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PROJECT FINANCE NEWSWIRE

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California Fallout: New Tax Incentives Possible For Project Developers

by Keith Martin, in Washington

Senate Republicans are pressing for a long laundry list of new tax incentives to promote construction of additional power plants.

The proposals are in a bill that the chairman of the Senate Energy Committee, Frank Murkowski (R.-Alaska), and the Senate Republican leader, Trent Lott (R.-Mississippi), introduced at the end of February. Murkowski and Lott also sit on the Senate tax-writing committee. Many of the proposals also have support from Senate Democrats.

Ironically, the bill could slow down some new power plant construction in cases where projects might qualify for tax relief by delaying completion until after the new tax benefits take effect. Most provisions in the bill apply only to projects that are placed in service after the new provisions are enacted.

The odds of the proposals becoming law are hard to assess. The new energy secretary, Spencer Abraham, said in a speech in late March that the Bush administration opposes tax incentives for energy producers. The administration has favored a free-market approach to the power shortages in California. However, nature abhors a vacuum, and the clamor from Republicans in Congress for the administration to do something is growing louder. Abraham said a Bush energy task force would issue policy recommendations by early April.

Another complicating factor is the business lobby has agreed not to push business tax relief this year in order to give President Bush a chance to put his $1.6 trillion tax relief package through

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UK WINDFALL PROFIT TAXES cannot be claimed as foreign tax credits in the United States, the Internal Revenue Service said.

A number of US utilities bought interests in electric distribution companies in the United Kingdom in the early 1990's when the British government privatized its utilities. The public was soon alarmed at the large profits being earned by the new owners of these companies. Consequently, Britain enacted a one-time windfall profit tax in

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Congress. That package is full of tax relief for individuals. (The only business tax provision in it is a proposal to make a tax credit for spending on research and development permanent.)

Congressional staffers say the fate of the tax proposals in the Murkowski bill will turn on whether Congress passes an energy policy bill. If so, then there will probably be a tax component to that legislation. Energy policy legislation has remained bottled up in committee for the past several years because of lack of consensus about whether to move forward with federal deregulation. However, high gas prices, electricity shortages on the West Coast, and cutbacks in oil production by OPEC may finally spur Congress to act, especially if the president ends up calling on Congress to enact a new national energy policy.

The Murkowski bill would speed up depreciation of most new power plants, create new tax credits for cogeneration facilities and for coal-fired power plants that retrofit with new technologies, and extend a so-called section 29 tax credit for tapping gas from coal seams, tight sands and landfills and for making synthetic fuels from coal — to flag just a few of its provisions.

Depreciation

The bill would allow most power plants to be depreciated over seven years using the 200% declining-balance method. Most power plants are depreciated today over 15 or 20 years using the 150% declining-balance method.

The change is worth a lot of money. For each dollar invested in a power plant today, the tax savings from depreciation over 20 years are worth about 15 cents. However, with 7-year depreciation, the tax savings for each dollar invested would almost double to 27 cents.

The bill would only apply to power plants whose output is primarily for sale. Thus, a manufacturing company would be unable to claim the faster depreciation on power plants that it owns to supply its own electricity. Such power plants would remain depreciated over 15 years. This could have the effect of encouraging paper mills, aluminum smelters, food processors and other heavy users of steam and electricity to rely on independent power producers for electricity.

Only projects placed in service after the enactment date qualify for the faster depreciation. This is a strong incentive to wait to place any new projects in service until after the proposal clears Congress. (The Murkowski bill would not stop someone from selling an existing power plant and leasing it back in order to get a new in-service date. However, Congress usually adds "anti-churning" rules to prevent this sort of transaction.)

The bill — as drafted — would slow down depreciation for small power plants that use biomass. They are depreciated currently over five years. It would not affect other power plants — like solar and windpower projects — that qualify currently for five-year depreciation.

It would let power plants that are financed with tax-exempt debt be depreciated on a straight-line basis over 10 years. Most power plants financed with tax-exempt debt today must be written off over 22 or 28 years.

Cogeneration Facilities

The Murkowski bill would allow a 10% energy tax credit to be claimed on any "combined heat and power system." A 10% credit means 10% of the cost of the project could be claimed as a credit against federal income tax liability.

In order to qualify for the credit, a power plant would have to produce two useful forms of energy. Mechanical shaft power can count as one. At least 20% of the total useful energy output would have to be in the form of steam or other thermal energy and at least 20% would have to be electricity or mechanical shaft power. The project would have to have an energy efficiency of at least 70% at normal operating rates (60% for smaller power plants of up to 50 megawatts). The

energy efficiency is the energy content of the output compared to the energy content of the fuel that went into the power plant.

The credit could only be claimed on projects that go into service after it is enacted. "Enacted" means the measure has passed both houses of Congress and been signed into law by the president. This would not be before next autumn at the earliest. The credit could only be claimed on investment after that date. Thus, for example, if the credit is enacted on October 30, it could be claimed on a cogeneration facility that is put into service in December, but only on the portion of the construction cost that is spent after October 30.

Distributed Generation

The same 10% energy credit could be claimed on "distributed power property." The bill defines this as two kinds of equipment: a generator with a rated capacity of more than one kilowatt that produces electricity primarily for use in an office building or apartment complex or equipment with a rated capacity of more than 500 kilowatts that generates electricity primarily for use in the taxpayer's own factory.

Coal

The bill would reward owners of existing coal-fired power plants who take steps to reduce air pollution at such plants or retrofit using new generating technologies. New coal plants would also qualify for tax breaks. The power plant would have to be in the United States.

This set of proposals may be a hard sell in Congress because of their sheer complexity.

First, Murkowski proposes a 10% investment tax credit for anyone adding pollution control equipment to an existing coal-fired power plant to control one or more pollutants "regulated under title I of the Clean Air Act." Such pollutants include nitrogen oxide, ash and other "particulate matter," sulfur dioxide, volatile organic

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July 1997. The tax was 23% of the difference between the "value of the company in profit making terms" and the price the company originally fetched in the privatization. The "value of the company in profit making terms" was set at nine times average annual earnings in the four years following privatization.

US companies can claim credit against their US income taxes for any "foreign income taxes" they paid on earnings that are brought back from overseas. However, the foreign tax must be an income tax in a US sense to be creditable.

The IRS national office warned its agents in a "field service advice" at the end of December that this one is not. The agency said the UK windfall profit tax falls short in two respects. First, it was not a tax on the UK company's earnings or income, but rather a tax on an artificial value. Second, the UK government did not wait to collect it until the taxpayer received, or "realized," the share value.

