

Decision **DRAFT DECISION OF COMMISSIONER WOOD**
(Mailed 11/16/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking to implement the provisions of
Public Utilities Code § 761.3 enacted by
Chapter 19 of the 2001-02 Second Extraordinary
Legislative Session.

Rulemaking 02-11-039
(Filed November 21, 2002)

**INTERIM OPINION REGARDING COMMISSION
IMPLEMENTATION AND ENFORCEMENT OF
GENERATOR OPERATION STANDARDS**

(See Attachment 1 for List of Appearances.)

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Attachment 1: List of Appearances

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INTERIM OPINION REGARDING COMMISSION IMPLEMENTATION AND ENFORCEMENT OF GENERATOR OPERATION STANDARDS

1. Summary

The energy crisis of 2000-2001 resulted in substantial disruption, sacrifice and economic hardship for the people and businesses of California. Among the causes, some electric powerplants were operated in questionable ways, or taken out of service for questionable reasons. This resulted in electricity power shortages and outages, danger to public health and safety, and dramatically increased prices. The California legislature responded with Senate Bill (SB) X2 39 to ensure electrical system reliability and adequacy, and stabilize the market.¹

In SB X2 39, the people of the State of California found and declared that electric powerplants are essential facilities. They also found and declared that the public interest, health and safety require that these essential facilities be operated and maintained effectively, appropriately and efficiently. The legislation established the California Electricity Generation Facilities Standards Committee (Committee) to develop and adopt operation and maintenance standards, and charged the Commission with implementing and enforcing those standards. It also directed that the Commission enforce California Independent System Operator (CAISO) protocols for the scheduling of powerplant outages.

¹ SB X2 39 (Burton and Spier), added by Statutes 2002, Second Extraordinary Session, Chapter 19, Section 4 (effective August 8, 2002). SB X2 39 repealed Pub. Util. Code § 342, amended § 362, and added § 761.3. All statutory references are to the Public Utilities Code unless noted otherwise.

The Commission has responded by adopting General Order (GO) 167. To date, we have implemented and are enforcing Committee-adopted Maintenance Standards, General Duty Standards for Operation and Maintenance (GDS), Logbook Standards for thermal powerplants, Logbook Standards for hydroelectric powerplants, and CAISO powerplant outage scheduling protocols. (See Decision (D.) 04-05-017 and D.04-05-018.)

This order involves our implementation and enforcement of Operation Standards adopted by the Committee on October 27, 2004. We also provide direction on the use of adopted Guidelines as guides, not standards. We address compliance via (a) on-site plans and (b) a summary filed with the Commission. We make other changes to GO 167 for parallel construction within the GO, consistency, clarity, and to correct errors.

Within 90 days of the effective date of the changes to GO 167 adopted herein, an authorized representative of each covered existing generation asset shall file with the Director of the Consumer Protection and Safety Division (CPSD) a verified Initial Certification regarding its Operation Plan. (GO §§ 8.2 and 15.3.) Within 120 days after the Executive Director specifies the form and content elements, an authorized representative of each covered generation asset shall file with the Director of CPSD a verified Plan Summary. (GO §§ 7.3, 8.3, 15.3, 15.10.) The proceeding remains open.

2. Background

During California's energy crisis of 2000-2001, electric powerplants were sometimes operated in questionable ways, or taken out of service for questionable reasons, as documented in our filings at the Federal Energy

Regulatory Commission (FERC).² This resulted in electricity power shortages and outages, danger to public health and safety, and dramatically increased prices. (See Attachment 2.) It is critical to California's economy, public health and public safety, however, that its electricity system be available and reliable. Parties share this belief:

“...it cannot be stressed too strongly that this Commission and electric generators share a common goal: **to ensure that generation in California is available when needed to meet customers' demand for electricity.**” (West Coast Power (WCP) Comments dated October 6, 2004, page 3, emphasis in original.)

“DENA [Duke Energy North America] reiterates its shared interest with the Commission in providing California with efficient and reliable sources of power.” (DENA Comments October 6, 2004, page 6; also in DENA Supplemental Comments November 3, 2004, page 7.)

The legislature responded to this situation with SB X2 39. This legislation established the Committee for the purpose of adopting operation and maintenance standards for electric generation facilities to ensure reliability and availability. (§ 761.3(b).) The Committee met nine times between December 2002 and October 2004. Following notice and opportunity for comment, the Committee adopted the following standards:

1. Maintenance Standards on February 3, 2003;
2. Logbook Standards for thermal powerplants on April 1, 2003;

² See, for example, California Parties' Supplemental Evidence of Market Manipulation by Sellers, Proposed Findings of Fact, and Request for Refunds and Other Relief, San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Serv., No. EL00-95-000 *et seq.* (FERC Mar. 3, 2003), cited in D.04-05-018, mimeo., page 3.

3. GDS 1-3 on May 2, 2003;
4. Revised GDS 1-6 on June 3, 2003;
5. Logbook Standards for hydroelectric powerplants on April 27, 2004; and
6. Operation Standards on October 27, 2004.

The Committee has now completed its work, and the Committee expires on January 1, 2005. (§761.3(b)(3).)

SB X2 39 also directs that the Commission shall:

“implement and enforce standards adopted [by the Committee] for the maintenance and operation of facilities for the generation of electric energy owned by an electrical corporation or located in the state to ensure their reliable operation. The Commission shall enforce the protocols for the scheduling of powerplant outages of the Independent System Operator.” (§ 761.3(a).)

We implement and enforce Committee-adopted standards and CAISO powerplant outage scheduling protocols through GO 167. (D.04-05-017 and D.04-05-018.) Our prior orders describe the Committee and Commission background and process for these items, which we do not repeat here.

Section 8 of GO 167 was reserved for Operation Standards. We briefly describe the Committee and Commission process leading to today’s order.

2.1. Committee Process

In 2003, the Committee directed its staff to develop and propose draft Operation Standards. On August 23, 2004, Committee Presiding Officer Carl Wood served draft Operation Standards for comment on participants before the Committee. On September 10, 2004, timely comments were served by (1) Pacific Gas and Electric Company (PG&E); (2) Southern California Edison Company (SCE); (3) San Diego Gas & Electric Company (SDG&E); (4) AES Alamos, LLC,

AES Huntington Beach, LLC, and AES Redondo Beach, LLC (AES); (5) Calpine Corporation (Calpine); (6) Duke Energy North America (DENA); (7) Elk Hills Power, LLC (Elk Hills); (8) FPL Energy, LLC (FPLE); (9) Independent Energy Producers Association (IEP); (10) Mirant Delta, LLC and Mirant Potrero, LLC (Mirant); (11) Reliant Energy Coolwater, Inc., Reliant Energy Ellwood, Inc., Reliant Energy Etiwanda, Inc., Reliant Energy Mandalay, Inc., and Reliant Energy Ormond Beach, Inc. (Reliant); and (12) West Coast Power (El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC, or WCP). No reply comments were served by the September 15, 2004 deadline.

On September 20 and 21, 2004, Committee staff conducted workshops in San Francisco to further consider and develop draft Operation Standards. On October 1, 2004, supplemental comments were served by PG&E, SCE, SDG&E, AES, Calpine, DENA, Reliant, WCP and Joint Generating Asset Owners (composed of PG&E; SCE; SDG&E; AES; Calpine; DENA; FPLE; High Desert Power Project, LLC (HDPP); La Paloma Generating Company; Mirant; Reliant; and WCP). On October 6, 2004, supplemental reply comments were served by Elk Hills.

On October 15, 2004, Committee staff served recommended revised draft Operation Standards on the Committee and participants, with limited further changes suggested on October 26, and at the meeting on October 27, 2004. On October 27, 2004, the Committee heard public comments from PG&E, WCP, and HDPP. After the opportunity for discussion, the Committee adopted Resolution No. 5, including the final "Operation Standards and Recommended Guidelines for Generating Asset Owners." On November 1, 2004, Resolution No. 5 and the final Operation Standards were filed with the Commission and

served on the service list. (See Attachment 3 for a copy of Operation Standards and Recommended Guidelines for Generating Asset Owners.)

In summary, the Committee adopted 28 Operation Standards. Operation Standards 1-11 are largely similar or the same as the first eleven Maintenance Standards. Operation Standards 12-28 are new and are specifically tailored to powerplant operation. The Operation Standards include, but are not limited to: safety, organizational structure and responsibilities, management and leadership, problem resolution, training, plant status, conduct, inspections, clearances, performance testing, emergency grid operations, security, readiness, changes in status, and unit storage. In addition, the Committee adopted Guidelines on how each Generating Asset Owner (GAO) may comply with each Standard.³ Finally, the Committee also made several recommendations to the Commission on how to implement the Committee-adopted Standards.

2.2. Commission Process

By ruling dated September 13, 2004, parties were invited to file and serve pleadings on Commission implementation and enforcement of Operation Standards. The ruling included limited proposed changes to GO 167:

- a. inclusion of Operations Standards (GO 167 §§ 2, 3, 8, 15 and Appendix D);
- b. clarification of the expiration of GDSs (GO 167 § 4);
- c. clarification of the effective date of changes (GO 167 §§ 4 and 15); and
- d. correction of a prior error (GO 167 § 15.1.1).

³ A GAO is “any person or entity owning, controlling, operating, or managing a Generating Asset,” with limited exceptions. (GO 167 § 2.9.)

By ruling dated September 20, 2004, dates were extended for the filing and service of various pleadings. On October 6, 2004, timely comments on Commission implementation and enforcement were filed and served by PG&E, SCE, SDG&E, Calpine, DENA, Elk Hills, Mirant, Reliant, and WCP. On October 13, 2004, no reply comments were filed.

On November 3, 2004, timely supplemental comments were filed and served by SDG&E, Calpine, DENA and Mirant. On November 8, 2004, no supplemental reply comments were filed.

On November 9, 2004, a motion for formal hearing was filed and served by Calpine. No responses were filed. The motion was denied by ruling filed on November 15, 2004.

We carefully consider the record before us. We adopt the changes to GO 167 in Attachment 4 for the reasons explained below. We are persuaded by parties in some cases not to adopt what was proposed in the ruling dated September 13, 2004, or to adopt a variation. In other cases, we are not persuaded to make any modification, and adopt what was proposed September 13, 2004. Further, we include the filing of plan summaries as recommended by the Committee. Parties also raise issues common to operation and maintenance which we address separately. Finally, parties again raise arguments about jurisdiction, which we discuss briefly below.

We address the following in order:

Chapter 3: Operation standards

Chapter 4: Expiration of GDS

Chapter 5: Effective dates

Chapter 6: Correction of prior errors and miscellaneous changes

Chapter 7: Issues common to operation and maintenance

Chapter 8: Jurisdiction

3. Operation Standards and Parallel Changes to Maintenance Standards

The most important change to GO 167 is to include Operation Standards. We do this by including appropriate language in §§ 2, 3, 4, 8, 15 and Appendix E.⁴ The bulk of the changes are to GO § 8.

