these acts there is no discretion*, and POUs are bound to comply.

Attachment A also states that energy efficiency and renewable energy targets set by POUs are "inherently less reliable" than those set by the CPUC. First off, the meaning of this statement is rather ambiguous and CMUA is not quite sure what a "less reliable" target is. Since POUs are, in fact, required to comply with the law, CMUA assumes that staff's comment takes issue with the differences between policies of the various POUs resulting from their discretion to determine the *manner* of compliance with the law. Apparently, whatever the CPUC staff means by the term "less reliable," staff states that it results *because* the POUs are subject to regulatory authorities other than the CPUC. Attachment A does not state that any particular POU is unreliable or that any particular target is unreliable. On the contrary, this very strong statement attacks the efficacy of the local government as a political institution, e.g., the lesser reliability is "inherent."[10] Below, CMUA presents briefly how local governments, by their very nature and character, are *not* less reliable in directing and carrying out their lawful obligations, including compliance with state mandates.

- CMUA knows of no inherent characteristic of local government that would hold that institution less accountable than the CPUC to the legislative branch of California's government. The California Legislature has plenary legislative authority as specifically limited by the California Constitution. The CPUC and local governments are all subject to the Constitution and statutes of California. CMUA would not expect CPUC staff to similarly question the ability of local governments to "make and enforce local, police, sanitary, and other ordinances and regulations" as authorized by the Constitution.[11] Nor would CMUA expect that staff takes issue with the capability of cities[12] to author and enforce a charter which has the same force and effect as enactments of the California Legislature.[13] Yet, CPUC staff has not presented any evidence to distinguish how the ministerial and discretionary actions of a city in setting a renewable energy target, for

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[8] CAL. PUB. UTIL. CODE § 9615.

[9] CAL. PUB. UTIL. CODE § 8341.

[10] Several definitions of the word "inherent" are: (1) involved in the constitution or essential character of something; (2) belonging by nature or habit; and (3) existing in someone or something as a permanent and inseparable element, quality, or attribute.

[11] CAL. CONST. ART. XI, § 7.

[12] Such as Los Angeles, for instance.

[13] CAL. CONST. ART. XI, § 3(a).

example, would be "inherently less reliable" than similar actions adopting and enforcing other local laws, ordinances, and regulations.

- CMUA knows of no inherent characteristic of local government that would hold that institution less accountable than the CPUC to the judicial branch of California's government. Decisions of the CPUC may be reviewed by the courts.[14] The court may compel performance by the CPUC if the Commission has not proceeded in the manner required by law. Likewise, the actions or inactions of local governments may be reviewed by the courts.[15] The court may compel a local government to perform any act which the law specially enjoins, as a duty resulting from an office, trust, or station. Courts may even correct abuses of discretion by local governments.[16]

- CMUA knows of no inherent characteristic of local government that would hold that institution less accountable than the CPUC to the public. CPUC processes are subject to open meeting laws (Bagley-Keene Act) and the California Public Records Act. Local agencies are subject to open meeting laws (Ralph M. Brown Act) and the California Public Records Act.[17]

If there are inherent qualities of the institution of local government, they are that local governments are more responsive, more accessible, and more accountable to the public than a centralized regulatory body. In light of CMUA's arguments above, the core of staff's comment actually calls into question the capability of two other branches of government. By stating that POU targets are "inherently less reliable," staff effectively questions both the wisdom of the Legislature in

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[14] CAL. PUB. UTIL. CODE §§ 1756-1769. *See Southern Cal. Edison Co. v. Public Utilities Com*., 128 Cal. App. 4th 1, 9-10 (2005) (providing the CPUC's description of the standard of review for Commission decisions).

[15] A writ may be issued "by any court . . . to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . . ." CAL. CODE CIV. PROC. § 1085. The availability of writ to compel a public agency to perform an act prescribed by law has long been recognized. *Rancho Murieta Airport, Inc. v. County of Sacramento*, 142 Cal. App. 4th 323, 326 (2006).

