

D R A F T

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Consumer Protection and Safety Division
Electric Generation Performance Branch

San Francisco, California
Date: August 23, 2007
Resolution EGPB-3

RESOLUTION

**RESOLUTION GRANTING APPROVAL OF THE
FINAL REPORT ON THE AUDIT OF THE POTRERO
POWER PLANT 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 Potrero Power Plant owned by Mirant Potrero LLC (“Mirant Potrero” or “the Plant”) dated February 27, 2007, (“Final Audit Report”). This Resolution also authorizes disclosure of the redacted Final Audit Report to the public.

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

The Mirant Potrero audit is the third of the audits conducted by CPSD for compliance with General Order 167. Going forward, CPSD intends to perform approximately two to four audits per year. 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 by the CPSD audit team, 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 taken by the plant. CPSD issues a public version of its final audit reports at the conclusion of each of the plant audits, detailing its findings and recommendations, and requesting Commission approval.

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. Mirant Potrero requested that the Final Audit Report and related materials be treated confidentially by letter dated October 6, 2005.² By letter dated November 10, 2005, CPSD staff agreed not to disclose the audit materials, unless and until such time as the full Commission authorizes public disclosure.³

DISCUSSION

1. Final Audit Report Findings and Recommendations

Starting in Nov. 2004, the CPSD audit team visited Mirant Potrero to determine compliance with logbook standards and maintenance standards in General Order 167. The methods used to conduct the audit included:

- Review of plant performance,
- Preparation of detailed data requests,
- A site visit from November 15 through 17, 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.

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.

² Letter to Randy Wu, General Counsel, from Dave A. Hansell, dated October 6, 2005.

³ Letter to Dave A. Hansell, from Charlyn Hook, Staff Counsel for CPSD, dated November 10, 2005.

The audit focused on the Unit 3 boiler; maintenance procedures for the gas turbines of Units 4, 5 and 6; root cause analysis of fuel contamination for Units 4, 5 and 6; plant security; plant safety program; and employee and contractor training and qualifications. A full description of the audit, including the procedures, 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 Mirant Potrero on August 22, 2005, identified potential violations of the Maintenance Standards, and recommended corrective actions be taken by the plant.

On October 10, 2005, Mirant Potrero submitted a Corrective Action Plan to CPSD in response to the Preliminary Audit Report. CPSD and Mirant Potrero next held meet-and-confer meetings on Dec. 16, 2005 and Sept. 20, 2006. CPSD subsequently revised the draft Final Audit Report based on additional information provided by the Plant.

The Final Audit Report details staff's preliminary findings and recommendations, the corrective actions taken by the Plant to date, and includes the final outcome and needed follow-up action recommended by CPSD staff. In most instances, Mirant Potrero has already resolved the finding by taking corrective action. In one instance, CPSD has requested that the Plant report on the progress of its corrective actions and submit an additional analysis.

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 found no need for formal enforcement action based on the audit findings. CPSD does, however, request that the Commission order Mirant to complete implementation of corrective action item 2.1, by providing a progress report on plant security improvements in June of 2007 and an analysis of the effectiveness of its security system in June of 2009. Corrective action item 2.1 is listed in the section of the Final Audit Report entitled "Executive Summary and Audit Conclusions."

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's logbook, maintenance and operation standards. Our approval of the findings and recommendations in the Final Audit Report endorses the findings therein, and requires Mirant Potrero to implement the corrective action measures

⁴ This 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 circulated within the Commission only, and will be attached to the Final Resolution if disclosure is authorized and the Final Report approved by the Commission.

identified in the Final Audit Report and provide progress or status reports as requested by CPSD.

2. Public Disclosure of the Final Audit Report

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. By correspondence dated October 6, 2005, Mirant requested that CPSD's audit report, including the preliminary and revised or final versions, and Mirant's October 10, 2005 response to CPSD's request for a corrective action plan, be afforded confidential treatment (hereafter collectively referred to as the "Audit Materials.")⁵ Upon receipt of such a request, CPSD's practice is to treat the Audit Materials as provisionally confidential. CPSD staff's agreement is not a final determination of the confidentiality of the Audit Materials and is not binding on the Commission. CPSD now seeks approval of this resolution authorizing disclosure of the redacted version of the Final Audit Report.

In its October 6, 2005 Confidentiality Claim, Mirant Potrero appears to request confidential treatment of the entire Final Audit Report. It identifies the following three categories of information in its request: (1) information relating to Plant security, including measures taken to prevent unauthorized access to the plant and updated security measures recently taken by Mirant; (2) information regarding the design of Mirant Potrero's generating units, design of the fuel tank, and the fuel system design and maintenance; and (3) incidents describing units placed out of service.