The IRS made the advice public in late March. The utility in question did not claim the credit on its original tax return filed in 1997, but tried to do so later on an amended return. This led to the query to the national office.

SYNCOAL PROJECTS may get some relief in April.

The US government allows a tax credit of $1.035 an mmBtu for making "synthetic fuel from coal." The IRS announced last October that it would no longer rule on whether facilities that produce such fuels qualify for tax credits while it studies what it means to make a "synthetic" fuel. Coal companies had complained that some 52 facilities that add a chemical binder to coal fines or crushed whole coal to make pellets were improperly claiming tax credits.

IRS and Treasury officials say additional guidance will be issued soon and that the IRS will

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compounds and mercury. The pollution control would have to be a "system of continuous emission control." Credits could only be claimed on up to $100 million in spending per "generating unit." The bill includes language that is supposed to allow taxpayers with too little tax appetite to use the credits to transfer them to another company via a sale-leaseback. However, the language is not drafted properly.

Next, Murkowski proposes a new tax credit of 0.34¢ a kilowatt hour for generating electricity at an existing coal-fired power plant that has been retrofitted with a "clean coal technology." Tax credits could be claimed on the electricity generated for the 10 years after the retrofit. The amount of the credit would be adjusted each year for inflation.

There is a long set of conditions before something qualifies as a "clean coal technology." The bill gives the following examples: advanced pulverized coal or atmospheric fluidized bed combustion, pressurized fluidized bed combustion, and integrated gasification combined cycle. However, it says that whatever is used must have a design heat rate of at least 500 Btus per kWh below that of the existing power plant before the retrofit. In addition, the design heat rate must be 9,000 Btus or less per kWh when using coal with an energy content of more than 8,000 Btus per pound. The credit would only apply to retrofits that are completed after the enactment date. It could not be transferred to a lessor in a leasing transaction.

Third, Murkowski proposes a 10% investment credit for retrofitting or replacing an existing coal-fired power plant with an "advanced clean coal technology." This credit is poorly drafted and will be hard for anyone to claim. The bill places a limit on the number of megawatts worth of different technologies that can qualify for the credit. For example, credits could only be claimed on up to 2,000 megawatts of integrated gasification combined cycle technology. The Department of Energy would run a "competitive solicitation" to choose who qualifies. The existing plant would have to have used "conventional technology" before it is retrofit or replaced. There is a detailed definition in the bill of what qualifies as conventional. The bill has language intended to allow the credit to be transferred to a lessor in a lease financing, but it does not work.

Fourth, Murkowski proposes a separate tax credit tied to the amount of output from facilities that use "advanced clean coal technology." Credits could be claimed on the output whether it takes the form of electricity or "fuels or chemicals." Credits could be claimed on output for 10 years after the facility goes into service. The amount of the credit varies. It is anywhere from 0.3¢ to 0.95¢ for each kilowatt hour of electricity generated or for each 3,413 Btus of fuels or chemicals produced, depending on the design of the facility.

Section 29 Credits

The bill would breathe new life into the section 29 tax credit.

This is a tax credit of $1.035 an mmBtu for looking in unusual places for fuel. The credit was enacted in 1980 soon after the Arab oil embargo. The idea was to reduce demand for imported oil and gas from the Middle East by inducing Americans to tap such underused domestic fuels as landfill gas and gas from tight sands, coal seams and Devonian shale, and to figure out ways to make synthetic fuels from coal.

The credit goes to the person producing the fuel. He must sell it to an unrelated party.

The deadline for placing projects in service to qualify for section 29 tax credits has already passed. Projects to produce gas from tight sands, coal seams and Devonian shale had to be in service by 1992. Landfill gas and coal synfuel projects had to be in service by June 1998.

The Murkowski bill would reopen the window for placing projects in service. The window would

be reopened for a period from date of enactment through 2010. Credits could be claimed on any new projects put in service during this new window period through 2012. However, the amount of the credit would phase out starting in 2009. For example, credits in 2009 would be only $0.897 an mmBtu compared with $1.035 an mmBtu today. (The tax credit is adjusted each year for inflation. This 2009 figure does not take into account inflation adjustments.) Credits in 2012 would be only $0.276.

The bill would also extend tax credits through 2012 for projects that are already in service. However, this may have been inadvertent.

The bill would add heavy oil to the list of eligible fuels. Anyone producing heavy oil would qualify for tax credits without the need to sell the output, as long as the heavy oil is "not consumed in the immediate vicinity of the wellhead."

Section 45 Credits

The bill would extend and greatly expand an existing tax credit for generating electricity from wind, "closed-loop biomass" and poultry waste.

The tax credit is currently 1.7¢ a kilowatt hour. The amount is adjusted each year for inflation. Projects must get into service by December 2001 to qualify. Tax credits may be claimed for 10 years after a facility is put into service. "Closed-loop biomass" refers to trees or crops grown exclusively for use as fuel in power plants. There are no closed-loop biomass projects currently in operation, according to the Internal Revenue Service. Poultry waste was added to the list of eligible fuels in 1999 at the urging of the then-chairman of the Senate Finance Committee, William Roth (R.-Delaware). Roth was defeated last November for reelection.

The Murkowski bill would expand the list of fuels that can be used to generate electricity to include biomass generally, municipal solid waste, geothermal steam or fluid, and landfill gas.

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resume issuing rulings by late April. A senior Treasury official said projects that already have IRS rulings will not be affected. Also, the government does not plan any change in what qualifies as a synthetic fuel. Rather, the guidance is expected to attack transactions the government considers abusive. Examples are "spawned" projects. These are conventional coal wash plants or asphalt plants that were converted into syncoal facilities after a June 1998 deadline for placing syncoal facilities in service to qualify for tax credits.

ARGENTINA will start collecting a new financial transactions tax on April 3. The tax will be up to 0.6% of debits and credits to bank accounts in the country and will be collected by the financial institutions.

BRAZIL may have to refund money after its financial transactions tax was declared unconstitutional.

Brazil collects a "CPMF" tax on any movement of money in the Brazilian financial system. Banks act as the collection agents. Brazil started collecting a temporary tax in 1997, and extended it in March 1999 at a 0.38% rate through March 2000 and at a 0.30% rate thereafter.

A federal appeals court said in early March that the tax was unconstitutional after March 1999 because Congress failed to extend it properly. Since the tax had already expired by the time Congress got around to extending it — two months had lapsed — the legislation should have talked about creating a new tax rather than "extending" the old one. The decision is not binding on the government, except for the taxpayer involved in the litigation.