We use an approach that largely parallels that used for Maintenance Standards. For example, each GAO will prepare an Operation Plan that is retained at the plant location or central office, just as with the Maintenance Plan. Similarly, the GAO will file a verified Initial Certification with CPSD.

Based on Committee recommendations and comments from parties, we also give direction on the use of Guidelines, and include the filing of an Operation Plan Summary. We make similar changes to Maintenance Standards to maintain a parallel structure in the GO. We provide guidance on how these changes are to be understood and implemented for Maintenance Standards given actions already undertaken during Summer 2004. We address these and other comments in the sections below, and do this in the order of the Sections in the adopted GO. We begin with what was perhaps the most heated topic in this phase: the role of Guidelines.

3.1. Guidelines (GO § 8.1)

3.1.1. Inclusion Within Standards

The Committee adopted Operation Standards and Recommended Guidelines. Each GAO is required to operate in compliance with Operation Standards. (GO § 8.1, Appendix E.) The Guidelines may be used to determine

⁴ Below we change prior Appendix D (reserved for Operation Standards) to Appendix E to promote a parallel structure within the GO.

compliance with a Standard. Respondents are unanimous in asking that the Recommended Guidelines not be considered part of the Operation Standards. We agree.

Each Standard is enforceable, while each Guideline is not. We include in the GO what is directly enforceable—that is, the Standards. We adopt the Committee’s recommendations, and repeat the Committee’s language here, because it provides meaningful context and direction on our use of the Guidelines:

“The Committee does not intend these guidelines to be enforceable. There may be reasonable ways of meeting a particular standard that do not follow every provision of the associated guidelines. On the other hand, the guidelines may not be an exhaustive list of the actions required by a standard, because at particular plants there may be special conditions not contemplated here.

“GAOs should consider the guidelines in reviewing or reformulating their own policies, operating procedures, and implementation schedules, to ensure that the concerns raised by the guidelines are addressed, where relevant, at each power generation unit. We anticipate that that Commission staff will use the guidelines as indicators of the kinds of GAO activities that are sufficient to meet standards. Failure to meet guidelines under a particular standard may of course raise questions about the completeness of a GAO’s program. Failure to meet a guideline, in combination with other evidence, may indicate a violation of the Standards. However, failure to meet a guideline should not be taken, per se, as a failure to meet the associated standard.” (Committee Operation Standards, October 27, 2004, Introduction, Guidelines, page 6.)

We adopt the Guidelines as guides, but do not adopt them as Standards. We seek a relatively compact, focused and streamlined GO that is most useful to the regulated community and the Commission. As such, we do not include the extensive and detailed Guidelines in the GO.

We do, however, include the Guidelines as an attachment to this decision. (See Attachment 3.) This permits the Guidelines to be in a printed volume of Commission decisions, and among Commission decisions on the Commission's web page, for easy reference. We note in the GO (at GO § 8.1 and in Appendix E) that the Guidelines are available from the Commission. We expect CPSD to make them readily available upon request.

3.1.2. Changes to Guidelines

While we adopt the Committee's Recommended Guidelines, we also authorize CPSD to modify Guidelines over time, and make revised Guidelines available to GAOs. We do this because the extensive and detailed Guidelines adopted today will not necessarily survive over time in the same manner as the adopted Standards. Rather, we expect CPSD to seek information and advice from the regulated community, along with using its own knowledge and experience, to revise Guidelines periodically, if and when reasonable and necessary.

Should concerns arise regarding CPSD's use of today's Guidelines, or those modified by CPSD over time, we may review the matter in one of several ways. First, a CPSD enforcement action involving Guidelines may be contested by the GAO. If subsequently brought to us formally by CPSD or another party, one or more participants may recommend that the Scoping Memo

for that proceeding identify as an issue the reasonable use of one or more Guidelines. If made an issue, the ultimate disposition of that proceeding could determine the appropriate use of one or more Guidelines.

Second, CPSD may bring Guidelines to us for review and consideration by draft Resolution. Consistent with the Commission's process, parties would have an opportunity to comment. (Rule 77.7 of the Commission's Rules of Practice and Procedure.)

Third, a GAO might petition the Commission for initiation of a proceeding (e.g., Order Instituting Investigation (OII) or Order Instituting Rulemaking (OIR)) to review and revise Guidelines, or their use. (See § 1708.5; Rule 14.7 of the Commission's Rules of Practice and Procedure.) Finally, on our own initiative we might open an OII or OIR to examine the proper role and use of Guidelines or revisions.

In comments on the draft decision, Mirant contends that it is unlawful for the Commission to delegate authority to CPSD to modify Guidelines, since modification involves more than a ministerial act but requires the exercise of discretion and judgment. We are not persuaded. Rather, as we have said previously:

“These provisions [Pub. Util. Code §§ 7, 308, 309] clearly authorize delegation of responsibilities that involve the actual exercise of judgment and discretion, and not simply the application of a rubber stamp or mathematical formula [footnote deleted].” (D.02-02-049, mimeo., page 9; also see D.04-05-018, mimeo., pages 13-14 for a discussion of delegation of functions to staff.)

Moreover, we have agreed with parties and the Committee that Guidelines are not enforceable. There is no improper delegation since we are not delegating authority to change individually enforceable policies or standards.

Rather, each Guideline is a guide. Each Guideline is intended to assist a GAO achieve compliance with a Standard. We expect GAOs and Commission staff to use Guidelines “as indicators of the kinds of GAO activities that are sufficient to meet standards.” (Committee Operation Standards, October 27, 2004, Introduction, Guidelines, page 6.) Where reasonable, we expect CPSD to give information to the regulated community about the “indicators” CPSD will consider in assessing compliance. The burden of actual compliance, however, remains with the GAO.

We expect CPSD to make Guidelines (as endorsed today or as modified over time) readily available upon request. CPSD may bring modifications to us for formal approval by draft resolution if desired, but that is not necessary. A GAO may bring the matter to our attention for formal consideration by contesting a CPSD enforcement action (e.g., GO § 13.3⁵), defending itself in a formal Commission action (e.g., GO § 13.1⁶), or petitioning the Commission to review and revise Guidelines. This approach recognizes the role of Guidelines as guides (not standards) while fully protecting parties’ rights and at the same time efficiently using the limited resources of industry and government.

⁵ These are largely ministerial actions, such as whether or not a document was filed by a particular date, or certain plans maintained.

⁶ Such as an Order to Show Cause why a GAO should not be held in violation of GO 167.

3.1.3. Maintenance Standards

We adopt the same approach for the Maintenance Standards, as discussed more below. As such, we eliminate reference in the GO to the Assessment Guidelines (GO § 7.2.1). We similarly streamline GO Appendix D (Maintenance Standards), and include references that Guidelines are available from CPSD.⁷ CPSD may modify Assessment Guidelines (Maintenance Standards) over time, just as it may modify Recommended Guidelines (Operation Standards).

3.1.4. Matrix

Related to whether or not the Guidelines are mandatory, respondents unanimously express concern about CPSD's prior use of a matrix to demonstrate compliance with Maintenance Standards. The matrix approach included a requirement that each Assessment Guideline for each Maintenance Standard be addressed or its nonuse explained. Respondents oppose the use of a matrix approach for measuring compliance with Operation Standards.

We understand CPSD's matrix concept was designed to employ a comprehensive approach, advance consistent and uniform treatment, and facilitate efficient processing of information. By employing the implementation recommendations of the Committee, however, we adopt an alternative approach that satisfies these goals in a less burdensome way. We address this below regarding the filing of a Maintenance Plan Summary and Operation Plan Summary.

⁷ The Assessment Guidelines were printed with D.04-05-018 and need not be attached again here.

3.2. Operation Plan (GO § 8.2)

3.2.1. Contents (GO § 8.2.1)

3.2.1.1 Contents Generally

Reliant, Mirant and others contend that CPSD should not be permitted to specify the contents and format of the Operation Plan. (GO § 8.2.1.) Rather, they assert that greater flexibility and individualized approaches be permitted.

We adopt their recommendation by making § 8.2.1 largely parallel to the previously adopted language for § 7.2.1. This eliminates use of the language in the September 13, 2004 proposal regarding CPSD. We adopt SDG&E's recommendation that:

“The focus should be on substance not form. As long as the Operation Plan allows CPSD to ascertain the necessary information, it should not be required to be in a particular format...” (SDG&E Comments dated October 6, 2004, page 3.)

At the same time, however, we expect GAOs to cooperate as fully as reasonably possible with CPSD. This cooperation will help reduce the cost and increase the efficiency of the entire process for GAOs and the Commission. If necessary to secure these efficiencies, in a future order we may be more specific on format and content. In the meantime, we also note that CPSD may seek information it needs in specific formats via information requests, and GAOs must comply. (GO § 10.)

3.2.1.2 Resolution of Conflicts and Use of Narrative

Part of the adopted flexibility is that a GAO may cite to “existing equipment manuals, checklists, warranty requirements and other documents” to

demonstrate compliance. (GO § 8.2.1.) As initially proposed, GO § 8.2.1 would have required that “if any of these documents are contradictory, the Operation Plan will resolve the contradiction.” Calpine asserts that GAOs may attempt to use Operation Plans to resolve all contradictory language, but it could be difficult to identify and resolve all instances where documents conflict, particularly as specific operating parameters and procedures change over time.

We agree with Calpine’s concern, and modify the language to provide more flexibility. GAOs are expected to use due diligence in identifying and resolving conflicts, and the burden is on GAOs to do so. Nonetheless, we change the language in GO § 8.2.1 from “will” to “should.” We adopt the same language for Maintenance Standards in GO § 7.2.1.

DENA recommends we specifically direct that the Operation Plan be a narrative description of how the GAO’s practices demonstrate compliance with each Operation Standard. While a narrative approach appears highly reasonable, and we encourage its use in all reasonable instances, we decline to be this prescriptive at this time. Rather, we employ language that the Plan may be in the form of “a narrative, index, spreadsheet, database, web site or other form.” This maintains flexibility for the GAO, while ensuring the necessary information is available to demonstrate compliance and facilitate an audit by CPSD. Failure to comply will occur if the information is not reasonably available, or if CPSD is unable to conduct an audit due to an inadequate Operation Plan, not whether the Plan is in the form of a narrative.

3.2.1.3 Corrective Action

We also include a requirement that the Operation Plan show how and when compliance will occur in a case where the GAO is not currently in compliance with an Operation Standard. This requirement is consistent with the

previously adopted approach for a corrective plan (GO § 7.2.3 effective May 10, 2004), and as proposed September 13, 2004 (§ 8.2.3), but identifies the corrective plan to be part of the Operation Plan retained at the facility site. Flexibility is retained for a GAO's demonstration of compliance as long as the compliance with each Operation Standard is demonstrated, or how and when compliance will occur is documented. Moreover, this clarifies that we do not intend the corrective plan to be a separate document, but is part of the Operation Plan.