Mirant asserts several legal bases in support of its request for confidential treatment of the above information. First, Mirant asserts that 16 U.S.C. section 824(g)(2) requires the Commission to maintain the confidentiality of the Audit Materials. Mirant asserts that this provision "specifies that the CPUC shall not publicly disclose sensitive commercial information obtained from wholesale generators ("EWGs")." This argument is only partially correct. It is true that section 824(g)(1) authorizes State commissions to obtain books, accounts and records from exempt wholesale generators. Further, subsection 824(g)(2) prohibits State commissions from publicly disclosing trade secrets or sensitive commercial information. However, Mirant has not demonstrated that the Audit Materials collectively, or any of the specific categories of information identified in its October 6, 2005 Confidentiality Claim, are commercially sensitive.

⁵ Letter from Dave A. Hansell to Randy Wu, General Counsel, dated October 6, 2005, entitled "General Order 167 Confidentiality Claim."

This argument appears to be directed at categories (2) and (3), of Mirant Potrero's confidentiality claim. With respect to category (2), the discussion in the Final Audit Report of problems with the Plant's fuel system in Finding 2.2, "Fuel Contamination and Forced Outages," does not contain unique or proprietary information regarding the Plant's fuel design. Moreover, there is nothing unique or special in the discussion of Mirant Potrero's maintenance techniques. Rather, the discussion refers to standard methods of maintenance and repair of fuel filters and fuel storage system, commonly known throughout the industry. Thus, we will adopt the recommendation of CPSD staff, and will not redact portions of the discussion on the Plant's fuel tank and fuel system design and maintenance.

With respect to category (3), there is discussion of units placed out of service due to the fuel contamination problems in Finding 2.2 of the Final Audit Report, including several tables and charts. As the Final Audit Report notes, this information was derived from CPSD staff's analysis of GADS (Generating Availability Data System) data obtained from NERC (North American Electric Reliability Council). NERC's general policy with respect to the GADS data is not to publish the data without authorization from the generator. General Order 167, authorizes CPSD to request GADS data from NERC, and states that CPSD will not disclose information designated as confidential unless the Commission orders or permits disclosure.⁶ In addition, CPSD wrote to all Generating Asset Owners, advising them of what information must be submitted to NERC and released to CPSD under the General Order, and informed GAOs that a completed confidentiality claim would ensure that the GADS data would not be disclosed publicly by CPSD staff, unless the full Commission voted to release the data in a noticed, public meeting.⁷

We will adopt the recommendations of CPSD staff in this instance, and decline to redact the limited references to outages contained in Finding 2.2 of the Final Audit Report. In so doing, we note that this information generally reflects favorably on Mirant Potrero, and confirms that the Plant's corrective actions have been successful. Additionally, preserving the tables and discussion is important to show the staff's analysis and reasoning. While some of these tables include unit specific information, the outage figures are aggregated on a monthly or annual basis; the most recent data is from November 2005. We do not believe that this information is proprietary or commercially sensitive, nor would it enable other market participants to gain a competitive advantage over Mirant Potrero.

Second, Mirant claims that disclosure of security and project design information in the audit report "does not align with Title XII of the recently enacted Energy Policy Act of 2005, which requires the Federal Energy Regulatory Commission to institute regulations

⁶ General Order 167, section 10.2.

⁷ Letter to Generating Asset Owners from Richard Clark, Director of CPSD, dated June 14, 2005.

to bolster the security of electricity infrastructure in the United States.” Although we do not believe that this section of the Energy Policy Act actually prohibits disclosure of the Audit Materials, we agree with Mirant that certain information in the Final Audit Report relating to plant security and unauthorized access should not be disclosed to the general public. Accordingly, we will adopt the recommendations of CPSD staff to redact information that might compromise the security and reliability of Mirant Potrero.

Third, Mirant contends that the Audit Materials are protected from public disclosure by Government Code section 6254(k) and Evidence Code section 1040. Mirant argues that Government Code section 6254(k) “specifies that a state agency is not required to disclose ‘records, the disclosure of which is exempted or prohibited pursuant to state or federal law.’” Further, Mirant contends that the Commission is “entitled to protect the enclosed documents pursuant to Section 1040 of the Evidence Code, which specifies that a public agency has a privilege to refuse to disclose information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made, when disclosure is forbidden by an act of Congress of the United States or a statute of this state.” Again, Mirant’s assertion here is not entirely correct. The Public Records Act (Government Code § 6250 *et seq.*) exemptions cited by Mirant are discretionary rather than mandatory. Thus, Government Code section 6254(k) and Evidence Code section 1040 permit, but do not require, an agency to refrain from disclosing information subject to these exemptions. Obviously, where a statute actually prohibits disclosure, we will assert the Government Code 6254(k) exemption. Where, however, a statute such as Evidence Code section 1040 permits us to assert a privilege against disclosure, we can and will exercise our judgment in doing so. Moreover, the applicability of each of these exemptions relies upon another state or federal law which prohibits disclosure or allows us to refrain from disclosure on a discretionary basis. Since Mirant has not demonstrated that any such state or federal law exists, this argument is not supported.