The government is expected to appeal. If it loses, then an avalanche of lawsuits is expected from other taxpayers seeking refunds.

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Biomass facilities would have to burn at least 75% biomass to qualify; the rest could be another fuel, like coal.

Credits could also be claimed in the future on electricity produced at "incremental hydropower" facilities. "Incremental hydropower" means the extra output from adding capacity or increasing efficiency at existing hydroelectric facilities. Murkowski would also reward anyone producing electricity or steam at a cogeneration facility that "integrates the production of coke, direct reduced iron ore, iron, or steel," but only to the extent the electricity or steam is produced using waste gas or heat from the mill.

The bill would extend the deadline through June 2011 for placing projects in service to qualify for section 45 tax credits. Credits would continue to run for 10 years after a project goes into service. (The deadline for placing steel cogeneration facilities in service would be December 2010.)

One problem with the current section 45 tax credit is it does not allow smaller developers with little tax appetite to get value for their credits by transferring them in a lease financing. The Murkowski bill would fix this problem. (The fix would be retroactive to 1994 for existing windpower projects.)

The bill has a number of peculiar features. Some are intended, and some may be drafting errors. First, it drops poultry waste from the list of eligible fuels. Second, the language that allows credits to be transferred in leasing transactions does not cover incremental hydropower projects. Third, a producer of landfill gas qualifies for tax credits even if he does not use the gas to generate electricity. The bill does not sort out who gets the tax credit in cases where another company uses the gas to generate electricity. Fourth, the bill would allow anyone already using at least 75% biomass as fuel at an existing power plant — or who switches to such a fuel at an existing power plant in the future — to claim credits for 10 years. Finally, it would retroactively negate a rule that tax credits cannot be claimed to the extent that a project benefited from tax-exempt bonds, other tax credits or government subsidies. However, it would only negate it for projects that went into service before 1997.

Senator Charles Grassley (R.-Iowa), the new chairman of the Senate Finance Committee, strongly supports extending section 45 credits for wind projects. Grassley introduced his own bill to do this in late March.

Interties

The bill would bar the Internal Revenue Service from taxing utilities on any "connection fees" the utilities receive from customers. This would solve a problem that some merchant power plant developers are facing. Some utilities are insisting that merchant plant developers pay not only the cost to connect their power plants to the grid, but also pay a "tax gross up" that can add another 25% to 70% to the cost. The provision would apply not only to electric interties, but also to gas, water and sewage connections. However, it would only apply to "transactions occurring" after the enactment date.

Other Provisions

The bill has a large number of other provisions.

It would settle a dispute between the gas pipeline companies and the IRS over whether the pipelines can depreciate gathering lines at gas fields over seven years rather than having to use the same 15-year depreciation that they use for the rest of their assets. The bill would allow 7-year depreciation not only for gathering lines, but also for all "the pipe, storage facilities, equipment, distribution infrastructure, and appurtenances used to deliver oil, natural gas, crude oil, or crude oil products." The change would be prospective. However, taxpayers could elect this depreciation retroactively for gas gathering lines.

Local gas distribution companies would be allowed to "expense" — or write off immediately — the full cost of gas storage facilities.

The bill implements a compromise that has been worked out between the private power industry and municipal utilities over whether tax-exempt bonds that the municipal utilities used to finance their systems will be put in jeopardy if the municipal utilities expand to provide service outside city limits.

It would also shield utilities from adverse tax consequences if they transfer operating control or ownership of their transmission grids to RTO's, or regional transmission organizations.

Finally, it would allow tax-exempt bonds to be used to finance projects that use bagasse — or the residue after the juice is extracted from sugar cane or sugar beets — to manufacture ethanol.

Outlook

Unless the Bush administration digs in firmly in its opposition to new tax incentives for energy producers — including for the oil and gas industry — some new tax incentives seem likely in the wake of the chaos in California. The Murkowski bill should be seen as the industry wish list. The lobbyists pushing for these items made one important cut for their proposals — with more cuts to follow.

Lenders May Need To Resecure Existing Loans

by Luis Torres, in Washington

The rules for perfecting a security interest in assets of a borrower are expected to change on July 1.

Many banks and other lenders must take steps to resecure their loans or they may find them-

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NEW IRS "TRUE LEASE" GUIDELINES are at the Office of Management and Budget awaiting signoff.

The IRS said in its business plan last year that it would update guidelines it has had since 1975 on what it will tolerate in lease transactions and still rule that the transaction is a "true lease." There has been a resurgence of interest in lease financing for power plants recently as taxpayers look for ways to finance assets off balance sheet and also to get more value for tax benefits that they cannot use efficiently. An example of such a transaction is where a power company sells a power plant to a company that can use the tax depreciation and leases it back. The transaction must be a "true lease" in order for the lessor to claim the tax benefits.

The new guidelines should be released soon. The leasing industry has been worried — with the IRS on the warpath recently against exotic cross-border lease structures — that any IRS action in this area would be bad news.

The new guidelines are similar to the old ones. They remain guidelines for advance rulings only — not a statement of substantive law and not to be used in audits. The only changes are in the area of what improvements a lessee can make to the property and what assets the IRS views as "limited use property" that cannot be leased.

The IRS asked the leasing industry in late February to stop sending in tax-shelter registration forms for lease transactions that follow "generally-accepted case law principles." It is drowning in paper.

WASTE FUELS receive more scrutiny.

Power plants that use waste fuels qualify for faster depreciation and can be financed partly with tax-exempt bonds. The IRS said in a "technical advice memorandum" in 1999 — a ruling by the

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selves without the protection they thought they had when the loans closed after a borrower fails to repay his debts.

Lenders have one year to rework their security arrangements for some types of collateral and five years for other types.

The rules for secured lending are in article 9 of the Uniform Commercial Code, or UCC. The UCC is a uniform set of laws that all states have adopted to govern commercial transactions. The conference of commissioners on uniform state laws rewrote article 9 in 1999, and the states have been gradually replacing their existing statutes with the new one. The uniform conference tentatively set July 1 this year as the date the new rules will take effect. However, if not all state legislatures have adopted the new rules by then, the date could be delayed.

