D R A F T

Agenda ID 6255

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Consumer Protection and Safety Division
Electric Generation Performance Branch

February 15, 2007
Resolution EGPB-2

RESOLUTION

RESOLUTION GRANTING APPROVAL OF THE FINAL REPORT ON THE AUDIT OF THE EL SEGUNDO GENERATING STATION PERFORMED BY THE ELECTRIC GENERATION PERFORMANCE BRANCH OF THE CONSUMER PROTECTION AND SAFETY DIVISION, AND AUTHORIZING PUBLIC DISCLOSURE OF THE FINAL AUDIT REPORT

SUMMARY

This Resolution grants the request of the Consumer Protection and Safety Division ("CPSD" or "staff") for approval of the Electric Generation Performance Branch's (EGPB) Final Report on the Audit of the El Segundo Generating Station ("El Segundo" or "the Plant") dated December 12, 2006, ("Final Audit Report"). This Resolution also authorizes disclosure of the Final Audit Report.

BACKGROUND

General Order 167, "Enforcement of Maintenance and Operation Standards for Electric Generating Facilities" (effective September 2, 2005) sets forth maintenance, operation, and logbook standards for electric generating facilities in California (referred to as "Generating Asset Owners" or "GAOs" in the General Order.) General Order 167 was adopted in response to legislation enacted by the California Legislature in 2002, codified in Public Utilities Code 761.3, which requires the Commission to "implement and enforce standards … for the maintenance and operation of facilities for the generation of electric energy" in California. Section 11.1 of General Order 167 notifies GAOs subject to the General Order that regular and systematic audits will be conducted in order to ensure compliance with General Order 167.[1]

[1] See also, D.04-05-018, pp. 15-16; additional detail on audit procedures is found in the "Maintenance Standards for Generators with Suggested Implementation and Enforcement Model, Section 3, Verification and Audit Process", Appendix C to D.04-05-018.

The El Segundo audit is the second of the audits conducted by CPSD for compliance with General Order 167. CPSD intends to request Commission approval to issue a final public version of the final audit reports at the conclusion of each of the plant audits, detailing its findings and recommendations. The El Segundo Final Audit Report is the result of an iterative process between staff and El Segundo, including the review of data requests, a one-week on-site visit by the CPSD audit team, issuance of the Preliminary Audit Report, review and receipt of El Segundo's response and corrective action plan, a meet-and-confer teleconference, and the issuance of a semi-final report reflecting corrective actions taken by El Segundo.

Section 15.4 of General Order 167 allows GAOs to request confidential treatment of information by indicating the specific law or statutory privilege prohibiting disclosure. El Segundo requested that "pre and post audit documents" be treated confidentially.[2] CPSD's practice is to treat such requests as pending claims of confidentiality under General Order 167, section 15.4.1. CPSD staff regards the data as "provisionally confidential," but it does not pursue a final determination from the Commission as to the confidential status of the documents until such time as it seeks release of the materials.

DISCUSSION

1. Final Audit Report Findings and Recommendations

In October 2004, the CSPD audit team visited the El Segundo power plant to determine compliance with logbook standards and maintenance standards in General Order 167.[3] The methods used to conduct the audit included:

- Review of plant performance,
- Preparation of detailed data requests,
- A on-site visit from December 6 through 10, 2004; including
    - Discussions with plant management,
    - Reviews of procedures and records,
    - Observations of operations and maintenance activities,
    - Interview with rank and file employees, and
    - Inspections of equipment and infrastructure.

The audit focused on logbooks, training, equipment, parts and tools, chemistry, safety, and maintenance planning, performance and documentation. A full description of the

[2] Letter from David Lloyd, Senior Attorney and Secretary to El Segundo Power LLC, to Richard Clark, Director of the Consumer Protection and Safety Division, Dated May 9, 2006.
[3] The audit team did not check for compliance with operation standards, which were adopted and incorporated into General Order 167 in September 2005, as they were not in effect at the time this audit began.

audit, including the procedure, findings, recommendations and conclusions is contained in the Final Audit Report attached as Appendix A to the Final Resolution.[4]

CPSD's Preliminary Audit Report, which was provided to El Segundo on August 12, 2005, identified nine potential violations of the Maintenance Standards, most of which the audit report characterizes as relatively minor. On October 15, 2005, El Segundo submitted its response to the Preliminary Audit Report. CPSD and El Segundo next held a meet-and-confer conference call on October 25, 2005. CPSD subsequently revised the draft Final Audit Report based on additional information provided during the conference call. El Segundo provided a supplemental response to the Preliminary Audit Report on May 9, 2006.