3.2.1.4. Specific Contents

Several parties note that the September 13, 2004 proposal identified four specific Operation Plan content elements (proposed GO §§ 8.2.1.1 through 8.2.1.4). They point out that these items should be revised based on what the Committee adopted on October 27, 2004. We generally agree.

In fact, however, we decline to adopt additional specifics regarding contents of the Operation Plan. This continues to make newly adopted GO § 8.2.1 more parallel with existing GO § 7.2.1. As discussed more below, specific elements may be considered for the Operation Plan Summary (GO § 8.3), including implementation items the Committee recommended on October 27, 2004.

Thus, the Operation Plan is composed of a more detailed document or documents retained at each GAO site that demonstrates how the GAO satisfies the Operation Standards. It may include a "mapping" like that used with the Compliance Document for Logbook Standards, as long as the necessary material is available without unreasonable delay for an audit or other use. GAOs should have reasonable flexibility in preparing their Operation Plan provided that it contains everything necessary to show compliance, or show how and

when compliance will be achieved, and reasonably facilitate an audit. CPSD may obtain a copy as necessary. (GO § 8.3.)

3.2.2. Availability (GO § 8.2.2)

We adopt the proposed availability requirement, which mirrors that already adopted for the Maintenance Plan. We also make clear that CPSD may ask for portions of the Operation Plan, not just the entire plan.

3.2.3. Initial Certification (GO § 8.2.3)

We adopt the proposed Initial Certification requirement, but we reorganize the section to increase clarity. That is, the Initial Certification for the Operation Plan is the same as previously required for the Maintenance Plan. We clarify, however, that the certification is of either compliance or noncompliance.

In the case of noncompliance, the GAO must also verify that it has identified and documented deficiencies, and adopted a course of corrective actions reasonably designed to achieve compliance. SDG&E, DENA and others point out that GO § 7.2.3 adopted May 10, 2004 provides 180 days for a GAO to achieve compliance, but proposed GO § 8.2.3 provides only 90 days. SDG&E contends there is no reason to shorten the deadline for Operation Standards.

We disagree, and retain 90 days. The 90 days begins with the filing of the Initial Certification of Operation Plan, which is 90 days after changes to the GO are effective.

That is, for example, if GO changes are effective December 23, 2004, the Initial Certification is due within 90 days, or March 23, 2005. Compliance with all Operation Standards is then expected within 90 days, or by June 21, 2005. June 21, 2005 is just after the beginning of Summer 2005. It is reasonable to expect GAO compliance with all Operation Standards by Summer 2005, or approximately 6 months from the date of this decision. On the other hand,

180 days would push the deadline to September 19, 2005. This is unacceptably beyond Summer 2005.

The 180-day period was satisfactory for Maintenance Standards given the newness of the program. A shorter timeframe for Operation Standards is reasonable given the experience of GAOs and CPSD with GO 167, the relative maturity of the program, and the need to have implementation and enforcement of Standards in place for Summer 2005.⁸

3.2.4. Filing Dates (GO § 8.2.4)

Each GAO must file a verified Initial Certification. For a generating asset in active service, the Initial Certification of a Maintenance Plan was due within 45 days of the effective date of the GO.⁹ (GO 167 §§ 7.2.4, 15.3.) For Operation Standards, the September 13, 2004 proposal was that this filing be within 90 days of the effective date of the order. (GO proposed § 8.2.4.) DENA contends this should be 180 days for Operation Standards, particularly if a matrix approach is used by CPSD.

We retain 90 days. This deadline is to complete the Initial Certification, not a matrix. The Initial Certification is a reasonably straightforward exercise to affirm and verify compliance or noncompliance.

⁸ By letter to the Executive Director, the GAO may, for good cause, seek an extension of the 90 days. To the extent reasonable, the request should (a) be limited to the subset of Standards for which extra time is requested, (b) identify the precise number of days of extension requested for each such Standard, (c) state the reason(s) an extension is necessary for each such Standard, and (d) state anything else reasonably necessary to explain and support the request. (Rule 48(b) of the Commission's Rules of Practice and Procedure; also see footnote 29 in D.04-05-017 regarding requests for extensions.)

⁹ GO 167 was effective May 10, 2004. The Initial Certification for Maintenance Standards was due by June 24, 2004.

Moreover, we adopt the approach of an Operation Plan Summary. As such, we do not need to increase the days from 90 to 180.

A parallel timeframe for Operation and Maintenance Standards would argue in favor of making the days the same at either 45 or 90. We decline to do so. It is moot to increase the days for the Initial Certification of a Maintenance Plan from 45 to 90 since that date has passed.

Similarly, we decline to reduce the days from 90 to 45 for the Initial Certification of an Operation Plan. There were 18 Maintenance Standards but there are 28 Operation Standards. A GAO may need more time to file its Initial Certification for the larger number of Operation Standards.¹⁰

We also adopt 90 days for the filing relative to other assets (e.g., new facilities, acquisitions). We have previously adopted 90 days for the Initial Certification of a Maintenance Plan regarding other assets (GO § 7.2.5 effective May 10, 2004). We know of no reason not to do so for the Initial Certification of an Operation Plan.

3.3. Plan Summaries (New GO § 8.3)

3.3.1 Contents (GO § 8.3.1)

Mirant says that proposed GO §§ 8.2.1.1 through 8.2.1.4:

“should be collapsed and combined into a single statement that ‘each Generating Asset Owner should prepare an Operation Plan that summarizes how the Generating Asset Owner meets the intent of the Operation Standards, including by identifying relevant operating policies, procedures, programs and routines

¹⁰ Those unable to comply may request an extension of time by letter to the Executive Director. (Rule 48(b).)

that the Generating Asset Owner has in place (or will put in place) to demonstrate compliance with the Operation Standards.’ ” (Mirant Comments, October 6, 2004, page 6.)

This is consistent with WCP’s recommendation:

“The operations standards should be implemented by means of a report from the Generation Asset Owner to the Commission. In this report, the GAO would describe how its operating procedures meet the standard, with cross-references to its existing documentation of operating procedures.” (WCP Comments, October 6, 2004, page 5.)

We agree, and do this in new GO § 8.3 regarding an Operation Plan Summary. We expressly provide for this in GO § 8.3.1 We adopt language less specific than recommended by Mirant, and only require that the document summarize how the GAO’s operation complies with each Operation Standard. At the same time, however, we expect the summary or report to be as comprehensive as necessary to be complete (i.e., as a complete summary or report, not the complete Operation Plan). Absent good reason to the contrary, we expect it to address each Operation Standard individually. Further, it should reference Guidelines and documents (including policies, procedures, programs, routines) where necessary and useful.

Unlike for the Operation Plan above, we provide that the Executive Director shall specify the format and content elements of the Operation Plan Summary. This is a reasonable requirement since this document is filed with the Commission. Where feasible, the Commission seeks to provide a consistent approach for each filing made with the Commission so as to promote efficiencies for both the regulated community and the Commission.

GAOs are encouraged to assist by submitting a proposal (e.g., format, organizational structure, content elements) consistent with discussions between GAOs and staff at the September 20-21, 2004 workshops. Unless staff sets a different deadline, we direct that GAOs submit their proposal within 30 days of the date this order is mailed. The Executive Director should employ all reasonable and feasible suggestions of GAOs to moderate the burden on GAOs while meeting the Commission's need to have information in a usable form so that the Commission may fulfill its duties.

DENA, SDG&E and others also observe that the Committee recommended an approach involving a summary plan with two specific components.¹¹ (DENA Supplemental Comments, November 3, 2004, page 4; SDG&E Supplemental Comments, November 3, 2004, page 3.) They point out that this approach, if adopted, should be included in the GO. We agree, but we leave the specific items up to the Executive Director.

¹¹ In particular, the Committee recommended:

- “1) A brief Unit Plan including the expected years the plant will remain in operation, whether the plant is regarded as a baseload plant or peaking plant (or some intermediate designation), what level of availability the GAO intends for the plant, whether the plant will operate year-round or only seasonally, and whether the GAO views the plant as a long-term resource that requires continued maintenance and investment.
- “2) A general description and timetable of how the GAO meets or plans to meet the provisions of each Operation Standard at each unit (or identical groups of units), identifying by title (and location) and summarizing the various operating policies, procedures, training programs and routines the GAO has in place (or will put in place) to demonstrate compliance with the Operation Standards. “ (October 27, 2004 Operation Standards, Introduction, Implementation, page 7.)

That is, we decline to include in the GO at this time the level of detail recommended by the Committee, but delegate that to the Executive Director. (GO § 15.10.) We are confident the Executive Director will determine a reasonable format and content elements, taking into account the recommendations of GAOs, and including some or all of the items specified by the Committee. If presented to us for consideration, we may in a future amendment to the GO be more specific about the level of detail, format and content elements for the Operation Plan Summary.

Finally, we note that the Operation Plan Summary must include a summary of corrective action a GAO will take when the GAO is not in compliance with an Operation Standard. This reasonably moves this requirement from what was previously called the Certificate of Noncompliance to the Operation Plan Summary.

3.3.2. Filing (GO § 8.3.2 and Related Sections)

Each GAO will need a reasonable amount of time to prepare its Operation Plan Summary after the Executive Director specifies the format and content elements. For assets in active service, we provide 120 days. (GO § 8.3.2.1.) For other assets (e.g., new facilities, acquisitions), we provide that the Operation Plan Summary be filed with the Initial Certification. (GO § 8.3.2.2.) This later timeframe (for other assets) is reasonable since the format and contents will be known sufficiently in advance to permit feasible preparation.¹² The Operation Plan Summary is to be filed under oath, affirmation or verification of a

¹² As noted above, the GAO may, by letter to the Executive Director and for good cause, seek an extension. (Rule 48(b).)

corporate officer, just as is each formal filing with the Commission (i.e., Certification, Recertification, Notice, Contest of Assessed Fine). We make that requirement clear in the appropriate part of the GO. (GO § 15.3.)

Moreover, we add a scheduled fine for failure to file an Operation Plan Summary, just as we have for other formal filings (i.e., Initial Certification, Recertification, Notice of Material Change). (GO § 13.3, and Fines for Specified Violations in Appendix F.) As with all scheduled fines, the GAO's acceptance of this fine is voluntary. The expedited procedure inherent with a scheduled fine, however, reduces the time and expense that a GAO might otherwise face as a respondent in a formal proceeding when the GAO admits (or does not dispute) violating the GO regarding a relatively specific act (e.g., failure to file a particular document by a specified date).

3.3.3 Updates (GO § 8.3.2.3)

Each GAO must periodically file a verified re-certification that it continues to maintain Logbooks and implement a Maintenance Plan in compliance with requirements of the GO. The re-certifications are due every other year pursuant to a schedule to be determined by CPSD. (GO § 15.1.) We add the parallel requirement in GO § 15.1 that each GAO periodically file a verified re-certification regarding implementation of an Operation Plan.