Two basic questions arise in any secured lending transaction. One is in what types of assets of the borrower it is possible for the lender to take a "security interest." A secured lender has priority over unsecured creditors of the borrower in the event the borrower is unable to repay all his debts. The other question is how the lender can "perfect" his interest, or put the world on notice that he has a claim so that others whose claims arise later in time come behind him in line. There our four ways to perfect a security interest. Some ways give the lender priority over other creditors, even though the others perfected their interests earlier in time.

New Types of Collateral

The first thing the new rules do is add to the types of collateral over which a lender can take a security interest. This is a move that was welcomed by the project finance community.

One new type of collateral is deposit accounts, such as "waterfall accounts" deposited in a bank. A lender perfects a security interest in these by obtaining "control" over the account. This can be done in one of three ways. The lender has control if a) it is the depository bank where the account is maintained, or b) the depository bank agrees to follow the lender's instructions regarding the account without the need for the borrower's consent, or c) the account is maintained in the name of the lender. This last approach of putting the lender's name directly on the account gives the lender a type of super priority ahead even of the depository bank's rights of recoupment or setoff.

Another new type of collateral is rights over letters of credit. The security interest would be in the cash to be withdrawn by a beneficiary of the LC, but not in the drawing right itself. As with deposit accounts, the lender must perfect his interest by gaining "control." In this case, "control" is achieved by obtaining consent to the assignment from whomever is obligated to give value under the letter of credit — usually the LC bank.

Another new type of collateral is supporting obligations, like guarantees. A lender will get a security interest in these automatically to the extent he has a security interest in the underlying obligation. For example, if a third party has guaranteed the value of an asset that has been pledged as security for a loan, the lender gets an interest in the guarantee automatically without the need for further action. His interest in the guarantee has the same priority as his interest in the underlying asset.

"Payment intangibles" will also be subject for the first time to article 9. An example of a payment intangible is a cash flow stream that one uses to borrow against in a securitization transaction. This should facilitate securitization transactions, since the rules will now be clearer for how lenders protect their interests in the cash flow standing behind the securitization. New article 9 will also cover the sale of promissory notes.

Beware that in order to accommodate new

types of collateral, the definitions given to existing types of collateral have been substantially revised. This is important because how one perfects a security interest in collateral depends on which category of collateral is involved. To the extent classifications have changed, then different steps may have to be taken than in the past to secure an interest in a particular asset of the borrower.

Priorities

A lender needs to "perfect" his security interest — or put the world on notice — before the interest has much meaning. There are four ways to perfect a security interest under existing article 9. These have not changed.

However, how one perfects a security interest depends on the type of collateral involved and — to the extent that particular assets have moved into different collateral categories under the new rules — a lender with existing loans may have to take action to ensure he preserves his place in line in relation to other creditors.

The four ways to perfect a security interest are a) automatic perfection by operation of law, b) filing a financing statement, c) taking physical possession of the collateral, and d) obtaining "control" over the collateral.

The dominant method of perfecting security is by filing a financing statement. Under new article 9, most financing statements must be filed where the borrower is located. This is a change from current law. Most filings today are made where the collateral is located. US corporations, partnerships and limited liability companies are considered located in their states of "registration," meaning the state under whose laws the entity was formed. Thus, where a Delaware LLC is the borrower for a project in Oklahoma, the financing statement will have to be filed in the future in Delaware. In the case of a "nonregistered" entity, like a sole proprietorship, the filing must be in

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national office to settle a dispute on audit between a taxpayer and an IRS agent — that corrugated containers that a middleman collected, sorted and bailed were not "waste" when delivered to a recycling plant because the material had value. The IRS has been questioning whether other materials are waste on audit.

The National Association of Bond Lawyers urged the US Treasury in a letter in late March to call off the IRS and to work out new guidelines for what qualifies as waste in discussions between the government and industry. The Treasury is in the midst of trying to set priorities for the coming year. There is a limit to the number of issues it can tackle.

NEW RULES ON R&D TAX CREDITS have been put on hold. The Bush administration wants to review complaints that the government is being too stingy about what qualifies as research.

An article in the February NewsWire *reported on the difficulties of trying to build such tax credits into the financing structures for power projects.*

FOREIGN ACQUISITIONS may bring hidden taxable income. US companies that buy shares in foreign corporations may be at risk of having to pay tax currently in the United States on income that the foreign target corporation earned before the acquisition.

The risk arises when a US company buys enough shares to become a "United States shareholder" in a "controlled foreign corporation." This means that the US entity acquires 10% or more of the stock in the foreign target, and the target is more than 50% owned by US persons. Certain types of income — generally passive income like rents, dividends and interest — earned by the target pass directly up to US tax returns of its US

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the place where the entity has its sole place of business or where its chief executive has his office. Foreign borrowers from countries where the law does not provide for public filing of financing statements — for example, Russia or Holland — will be treated as if they are located in the District of Columbia.

Even though new article 9 requires filing where the borrower is located in most cases, it retains local filing for real-estate-related collateral. There are also special filing provisions for utilities that own transmission grids.

A security interest perfected by filing is inferior in rank to certain security interests perfected by means of "control" even if the filing was made before the other creditor secured "control." For example, this is true of deposit accounts, "investment property" like the permitted investments a borrower makes of spare cash, and letter of credit rights. As a consequence, most lenders try to secure control over these types of assets even while they rely on filing or automatic perfection to perfect security over the rest of the borrower's assets.

Permitted Investments

New article 9 changes the rules for "investment property" — like permitted investments that a borrower makes of spare cash. First, for perfection, a lender may exercise control for the first time through a third party, such as an agent, who must acknowledge that it has control on behalf of the lender. Second, all security interests perfected by control will no longer rank equally; instead, the first in time will prevail. Finally, a lender's control over a securities account that is in the name of the borrower need not be unconditional. Thus, the lender's "control" can be subject to a default by the borrower or consent by a more senior lender before it comes into play.

Enforcement Proceedings

Until now, a lender planning to foreclose on security had to foreclose on all the security at once. New article 9 allows "partial strict foreclosure," or the ability to accept collateral in partial satisfaction of the borrower's obligations. This should give lenders more tools in default situations. Lenders will be able to accept collateral in full or partial satisfaction of the obligations as long as some conditions, such as consent by the debtor and notice to other lienholders, are met.

In another change from current law, new article 9 will also impose on creditors who sell or otherwise dispose of collateral the duty to extend warranties of possession, title, quiet enjoyment and the like, although these warranties can be explicitly disclaimed or modified. Statutory liability will be imposed on creditors who fail to comply with their obligations; debtors are allowed to obtain injunctive relief and monetary damages for any loss caused by the secured party's noncompliance.