The Final Audit Report details staff's preliminary findings and recommendations, the corrective actions taken by El Segundo to date, and includes the final outcome and follow-up action recommended by CSPD. In all instances, CPSD and El Segundo have come to a satisfactory conclusion; in a few instances, CPSD has recommended that El Segundo monitor the proposed corrective action on a regular basis. CPSD has not recommended progress reports or notices of completion; however, it may conduct inspections in the future to ensure that the plant's inspection program has sufficiently addressed these findings. The results of CPSD's audit indicate that the continued implementation of the proposed corrective actions will adequately address all of the findings in the Final Audit Report. CPSD finds no need for formal enforcement action based on the audit findings.

We hereby grant CPSD's request for approval of the Final Audit Report. CPSD's General Order 167 audits provide a thorough assessment of the Plant's efforts to comply with General Order 167 logbook and maintenance standards. Our approval of the Final Audit Report endorses the findings and recommendations in the Final Audit Report, and requires El Segundo to monitor the corrective actions on a regular basis as discussed in Findings 2.1 through 2.9 of the Final Audit Report.

2. Public Disclosure of the Final Audit Report.

El Segundo does not specifically request confidential treatment of the Final Audit Report, but states that "all data relating to operations" is proprietary. CPSD seeks only to make the Final Audit Report public by this Resolution, not the draft report, related materials, or documents provided either during the audit or in response to CPSD data requests. However, because the Final Audit Report may contain statements discussing operational

[4] The Public Version of the Draft Resolution does not include Appendix A, as the Final Report is subject to a pending request for confidential treatment under section 15.4 of General Order 167. Appendix A is attached to the Confidential/Non-Public Version of the Draft Resolution, and will be attached to the Final Resolution if disclosure is authorized and the Final Report approved by the Commission.

data that the plant considers confidential, we will address El Segundo's confidentiality claims here.

General Order 167, section 15.4, places the burden on the GAO to prove why all or part of any document should be withheld from public disclosure. Section 15.4.1 requires the GAO to specify in its confidentiality request the law or privilege supporting nondisclosure. El Segundo makes several assertions in support of its request for confidential treatment, which are discussed below.

First, El Segundo maintains that all information relating to operations is "proprietary and should be treated as 'trade secret' information" under California Evidence Code section 1060. El Segundo asserts, without explanation, that "any information derived from this audit that might be disclosed to El Segundo's competitors would place El Segundo in a disadvantageous competitive position" due to the "extremely competitive environment in southern California." Second, El Segundo asserts that the Commission is required to maintain the confidentiality of "sensitive commercial information obtained from Exempt Wholesale Generators" under 16 U.S.C. section 824(g)(2), and that Government Code section 6254(k), which exempts certain documents from disclosure under the Public Records Act, further prohibits the disclosure of this information. Third, El Segundo asserts, again, without explanation or legal citation, that the "release of this critical operational data poses a security risk." Fourth, El Segundo asserts that "General Order 66-C protects this information."

With respect to all of the above assertions, we conclude that El Segundo has not met its burden of proof as required in General Order 167, section 15.4, et seq. El Segundo does not describe the information claimed to be confidential with any specificity, nor does it explain the applicability of the law or privilege asserted. Section 15.4.3.1 requires GAOs to specifically indicate the information that it wishes to be kept confidential. Additionally, section 15.4.3.4 requires GAOs to "explain in detail the applicability of that law to the information for which confidential treatment is requested." We note as a rule, when no particular information is described in a confidentiality claim, it is difficult, if not impossible, to evaluate the merits of that claim.

The Trade Secret privilege extends to information that (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy, and (3) application of the privilege "will not tend to conceal fraud or otherwise work an injustice." (Civ. Code § 3426.1(d); Evid. Code § 1060.) These requirements are also set forth in General Order 167, section 15.4.3.4. El Segundo does not explain how it would suffer competitive harm if the alleged confidential information was released to the public, or why the information is commercially sensitive.

Title 15 U.S.C. section 824(g) authorizes State commissions to obtain books, accounts and records from wholesale generators, and requires State commissions not to publicly disclose sensitive commercial information[5]. We acknowledge the applicability of this section, and our responsibility not to disclose commercially sensitive information. However, El Segundo has not demonstrated that any information in the Final Audit Report is "commercially sensitive."

