



Department of Energy
Western Area Power Administration
P.O. Box 281213
Lakewood, CO 80228-8213

August 8, 2011

California Air Resources Board
1001 I Street
Sacramento, CA 95814
Submitted electronically:

http://www.arb.ca.gov/lispub/comm/bcsubform.php?listname=capandtrade10&comm_period=1
http://www.arb.ca.gov/lispub/comm/bcsubform.php?listname=ghg2010&comm_period=1

Dear Members of the Board:

These comments are in response to the California Air Resources Board (CARB) request for comments on the Modified Text for the Proposed California Cap on Greenhouse Gas Emissions and Market Based Compliance Regulation, including Compliance Offset Protocols.

While Western Area Power Administration (Western) appreciates the changes made by CARB to allow voluntary participation, Western, a federal agency, continues to express concerns that CARB's regulations include Western as a regulated entity. Western respects the state's initiatives to implement its cap and trade regulations for greenhouse gases; however, Western is bound by federal laws and regulations. The Supremacy Clause of the United States Constitution does not allow a state to directly regulate the federal government without its consent or within a field regulated entirely by the federal government. Western understands CARB believes the Clean Air Act provides a waiver of sovereign immunity for these regulations. While Section 118 of the Clean Air Act, 42 U.S.C. § 7418, provides a limited waiver of sovereign immunity and under certain circumstances requires federal facilities to comply with federal, state, interstate and local requirements for the abatement of air pollution to the same extent as any nongovernmental entity, under the Act, there must be an action by the United States to delegate authority over cap and trade for greenhouse gases to the state before a federal agency may comply with state regulations. There have been cap and trade initiatives associated with greenhouse gas regulations before both the U.S. Congress and Environmental Protection Agency (EPA). However, as of this writing, Western understands neither the U.S. Congress nor the EPA have promulgated any such cap and trade laws or regulations. While Congress or EPA may decide to implement cap and trade for greenhouse gases, until such time, there is no waiver of sovereign immunity and Western does not have authority to bind Congress, EPA or other federal agencies with jurisdiction over such matters. Furthermore, these regulations that CARB is proposing to promulgate directly impact Western's primary mission of marketing federal power, a field regulated entirely by the federal government. Therefore, Western continues to believe the regulations should not include Western as a regulated party.

In our conversations with your staff, Western understands the importance of having all in-state utilities participate (either on a mandatory or voluntary basis). In the past, Western has worked with state agencies, including CARB, to provide information the state needs. For instance, Western voluntarily reports its greenhouse gas emissions to assist the state in meeting its goals.

While Western is willing to work with CARB to meet the state's needs, Western ultimately determines, through its own process, if, how and to what extent it will participate. Western will continue to work with the state and may voluntarily participate in cap and trade, however, at this time; Western cannot consent to direct state regulation.

In an effort to foster cooperation, Western has met with CARB. Western appreciates the changes made to the program to allow voluntary participation and to provide Western with an allocation. In light of this cooperative relationship, Western is providing further comments based on our last discussion. Western understands that when determining a utility's allocation of allowances, CARB will assume the RPS obligation in a utility's resource mix even if that utility has not reported its RPS or is not under an RPS obligation. The assumed RPS obligation used by CARB will effectively reduce the amount of unspecified resources, and subsequently the allowances allocated to that utility. Western is not required to comply with California's RPS. However, Western's primary mission is to market the power generated from the Bureau of Reclamation's hydro generation facilities. The Sierra Nevada Region markets approximately 2,500 GWh annually to its end-use customers. On average, approximately 50 percent of that load is served with large hydro resources, a null greenhouse emitting resource. Western understands the goal under both the RPS and the Cap and Trade is to reduce greenhouse gas emissions. Western is already serving its load with an average of 50 percent greenhouse gas emission-free resources (well above the RPS requirements) and, therefore, should be allocated allowances based on its total reported unspecified resources.

Western has also received a copy of Bonneville Power Administration's comments in this proceeding. Western concurs with Bonneville Power Administration and urges CARB to modify sections 95101(d)(5), 95102(a)(118), and 95802(a)(84) (same definition of "Electricity importers" as the definition used in § 95102(a)(118)) in one of two ways: either by deleting the unnecessary language entirely, as indicated in strikethrough; or, by modifying it as indicated in underline. The excerpts below illustrate both options for each of the three sections.

DELETE OPTION FOR § 95101:

§ 95101 Applicability.

(d) *Electric Power Entities*. The entities listed below are required to report under this article:

- (1) Electricity importers and exporters, as defined in section 95102(a);
- (2) Retail providers, including multi-jurisdictional retail providers, as defined in section 95102(a);
- (3) California Department of Water Resources (DWR);
- ~~(4) Western Area Power Administration (WAPA);~~
- ~~(5) Bonneville Power Administration (BPA).~~

OR MODIFICATION OPTION FOR § 95101:

§ 95101 Applicability.

(d) *Electric Power Entities.* The entities listed below are required to report under this article:

- (1) Electricity importers and exporters, as defined in section 95102(a);
- (2) Retail providers, including multi-jurisdictional retail providers, as defined in section 95102(a);
- (3) California Department of Water Resources (DWR);
- (4) Western Area Power Administration (WAPA), unless it voluntarily reports under these regulations;
- (5) Bonneville Power Administration (BPA), unless it voluntarily reports under these regulations.