Related to this re-certification, we require that the GAO update its Operation Plan Summary and file a verified copy of the update with CPSD every other year on a schedule to be determined by CPSD. (GO § 8.3.2.3.) We also add a scheduled fine for failure to file an update to the Operation Plan Summary when required. (GO § 13.3, Appendix F.) This will ensure that the Commission has information that is reasonably up-to-date and accurate. CPSD may also obtain this and other information at other times as needed. (GO § 10.0.)

3.4. Exemption (GO § 8.4)

We adopt the same exemption provisions that we have already adopted for Maintenance Standards.

3.5. Maintenance Standards**3.5.1. Consistency With Operation Standards**

We use this opportunity to make GO provisions for Maintenance Standards essentially parallel to those for Operations Standards. A similar GO structure for both Maintenance and Operation Standards will facilitate use of the GO by both the regulated community and the Commission. It permits incorporation of reasonable clarifications based on what we have learned since adoption of GO 167 in May 2004 (e.g., whether or not there is a separate Corrective Plan). It also permits consistent treatment of similar issues raised by parties (e.g., use of Guidelines, contents of each Plan).

The revisions retain the same basic requirements for Maintenance Standards adopted in May 2004. For example, the Plan is used to show compliance with Standards, and is retained at the GAO's facility. Similarly, the verified Initial Certification and filing dates are the same. We use a better GO organization and structure, however, such as putting compliance and non-compliance as items under Initial Certification.

We also adopt the same language regarding the contents of the Maintenance Plan that is used for the Operation Plan, and do so for the same reasons. Thus, each GAO has reasonable flexibility in its preparation of the Maintenance Plan. We similarly clarify that the Maintenance Plan is to include information on a course of corrective action when the GAO's maintenance does not satisfy a Maintenance Standard.

3.5.2. Matrix and Maintenance Plan Summary

We also use parallel language for each plan summary. (GO §§ 7.3 and 8.3). We provide the following guidance on how this change is to be understood and implemented for the Maintenance Plan Summary given actions already undertaken with regard to the Maintenance Plan compliance matrix in Summer 2004.

The Maintenance Plan Summary is not required until 120 days after the Executive Director specifies the format and content. We expect that the Executive Director will seriously consider accepting a fully completed matrix for the Maintenance Plan Summary. We also expect the Executive Director to work with GAOs on the reasonable format and content for the Maintenance Plan Summary, just as we do for the Operation Plan Summary, and to solicit their recommendations at the appropriate time. The Executive Director should consider those recommendations in designing a Maintenance Plan Summary. If appropriate as determined by the Executive Director, the Maintenance Plan Summary might then be filed by a GAO if the GAO has not already successfully completed an entire Maintenance Plan matrix. Alternatively, the Executive Director may defer specifying the format and content elements until the next biennial update and filing in 2006 (GO § 7.3.2.3).

In any event, we do not adopt this parallel treatment for each Plan Summary to unreasonably increase the burden on GAOs or staff. Rather, we adopt this language as part of the development and evolution of the program. We expect it to be employed reasonably in fulfilling the legislative intent and purpose for this program, to assist the regulated community come into reasonable compliance, to permit each GAO to demonstrate its compliance, and

to provide staff with an additional tool to facilitate implementation and enforcement.

3.6. Committee's Recommendation

Our adopted approach applies the Committee's recommendation:

“that the Commission implement the standards in a way that provides GAOs considerable flexibility in meeting the standards while retaining accountability. Accordingly, the Committee recommends that the Commission require GAOs to file for each power generation unit an Operation Plan...[with certain minimum requirements]... The Committee recommends that the Commission require the Operation Plans to be updated appropriately...”
(Committee Operation Standards, October 27, 2004 at page 7.)

That is, each GAO will have a specific Maintenance Plan, and a specific Operation Plan. Each plan will demonstrate how the GAO's practices comply with each standard, or how and when compliance will be achieved. (GO §§ 7.2.1 and 8.2.1.) Each plan will be retained at the GAO's site or central business office. (GO §§ 7.2.2 and 8.2.2.) Each GAO has filed, or will file, a verified Initial Certification. (GO §§ 7.2.3, 7.2.4, 8.2.2, 8.2.4, 15.3.) Each GAO will file a verified Plan Summary showing how its operation and maintenance meets each Standard. Each GAO will periodically file a verified re-certification of compliance, and an updated verified Plan Summary. (GO §§ 7.3, 8.3, 15.1.1, 15.2, 15.3.) This approach provides considerable flexibility while retaining accountability, requires the filing of reasonable plans, and provides for appropriate updates.

3.7. GAO Compliance

Our adopted approach seeks to facilitate a GAO's compliance, while meeting our duties. We expect each GAO's Summary Plan (along with each GAO's detailed plan retained at the GAO's site, and all other relevant information) to be used by CPSD to determine whether or not the GAO is in compliance with GO 167.

Even if not in a GAO's plan, we expect CPSD to use the Recommended Guidelines for Operation Standards adopted herein in its determination of a GAO's compliance (and the Assessment Guidelines adopted in D.04-05-018 for Maintenance Standards). As explained above, failure to meet a Guideline should raise concern about a GAO's compliance, and failure to meet a Guideline in combination with other evidence may demonstrate a violation, but failure to meet one or more Guideline(s) does not by itself demonstrate a failure to comply with GO 167.

Calpine expresses concern that this approach:

“sends a mixed message by asserting that the guidelines are not enforceable requirements, but the failure to meet a guideline may indicate a violation. This language suggests that the guidelines are enforceable to some degree.”
(Calpine Supplemental Comments, November 3, 2004, page 3.)

We are not persuaded. Failure to meet a Guideline may indicate a violation, or it may not. “May” is not “is.” The facts of each case will control. GAOs have flexibility to employ alternative ways to satisfy each Standard, as long as there is compliance with the Standard. The burden is on the GAO to comply, and either show compliance or a plan of corrective action. The GAO

may elect to use and cite Guidelines to show compliance, or may use and cite other methods, as long as the Standard is met.

4. Expiration of General Duty Standards for Operation and Maintenance

In May 2004, we stated that our implementation and enforcement of the GDS was limited and temporary for large facilities (over 50 MW), lasting only until more detailed operation standards were implemented and enforced. We also incorporated the most important elements of the GDS into relevant sections of the GO for medium sized facilities (between 1 MW and 50 MW). (D.04-05-018, page 23; GO 167 §§ 3.3, 4.2, 5.2, 6.2 and 7.4.) In September 2004, we asked for comments regarding the expiration date of the GDS. (Ruling dated September 13, 2004.)

No objections were received to clarifying the expiration date of the GDS within the GO itself. We adopt this clarification. Similarly, no reasons are known against putting the most important elements of the GDS into relevant GO sections for operations of medium sized facilities (GO § 8.4), just as we have done for maintenance of medium sized facilities (GO § 7.4). We do so.

5. Effective Dates

5.1 Effective Date for Changes to GO (§ 15.12)

No party objects to the September 13, 2004 proposal making changes to the GO effective three days after the decision is mailed. We adopt this proposal.

5.2. Active Service (§ 2.1)

“Active Service” is now defined in the GO. (GO § 2.1.) For each generating asset placed in active service after the effective date of the new Operation Standards, a verified Initial Certification must be filed within 90 days.

(GO § 8.2.4.1.) According to SDG&E, however, the definition of active service could trigger the 90 days from the date the plant is first tested. SDG&E says that this could be many months before the plant is running on a regular basis. SDG&E recommends a change in the definition of active service. (GO § 2.1.) No party objects.

We adopt SDG&E's proposal, and include within the definition of active service the condition that the facility has achieved commercial operation. This terminology has a standard meaning within the industry, according to SDG&E, and we accept SDG&E's assertion that the revised language clarifies when the verified Initial Certification must be filed.

6. Corrections and Other Minor Changes

We correct a typographical error identified in the September 13, 2004 ruling (i.e., in GO § 15.1.1 to correct the reference from GO § 7.5 to GO § 7.4). We also change or correct other minor, non-substantive items (e.g., GO § 1 to include “(Operation Standards)” in parallel treatment with “(Maintenance Standards)”; GO § 15.8 to correct “utility” to “utilities”).

We also change the order for the next printing of GO 167. That is, GO 167 is organized in the following order from §§ 4 through 8:

- 4.0. General Duty Standards
- 5.0. Generator Logbook Standards (Thermal Energy)
- 6.0. Generator Logbook Standards (Hydroelectric Energy)
- 7.0. Generator Maintenance Standards
- 8.0. Generator Operation Standards

The first printing of the appendices did not follow this order. For subsequent printings, we will follow the above order for a more parallel structure within the

GO and its appendices. Because we change the order of some appendices, we also correct the references within the GO. (E.g., GO §§ 2.11, 13.3.2, 13.3.4, 14.4.)

We number the specified violations in Appendix F for easier reference. Violation 2 is for failure to maintain specific documents required by the GO. We add a scheduled fine for failure to maintain an Operation Plan. We add the parallel requirement for failure to maintain a Maintenance Plan. (GO § 13.3, and Fines for Specified Violations in Appendix F.) As with all scheduled fines, the GAO's acceptance of a scheduled fine is voluntary.

7. Items Common to Operation and Maintenance

7.1. FERC Licensed Hydro

FERC-licensed hydroelectric facilities are exempt from some, but not all, sections of the GO. (D.04-05-018 at Ordering Paragraph 2.) PG&E and SCE recommend that the exemption be extended to Operation Standards, and be stated in the GO.

We agree. The same reasons that justify an exemption from Maintenance Standards similarly justify an exemption from Operation Standards (e.g., intergovernmental comity). (D.04-05-018 at *mimeo.*, pages 7-9.) It is administratively desirable to state all relevant items in the GO in order to facilitate implementation of the program, including our adopted treatment of FERC-licensed hydro. This approach does not increase the burden on parties or the Commission should a change later be needed (i.e., a Commission order is needed whether it is to change a prior Commission decision or a GO). Thus, we make this change by adding GO § 3.5 to GO § 3 (Required Compliance).

7.2. Multiple Violations

Calpine, DENA and Reliant point out that: (a) Operation Standards 1-11 are similar to, or the same as, Maintenance Standards 1-11; (b) Operation Standard 17 involves records of operation that may overlap with recordkeeping required by Logbook Standards; and (c) some Standards and Guidelines (e.g., safety, clearances) are already regulated and enforced by other state and federal agencies. They assert that two or more violations should not be found when a GAO fails to comply with one Standard that is repeated in two places, or enforced by two or more government agencies.

We decline to make a generic determination here. Rather, the finding of one or more violations, and the assessment of one or more penalties, will be fact-specific.