As we stated in EGPB-1, General Order 66-C excludes records of investigations and audits from the definition of "public records" under the Public Records Act, (Gov't Code § 6250, et seq.), except to the extent disclosed at a hearing or by formal Commission action." (General Order 66-C, § 2.2(a).) Thus, General Order 66-C provides only an initial bar to public access. It does not limit our ability to order the release of the Audit Materials. The Commission can authorize disclosure of such records through formal action, such as this Resolution.

In summary, El Segundo has not indicated the specific information that it believes is confidential, nor has it explained the legal basis for its claim. We conclude that it has not satisfied its burden of proof under General Order 167. As we stated in Resolution EGPB-1, we are aware of the need to protect trade secret and sensitive commercial information which we receive from GAOs pursuant to our authority in General Order 167. We have already acknowledged in Resolution EGPB-1 that there could be some aspects of plant maintenance and operations which, if publicly disclosed, may be advantageous to competitors. El Segundo is free to bring specific information in this regard to our attention. In light of our discussion above, the Final Audit Report should be made public.

COMMENTS

The Draft Resolution of the CPSD in this matter was mailed to the parties in interest on January 10, 2007, in accordance with Public Utilities Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed by _____ on _____.

FINDINGS OF FACT

1. General Order 167, "Enforcement of Maintenance and Operation Standards for Electric Generating Facilities" (effective September 2, 2005) sets forth maintenance, operation, and logbook standards for electric generating facilities in California. Section

[5] General Order 167 relies in part, on the Commission's authority derived from state law and 16 U.S.C. § 824(g).

11.1 of General Order 167 notifies GAOs subject to the General Order that regular and systematic audits will be conducted in order to ensure compliance with General Order 167.

2. The Final Audit Report is the result of an iterative process between staff and the plant, including the review of data requests, a one-week on-site visit, issuance of the Preliminary Audit Report, review and receipt of the plant's response and Corrective Action Plan, a meet and confer period, and the issuance of a semi-final report reflecting corrective actions (if any) taken.

3. As part of the audit process, the CPSD audit team visited El Segundo from December 6, 2004 through December 10, 2004, to determine compliance with logbook standards and maintenance standards in General Order 167.

4. CPSD intends to request Commission approval to issue a final public version of the final audit reports at the conclusion of each of the plant audits, detailing its findings and recommendations.

5. Section 15.4 of General Order 167 allows GAOs to request confidential treatment of information by indicating the specific law or statutory privilege prohibiting disclosure. El Segundo requested that the Final Audit Report and related materials be treated confidentially by letter on May 9, 2006.

6. CPSD's practice is to treat requests for confidential treatment under General Order 167, section 15.4.1 as a pending claim of confidentiality; CSPD regards the data as "provisionally confidential," but does not pursue a final determination from the Commission as to the confidential status of the documents until such time as it seeks release of the materials.

7. CPSD's General Order 167 audits provide a thorough evaluation of El Segundo's efforts to comply with General Order 167 logbook and maintenance standards.

8. The results of CPSD's audit indicate that the continued implementation of the proposed corrective actions will adequately address all of the findings in the Preliminary Audit Report. There is no need for formal enforcement action based on the audit findings at this time.

CONCLUSIONS OF LAW

1. Our approval of the Final Audit Report endorses the findings and recommendations in the Final Audit Report, and requires El Segundo to monitor the corrective actions on a regular basis as discussed in Findings 2.1 through 2.9 of the Final Audit Report.

2. General Order 167, section 15.4.1, places the burden of proof on GAOs to establish the legal basis for confidential treatment. Section 15.4.3.1 requires GAOs to specifically indicate the information that the GAO wishes to be kept confidential. Additionally, section 15.4.3.4 requires GAOs to "explain in detail the applicability of that law to the information for which confidential treatment is requested."

3. El Segundo has not met its burden of establishing a claim of confidentiality as required in General Order 167, section 15.4.1, et seq. El Segundo does not describe the information claimed to be confidential with any specificity, nor does it explain the applicability of the laws or privileges it asserts.

4. General Order 66-C provides only an initial bar to public access. It does not limit our ability to order the release of the Audit Materials. The Commission can authorize disclosure of such records through formal action, such as this Resolution.

5. The Final Audit Report should be made available to the public.

ORDER

1. CPSD's request for disclosure of the "Final Report on the Audit of the El Segundo Generating Station," dated December 12, 2006, is granted.

2. El Segundo is ordered to continue implementation of the corrective actions discussed in Findings 2.1 through 2.9 of the Final Audit Report.

3. This Resolution is effective today.

I certify that this resolution was adopted by the Public Utilities Commission at its regular meeting held on February 15, 2007. The following Commissioners voting favorably thereon:

_____

STEVE LARSON
Executive Director