Fourth, Mirant maintains that under General Order 66-C, the Commission “will not disclose records in response to a request from a member of the public if the requested records ‘(1) are records or information of a confidential nature furnished to, or obtained by the CPUC, or (2) contain information obtained in confidence from other than a business regulated by the CPUC where the disclosure would be against the public interest.’” Mirant continues that, “Disclosure of information regarding security at the State’s electric generation facilities could jeopardize safety and reliability at those facilities and thus would be contrary to the public interest. In addition, disclosure of information obtained in confidence from EWGs would discourage entities from cooperating with future information requests from the CPUC and the CPSD, which also would be contrary to the public interest.” We now consider each of these claims.

We point out that General Order 66-C provides only an initial bar to public access. While General Order 66-C does not allow staff to release certain types of information, it does not limit our ability to order the release of information, even if it can be excluded from the definition of public records under General Order 66-C. Additionally, information obtained pursuant to General Order 167 does not carry the presumption of confidentiality. Rather, General Order 167 places the burden of proof on the GAO to establish the legal basis for confidential treatment. (See EGPB-1, *Resolution Granting Approval of the Final Report on the Audit of the AES Huntington Beach Power Plant Performed by the Electric Generation Performance Branch of the Consumer Protection and Safety Division, and Authorizing Public Disclosure of the Final Audit Report*.) Thus, Mirant is incorrect in assuming that the provisions of General Order 66-C relating to “information obtained in confidence” is applicable here, and in asserting that General Order 66-C prohibits our ability to order disclosure.

We also reject Mirant’s claim that disclosure of the information that Mirant considers, but has not demonstrated to be confidential, would be contrary to the public interest and would discourage entities from cooperating with future information requests. In EGPB-1, we rejected this same argument, noting that this argument “strikes us as contrary to the spirit and intent of the California Constitution and the Public Records Act, and not the type of “public benefit” the Commission wishes to endorse. The Commission has previously rejected similar arguments by utilities that the threat of public scorn might have a “chilling effect” on the substance and candor of information provided to the Commission, in particular, where there is a legal obligation to provide complete and accurate information, as there is here.” In EGPB-1, we found that there may well be important public interests served by disclosure of the General 167 audit reports, including “the public’s right to know that generating facilities providing the electric service it relies on are operated in conformance with regulatory requirements. In addition, the release of audit reports will increase awareness of safety issues and best practices within the generating community. Allowing public access to audit reports will provide an incentive to GAOs to maintain their plants in top condition, which may lead to increased reliability.” Thus, we concluded that unless the GAO demonstrates that the public interest in non-disclosure clearly outweighs the public interest in disclosure, we will release the audit information. (See, Gov’t Code § 6255.) Here, with the exception of the security information in category (1) of Mirant’s Confidentiality Claim, Mirant has not demonstrated that the public interest in non-disclosure clearly outweighs the public interest in disclosure.

Finally, Mirant claims that the Audit Materials are confidential “Protected Materials” pursuant to the protective order in CPUC Docket No. I.00-08-002 (*Order Instituting Investigation into the Functioning of the Wholesale Electric Market and Associated Impact on Retail Rates*) and the CPUC investigation under Resolution L-293. The protective order adopted in the Commission’s investigation in I.00-08-002 applied only to

information obtained within that particular proceeding, which has been closed now for nearly three years.⁸ Resolution L-293 authorized the Commission's informal investigation of certain EWGs during the 2000-2001 period of electrical emergencies and outages, and allowed EWGs to submit documents obtained in that investigation pursuant to the protective order in I.00-08-002. While Resolution L-293 remains a valid statement of the Commission's authority over EWGs, the Commission's investigation into the causes of generator outages in 2000 and 2001 has also been closed for several years. CPSD's audit of Mirant Potrero was conducted in accordance with the maintenance and operational standards in General Order 167, adopted by the Commission after the *Rulemaking to implement the provisions of Public Utilities Code § 761.3* in R.02-11-039. General Order 167 has its own provisions for claiming confidentiality, which are set forth in section 15.4. The protective order adopted in I.00-08-002 and referenced in Resolution L-293 is limited to documents obtained in these prior investigations; Mirant may not claim the protections of this protective order for documents submitted in other matters.