For example, safety—and violation of a safety standard (e.g., Maintenance Standard 1 and Operation Standard 1)—may or may not be the same when it is maintenance-related or operations-related. It may be possible to perform maintenance safely, but operate unsafely, or vice versa, or to simultaneously fail to do both. Similarly, one safety violation may involve two different but necessary underlying actions to separately accomplish safe maintenance and safe operation (with each one identified in the individual Maintenance Plan and Operation Plan). As a result, one apparent violation may or may not actually be one violation, and may or may not justify more than one penalty. We are confident that a GAO will present (or make available to CPSD) all reasonable and necessary facts in each particular case to demonstrate and support whether one or two violations has occurred, and whether one or two penalties is a just and reasonable result.

We also point out that we have already provided several ways that sanctions may be mitigated. (GO 167, § 14.2.) These mitigation measures generally address the concerns expressed by GAOs here. For example, in determining sanctions we take into account penalties by other governmental agencies, contracts or other regulatory bodies for the same acts or omissions. (GO 167 § 14.2.3.) A GAO should bring such matters to our attention in an enforcement action.

7.3. GAO Management of Employees

Calpine asserts that the Commission should state its implementation and enforcement of Operation Standards will not interfere with the right of a GAO to manage its employees or business structures, including without limitation the right to hire, fire, reward and motivate its employees and structure its management. (Calpine Comments October 6, 2004, page 2.) We agree to the extent we adopt the Committee's position that:

“References within the Standards and Guidelines to ‘employees,’ ... ‘management,’ or other staffing descriptions are not intended to require a GAO to follow any particular organizational structure...Rather, a GAO is free to organize its work force in the manner it deems most appropriate.”
(Operations Standards, October 27, 2004, page 5.)

This interpretation should also apply to our implementation and enforcement of Maintenance Standards, and we do so.

We also affirm, with limited exception, that our implementation and enforcement of all GO 167 Standards will not interfere with the right of a GAO to manage its employees or internal business structures, including without limitation the right to hire, fire, reward and motivate its employees and structure its management. The exception is with respect to compliance with GO 167

Standards, and cooperation with the Commission. In particular, this involves our duty to protect public health and safety.

Specifically, we point out that a GAO, its employees and its contractors shall provide testimony under oath or submit to interviews concerning matters covered by GO 167. (GO § 11.2) Management may not manage its employees, hire, fire, reward or motivate its employees or structure its management in any way to restrict this duty. We repeat here, as we said before, that this does not override any constitutional or statutory privilege that may be properly invoked by the examined person. (D.04-05-018, *mimeo.*, page 36.) We do not, however, authorize management to reward an employee for failing to comply with a CPSD request for testimony or an interview. (GO § 11.2.) Further, we will not tolerate retaliation by a GAO against an officer, employee, agent, contractor, subcontractor or customer for reporting a violation of the GO, or providing information during the course of an audit, inspection, or investigation. (GO § 12.2.)

Our interest is in protecting public health and safety. It is not in directing or limiting managements' decisions regarding internal business structures or employee relations.

7.4. Independent Business Judgment

Mirant recommends that in implementing the Operation Standards, the Commission should recognize and confirm that each GAO is free to make operating and investment decisions according to its own business goals, and based on its independent analyses of relative costs and benefits. Mirant asserts it is essential that the Commission and CPSD not attempt to second-guess decisions made by a GAO as it plans and operates its business. According to Mirant, the autonomy of a GAO to make decisions based on prudent and rational

commercial operating practices is a principle that should be built into Commission implementation and enforcement policies.

We include this principle to the following extent. We implement and enforce GO 167 operation and maintenance standards in a manner such that each GAO has abundant, but not unlimited, authority to make its own business decisions. For example, a GAO may employ or not employ a range of policies and practices—including or not including various Guidelines—to satisfy each of the 18 Maintenance Standards and the 28 Operation Standards. A GAO is free to use its own business judgment as long as it complies with each adopted Standard.

Calpine shares Mirant's concern that implementation and enforcement of GO 167 standards may "interfere with a GAO's ordinary and reasonable business practices." (Calpine Comments, October 6, 2004, page 2.) We do not foresee this happening except, perhaps, if there is a conflict between private and public interests subject to GO 167—and in particular public health and safety.

When private business interests conflict with the public interest, the people of California have determined that the public interest controls. If a business practice believed reasonable by a GAO subject to GO 167 is unreasonable in the context of public health and safety, the public interest controls. Should private and public interests conflict, the Commission will implement and enforce GO 167 so that the public interest, public health and public safety prevail.

7.5. Confidential Information

Mirant contends that the Commission should not require GAOs to produce privileged and confidential information without adequate assurance that the Commission will maintain its confidentiality. We have already provided

that assurance. (GO § 15.4.) Mirant offers nothing to convince us to change our prior decision.

Mirant asserts that existing GO 167 provisions impose an unreasonably high burden on a GAO to obtain confidential treatment of data. We are not persuaded. We have already considered the arguments for and against confidential treatment of data, and have found the proper balance in GO 167. We have determined, for example, that the GAO has the burden of proof. (GO § 15.4.1.) No facts or argument are stated that convince us to change this balance.

8. Jurisdiction

We have previously addressed jurisdiction, including respondents' concerns regarding hydroelectric facilities, nuclear powerplants, exempt wholesale generators, out-of-state facilities, and others. We have also stated our intention to pursue our responsibilities "in a spirit of cooperation and comity," but not to "concede or limit any authority of the State of California, either directly or indirectly." (See, for example, D.04-05-017, *mimeo.*, at pages 5-21; D.04-05-018, *mimeo.*, at pages 6-11 and 16-21.)

Respondents continue to express reservations about our authority. We are not persuaded to reverse or change our position, but we address several concerns below.

8.1. Redundant Regulations

Calpine recommends elimination of standards that duplicate the responsibilities of other agencies (e.g., safety). To the extent there may be duplications, of any, we decline to do so.

The Committee's duty was to adopt operation and maintenance standards that addressed the public's concern about electric service reliability and adequacy, public health, public safety, effective maintenance and efficient

operation. The Committee has done so by adopting a comprehensive set of standards.

We do not seek, and do not intend, to duplicate implementation and enforcement that is undertaken by a sister federal, state or local agency absent a compelling reason to do so. Nonetheless, it is reasonable and necessary to maintain a comprehensive set of standards, and be in a position as necessary to engage in their implementation and enforcement. The legislature has given us that responsibility, and we will not willfully ignore or abandon it.

At the same time, we point out that we have already provided for the mitigation of sanctions based on conflicting or competing requirements imposed on GAOs by other governmental agencies, the CAISO, or others. (GO § 14.2.2.) Similarly, sanctions may also be mitigated based on penalties imposed on GAOs by other governmental agencies. (GO § 14.2.3.) Moreover, our enforcement of any Standard will not modify, delay, or abrogate any deadline, standard, rule or regulation adopted by a federal, state or local agency for the purposes of protecting public health or the environment. (GO § 15.6.)

This is a reasonable balance regarding potentially duplicate responsibilities. As necessary, a GAO should bring potential or actual duplications to our attention during specific implementation and enforcement actions.

8.2. CAISO Tariff

Calpine urges that the Commission reject Operation Standard 22 (Readiness), Operation Standard 23 (Notification of Change in Plant Status), Operation Standard 24 (Changes in Plant Status), and Operation Standard 26 (Planning for Unit Storage). Calpine says these matters are already governed by the CAISO tariff approved by FERC, and Commission adoption of these

standards will raise unavoidable federal-state jurisdictional conflicts. Calpine concludes that the Commission should fulfill its obligation by seeking enforcement capability from FERC, and continue to explore matters with FERC.

We have addressed this before, and nothing here convinces us to change our position or approach. We have our own duties, responsibilities, and authority, but, at the same time, we seek a cooperative relationship with FERC and others. (D.04-05-018, *mimeo.*, pages 16-21.) We will continue to embrace a comprehensive approach to implementing and enforcing operation and maintenance standards. We do this to satisfy the legislative goals for California's electricity market: protecting public health and safety; ensuring effective and appropriate maintenance, and efficient operation; and ensuring electrical service reliability and adequacy. (See D.04-05-017, *mimeo.*, page 11.) We do not intend to duplicate efforts of sister agencies, but we will not decline to implement and enforce any Committee-adopted Maintenance or Operation Standard because it might overlap with the duties of another agency. We will continue to explore a cooperative relationship with FERC.

In comments on the draft decision, IEP recommends that the Commission harmonize the requirements of GO 167 with provisions in the CAISO tariff. IEP says a comprehensive set of Operation and Maintenance Standards will inevitably overlap and conflict with other provisions.

We find no conflict that needs our action. The CAISO Chairman was a member of the Committee, and CAISO staff served on the Committee staff. The Committee and its staff developed and adopted a comprehensive set of standards that meet the objectives and requirements of SB X2 39. Neither the CAISO and its staff, nor the Committee and its staff, found any unreasonable

conflict with CAISO tariffs. This is true for both Maintenance and Operation Standards. In fact, the CAISO staff reported at the last Committee meeting:

“The ISO staff took the lead in developing the maintenance standards, as Commissioner Wood has described. And those, of course, were passed by this committee earlier in this process.

“On the other hand, the committee staff took the lead in developing the operation standards. And what the ISO has worked diligently to do is to make sure that they are consistent with our role to operate a reliable electric system. And we believe that we have achieved that.” (Pettingill, Transcript of Committee Meeting held October 27, 2004, page 8.)

We conclude that there is reasonable and adequate harmonization. Moreover, as stated above, we neither seek nor intend to duplicate implementation and enforcement undertaken by a sister agency absent compelling reason to do so. Also as stated before, we will continue to explore a cooperative relationship with others. At the same time we “emphasize, however, that by this action, we do not, nor do we intend to, concede or limit any authority of the State of California, either directly or indirectly.” (D.04-05-018, mimeo., pages 20-21.)

8.3. Consistency With Other Law

Calpine asks that the Commission enforce the Operation Standards without requiring a GAO to act in any manner inconsistent with existing federal, state or local law. Calpine similarly asks that no GAO be required to alter or amend any contractual agreement to comply with the Operation Standards.

We are unable to make such generic statements. We are unaware of any such conflicts in law or contract, and do not anticipate any.

Elk Hills identifies an example of a conflict between Guidelines for Operation Standard 14 (Clearances) and clearance requirements of the California

Occupational Health and Safety Administration. Elk Hills asks that we clarify that the Guidelines are not intended to exceed other existing requirements.

As we do above, we note that Guidelines are guides, not Standards. No enforceable conflict exists. No others are brought to our attention needing resolution here.

8.4. Legal Basis for Approving Changes in Long-Term Plant Status

DENA says the Commission must state the legal basis for its authority to approve changes in long-term plant status. According to DENA, SB X2 39 provided for the development of standards for operation and maintenance, but requiring approval for changes in long-term plant status appears to conflict with an owner's property rights. DENA asserts that this flaw is most problematic with respect to Operating Standard 24, but is also applicable to Operating Standards 22 through 26.

