

MegaWatt Storage Farms, Inc. Comments on GO 167 Draft Revisions

Re: SB 1383 ESS Operation and Maintenance Standards

Thank you for the opportunity to comment on the proposed changes for the SB 1383 ESS Operation and Maintenance Standards in General Order 167 (GO 167).

Overview

Our comments focus on Section 9.4.1 (d) reporting requirements.

Negative publicity should not be treated the same as a safety incident, which what the new wording does. Also the wording of Section 9.4.1(d) is vague and overly broad. Even the previous version suffers some of the defects identified. The suggested change is to delete 9.4.1(d) because negative publicity by itself is not a safety incident.

Old and New Versions

For reference, the current relevant language¹ is:

10.4 Safety-related Incidents. Within 24 hours of its occurrence, a Generating Asset Owner shall report to the Commission's emergency reporting web site any safety-related incident involving a Generating Asset. If internet access is unavailable, the Generating Asset Owner may report using the backup telephone system. Such reporting shall include any incident that has resulted in death to a person; an injury or illness to a person requiring overnight hospitalization; a report to Cal/OSHA, OSHA, or other regulatory agency; or damage to the property of the Generating Asset Owner or another person of more than \$50,000. The Generating Asset Owner shall also report any other incident involving a Generating Asset that has resulted in significant negative media coverage (resulting in a news story or editorial from one media outlet with a circulation or audience of 50,000 or more persons) when the Generating Asset Owner has actual knowledge of the media coverage. If not initially provided, a written report also will be submitted within five business days of the incident. The report will include copies of any reports concerning the incident that have been submitted to other governmental agencies.

The proposed new language is:

9.4.1 Reportable incidents are those which:

- a) result in a fatality or personal injury/illness that requires medical attention from a healthcare professional and are attributable or allegedly attributable to GA or ESS facilities; or
- b) result in a report to Cal/OSHA, OSHA, or other regulatory agencies; or
- c) involve damage to property estimated to equal or exceed \$200,000. Property in this section refers to any GA or ESS and/or other property and facilities. In calculating the amount of damages, the utility shall estimate the cost to replace any damaged facilities. The cost shall also include the labor involved to replace the damaged facilities and should be broken down to show the cost of damages to both GA-owned or ESS-owned and other facilities; or
- d) are the subject of significant negative public attention or media coverage and are attributable or allegedly attributable to the GA or ESS facilities, resulting in a news story or editorial from one media outlet with a circulation or audience of 25,000 or more persons in the area, city and/or county where the incident occurred; or
- e) involve GA or ESS malfunctions or failures resulting in fires, thermal runaway, explosions, or hazardous emissions.

9.4.2 [not shown]

9.4.3 20-DAY REPORT Within twenty (20) business days of a reportable incident, the GAO or ESSO shall provide designated CPUC staff along with a notification to the GO167 mailbox (GO167@cpuc.ca.gov) a written report of the incident. The report shall include, at a minimum, the following information as well as updates to any previous information provided:

- Location of the incident, date and time of the incident, date and time the GAO or ESSO became aware of the incident, and date and time of the notice to the Commission;
- A detailed description of the nature of the incident and its cause;
- Outage ID number reported to CAISO and/or CPUC through the Power Plant Outage Reporting (PPOR) web portal if applicable, and estimated time of return to service;
- A description of the GAO's or ESSO's response to the incident and the corrective actions planned and taken to repair the facilities and/or remedy any related problems;
- A description of preventive measures planned or taken to prevent recurrence of problems on the system which may have contributed to the incident, if available;

- The name(s) and contact information of any injured person(s);
- Whether the GAO or ESSO is investigating the incident, the status of the investigation, and the status of the Root Cause Analysis;
- Identification of any agencies, equipment material suppliers, service providers, and consultants that were notified of the incident; General Order 167-C - 23 –
- A list of evidence collected by the GAO or ESSO as a result of the incident;
- A list of witnesses the GAO or ESSO identified and their contact information;
- Identification of the GA or ESS facilities/equipment that were damaged as a result of the incident, an updated amount of the cost of damages to the GA or ESS and other facilities/property that were damaged as a result of the incident; and
- Provide justification for any of the above information that is not available or submitted with the 20-Day Report. Provide a projected completion date for the missing information.

Importantly, regulations such as GO 167 have force of law and violation can lead to civil or criminal penalties.

