**BEFORE THE AIR RESOURCES BOARD**
**OF THE STATE OF CALIFORNIA**

September 24, 2010

Mary D. Nichols, Chair
California Air Resources Board
1001 I Street
Sacramento, CA

Re: **Comments of the Utilities Group Regarding *Proposed 15-Day Modifications to $SF_6$ Regulation***

The Northern California Power Agency,[1] Pacific Gas & Electric Company, Sacramento Municipal Utility District, San Diego Gas & Electric Company, Southern California Edison Company, and Southern California Public Power Authority[2] ("Utilities Group") appreciate the opportunity to provide these comments to the California Air Resources Board ("CARB") on the 15-day language regarding modifications to its *Regulation for Reducing Sulfur Hexafluoride Emissions from Gas Insulated Switchgear* ("$SF_6$ Regulation"), issued September 9 , 2010.

## I. INTRODUCTION

The Utilities Group has worked with CARB Staff over the past year to develop a fair SF6 Regulation, and greatly appreciate that Staff has accepted many of the comments offered by the Utilities Group in response to the drafts of the SF6 Regulation. The Utilities Group believes that the revisions incorporated into the 15-day language help to clarify and improve the regulation, and clarify a number of issues raised by stakeholders during the rulemaking process. The Utilities Group remains concerned, however, that the issue of enforcement – that was the topic of numerous oral comments before the Board and discussion among the Board Members and

[1] The members of the Northern California Power Agency include the cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah plus Bay Area Rapid Transit District, Port of Oakland, the Truckee Donner Public Utility District, and the Turlock Irrigation District. Associate members are the Plumas-Sierra Rural Electric Cooperative and the Placer County Water Agency.

[2] The members of the Southern California Public Power Authority are Anaheim, Azusa, Banning, Burbank, Cerritos, Colton, Glendale, Los Angeles Department of Water and Power, Imperial Irrigation District, Pasadena, Riverside, and Vernon.

CARB Staff during the meeting – is not addressed at all in the revised 15-day language. As explained below, the Utilities Group believes that the enforcement issue was raised at the February Board meeting, is a significant issue of concern among obligated entities, and should be addressed in 15-day language.

In addition to the enforcement issue, the Utilities Group has other comments on the proposed changes. A brief description of these issues is below, followed by a detailed discussion of each issue in Parts III and IV of these comments.

- "Active GIS Equipment" should not be defined as equipment that is connected to the GIS owner's electrical power system, since there are instances where the owner of the GIS equipment does not own the transmission or distribution lines to which the equipment is connected. Stating that Active GIS Equipment is connected to the electrical power system is sufficient; GIS owner should be deleted from this definition.
- The location of GIS equipment should not be included in the annual reports to CARB, for security reasons. This appears to be an inadvertent addition in the 15-day language that deviates from the reporting requirements in the SF6 regulation that was adopted by the Board in February.

## II. CURRENT ENFORCEMENT PROVISIONS ARE INAPPROPRIATE.

### A. *Basis for changes.*

During numerous discussions with CARB Staff leading up to the February Board meeting as well as in written comments, the Utilities Group expressed concerns that the proposed enforcement language (separate daily violations) was inappropriate for an annual emissions limit. In addition, utility representatives raised the issue of enforcement at the CARB Board meeting on February 25, 2010, and in subsequent meetings with CARB staff. At the February 25, 2010 meeting, the Board Members seemed receptive to the Utilities Group's comments on enforcement.[3] It is clear that enforcement was discussed by stakeholders, ARB staff, and by the Air Board members themselves during the February Board meeting, culminating with a statement by Board Member Berg that: "... what I hear from industry is they would like some

[3] See transcript February 25, 2010 CARB Board meeting Pages 75-79.

guideline that we know that we're not going to take either extreme [with regard to penalties]. So I would like to encourage that."

While the resolution the Board adopted did not call for any specific changes to the SF6 Regulation other than those already proposed by CARB staff in Attachment B, it did include language allowing additional changes to be considered, stating: "… the Executive Officer shall take final action to adopt the regulation as set forth in Attachment A, with modifications set forth in Attachment B and other such conforming modifications as may be appropriate …" and also: "… shall make modifications as appropriate in light of the comments received…"[4] In the proposed 15-day language, CARB staff included additional changes beyond those suggested in Attachment B, in part based on the written and oral comments received as part of the record for this regulation. There appears to be no reason to exclude from consideration a specific issue raised by multiple stakeholders – such as enforcement – on which the Board actually commented during adoption.