The Commission's authority is stated in GO 167. (See GO § 1.0.) Among other sources, the authority comes from SB X2 39. The purpose of this legislation includes: "to protect the public health and safety and to ensure electrical service reliability and adequacy." (SB X2 39, Section 1(d).) The long-term status of a unit directly affects electrical service reliability and adequacy.

Whether, and when, to operate is the most basic decision regarding operation. Nothing more directly affects electric system adequacy than whether and when a unit is retired. It is appropriate that Operation Standards address this most fundamental of operation decisions.

It is premature to conclude here whether or not Operation Standard 24 conflicts with an owner's property rights. Such conclusion must depend upon the facts of a particular case. Those facts could include whether or not a

mechanism for compensation is available, what is the level of just compensation, and whether just compensation has been denied.

DENA recommends that Operation Standard 24 not be made operative until a mechanism is provided to compensate the GAO for readiness services. (DENA Supplemental Comments, November 3, 2004, page 6.) This is unnecessary. As DENA says, this is a “condition precedent” to its effectiveness. (*Id.*) That is, the standard itself already says: “This standard is applicable only to the extent that the regulatory body with relevant ratemaking authority has instituted a mechanism to compensate the GAO for readiness services provided.” The facts of a particular case will determine whether or not Operation Standard 24 is applicable, and whether or not a compensation mechanism is or is not in place at the time.

Related to DENA’s concern, Mirant contends that taken together Operation Standards 22 and 24 require a GAO to continue operating a unit, and make it fully available to the state’s electricity system, until the Commission authorizes the GAO to shut down or retire the unit. Mirant asserts that this exceeds the Commission’s authority. In support, Mirant asserts that the Commission’s authority is limited to “public utilities.”

We disagree. Mirant is incorrect regarding our authority for the reasons we have already stated. (D.04-05-017, *mimeo.*, pages 7-19.)

Mirant continues by arguing that that “[n]othing in Senate Bill 39xx authorizes the Commission—or the Committee—to restrict non-jurisdictional generators...” (Mirant Supplemental Comments, November 3, 2004, page 3.) All generators subject to SB X2 39 are under the jurisdiction of the Committee and the Commission. We are not persuaded by referring to some covered entities as “non-jurisdictional.”

Finally, Mirant states that “the Commission is not authorized to regulate the economic decisions of entities that sell power exclusively at wholesale...” (Id.) The Commission is not regulating economic decisions. The Commission is implementing and enforcing operation and maintenance standards, a matter that is within our jurisdiction.

In comments on the draft decision, DENA states a concern that the “public interest” standard (discussed above in § 7.4 “Independent Business Judgment”) may be used to require a GAO to keep a powerplant in operation even if the asset is unsuccessful in the marketplace (e.g., does not have a contract with a Load Serving Entity (LSE); does not have a reliability must run contract with the CAISO). DENA asks that the Commission remove any such implication. We clarify as follows.

We will take all material and relevant facts that are brought to our attention into account when implementing and enforcing Operation Standard 24. For example, we expect to consider whether the GAO has a contract with an LSE or the CAISO for its output, whether the resource has been addressed in the Commission’s long term procurement proceeding, or whether the resource is addressed in the Energy Action Plan or other state-adopted plan. Further, we will consider all material and relevant facts presented by the GAO or any party.

8.5. Transfer of Ownership

DENA also asserts that Operation Standard 25 needs to provide more flexibility regarding notice of a transfer of ownership. That is, Operation Standard 25 requires that the GAO notify “the Commission and the Control Area Operator in writing at least 90 days prior to any change in ownership.” DENA states that a GAO may not know whether a transfer will in fact occur within the contemplated timeframe. DENA recommends that “the GAO not be considered

out of compliance as long as the information is relayed as quickly as legally possible.” (DENA Supplemental Comments, November 3, 2004, page 6.)

DENA’s recommendation is reasonable. We will not refer the Standard back to the Committee for amendment, however, given that the Committee expires on January 1, 2005. We might, however, after January 1, 2005, entertain a petition for modification of this order that includes a proposed modification of Operation Standard 25 regarding this provision. We will consider the merits of any such petition at that time. In the meantime, however, we will direct CPSD to enforce Operation Standard 25 with reasonable flexibility, as long as the notice “is relayed to the Commission as soon as legally possible.”

DENA also says that standard commercial practice is to hold negotiations for such transfer in confidence until such time as the transaction is finalized. DENA states that whether the transfer is initiated by the buyer (such as through a solicitation) or the seller, the Commission should avoid impeding commercial transactions through the implementation and enforcement of this standard.

We generally agree. We will take reasonable steps to avoid impeding commercial transactions. Confidentiality, however, is not a valid defense for not notifying the Commission. The GAO may submit such notification consistent with confidentiality provisions of the GO (e.g., GO § 15.4). As such, the notice must be at least 90 days prior to any change in ownership, or as soon as legally possible.

9. California Environmental Quality Act

The California Environmental Quality Act (CEQA) requires that public agencies prepare an environmental impact report whenever the discretionary approval of a proposed project may cause significant adverse impacts on the

environment.¹³ Certain classes of activities have been determined not to have a significant effect on the environment and are exempt from CEQA.¹⁴ One of these categorical exemptions applies to the operation and maintenance of existing electric power generation facilities.

We believe the adoption, implementation and enforcement of Operation Standards, along with the parallel treatment of Maintenance Standards adopted herein, is exempt from CEQA since the standards pertain to the operation and maintenance at existing electric power generating facilities.¹⁵ Moreover, to the extent they apply to a new facility, the new facility will be subject to applicable CEQA review when development of the facility is proposed. As a result, we direct the Executive Director to file a notice of exemption indicating this determination.

10. Proceeding Remains Open

This proceeding remains open for two purposes. First, to resolve any issues stated in the Scoping Memos that have not yet been decided. The assigned Administrative Law Judge (ALJ) should seek comments from parties as necessary and useful.

Second, we will assess whether or not any further technical modifications are needed to promote parallel treatment and consistency within the GO. Again, the ALJ may seek comments from parties as necessary and useful.

¹³ Cal. Pub. Res. Code § 21002.1 (West 2003).

¹⁴ CEQA Guidelines § 15300.

¹⁵ *Id.* § 15301(b).

11. Comments on Draft Decision

On November 16, 2004, the draft decision of Commissioner Carl Wood was filed and served on parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure. Comments were filed and served on or before December 6, 2004 by PG&E, SCE, AES, Calpine, DENA, Elk Hills, IEP, Mirant, and WCP. No reply comments were filed. No motion for final oral argument was made.

We make several changes based on comments. For example, as recommended by SCE, we change the first phrase in Conclusion of Law 9 from 'should' to 'may.' ("Failure to meet a Guideline may raise CPSD's concern about a GAO's compliance...") In response to a comment of DENA, we change a reference from "CPSD's implementation and enforcement" of Guidelines (which may imply a more formal role for Guidelines than intended) to "CPSD's use of Guidelines." Also in response to a comment by DENA, we clarify that implementation of Operation Standard 24 will take into account all relevant and material factors brought to our attention (e.g., whether or not the GAO has a contract for its output). We also provide more precision on filing requirements to maintain a consistent and parallel approach within the program (e.g., Operation Plan Summary to be filed under oath, affirmation or verification; scheduled fine for failure to file the Operation Plan Summary or Updated Operation Plan Summary). We add a scheduled fine for failure to maintain an Operation Plan. (This decision at §§ 3.3.2 and 3.3.3.) We make parallel changes to the GO regarding a Maintenance Plan.

Finally, concerns have been raised regarding potential ambiguities in the enforcement of Standards we adopt today. We encourage CPSD staff to continue to meet with GAOs to eliminate any perceived ambiguities.

12. Assignment of Proceeding

Carl W. Wood is the Assigned Commissioner. John E. Thorson and Burton W. Mattson are the assigned ALJs in this proceeding.

Findings of Fact

1. On November 1, 2004, the Committee filed its Resolution No. 5, including Generator Operation Standards and Recommended Guidelines, with the Commission for Commission implementation and enforcement pursuant to § 761.3(a).
2. Timely comments and supplemental comments were filed and served regarding Commission implementation and enforcement of Operation Standards and Recommended Guidelines, and a motion for formal hearing was denied.
3. The Committee does not intend that each Guideline be enforceable.
4. Some parties recommend that (a) each GAO file with the Commission a summary (or report) regarding its Operation Plan in a manner that provides the GAO with flexibility while retaining accountability, and (b) the Commission incorporate the Committee's recommendation regarding the filing of an Operation Plan summary.
5. The Committee recommends "that the Commission implement the standards in a way that provides GAOs with considerable flexibility in meeting the standards while retaining accountability," that each GAO be required "to file for each power generation unit an Operation Plan" that summarizes key

characteristics of each unit, and that “the Commission require the Operation Plan to be updated appropriately.”

6. The adopted approach (i.e., a detailed Plan demonstrating compliance or corrective action with regard to each Standard, the detailed Plan retained at the GAO site, a verified Initial Certification filed with the Commission, a verified Plan Summary filed with the Commission, periodic verified re-certifications, periodic updating and verified re-filing of the Plan Summary, CPSD obtaining other information by information request) provides flexibility while retaining accountability, requires the filing of reasonable plans, and requires appropriate updates.

7. Each GAO must comply with each Maintenance and Operation Standard and may—but is not required to—use some or all Guidelines to demonstrate compliance.

8. The adoption of 90 days to achieve compliance after filing the Initial Certification results in compliance by early Summer 2005, while a period of 180 results in compliance after Summer 2005.

9. It is neither necessary to increase the days for a GAO to file its Initial Certification regarding its Operation Plan from 90 to 180 (since this is an Initial Certification) nor is it desirable to decrease the days from 90 to 45 (given that there are 28 Operation Standards but were only 18 Maintenance Standards).

10. The existing definition of active service (GO § 2.1) could trigger the 90 day timeframe from when the plant is first tested, which could be many months before the plant is running on a regular, commercial basis.

11. The long-term status of a generation unit directly affects electrical service reliability and adequacy.

12. GO 167 includes provisions for a GAO to submit information subject to claims of confidentiality.

Conclusions of Law

1. A formal hearing on Operation Standards is neither necessary nor required.
2. Each Standard is enforceable, but each Guideline is not.
3. CPSD should make adopted Guidelines available to GAOs upon request, modify adopted Guidelines over time as necessary and reasonable, and make revised Guidelines available to GAOs.
4. GO 167 § 8 should be reasonably parallel to GO 167 § 7, and vice versa.
5. The regulatory focus regarding both the Maintenance Plan and the Operation Plan should generally be on substance (not form), with GAOs permitted reasonable flexibility subject to being held accountable for compliance with each adopted Standard.
6. The Executive Director should specify the format and content elements of the Operation Plan Summary and Maintenance Plan Summary after considering the recommendations of GAOs (e.g., regarding format, organizational structure, content elements).
7. The changes to GO 167 stated in Attachment 4 should be adopted.
8. In conducting an audit, CPSD should use the Maintenance Plan and Operation Plan retained by each GAO on site, the Maintenance Plan Summary and Operation Plan Summary of each GAO filed with the Commission, a GAO's responses to information requests, Assessment Guidelines (Maintenance Standards), Recommended Guidelines (Operation Standards), Maintenance Guidelines for Electric Generating Facilities (Appendix A to Maintenance

Standards attached to D.04-05-018), and other relevant and useful information to determine whether or not a GAO is in compliance with GO 167.