When a lender forecloses, it can only cover its "loss" out of the borrower's assets. There are three ways to calculate loss currently. New article 9 adopts a single way to calculate it as a rebuttable presumption. This is probably for the good since it eliminates current uncertainties.

Transition

The new article 9 rules are expected to take effect on July 1. Old security arrangements will need to be updated.

If a lender perfected his security interest by a means other than filing a financing statement, then he has just one year from when the new rules take effect to comply with the new rules. After that, he is in danger of no longer having a perfected security interest. There is no need to wait until after July 1 to act. At a minimum, many lenders are already reviewing their portfolios, assessing what needs to be done to resecure their positions under the new rules, and taking action.

Lenders who perfected their security by filing

financing or continuation statements have five years to file new financing statements. A new filing will relate back in time to the original filing, even though it may have been in another state, as long as it identifies the original filing.

Opinion: Deregulation Advocates Should Support The Refund Orders In California

By Lynn Hargis, in Washington

The Federal Energy Regulatory Commission has changed tack — perhaps because of prevailing political winds — and has now ordered refunds or "potential refunds" by independent generators in at least three instances for power sales made in California. The generators had legal authority to sell at "market-based rates." More refund orders are expected.

Since I argued in the *Newswire* last December that FERC's failure to order refunds — after finding that rates in California were "unjust and unreasonable" — was bad for generators, I should now be arguing that the current refunds are good for generators.

And, with qualifications, I believe that they are.

Although from an independent generator's perspective it is counterintuitive to applaud FERC's interference in the bulk power market by means of an after-the-fact determination that refunds are required, such action may be the only thing that can save the bulk power market in the long run. Consumer backlash against deregulation in California is already enormous. This can lead to direct action at the polls in the form of ballot initiatives that can eliminate deregulation

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owners. This is known as "subpart F income." US tax rules require that anyone who owns shares in a foreign corporation on the last day of the year must report his share of the company's income for the entire year. Thus, someone who buys into the company in December is at risk of having to report income for the entire year.

Some US buyers can protect themselves by making a "section 338 election." This will end the target's tax year as of the date of the sale, which prevents any pre-sale subpart F income from reaching the buyer's tax return. However, this election is only available if the US shareholder acquires at least 80% of the foreign target within a 12-month period.

MEXICO delayed an increase in the withholding tax charged on interest paid to foreign banks.

The rate through June 30 will remain 4.9%. However, after that, the rate will increase to 10%. The action comes after foreign banks complained to the Mexican government that they are disadvantaged compared to banks lending from the United States. The 4.9% rate for interest paid to US banks is written permanently in to the US-Mexican tax treaty. The withholding rate for interest paid to other foreign banks was scheduled to increase to 10% last January 1. This increase has been delayed for six months, the Mexican government said in March.

INDIA is extending an income tax holiday for infrastructure projects.

The government said in its budget message at the end of February that it would allow a 100% income tax holiday for 10 years — rather than the current five years — for infrastructure projects in the core sectors of roads, rail systems, solid waste and water treatment facilities, ports and airports. In addition, companies will be allowed to choose in

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in the state overnight. The state has authorized a power authority and is apparently taking over the transmission grid, and some of the most conservative cities in the state are considering municipalization of their utility systems.

In addition, the predicted supply shortage in most of the rest of the country this summer could lead to a quick reversal of deregulation in the nation. Independent generators can easily become an adjunct to state or traditional utility-owned generation, selling under long-term, cost-based contracts. The competitive bulk power market could be dead soon.

The best hope to save the bulk power market is partially and effectively to regulate it. If FERC cannot be relied on to provide a safety net or backstop to keep wholesale electric prices from going through the roof in times of inadequate supply, then political pressure from power customers will probably result in total reregulation. The current commission — with its free-market bent — has apparently also come to this conclusion in deciding to order refunds in California.

Refund Orders

What has FERC done in its recent orders? FERC first determined that some rates being charged for wholesale electricity in California were not "just and reasonable." This gave it the power to act. It is not obvious what "just and reasonable" means in a market context where prices are set by arm's-length negotiation. FERC established for the first time a "rate screen" for sales above which refunds will either be required or further investigation will be undertaken. FERC developed this rate screen — in effect — by establishing the market-clearing price that it believes would have been set in a single price auction had competitive forces been at work.

FERC decided that potential market power is most likely to be exercised during "stage 3" emergencies in California, when the system has almost no reserve margin. FERC chose a simple-cycle combustion turbine unit as a proxy for the unit to be bid in a stage 3 emergency. It assumed the combustion turbine has a heat rate of 18,073 Btus per kilowatt hour. It assumed variable costs of operating this unit based on an average January natural gas price, an average of NOx allowance costs, an average NOx emissions rate, and variable operating and maintenance costs as reported by public utility sellers. FERC came up with a proxy clearing price of $273 a megawatt hour for the month of January 2001, and potential refunds or offsets of $69 million.

FERC offered an incentive for generators selling at or above the clearing price of $273 a megawatt hour during stage 3 emergencies to pay refunds voluntarily. The incentive is that generators who wait for a FERC investigation of their situations may find themselves having to pay interest — in addition to the refunded amount. FERC said interest on any refunds that it orders "may be appropriate." Moreover, if additional information submitted to support charges above the proxy amount — on a cost or "other justification" basis — indicates that charges associated with any other bids are unjust and unreasonable, FERC could order additional refunds

FERC also announced that it would determine a proxy market clearing price for each month through April 2001, based on the above indices. The proxy amount for February, issued March 16, 2001, is based on the same methodology, but is significantly higher due to higher gas and NOx allowance prices: $430 a megawatt hour. Even so, applied to stage 3 emergencies, use of this proxy should lead to about $55 million of total potential refunds or offsets.

Perhaps more ominously, FERC issued a "show cause order" against Williams Energy Market & Trading Company and AES Southland, Inc. ordering the two companies to show cause why they have not violated the Federal Power Act by failing to make available "must-run units" under must-

run contracts on file with FERC. (FERC charged the companies with earning high prices for electricity by shutting down must-run units, thereby forcing Californians to buy higher-priced electricity from the companies' other power plants.) It was surprising to see AES included as one of the targets of the order since AES sells to Williams under a fixed-price tolling agreement and is subject to dispatch orders from Williams.

FERC said the remedy for these violations, if proven, is an order to refund all revenue the two companies earned above what they would have earned had their must-run units been operating. Williams could also find itself limited in what it can charge for power from non-must-run units when its must-run units are not available.