The enforcement issue should be resolved at this point in the process to:

- provide a pertinent, clear, and reasonable penalty structure that reflects the severity of potential violations in the regulation itself;
- provide parties with regulatory certainty about the enforcement process and give them a meaningful guide to understanding how potential violations will be enforced;
- provide a consistent enforcement mechanism on which current and future CARB staff can rely; and
- guard against the ad hoc enforcement of the same enforcement "rules" depending on the timing of the violation and the CARB staff involved in reviewing the circumstances of each violation.

### B. *Principles for penalty provisions.*

The Utilities Group believes that a penalty structure should reflect five general principles:

1) be pertinent to the type of violation,
2) be sufficient to induce compliance in most if not all cases,
3) be proportionate to the violation for which the penalty is imposed,

[4] See Resolution 10-1 at: http://www.arb.ca.gov/regact/2010/sf6elec/res101.pdf

4) allow flexibility to handle unusual cases but provide regulatory certainty for the most common violations, and
5) not be so high as to be considered excessive.

### C. *Penalties for each day of the year are not appropriate for the SF6 Regulation.*

Considering the above principles, daily penalties can make sense for violations of daily emission limits, where the excess emissions on each day represent violations of the required daily limit. However, a daily penalty structure that follows the above principles is not easy to craft for regulations that have annual or multi-year compliance periods. The Utilities Group believes that the $SF_6$ penalty structure should ***not*** assign daily violations for "***each day of the compliance period***", for two main reasons.

First, this structure leads to the potential for penalty amounts that are excessive and out of proportion to the underlying violation, with too much reliance on vague flexibility to create reasonable penalties in each case. Furthermore, obligated entities do not have sufficient knowledge ahead of time about how penalties may be imposed. Lack of knowledge of the actual penalty and dependence upon uncertain enforcement flexibility can lead to significant cost liabilities to covered entities that must maintain financial market coverage of potential penalties.

Second, considering each day of a compliance period to be a separate violation when compliance is based on an average annual emission rate is not an accurate reflection of actual violation. For the $SF_6$ Regulation, for example, if an entity exceeds the average annual emissions rate, in most cases there would not be a daily violation if each day's emissions rate is considered separately, therefore each day of the compliance period should not be considered a violation. It is the summation of $SF_6$ leakage over many days that may result in a violation of the annual limit. Suggesting that each day of the compliance period is a violation when the annual limit is broached is akin to suggesting that each hour of a day is a violation when a daily emission limit is violated. This penalty structure is not pertinent to the nature of the violation and leads to the potential for onerous penalties as well as significant enforcement uncertainty.

### D. *Total penalties may be too low or too high.*

The Utilities Group understands that enforcement and penalty authority for the SF6 Regulation resides in Health and Safety Code sections 38580 and 42400. Section 38580 says that

any violation is subject to the penalties established in 42400. These penalties differ from $1,000 for basic violations (42400(a)) to as much as $250,000 (42400.2(c)) for more egregious violations. Hence, if a violation of the annual emissions limit is treated as a single violation, the penalty may be as little as $1,000, which, as CARB Staff mentioned at the February Board meeting, may not be sufficient to induce compliance.

On the other hand, if each day of the compliance period is considered a separate violation, penalties could add up to $365,000 (at the basic $1,000 per violation level) or could be as high as $91 million (at the $250,000 per violation level). Simple violation due to negligence is subject to a penalty of up to $25,000 per violation (42400.1(a)), or potentially $9.1 million if each day is treated as a separate violation. Again, the specter of these very large potential penalties gave rise to Board Member Berg's comment at the February Board Meeting that there should be some guidance that ARB would not go to extremes when assessing penalties. As the enforcement language is currently written, these potential low and potential high penalties could result regardless of whether the annual $SF_6$ limit is barely violated or whether the limit is substantially violated, providing significant uncertainty.

These examples illustrate that it is not easy to take an annual or multi-year compliance period and provide for clear and proportionate penalties under Section 42400. From one perspective, it is understandable that CARB staff has proposed the 365 day penalty structure, in order to have sufficient penalty authority in cases of egregious violations.

However, the Utilities Group submits that Section 38580(c) provides significant flexibility for CARB to develop a much better penalty structure – one that meets the criteria expressed earlier by being clearly proportionate to violation severity and reducing the uncertainty that is inherent in the current structure, while providing sufficient penalty authority for egregious violations.

### E. *Options for penalty design.*

The $SF_6$ Regulation should be structured so that the amount or degree of exceedance is defined in units that provide for additional violations the farther away from the compliance target an entity lies. For example, for the $SF_6$ Regulation, CARB could define a violation of the annual emissions limit in terms of excess pounds of $SF_6$ emissions, or in terms of percentage units above the annual percent limit. As an illustration, if the annual percentage limit for $SF_6$ equated to 100

lbs of $SF_6$ leaked, then each pound over 100 would be a separate violation. Alternatively, without translating to pounds, each tenth or hundredth of a percentage point above the annual limit could constitute a separate violation.