9. Failure to meet a Guideline may raise CPSD's concern about a GAO's compliance, and failure to meet a Guideline in combination with other evidence may demonstrate a violation, but failure to meet one or more Guideline(s) does not by itself demonstrate a failure to comply with GO 167.

10. References within the Standards and Guidelines to employees, management or other staffing descriptions should not be interpreted as requiring a GAO to follow any particular organizational structure.

11. Commission implementation and enforcement of GO 167 Standards should not interfere with the right of a GAO to manage its employees or internal business structures (e.g., right to hire, fire, reward and motivate its employees and structure its management) unless it involves compliance with GO 167 Standards (e.g., operation and maintenance of essential facilities that are necessary for maintaining and protecting public health and safety, and ensuring electrical service reliability and adequacy) or cooperation with the Commission (e.g., complying with requests for information or interviews; no retaliation).

12. Each GAO should have abundant, but not unlimited, authority to make its own business decisions in its operation and maintenance practices as long as the GAO complies with each Standard and the requirements of GO 167.

13. Private business interests and private business practices should yield to the public interest, health and safety when there is a conflict regarding an operation or maintenance standard implemented and enforced under GO 167.

14. CPSD should implement and enforce Operation Standard 25 with reasonable flexibility, as long as the GAO provides transfer of ownership notice to the Commission as soon as possible.

15. Confidentiality is not a valid defense for failing to notify the Commission of a transfer in ownership.

16. CEQA provides a categorical exemption for projects regarding the operation and maintenance of existing electric generation facilities, and a new facility will be subject to applicable CEQA review when construction of the facility is proposed.

17. The Executive Director should file a Notice of Exemption from CEQA regarding Operation Standards and changes to GO 167 adopted herein.

18. The Executive Director should forward the standards adopted herein, and all related current and future decisions that implement and enforce generator maintenance and operation standards, to the CAISO with a request that the CAISO submit these standards to the FERC for approval as amendments to the CAISO's tariff.

19. This proceeding should remain open to address limited concerns.

20. This order should be effective immediately so that Operation Standards can be implemented and enforced without delay, and the legislative findings and declarations contained in SB X2 39 can be secured for California residents and businesses without delay.

INTERIM ORDER**IT IS ORDERED** that:

1. The changes to General Order (GO) 167 stated in Attachment 4 are adopted. The changes become effective on the third day after the mailing of this order. Each Generating Asset Owner subject to GO 167 shall comply with all terms therein, and shall file a verified Initial Certification regarding its Operation Plan within 90 days of the date changes to GO 167 become effective.
2. Respondents and parties may file and serve proposals on the format, organizational structure and content elements of the Operation Plan Summary. Proposals shall be filed and served within 30 days of the date this order is mailed, unless a different date is set by the Executive Director or the Director of the Consumer Protection and Safety Division.
3. The Executive Director will file a Notice of Exemption from the California Environmental Quality Act regarding Operation Standards.
4. The Executive Director will forward the standards adopted in this decision, and all related current and future decisions that implement generator operation and maintenance standards, to the California Independent System Operator (CAISO) with a request that the CAISO submit these adopted standards to the Federal Energy Regulatory Commission for approval as amendments to the CAISO's tariff.
5. The Executive Director will serve a notice of this decision on the owner or operator or each electric generation facility subject to Pub. Util. Code § 761.3 that is not already on the service list of this proceeding.

6. This proceeding remains open to address limited matters stated in the decision.

This order is effective today.

Dated _____, at San Francisco, California.

ATTACHMENT 1

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LIST OF APPEARANCES

Appearance

ALEX GOLDBERG
WILLIAMS COMPANIES, INC.
ONE WILLIAMS CENTER, SUITE 4100
TULSA, OK 74172

TIM MULLER
LEGAL DEPARTMENT
WILLIAMS ENERGY SERVICES
ONE WILLIAMS CENTER, MD 41-3
TULSA, OK 74172

J. CHRISTOPHER HAJOVSKY
RELIANT ENERGY, INC.
1000 MAIN STREET, SUITE 1726
HOUSTON, TX 77002

DAVID M. NORRIS
ATTORNEY AT LAW
SIERRA PACIFIC POWER COMPANY
6100 NEIL ROAD
RENO, NV 89520

HAMID V. NEJAD
LOS ANGELES DEPT. OF WATER & POWER
111 N. HOPE STREET, ROOM 1141
LOS ANGELES, CA 90012

LISA URICK
ATTORNEY AT LAW
SAN DIEGO GAS & ELECTRIC COMPANY
555 W. FIFTH STREET, SUITE 1400
LOS ANGELES, CA 90013-1011

DANIEL W. DOUGLASS
DOUGLASS & LIDDELL
21700 OXNARD STREET, SUITE 1030
WOODLAND HILLS, CA 91367-8102

BRIAN KATZ
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE
ROSEMEAD, CA 91770

LARRY R. COPE
ATTORNEY AT LAW
SOUTHERN CALIFORNIA EDISON
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

MARK MINICK
SOUTHERN CALIFORNIA EDISON
2244 WALNUT GROVE BLV D.
ROSEMEAD, CA 91770

DANIEL A. KING
SEMPRA ENERGY
101 ASH STREET, HQ13
SAN DIEGO, CA 92101

MEREDITH E. ALLEN
ATTORNEY AT LAW
SOUTHERN CALIFORNIA GAS COMPANY
101 ASH STREET, HQ13
SAN DIEGO, CA 92101

KELLY M. MORTON
ATTORNEY AT LAW
SAN DIEGO GAS & ELECTRIC
101 W. ASH STREET, MAIL STOP: HQ13B
SAN DIEGO, CA 92101-3017

EDWARD E. MADDOX
BUSINESS DEVELOPMENT MANAGER
SEAWEST WINDPOWER, INC.
1455 FRAZEE ROAD, SUITE 900
SAN DIEGO, CA 92108-4310

GINA M. DIXON
SAN DIEGO GAS & ELECTRIC COMPANY
8330 CENTURY PARK COURT, M.S. CP32D
SAN DIEGO, CA 92123

JOSEPH KLOBERDANZ
SAN DIEGO GAS & ELECTRIC COMPANY
8330 CENTURY PARK COURT
SAN DIEGO, CA 92123

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DAVE BOWARD
GENERAL MANAGER
HIGH DESERT POWER PROJECT LLC
19000 PERIMETER ROAD
VICTORVILLE, CA 92394

MARC D. JOSEPH
ATTORNEY AT LAW
ADAMS BROADWELL JOSEPH & CARDOZO
651 GATEWAY BOULEVARD, SUITE 900
SOUTH SAN FRANCISCO, CA 94080

EVELYN KAHL
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104

ROD AOKI
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104

BARNEY SPECKMAN
NEXANT
101 SECOND STREET, 11TH FLOOR
SAN FRANCISCO, CA 94105

BRIAN T. CRAGG
ATTORNEY AT LAW
GOODIN MACBRIDE SQUERI RITCHIE & DAY LLP
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111

TERRY J. HOULIHAN
BINGHAM MCCUTCHEN LLP
3 EMBARCADERO CENTER, 18TH FLOOR
SAN FRANCISCO, CA 94111

LISA A. COTTLE
ATTORNEY AT LAW
WHITE & CASE LLP
3 EMBARCADERO CENTER, SUITE 2210
SAN FRANCISCO, CA 94111-4050

TOM ROMESBERG
LA PALOMA GENERATING COMPANY, LLC
PO BOX 175
1760 WEST SKYLINE ROAD
MCKITTRICK, CA 93251

CHARLYN A HOOK
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5033
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

NORA SHERIFF
ATTORNEY AT LAW
ALCANTAR & KAHL LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104

ROD AOKI
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104

JANET C. LODUCA
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, B30A
SAN FRANCISCO, CA 94105

JOSEPH M. KARP
ATTORNEY AT LAW
WHITE & CASE LLP
3 EMBARCADERO CENTER, STE 2210
SAN FRANCISCO, CA 94111

LINDSEY HOW- DOWNING
ATTORNEY AT LAW
DAVIS WRIGHT TREMAINE, LLP
ONE EMBARCADERO, SUITE 600
SAN FRANCISCO, CA 94111-3834

SARA STECK MYERS
ATTORNEY AT LAW
122 - 28TH AVENUE
SAN FRANCISCO, CA 94121

ATTACHMENT 1

Page 3

ROXANNE PICCILLO
REGULATORY ANALYSIS
PACIFIC GAS AND ELECTRIC COMPANY
MAIL CODE B10B
PO BOX 770000
SAN FRANCISCO, CA 94177-0001

STEPHEN NELSON
RJ RUDDEN AND ASSOCIATES
1032 LINDSEY CT.
LAFAYETTE, CA 94549

GREGORY T. BLUE
MANAGER, STATE REGULATORY AFFAIRS
DYNEGY INC.
5976 WEST LAS POSITAS BLVD., NO. 200
PLEASANTON, CA 94588

STEVE HUHMANN
SOUTHERN COMPANY ENERGY MARKETING
1350 TREAT BLVD. SUITE 500
WALNUT CREEK, CA 94597

C. SUSIE BERLIN
ATTORNEY AT LAW
MC CARTHY & BERLIN, LLP
2005 HAMILTON AVENUE, SUITE 140
SAN JOSE, CA 95125

KEITH JOHNSON
CALIFORNIA ISO
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

ANDREW B. BROWN
ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO, CA 95814

DOUGLAS K. KERNER
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS LLP
2015 H STREET
SACRAMENTO, CA 95814

MICHAEL ALCANTAR
ATTORNEY AT LAW
ALCANTAR & KAHL LLP
1300 SW FIFTH AVENUE, SUITE 1750
PORTLAND, OR 97201

SYLVIA D. GARDNER
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, RM. 848A - B8R
SAN FRANCISCO, CA 94177-0001