DELETE OPTION FOR § 95102:

§ 95102. Definitions.

(a) For the purposes of this article, the following definitions shall apply:

(118) “Electricity importers” are marketers and retail providers that hold title to imported electricity. For electricity delivered between balancing authority areas, the entity that holds title to delivered electricity is identified on the NERC E-tag as the purchasing-selling entity (PSE) on the tag’s physical path, with the point of receipt located outside the state of California and the point of delivery located inside the state of California. ~~Federal and s~~State agencies are subject to the regulatory authority of ARB under this article and include ~~Western Area Power Administration (WAPA), Bonneville Power Administration (BPA),~~ and California Department of Water and Power (DWR). When PSEs are not subject to the regulatory authority of ARB, including tribal nations, the electricity importer is the immediate downstream purchaser or recipient that is subject to the regulatory authority of ARB.

OR MODIFICATION OPTION FOR § 95102:

§ 95102. Definitions.

(a) For the purposes of this article, the following definitions shall apply:

(118) “Electricity importers” are marketers and retail providers that hold title to imported electricity. For electricity delivered between balancing authority areas, the entity that holds title to delivered electricity is identified on the NERC E-tag as the purchasing-selling entity (PSE) on the tag’s physical path, with the point of receipt located outside the state of California and the point of delivery located inside the state of California. ~~Federal and s~~State agencies are subject to the regulatory authority of ARB under this article and include ~~Western Area Power Administration (WAPA), Bonneville Power Administration (BPA),~~ and California Department of Water and Power (DWR). Federal agencies, including Western Area Power Administration (WAPA) and Bonneville Power Administration

(BPA), may voluntarily report under these regulations. When PSEs are not subject to the regulatory authority of ARB, including tribal nations, the electricity importer is the immediate downstream purchaser or recipient that is subject to the regulatory authority of ARB.

DELETE OPTION FOR § 95802:

§ 95802. Definitions.

(a) Definitions. For the purposes of this article, the following definitions shall apply:

(84) “Electricity importers” are marketers and retail providers that hold title to imported electricity. For electricity delivered between balancing authority areas, the entity that holds title to delivered electricity is identified on the NERC E-tag as the purchasing-selling entity (PSE) on the tag’s physical path, with the point of receipt located outside the state of California, and the point of delivery located inside the state of California. ~~Federal and s~~State agencies are subject to the regulatory authority of ARB under this article and include ~~Western Area Power Administration (WAPA), Bonneville Power Administration (BPA), and~~ California Department of Water and Power (DWR). When PSEs are not subject to the regulatory authority of ARB, including tribal nations, the electricity importer is the immediate downstream purchaser or recipient that is subject to the regulatory authority of ARB.

(246) “Retail Provider” means an entity that provides electricity to retail end users in California and is an electric corporation as defined in Public Utilities Code section 218, electric service provider as defined in Public Utilities Code section 218.3, local publicly owned electric utility as defined in Public Utilities Code section 224.3, a community choice aggregator as defined in Public Utilities Code section 331.1, ~~or the Western Area Power Administration.~~ For purposes of this article, electrical cooperatives, as defined by Public Utilities Code section 2776, are excluded.

OR MODIFICATION OPTION FOR § 95802:

§ 95802. Definitions.

(a) Definitions. For the purposes of this article, the following definitions shall apply:

(84) “Electricity importers” are marketers and retail providers that hold title to imported electricity. For electricity delivered between balancing authority areas, the entity that holds title to delivered electricity is identified on the NERC E-tag as the purchasing-selling entity (PSE) on the tag’s physical path, with the point of receipt located outside the state of California, and the point of delivery located inside the state of California. ~~Federal and s~~State agencies are subject to the regulatory authority of ARB under this article and include ~~Western Area Power Administration (WAPA), Bonneville Power Administration (BPA), and~~ California Department of Water and Power (DWR). Federal agencies, including Western Area Power Administration (WAPA) and Bonneville Power Administration (BPA), may voluntarily participate under these regulations. When PSEs are not subject to the regulatory authority of ARB, including tribal nations, the electricity importer is the

immediate downstream purchaser or recipient that is subject to the regulatory authority of ARB.

(246) "Retail Provider" means an entity that provides electricity to retail end users in California and is an electric corporation as defined in Public Utilities Code section 218, electric service provider as defined in Public Utilities Code section 218.3, local publicly owned electric utility as defined in Public Utilities Code section 224.3, a community choice aggregator as defined in Public Utilities Code section 331.1, ~~or the Western Area Power Administration.~~ Federal agencies, including Western Area Power Administration (WAPA) may voluntarily participate under these regulations. For purposes of this article, electrical cooperatives, as defined by Public Utilities Code section 2776, are excluded.

If you have any questions with regard to the above, please feel free to contact me at (720) 962-7017 or kawamura@wapa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Koji Kawamura', with a long horizontal flourish extending to the right.

Koji Kawamura
Attorney