Such a structure is similar to the expected violation structure in the Renewable Electricity Standard ("RES") regulation and the cap and trade regulation, where each megawatt hour or ton of emissions, respectively, constitutes a separate violation.

The RES regulation currently defines violations in units of MWh that reflect the severity of a violation, and establishes daily penalties for each violation, but NOT for each day of the compliance period. The Utilities Group believes that using both of these strategies at the same time, as is done in the RES regulation, leads to penalties that are onerous and out of proportion to the costs of compliance, and notes that during the Board adoption of the RES regulation on Thursday, September 23, 2010, CARB staff was directed to reconsider penalty structures, including: 1) adding potential annual caps on penalties; 2) removing 'daily' penalties; 3) changing the units of violation; and 4) other methods that lead to more reasonable penalties.

Using one or more of these strategies to establish a reasonable, proportionate, penalty structure for the SF6 regulations makes more sense than the current 365-day structure, which depends upon unwritten flexibility to match the seriousness of a violation to the amount of penalty, hence creating uncertainty.

The Utilities Group also recognizes that the strategy used for the RES, where daily penalties are imposed from the compliance deadline until such time as sufficient renewable energy is procured to establish compliance, will not work for the $SF_6$ regulations because if an emissions limit is violated there is no additional procurement or other strategy that will provide retroactive compliance.

There are various ways in which reasonable and proportionate penalties can be calculated, including ways that do not involve daily violations. The Utilities Group wishes to engage in a further dialogue with CARB staff regarding these options.

### F. *Allow utilities to correct reporting errors before imposing penalties.*

In addition, the Utilities Group would appreciate explicit written acknowledgement that the Executive Director should provide flexibility to obligated entities for possible reporting violations, as reflected in the proposed change to section 95358(b) below.

> (b) Each day or portion thereof that any report required by this subarticle remains unsubmitted, is submitted late, or contains incomplete or inaccurate information, shall constitute a single, separate violation of this subarticle. The Executive Director must provide an opportunity to correct or resubmit information prior to imposing penalties.

## III. "ACTIVE GIS EQUIPMENT" SHOULD NOT REFER TO ELECTRICAL POWER SYSTEM BEING OWNED BY GIS OWNER.

The Staff's proposed changes to the definition of Active GIS Equipment in section 95351(a)(1) of the $SF_6$ Regulation are welcomed. However, the definition still refers to the GIS equipment being connected to an electrical power system belonging to the GIS Owner. The GIS Owner may not own the electrical power system to which the GIS equipment is connected. The effect of this definition would be that GIS equipment owned by one party and connected to an electrical power system owned by another party would not constitute Active GIS Equipment and would not be covered by this regulation. To avoid this outcome, the words "GIS owner's" should be removed from the definition, as set out below. The owner of the electrical power system is not relevant for the purposes of this regulation.

The Utilities Group suggests the following changes to section 95351(a)(1) of the $SF_6$ Regulation (incorporating the Staff's proposed changes):

> "Active GIS Equipment" means non-hermetically sealed SF6 gas insulated switchgear that is:
>
> (A) Connected through busbars or cables to the ~~GIS owner's~~ electrical power system; or
>
> (B) Fully-charged, ready for service, located at the site in which it will be activated, and employs a mechanism to monitor SF6 emissions.
>
> "Active GIS equipment" does not include equipment in storage.

## IV. FOR SECURITY REASONS, THE LOCATION OF GIS EQUIPMENT SHOULD NOT BE REQUIRED TO BE REPORTED.

Section 95355(a) of the $SF_6$ Regulation requires GIS owners to maintain a record of the location of their GIS equipment. In the version of the $SF_6$ Regulation presented to the ARB for approval in February 2010, the location of GIS equipment was not required to be reported to the ARB for reasons of homeland security, given that information reported to the ARB is able to be

accessed by the public. However, the Staff's proposed changes to section 95356(b)(8) include reference to section 95355(a)(11) (as renumbered), with the result that GIS equipment location would be required to be reported to the ARB annually.

To avoid this danger to homeland security, the Utilities Group suggests that section 95356(b)(8) be amended to exclude information on the location of GIS equipment from the annual report, as follows:

> (b) The annual report must contain all of the following information: ...
>
> (8) A gas insulated switchgear inventory report containing the information required by Section 95355, subsections (a)(1) through (a)(10~~11~~); and ...

***

The Utilities Group appreciates the opportunity to submit these comments.