MARK J. SMITH
FPL ENERGY
7445 SOUTH FRONT STREET
LIVERMORE, CA 94550

PETER W. HANSCHEN
ATTORNEY AT LAW
MORRISON & FOERSTER LLP
101 YGNACIO VALLEY ROAD, SUITE 450
WALNUT CREEK, CA 94596

JAMES CROSSEN
SENIOR COUNSEL
AUTOMATED POWER EXCHANGE, INC.
5201 GREAT AMERICA PARKWAY,
SUITE 522
SANTA CLARA, CA 95054

SCOTT BLAISING
ATTORNEY AT LAW
BRAUN & BLAISING, P.C.
8980 MOONEY ROAD
ELK GROVE, CA 95624

PHILIP D. PETTINGILL
CAISO
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

ANDREW B. BROWN
ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO, CA 95814

STEVEN KELLY
INDEPENDENT ENERGY PRODUCERS ASSN
1215 K STREET, SUITE 900
SACRAMENTO, CA 95814

PAUL CAPELL
PACIFIC POWER AND LIGHT
825 NORTHEAST MULTNOMAH, RM 1600
PORTLAND, OR 97232

ATTACHMENT 1

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Information Only

JOEL D. NEWTON
SENIOR ATTORNEY
FPL ENERGY, LLC
801 PENNSYLVANIA AVE., NW, STE. 220
WASHINGTON, DC 20004

TIM MULLER
LEGAL DEPARTMENT
WILLIAMS ENERGY SERVICES
ONE WILLIAMS CENTER, MD 41-3
TULSA, OK 74172

KEVIN J. SIMONSEN
ENERGY MANAGEMENT SERVICES
646 EAST THIRD AVENUE
DURANGO, CO 81301

NORMAN A. PEDERSEN
ATTORNEY AT LAW
HANNA AND MORTON LLP
444 SOUTH FLOWER ST., SUITE 1500
LOS ANGELES, CA 90071

VITALY LEE
AES ALAMITOS, LLC
690 N. STUDEBAKER ROAD
LONG BEACH, CA 90803

SOUTHERN CALIFORNIA EDISON COMPANY
CASE ADMINISTRATION
2244 WALNUT GROVE AVENUE, ROOM 370
ROSEMEAD, CA 91770

CHRISTINE NGUYEN
LATHAM & WATKINS
701 B STREET, STE. 2100
SAN DIEGO, CA 92101

THOMAS CORR
SEMPRA ENERGY
101 ASH STREET, HQ 15G
SAN DIEGO, CA 92101

CENTRAL FILES
SAN DIEGO GAS & ELECTRIC
8330 CENTURY PARK COURT
LLP
SAN DIEGO, CA 92123-1530

ALEX GOLDBERG
WILLIAMS COMPANIES, INC.
ONE WILLIAMS CENTER, SUITE 4100
TULSA, OK 74172

BRIAN FIELDS
1000 MAIN (OFFICE 3434D)
HOUSTON, TX 77002

PAT VANMIDDE
22006 NORTH 55TH STREET
PHOENIX, AZ 85054-7150

TANDY MCMANNES
KJC CONSULTING COMPANY
2938 CROWNVIEW DRIVE
RANCHO PALOS VERDES, CA 90275

JENNIFER LEHMANN
AES PLACERITA, LLC
20885 PLACERITA CANYON ROAD
NEWHALL, CA 91321

ATTORNEY AT LAW
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

LINDA LEBHAR
LATHAM & WATKINS
701 B STREET, STE. 2100
SAN DIEGO, CA 92101

MICHAEL SHAMES
ATTORNEY AT LAW
UTILITY CONSUMERS' ACTION NETWORK
3100 FIFTH AVENUE, SUITE B
SAN DIEGO, CA 92103

JOHN W. LESLIE
ATTORNEY AT LAW
LUCE, FORWARD, HAMILTON & SCRIPPS,
11988 EL CAMINO REAL, SUITE 200
SAN DIEGO, CA 92130

ATTACHMENT 1

Page 5

THOMAS M. BARNETT
VICE PRESIDENT
CONSTELLATION GENERATION GROUP
3501 JAMBOREE ROAD
SOUTH TOWER, SUITE 606
NEWPORT BEACH, CA 92660

DIANE I. FELLMAN
LAW OFFICES OF DIANE I. FELLMAN
234 VAN NESS AVENUE
SAN FRANCISCO, CA 94102

ANDREW L. NIVEN
ATTORNEY AT LAW
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, SUITE 3109
SAN FRANCISCO, CA 94105

LULU WEINZIMER
CALIFORNIA ENERGY CIRCUIT
695 9TH AVE. NO.2
SAN FRANCISCO, CA 94118

AVIS CLARK
CALPINE CORPORATION
4160 DUBLIN BLVD.
DUBLIN, CA 94568

MRW & ASSOCIATES
1999 HARRISON STREET, SUITE 1440
OAKLAND, CA 94612

BRUCE MCLAUGHLIN
8066 GARRYANNA DRIVE
CITRUS HEIGHTS, CA 95610

CAROLYN M. KEHREIN
ENERGY MANAGEMENT SERVICES
1505 DUNLAP COURT
DIXON, CA 95620-4208

KEVIN SMITH
BRAUN & BLAISING, P.C.
915 L ST STE. 1460
SACRAMENTO, CA 95814

ANJA IRWIN
AES HUNTINGTON BEACH, LLC
18904 DEODAR ST.
FOUNTAIN VALLEY, CA 92708

REGINA COSTA
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

CALIFORNIA ENERGY MARKETS
517-B POTRERO AVENUE
SAN FRANCISCO, CA 94110

JUNE RUCKMAN
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, MAIL CODE B8R
SAN FRANCISCO, CA 94177

SETH D. HILTON
MORRISON & FOERSTER LLP
101 YGNACIO VALLEY ROAD
WALNUT CREEK, CA 94596

BARRY F. MCCARTHY
ATTORNEY AT LAW
MCCARTHY & BERLIN, LLP
2005 HAMILTON AVENUE, SUITE 140
SAN JOSE, CA 95125

RICHARD MCCANN
M.CUBED
2655 PORTAGE BAY ROAD
DAVIS, CA 95616

CALIFORNIA ISO
LEGAL AND REGULATORY DEPARTMENT
151 BLUE RIVER ROAD
FOLSOM, CA 95630

KEVIN WOODRUFF
WOODRUFF EXPERT SERVICES
1100 K STREET, SUITE 204
SACRAMENTO, CA 95814

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MELANIE GILLETTE
DUKE ENERGY NORTH AMERICA
980 NINTH STREET, SUITE 1420
SACRAMENTO, CA 95814

(END OF ATTACHMENT 1)

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EVENTS IN CALIFORNIA'S ENERGY CRISIS

The following items provide information on the nature and extent of the problems facing California during the 2001-2002 energy crisis: (1) the Governor's 2001 State of the State Address, (2) a State of Emergency Proclamation issued January 17, 2001, and (3) Senate Bill (SB) X2 39.

1. 2001 State of the State Address

On January 8, 2001, Governor Gray Davis addressed the dysfunctional electricity market and withholding of power in his State of the State address (excerpted below):

“...a dysfunctional energy market...is threatening to disrupt people's lives and damage our economy.

“[restructuring] has resulted in skyrocketing prices, price gouging, and an unreliable supply of electricity. In short, an energy nightmare.

“Worst of all, there's evidence that some generators may be withholding electricity from the California grid to create artificial scarcity; which, in turn, drives up the price astronomically.

“And make no mistake, we will regain control over the power that's generated in California and commit it to the public good.

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“In the days that follow, I will ask you [the legislature] to pass legislation to take these immediate steps:

“Four, provide state regulatory agencies with the authority to order any functioning generating facility down for ‘unscheduled maintenance’ to go back on line.

“Five, give the Public Utilities Commission 50 new inspectors to monitor and, if necessary, stand guard at any facility suspected of deliberately withholding power from the grid.

“Six, make it a criminal act to deliberately withhold power from the grid, if it results in the imminent threat to public health or safety.”ⁱ

2. State of Emergency Proclamation

On January 17, 2001, the disruption in the electricity market caused Governor Davis to proclaim a State of Emergency (excerpted below):

“WHEREAS, shortages of electricity available to California’s utilities have today resulted in blackouts affecting millions of Californians; and

* * *

“WHEREAS, the imminent threat of widespread and prolonged disruption of electrical power...constitutes a condition of extreme peril to the safety of persons and property within the state...

* * *

“NOW, THEREFORE, I, GRAY DAVIS, Governor of the State of California...HEREBY PROCLAIM A STATE OF EMERGENCY to exist within the State of California...”

ATTACHMENT 2**Page 3****3. Senate Bill X2 39**

The legislature responded with several pieces of legislation in 2001 and 2002. On April 26, 2002, Senate Bill X2 39 was filed with the California Secretary of State. In Section 1 of SB X2 39:

“In particular, the Legislature found and declared that:

- “a. Electric generating facilities and powerplants in California are essential facilities for maintaining and protecting the public health and safety of California residents and businesses.
- “b. It is in the public interest to ensure that electric generating facilities and powerplants located in California are effectively and appropriately maintained and efficiently operated.
- “c. Owners and operators of electric generating facilities and powerplants provide a critical and essential good to California residents.
- “d. To protect the public health and safety and to ensure electrical service reliability and adequacy, the Commission and the California Independent System Operator (CAISO) shall develop uniform operating practices and procedures, and the Commission shall enforce compliance with those practices and procedures.” (D.04-05-017, *mimeo.*, page 11.)

ⁱ Mirant contends that it is improper to take official notice of the Governor’s 2001 State of the State Address. Even if proper, Mirant asserts that the Governor’s Address provides no evidentiary support regarding questionable operation of powerplants and resulting disruptions. We disagree to the extent explained below.

Official notice may be taken of matters that may be judicially noticed by the courts of the State of California. (Rule 73.) Judicial notice may be taken of official acts of the

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executive department of any state of the United States. (Evidence Code § 452(c).) The 2001 State of the State Address is an official act of California's Governor. (California Constitution, Article 5, Section 3.)

The 2001 State of the State reflects the beliefs of the State's Chief Executive at the time. Those views provide useful context for the adoption of SB 2X 39, and our related responsibilities.

Mirant contends that even if official notice may be taken, the Commission must still apply its own discretion to determine what inferences, if any, should be drawn from the document, and what weight it should be given. We do so. For example, we consider our own filed pleadings before the federal government (i.e., pleadings which document many instances of generating assets being placed in reserve status for questionable reasons and resulting in power outages), and we add a reference in this decision to these pleadings (i.e., the same reference cited in D.04-05-018). We consider the fact that the Governor determined the situation to be so grave that he proclaimed a State of Emergency (the proclamation itself identifying shortages, blackouts, imminent threat of widespread and prolonged disruption, and a condition of extreme peril). We consider our own many decisions which discuss and address California's dysfunctional electricity market and energy crisis. (E.g., D.01-01-018, D.01-03-082, D.01-04-006, D.02-04-060, D.04-01-026.) We also consider relevant court decisions in cases in which we were involved (e.g., *Southern California Edison Co. v. Peevey* (2003) 31 Cal. 4th 781) in determining the inferences to be drawn, and the weight to give, the 2001 State of the State Address.

Finally, we note that this reference is used in the background section of the decision to provide context. It is not used as evidence, and is not relied upon in this order for any finding of fact, conclusion of law, or ordering paragraph.

(END OF ATTACHMENT 2)