[16] A mandamus action is available to compel a public agency's performance or correct an agency's abuse of discretion whether the action being compelled or corrected can itself be characterized as "ministerial" or "legislative." *Cal. Correctional Supervisors Org. v. Dep't of Corr*., 96 Cal. App. 4th 824, 827 (2002). While mandamus does not lie to compel a government body which is vested with discretionary authority to use it in a particular manner, mandamus is appropriate to compel a government body to perform a discretionary act when it has a legally mandated duty to perform such act and has refused to do so. *Common Cause of Cal. V. Board of Supervisors*, 49 Cal. 3d 432, 442-443 (1989).

[17] CPUC meetings are almost always held in a time and place when most members of the public cannot attend unless they take time off from work and travel a long distance. Local agency meetings, however, must be held in the local area, and are generally held in the evenings when the public stakeholders may participate.

its grant of discretion and authority to local governments, and the capability of the judiciary to interpret and enforce the laws through established legal processes.[18]

**Q3. What means beyond policies currently adopted by the two Commissions hold potential for the delivery of additional energy efficiency?**

As discussed in CMUA's answer to Question 1, the energy efficiency policies adopted by local governments are in addition to those adopted by the Joint Agencies. This critical distinction is recognized by the CEC in the 2007 IEPR.[19]

**Q4. What means beyond policies currently adopted by the two Commissions hold potential for the integration of additional renewable resources into the grid?**

There are several local agencies, along with their respective POUs, that are exploring new transmission opportunities. Many POUs do not operate within the CAISO Control Area and they build, own, and operate their own transmission systems. Attachment A did not consider the history or the future of municipally owned transmission infrastructure.

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[18] This position would be untenable as violative of the separation of powers doctrine. CAL. CONST. ART. III, § 3; *See Marine Forests Society v. Cal. Coastal Commission*, 36 Cal. 4th 1, 24-25 (2005) (explaining the limits on the actions of the various governmental branches).

[19] *See e.g.*, *2007 IEPR* at 86-93. The POUs spent more than $54 million on energy efficiency in 2005-2006 and achieved more than 170 GWh in energy efficiency savings. *2007 IEPR* at 86. In regard to the two largest POUs, the Sacramento Municipal Utility District spent $22 million on energy efficiency in this time period and the Los Angeles Department of Water and Power ("LADWP") increased its expenditures by $14 million in 2006-2007. *2007 IEPR* at 86-87. The IEPR states that LADWP plans to spend $80 million on energy efficiency in 2007-2008. *2007 IEPR* at 87.

## III. CONCLUSION

At a minimum, CMUA requests that the Joint Agencies disregard those statements of CPUC staff as discussed above. Preferably, the Joint Agencies should affirmatively acknowledge the parity of local governments and the CPUC in their authority and capability to craft "reliable" targets. The Joint Agencies should strive to be more inclusive in this rulemaking, with the goal that any recommendations will truly be a consensus of the entire electric sector. Up to this point, they are not.

Dated: January 4, 2008

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

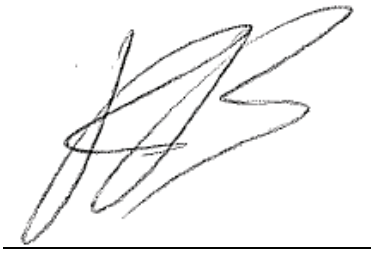
I hereby certify that I have this day served a copy of the attached:

**OPENING COMMENTS OF THE**
**CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION**
**ON MODELING-RELATED ISSUES**

on all known parties to R.06-04-009 by transmitting an e-mail message with the document attached to each party named in the official service list. I served a copy of the document on those without e-mail addresses by mailing the document by first-class mail addressed as follows:

See attached service list

Executed this 4th day of January 2008, at Sacramento, California.



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