Wider Significance

What is the wider significance of FERC's orders — beyond potential refunds for several months in California?

FERC set a precedent for determining a proxy for market-clearing prices that is based on cost. It has also shown that it will not simply sit by when it appears that a bulk power market is dysfunctional, but will step in to impose some upward limits. Further, the show cause order issued to Williams and AES indicates that FERC will seek to enforce the terms of contracts and market monitoring protocols on file at FERC.

All of these attempts to correct a power market that FERC believes is not working properly can be translated to other markets around the country where there are imbalances between supply and demand. While this may trouble electricity sellers who thought an unfettered market would set prices, the FERC actions may provide comfort to consumers and state commissions that are nervous about deregulation in light of California's experience. If so, they may encourage bulk power markets in the long run.

Of course, one FERC commissioner and many

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cont.

which 10 of the first 15 or 20 years — depending on the type of project — they want to be exempted from income taxes. This should ease a problem that many projects have tax losses for the first few years after they go into service, making the tax holiday meaningless.

The government also proposed to make external commercial borrowing more expensive. Interest paid on loans in foreign currency is currently exempted from withholding tax at the border. This exemption will be withdrawn from June 1.

The government also announced it would propose an electricity bill in the current session of parliament. The bill is expected to provide for restructuring of state electricity boards, or SEBs, commercialization of electricity distribution, and strict compliance with electricity tariffs.

VIETNAM is the most corrupt country in South Asia and the Far East, according to a survey of businessmen by the Political & Economic Risk Consultancy, Ltd. in Hong Kong.

The survey ranked countries in the region on a scale of 0 to 10 — with 10 being the most corrupt — by polling expatriate businessmen working in them. The three most corrupt countries in the region were Vietnam with a ranking of 9.75, Indonesia at 9.50 and India at 9.25. Least corrupt was Singapore at 0.83.

INVESTMENT TAX CREDITS were denied to a utility.

Commonwealth Energy System in Massachusetts lost a bid for investment tax credits on spending in the late 1980's to upgrade a power plant. The investment tax credit was repealed at the end of 1985. However, companies could still claim credits through 1990 under various transition rules, including one for investments that had to be made to perform an existing "service or supply contract."

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customer groups are complaining that FERC's refund orders did not go far enough. Commissioner Massey said — in a strong dissent to the methodology used in the refund orders — that by focusing only on power sales during stage 3 emergencies, FERC ignored "80%" of power sales for prices above the "soft cap" of $150 a megawatt hour that FERC set in an order on December 15, 2000. The California ISO, or independent system operator, filed a study with FERC claiming that generators overcharged for power by $6.2 billion from May 2000 through February 2001. Attacks on FERC's limited refund orders could lead to reversal in the courts of appeal and larger — or smaller — refunds, but such court action would probably take a year or more. The fact that FERC has taken some action to limit wholesale rates might be enough to forestall cases that the California utilities and others have filed in the federal courts against FERC for failing to take action after determining that rates in California were not "just and reasonable."

To sum up, FERC had to act to correct what it had found to be a "dysfunctional" market. It did so in a conservative manner. Although courts of appeal may ultimately reverse its orders, the fact that FERC acted at all to order some refunds and to investigate some power plant shutdowns — regardless of the outcome — may help the cause of deregulation.

South Africa Restructures Its Power Sector

by Rudolph J. Willemse, with Hofmeyr Herbstein & Gihwala in Sandton, South Africa, and Paul L. Weber, in London

South Africa is in the process of finalizing proposals for restructuring the regulatory framework for the provision of electricity. Under the proposals, electricity generation would be deregulated and electricity distribution reorganized. Significant modifications to the tariff structure have also been proposed.

Background

In 1998, the South African government published a white paper on energy that accepted the need to address tariff, supply and quality distortions in the electricity market. The minister of energy affairs, Phumzile Mlambo-Ngcuka, appointed consultants to advise the government on how to transform the electricity sector. In July 2000, these consultants presented their report to the president's cabinet. The cabinet referred the report back to the restructuring committee overseeing the process for reconsideration of certain recommendations. In November 2000, the government issued a proposal for restructuring electricity distribution.

The electricity sector is governed currently by the Electricity Act, 1987, the Eskom Act, 1987, and legislation pertaining to municipalities, and it is regulated by the National Energy Regulator, or the "NER." Electricity is generated in the main through Eskom, a state entity established pursuant to the Eskom Act, as the monopoly generator of power. Some generation facilities are owned by municipalities and certain municipalities are in the process of selling, or have announced their intention to sell, these assets to private-sector investors.

Deregulation

The first step in the deregulation of the generation of electricity has already been taken. In December 2000, the NER approved the first license for power generation by a private sector entity. Another two applications for generation licenses are currently pending before the NER. The NER envisages, in the medium term, an inter-

nal pool for electricity trading fed by imported electricity and independent producers, eventually leading to the creation of a power exchange. In addition, a bill has been published for comment proposing the conversion of Eskom from a statutory entity into a company under the Companies Act, 1973. While this step may be a precursor to Eskom's eventual privatization, the current focus of the reform process is on the regulatory framework for the electricity sector, not on Eskom's privatization.

Distribution is supplied through Eskom and approximately four hundred municipalities. Proposals published by the government in November 2000 proposed the establishment of six regional electricity distributors, or "REDS," controlled by the government and to which the electricity distribution assets of Eskom and the municipalities will be transferred.

The government's challenge is to ensure that electricity provision is expanded to rural areas, where electricity is not generally available and where the ability to pay for electricity is limited. The government is also under pressure to keep electricity prices low, which it has managed to do very well, by international comparison. In January 2000, Eskom's application for a 7% increase was rejected and a below-inflation increase of only 5.4% allowed. In addition, proposals are under consideration for the implementation of a so-called "poverty tariff" to subsidize power to poor people. Proposals being considered include a direct subsidy from the government, large electricity users subsidizing lower-income users and incremental subsidies, whereby all electricity up to a certain usage is provided free or at low cost.

The government's proposals are opposed by labor, which fears job losses, and municipalities, which consider the proposals an infringement of their constitutionally-entrenched electricity distribution power. Municipalities in many

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The utility argued it had to make the improvements to its power plant because of a contract it signed in 1965 to supply electricity from the power plant to neighboring utilities for 33 years. A US appeals court said in February the link was too attenuated.