In summary, we find that Mirant has not met its burden of establishing a claim of confidentiality as required in General Order 167, section 15.4.1, et seq. As we stated in D.06-01-047, we are aware of the need to protect trade secrets and sensitive commercial information that we receive from GAOs pursuant to our authority in General Order 167. We acknowledge that there are certain aspects of plant maintenance and operations which, if publicly disclosed, could be advantageous to competitors. We have carefully considered Mirant's arguments, but do not find that the Final Audit Report contains commercially sensitive information that needs to be redacted. In addition, we acknowledge the need to maintain the security of California's power plants. We will not order disclosure of information regarding a plant's security systems, or measures taken to prevent unauthorized access. Thus, we agree with Mirant's position that this information in the Final Audit Report should be kept confidential, and we will adopt CPSD's recommendations to redact portions of the Final Audit Report.

COMMENTS

CPSD's Preliminary Audit Report was provided to Mirant Potrero on August 22, 2005. The Preliminary Audit Report identified possible violations of the Maintenance Standards, and recommended corrective actions be taken by the plant. On October 10, 2005, Mirant Potrero submitted a Corrective Action Plan to CPSD in response to the Preliminary Audit Report.

CPSD and Mirant Potrero held meet-and-confer meetings on December 16, 2005 and September 20, 2006. In addition, on August 25, 2006 CPSD auditors held a conference call to discuss the draft Final Audit Report with Mirant Potrero. CPSD subsequently

⁸ See Order Closing Proceeding, I.00-08-002, dated August 20, 2004.

revised the draft Final Audit Report based on additional information provided during the meet and confer meetings and conference call.

The Draft Resolution of the Legal Division in this matter was mailed to the parties in interest on July 19, 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 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 audit, 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 by the plant.

3. As part of the audit process, the CPSD audit team visited Mirant Potrero, L.L.C. power plant from November 15, 2004 through November 17, 2004; and on January 4, 2005 to determine compliance with logbook standards and maintenance standards in General Order 167.

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

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. Mirant Potrero requested that the Final Audit Report and related materials be treated confidentially by letters dated October 6, 2005. CPSD staff agreed to treat the audit materials confidentially, until such time as the full Commission authorizes public disclosure.

6. CPSD’s General Order 167 audits provide a thorough evaluation of the Plant’s efforts to comply with General Order 167’s logbook, operation and maintenance standards.

7. 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 therein, and requires Mirant Potrero to implement the corrective action measures identified in Findings 2.1 through 2.6, and to provide a progress report on plant security improvements by June 2007, as well as an analysis of the effectiveness of its security system by June 2009, as discussed in Finding 2.1.
2. General Order 167, section 15.4.1, places the burden of proof on the GAO to establish the legal basis for confidentiality treatment.
3. Mirant has not demonstrated that the Audit Materials collectively, or any of the specific categories of information identified in its October 6, 2005 Confidentiality Claim, are commercially sensitive information that should not be disclosed pursuant to 16 U.S.C. section 824(g).
4. Title XII of the Energy Policy Act of 2005 does not prohibit disclosure of the Audit Materials. However, as a matter of policy, we agree with Mirant that certain information in the Final Audit Report relating to plant security and unauthorized access should not be disclosed to the general public.
5. The Public Records Act exemptions in Government Code section 6254(k) and Evidence Code section 1040 permit, but do not require us to refrain from disclosing information. Mirant has not demonstrated that there is any state or federal law that prohibits disclosure of the Audit Materials, thus we are within our discretion in refusing to assert a privilege against disclosure.
6. 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.
7. The Audit Materials were obtained pursuant to General Order 167, which does not carry a presumption of confidentiality. General Order 167 has its own provisions for claiming confidential treatment in section 15.4. The provisions of General Order 66-C relating to “information obtained in confidence” is not applicable here.

8. With the exception of the security information in category (1) of Mirant's Confidentiality Claim, Mirant has not demonstrated that the public interest in non-disclosure clearly outweighs the public interest in disclosure

9. The protective order adopted in I.00-08-002 and referenced in Resolution L-293 is limited to documents obtained in these prior investigations, which are now closed. Mirant may not claim the protections of this protective order for documents submitted in other matters.

10. Mirant has not met its burden of establishing a claim of confidentiality as required in General Order 167, section 15.4.

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

ORDER

1. The Consumer Protection and Safety Division's request for disclosure of the "Final Report on the Potrero Power Plant," dated February 27, 2007, is granted.

2. Mirant is ordered to (1) complete implementation of the corrective actions in Findings 2.1 through 2.6; and to provide a progress report on plant security improvements by June 30, 2007, as well as an analysis of the effectiveness of its security system by June 30, 2009, as discussed in Finding 2.1.

3. This Resolution is effective today.

I certify that this resolution was adopted by the Public Utilities Commission at its regular meeting held on August 23, 2007. The following Commissioners voting favorably thereon:

PAUL CLANON
Executive Director