Discussion

Our discussion is from the perspective of storage projects (ESS) but our comments are applicable also for generating assets (GA) that are subject to these regulations. We are detailed in our comments in case the CPUC decides to change the wording, rather than follow our recommendation of deleting 9.4.1(d) entirely.

Note that 9.4.1 (a) through (e) are joined by “or” – any one alone is sufficient to create a “reportable incident”. As a result, under the new language of 9.4.1 (d), a “reportable incident” can be nothing more than negative media coverage – no safety incident, zero injury, zero damage to the project – just negative media coverage.

If the concern is safe and reliable storage operation, the occurrence of any one of (a), (b), (c) or (e) of 9.4.1 provides sufficient scope to define a "reportable incident" and to trigger the subsequent 20 day report required by 9.4.3 (a copy of which is shown above). Subsection 9.4.1 (d) is not needed and should be deleted.

Negative publicity by itself is not a safety event – it is a normal consequence of people exercising their First Amendment rights. It should not be reportable.

A further problem is Section (d)’s new wording creates a duty of storage sites to monitor media and find any negative coverage. Notably, the proposed draft struck the old language of "Generating Asset Owner has actual knowledge of the media coverage". This change converted the regulation from reporting negative coverage that the project “has actual knowledge of” to an

active duty to screen and report all negative publicity. Failure to comply with either form of the regulation is punishable by civil or criminal penalties.

More specifically, it certainly should not be a duty of a storage project to report all negative publicity to the government (even if qualified by the 25,000 threshold). Such sweeping reporting regulations have no place in a free democracy that values freedom of expression. Yet taken by its current wording, this is precisely what 9.4.1(d) mandates. Moreover, it treats such negative publicity as if it was a safety incident.

The fact that 9.4.1(d) is on the books now in an earlier form (Section 10.4) is not relevant to the appropriateness or legality of the new wording, if the old wording is now also understood to be unreasonable or unlawful. Specifically, both the old and proposed versions suffer from ambiguous and vague wording. However, we focus on the proposed wording in the following discussion.

First, there is the issue of what constitutes “media”. Paper newspapers have been in severe decline and economic distress for over a decade. Social media is arguably now far more influential than paper newspapers. Is social media included? What about:

- Magazines?
- Newsletters?
- TV shows?
- Radio?
- Podcasts?
- Tweets?
- Reddit?
- Snapchat (media vanishes after being viewed - how does one even monitor that)?
- Instagram?
- Tiktok?
- YouTube?
- Vimeo?
- Nextdoor?
- Twitch?
- Kick?
- A web site run by an individual or non-media company?
- A web site run by a political activist?
- A web site run by a nutty conspiracy theorist?
- Public gatherings that broadcast proceedings via Zoom or Teams or other web or cable TV media (like the March 20, 2024 Morrow Bay Vista Community Meeting²)?
- A private invite-only server such as Discord or Slack (some of which have massive circulation, but which the storage project may not be authorized to access)?
- A negative comment posted anywhere in response to any of these?
- An email mail list?
- Political campaign materials such as flyers, billboards, lawn signs, mailings, etc.?

Further, how does one measure viewership or circulation? A web site’s viewership rises over

² Archive available at https://slo-span.org/meeting/county-sm_20240320/

time, and can go from tiny viewership for an extended time (sometimes years) to suddenly blowing up to huge numbers. An old social media post from ten years back that suddenly explodes in popularity becomes reportable under 9.4.1(d) when its popularity takes off.

Further, how does one estimate or measure whether the "circulation or audience of 25,000 or more persons" is actually "in the area, city and/or county where the incident occurred"?

Further, what does "and/or" mean in the phrase "in the area, city and/or county where the incident occurred"? Does it mean any one of area, city, county? Or does it mean "each and every one of" area, city, county?

Further, what are the geographic boundaries of an "area"?

Further, what is an "audience" of an internet source in counting towards the 25,000 reporting threshold? Is one single brief view of an internet media sufficient to make a specific person an audience of that media, even if the person never returns to the site and didn't spend enough time to read the content? And how should a storage project get such information on viewership?

Further, what is "one media outlet" for the purposes of the 25,000 threshold? How many media outlets is a hybrid (live & virtual) meeting that is simulcast on YouTube, Twitch and Zoom – is it four media outlets (one live, three virtual), or just one? What about two attendees each independently broadcasting the same meeting on their own separate Twitch channels via their own separate cellphones – is that two virtual media outlets, or just one?