BRIEFLY NOTED: The IRS is under fire from taxpayers who charge that it is violating a moratorium by cracking down on a tax planning technique that some US companies used to defer US taxes on gain from the sale of foreign projects between January 1997 and November 1999. The companies sold shares in foreign subsidiaries. However, they made elections just before the sales to treat the foreign subsidiaries as "disregarded" for US tax purposes. This had the effect of letting them defer US taxes on gain by retaining the sales proceeds in an offshore subsidiary. US companies charge that retroactive application of the new policy violates a promise by the Treasury not to enforce new Treasury rules on "hybrid branches" — entities that are treated as real in a foreign country but are disregarded for US tax purposes — before 2006 at the earliest . . . . An Arizona congressman has introduced a bill to make it easier for Indian tribes to issue tax-exempt bonds to finance projects on Indian reservations. Although tribes have bond authority currently, restrictions in the US tax code make it nearly impossible to use such bonds to finance a power or other infrastructure project. ■

— contributed by Keith Martin, Heléna Klumpp and Samuel R. Kwon in Washington, and Lulu Luk in Hong Kong.

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instances earn a margin on the supply of power, and they are not keen to see their credit ratings affected and their assets transferred to other entities, at least not without consideration. The proposals come at a time when local governments are under pressure to make ends meet and when the municipal system is also in transition due to the re-demarcation of municipal boundaries and the introduction of a new legislative framework for municipalities. The government has enacted legislation relating to municipal structures, municipal systems and property taxes and is currently preparing a draft bill on municipal financial management. The new legislative framework permits the establishment of municipally-owned utilities, and allows municipalities to give guarantees, make investments in generation facilities — among other things — and alienate and encumber municipal assets subject to certain conditions.

There are obvious costs in extending the distribution network and restructuring the sector. These include the costs of building the distribution infrastructure, establishing the REDS and paying compensation to the municipalities. End consumers may be asked to pay these costs. The idea of an electricity levy to finance restructuring — including compensation for municipal assets — has also been raised. Alternatively, these amounts could be raised through taxation. In theory, this burden will eventually be offset by competitive pricing of electricity.

An open issue is how electricity will be distributed during the transitional phase prior to the REDS becoming operational. Initial proposals contemplate a vertically-integrated distribution company owned by the state, comprising the staff and assets of municipal and Eskom distributors that would act as the interim national distributor of electricity. However, the energy minister's consultants proposed that this company should act as an advisor and implement the establishment of the regional electricity distributors, but should not itself provide electricity. The number of regional electricity distributors also remains to be resolved. The government proposes six regional distributors, while Eskom favors seven.

Timetable

The regulatory framework relating to distribution was supposed to be implemented on April 1, 2001. However, this target date will not be met.

The big question is when developers who want to do business in South Africa will have a clearer idea of the regulatory framework for doing business. The cabinet returned the deregulation proposals to the restructuring committee for further work last year. It will probably be another six months before a revised set of proposals is sent back to the cabinet. Implementation of deregulation itself will take several years. ■

Nothing Is Secret Anymore

by Keith Martin and Heléna Klumpp, in Washington

The US tax authorities may have the ability to read a lot more internal tax planning memos and e-mails after a decision in February by a US appeals court in Washington.

The court said the fact that a proxy statement filed with the US Securities and Exchange Commission discussed the tax consequences to shareholders of a proposed merger between two companies meant that all internal file memos about the tax consequences of the merger lost any privilege they might have had from disclosure to outsiders.

The decision is important because it means that companies run the risk of having to open

their files to the Internal Revenue Service about all transactions for which an offering circular was prepared if the offering circular included a tax analysis of the transaction.

Background

Pioneer Hi-Bred International is a seed company that was acquired by DuPont in October 1999 through a merger. Pioneer had a license agreement giving it the right to use a genetic technology that makes soybeans and canola resistant to a herbicide. Monsanto held the patent for this technology. Monsanto maintained that the license agreement terminated when Pioneer merged into DuPont. The two companies are now fighting over the issue in court.

During depositions in the case, Monsanto asked a Pioneer witness about the tax consequences of the merger with DuPont. The witness refused to answer on grounds that the information was privileged.

Monsanto asked the court in the case to order the witness to answer. It did. Pioneer appealed to the US court of appeals in Washington. The appeals court agreed that the questions had to be answered.

In general, a company can claim information is privileged from disclosure in two situations. One is where the information is legal advice from one's lawyers. This is called the "attorney-client privilege." Congress has extended it to tax advice from accountants, but not where the advice involves a tax shelter; the definition of tax shelter was left vague. The other situation where information can be withheld covers work done in preparation for litigation — the "work product privilege." The idea behind the work product privilege is to prevent opposing counsel from freeloading on information prepared by a company's own lawyers. However, litigation must have been more than a distant possibility, and it must have been the primary motivating factor for writing the memo.

A company waives any privilege by disclosing information to an outsider.

In this case, Pioneer and DuPont filed a proxy statement with the SEC in connection with the merger. The proxy statement had a standard discussion of the tax consequences of the merger to the Pioneer shareholders. This tax discussion was described in the proxy as representing the joint opinions of Skadden Arps and Fried Frank, the two law firms representing the companies, about the tax consequences.

The court said,

> "The disclosure of that advice [from the two law firms] and reliance on that advice waived the attorney-client privilege with respect to all documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice."

Implications

Under this logic, the IRS would also have access to the same materials.

Most offering circulars in large transactions include a section discussing the tax consequences. The effect of the US appeals court decision will be to force companies behind such offering circulars to open their files about all the tax consequences of the transactions, including internal memoranda and communications with outside advisers.

The most immediate effect is on companies headquartered in the 8th judicial circuit in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota. The US appeals court in Washington said it was interpreting the law in that circuit because the case was referred by a federal court in Missouri. However, the case should be a warning to everyone to be careful about what one says in writing. The file may be read some day by the IRS.

Environmental Update

Plans by the US Environmental Protection Agency to regulate mercury and hazardous air pollutants from power plants that burn coal or oil have come under fire. The plans could cost the power industry between $1.6 and $5 billion to comply.

Meanwhile, the US Supreme Court upheld other air rules the Environmental Protection Agency issued that require reductions in nitrogen oxides, volatile organic compounds and particulate matter. The US government is now moving forward to implement the rules. Implementation could lead to additional NOx, VOC and PM reductions at many US power plants.

Mercury

The Edison Electric Institute filed suit at the end of February in the US court of appeals in Washington challenging a decision by the US Environmental Protection Agency to regulate mercury and other hazardous air pollutants from coal- and oil-fired steam generating plants. The Edison Electric Institute is the trade association for the regulated utilities.

A group of electric utilities petitioned the agency separately to reconsider its position.

At this point, the US government has merely announced an intention to regulate these pollutants. It is expected to issue a proposed rule by December 2003 and to have the final rule out by the end of 2004 with industry expected to achieve compliance by the 2007 to 2008 timeframe. Compliance will be expensive.

Supreme Court Action

The US Supreme Court said in late February that Congress did not unconstitutionally delegate its legislative authority when it left it to the Environmental Protection Agency to come up with "national ambient air quality standards," or "NAAQS," for ozone and fine particulate matter under the Clean Air Act. The case is Whitman v. American Trucking Associations. "NAAQS" are standards that set an acceptable level of a pollutant in the ambient air that, in turn, triggers federally-required air emission reductions in areas that do not meet the standards.

The court also said that it reads the Clean Air Act to say that the agency is not supposed to balance air quality standards against the cost to comply with them in setting a NAAQS. However, the court said that the states — which are charged with figuring out how to reach national ambient air quality standards — can consider economic costs and technological feasibility when coming up with their own implementation plans.

The decision is important because it means that the Environmental Protection Agency can continue to establish NAAQS as it has done for over 30 years, including turning a blind eye to cost.

While the Environmental Protection Agency's standard setting process was upheld, the Supreme Court overturned the agency's plan to implement the new "8-hour ozone NAAQS" on grounds that the agency had misinterpreted what the Clean Air Act requires. The "8-hour ozone NAAQS" — which is more restrictive than the current 1-hour ozone NAAQS — will ultimately translate into more stringent NOX and VOC emission standards. The government will now have to come up with a new implementation plan.

The new 8-hour ozone standard and the new particulates standard will trigger the designation of new ozone and particulate matter nonattainment

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areas that could result in added emission reduction requirements for existing sources in these areas and more stringent environmental requirements for new and modified sources in the future.

NOx SIP Call

The Environmental Protection Agency won a round before the US Supreme Court in early March. The court declined to review a decision by a US appeals court that largely affirmed the "NOx SIP call rule." The case is *Michigan v. EPA*.

The "NOx SIP call rule" requires 22 states covered by the rule to take steps to reduce nitrogen oxide emissions to a specified budget level by 2007. The US appeals court had said the federal government was within its rights to apply the rule to at least 19 of the 22 covered states as well as the District of Columbia. The three states where the status of the rule is in doubt are Georgia, Missouri and Wisconsin. In the case of these three states, the Environmental Protection Agency proposed in January to exempt Wisconsin and only include portions of Georgia and Missouri in the NOX SIP call rule.

All the covered states are in the eastern United States. These are states whose nitrogen oxide emissions migrate and contribute to air pollution in neighboring states. Power plants and other large "sources" within the covered states are required to comply with the new NOx standards by May 31, 2004.

Carbon Dioxide

President Bush backed away from a promise during the presidential campaign to reduce carbon dioxide emissions at power plants. The president explained his position in a March 13 letter to Senator Chuck Hagel (R.-Nebraska). In the letter, he reaffirmed his opposition to the Kyoto protocol and indicated he supports a "multi-pollutant strategy" to require power plants to reduce sulfur dioxide, nitrogen oxide and mercury emissions. However, he said that there should not be any mandatory reductions in carbon dioxide emissions.

Bush gave two reasons for his change in position. One is he does not believe that CO_2 is a "pollutant" covered by the Clean Air Act. The other is a recent US Department of Energy report called "Analysis of Strategies for Reducing Multiple Emissions from Power Plants" that warned that CO_2 emission caps as part of a multiple emissions reduction strategy would lead to a dramatic shift from coal to natural gas and result in significantly higher electricity prices compared to scenarios in which only sulfur dioxide and nitrogen oxide are reduced. Bush had said during the campaign that he favored CO_2 reductions as part of a multi-pollutant control strategy.

Congress

The Republican head of the Senate Environment and Public Works Committee is expected to release soon a set of "principles" for a multi-pollutant bill that would regulate nitrogen oxide, sulfur dioxide and mercury emissions from power plants. Senator Robert Smith (R.-New Hampshire) had previously expressed a willingness to consider mandatory CO_2 emission reductions as part of the legislation. However, it appears now that he is moving toward proposing a voluntary system for recognizing CO_2 reductions.

Meanwhile, a bipartisan group of moderates has introduced its own multi-pollutant bill that

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would impose controls on NOx, SO_2, CO_2 and mercury emissions from power plants. The bill — S. 556 — was introduced in mid-March by Senators Jim Jeffords (R.-Vermont), Joseph Lieberman (D.-Connecticut) and Susan Collins (R.-Maine).

California

California governor Gray Davis took steps in early February to jumpstart the siting and construction of new power plants. The governor issued six executive orders that are designed to streamline the review process for developers who want to bring new power plants on line through 2004 and to increase output from existing plants.

The governor has set a target of bringing another 5,000 megawatts of additional power on line by July 2001 and another 5,000 megawatts by July 2002.

The executive orders were issued under a provision in the California Emergency Services Act that gives the governor broad authority to suspend most state statutes and regulations and issue orders that have the force of law during times of emergency.

However, his actions do not affect — and would be greatly limited by — federal laws and regulations that apply to California projects.

One of the orders streamlines the review process for certifying peaking plants that could come on line by July 31, 2001. Peaking plants that have a contract with the ISO, or independent system operator, and can be on line by July 2001 may be permitted under the California Energy Commission's emergency siting process and will be exempted from the California Environmental Quality Act, or "CEQA," requirements as emergency projects. The CEC is instructed to complete its expedited review for these plants within 21 days. Further, the review of CEQA documents is shortened to seven days for all plants below 50 megawatts and that are proposed to be on line by the summer of 2001. (Plants below 50 megawatts are not subject to CEC review in the first place.) Finally, the CEC's four-month emergency permitting authority was reinstated. It applies now to any simple-cycle plant that can be brought on line by August 31, 2002 with an application accepted by the CEC as complete by December 31, 2001.

Another executive order directs local, regional and state agencies to "work cooperatively and expeditiously" with the CEC and within the CEC's timeline to review all applications for certification.

Another order directs the local air districts to modify hours of operation limits for existing plants to allow existing plants to generate up to an additional 50 megawatts using existing installed capacity. The CEC recently released guidance implementing the 21-day siting process for new or expanded peaking plants that included standard permit conditions.

— contributed by Roy Belden in Washington.

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