Further, such a broad legislative sweep requiring all negative media coverage be reported to the government, would probably, if challenged in Court, be found a Constitutional violation of the First Amendment, due to its chilling effect on free speech. Even more so if it included investigation of the locational information of each viewer, as needed to see if those encountering the statement are "in the area, city and/or county ...".

Further, the negative coverage "attributable or allegedly attributable to the GA or ESS facilities" literally includes negative statements made BY the storage project, in addition to negative statements ABOUT the storage project³. So if a storage project made a negative statement about a politician or the CPUC or fossil fuels, and it gathered widespread media attention, that would become a reportable incident. Or if a politician or CPUC person made a widely covered statement that is negative about a storage project, that would that be a reportable incident.

Further, even an "allegedly" attributable negative statement is reportable. So even if the attribution is known to be wrong, it is still reportable. And are there any bounds of who makes the allegation before it becomes reportable? Or is anyone able to turn any widely viewed

³ attributed; attributing - transitive verb

1 : to explain (something) **by indicating a cause**. He attributed his success to hard work.

2 a : to regard as **a characteristic of a person or thing**. should not attribute adult reasoning to children

b : to reckon as **made or originated in an indicated fashion**. attributed the invention to a Russian

c: CLASSIFY, DESIGNATE

attributable adjective

Source: Merriam Webster dictionary, available at: <https://www.merriam-webster.com/dictionary/attribute>

negative statement into a reportable incident by simply stating it was made by or about a storage project?

Further, the phrase “allegedly attributable to the GA or ESS facilities” includes a statement by a third party that the storage project made a negative statement or had a negative statement made about it. If that third party’s statement had wide coverage, that would trigger a reportable event.

Further, what is “negative”? About whom? Using some made-up examples to illustrate the issues:

- About the CPUC, by the storage project? (“... aside from their approval of our wonderful new storage project, the CPUC has a history of poor decisions ...”)
- Negative about storage in general? (“... storage in general is bad – it is an eyesore and costs too much money ...”)
- Negative about the storage project? (“... that storage project is an eyesore and should be decommissioned ...”?)
- Negative about the writer, by the storage project? (“... that writer has a track record of incorrect, erroneous reporting about our storage project ...”)?
- Negative about anyone or anything, by the storage project? (e.g. “... we asked management at the wonderful new battery storage project and they agreed that the manufacturing plant next door to them is a terrible polluter and should be immediately shut down”).

A further problem is the detailed report required from the storage project owner 20 days after the negative media coverage. Section 9.4.3, shown above, lists what the mandatory 20 day report must provide, even if the only thing creating a “reportable incident” is negative media coverage. It requires the storage project to do detailed investigation into the negative coverage, including providing witnesses, evidence, root cause analysis and more. The reporting is mandatory and subject to civil or criminal penalties if the investigation is not done and report not provided.

Finally, an editorial that is negative about a storage site (or storage in general) certainly should not be reportable. (The old and new language includes "editorial".) What is more fundamental to exercising free speech than an editorial?

"The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940)

"The freedom of speech and of the press protected by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth Amendment against abridgment by a state." *Gitlow v. New York*, 268 U.S. 652, 666 (1925)

These quotes span nearly a century of Supreme Court jurisprudence consistently affirming that the ability to freely express opinions on matters of public concern, including through editorials, lies at the core of the First Amendment's free speech and free press guarantees.

Basically, if the CPUC wants to monitor some or all the above, they can hire a media monitoring

firm to do it for them, subject to Constitutional and other legal limitations on such monitoring. It should not be the duty of storage projects to fill that role for the CPUC.

The current draft is an unreasonable, possibly unlawful, imposition on storage site operators.

Redline corrections

The CPUC's instructions on comments requested a redline showing the commenter's suggested changes, which is hereby provided for Section 9.4.1(d) of the proposed draft:

~~d) are the subject of significant negative public attention or media coverage and are attributable or allegedly attributable to the GA or ESS facilities, resulting in a news story or editorial from one media outlet with a circulation or audience of 25,000 or more persons in the area, city and/or county where the incident occurred; or~~

[subsection deleted]

Concluding Remarks

Thank you again for the opportunity to provide these comments and for the fine work of the Commission as it works through the challenges of transitioning to a renewables-based grid.

Respectfully submitted,

/s/ David MacMillan

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