

September 27, 2011

California Air Resources Board
1001 I Street
Sacramento, California 95812

Subject: Comments on the Second 15-Day Modifications to the Regulation to Implement the California Cap-and-Trade Program (posted September 12, 2011)

Executive Summary – Remove the added language in proposed Section 95802(a)(85) defining an Electrical Distribution Utility as an “entity that owns or operates a distribution system” because it is not reasonably necessary to effectuate the purpose of the statute.

I. Introduction

In Board Resolution 10-42, the Air Resources Board determined that ARB staff’s proposed regulation, among other things:

Provides for distribution of allowances through a mix of direct allocation and auction in a system designed to reward early action and investment in energy efficiency and GHG emissions reduction; allowances will be distributed for the purposes of price containment, industry transition and assistance, and fulfillment of AB 32 statutory objectives;

Resolution 10-42 provided further that:

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to work with the California Public Utilities Commission (CPUC) and the publicly owned utilities (POU) to ensure that the proposed allowance value directed to the electric distribution utilities is used for the benefit of residential, commercial, and industrial ratepayers that might otherwise face indirect costs from implementation of this regulation, with particular consideration of the potential for impacts from this program on low-income customers, and for the purposes of AB 32, which could include investment in energy efficiency programs beyond those already required by California law and in renewable energy projects that achieve environmental and public health co-benefits for Californians.

To this end, ARB staff identified the scope of electric sector entities that should receive allowance allocations to achieve the Board’s direction as stated above. As a means of identification, these entities were called electrical distribution utilities (EDUs). From the beginning, ARB staff’s primary consideration was whether an entity was best situated in the stream of commerce so as to direct the allowance value to retail electricity ratepayers.

The *Appendix A: Staff Proposal for Allocating Allowances to the Electric Sector*¹ was drafted, among other things to “clarif[y] which entities are eligible to receive allowances reserved for the

¹ Posted July 27, 2011.

electricity sector.”² The *Appendix* describes the core functional criteria used to distinguish EDU’s from other entities that should not receive allowance allocations. The *Appendix* states that “entities must provide electricity serve [sic] end-use customer load and receive payment for the load from end-use customers.”³ ARB staff determined that to be eligible for an allowance distribution, an EDU must have a transactional relationship with end-use electricity customers. The *Appendix* stated further, that this requirement was “essential to correctly incorporating the emissions price signal in electricity markets and appropriately compensating electric customers If entities without a transactional relationship to consumers are allocated allowances for the benefit of end-use customers their only means of directly defraying the programmatic costs would be to reduce prices. This outcome is explicitly NOT the goal of cap and trade.”⁴

In the Second 15-Day Modifications, a proposed change includes a new criterion for EDUs which directly conflicts with the goals stated in Resolution 10-42 as well as ARB staff’s recommendations in *Appendix A*. In renumbered Section 95802(a)(85), the new language redefines “Electrical Distribution Utility(ies)” to mean “an entity that owns and/or operates an electrical distribution system, including: 1) a public utility ~~Investor Owned Utility (IOU)~~ as defined in the Public Utilities Code sections ~~and 216~~ (referred to as an ~~Investor Owned Utility or IOU~~); or 2) ~~218~~, or a local publicly owned electric utility (POU) as defined in Public Utilities Code section 224.3, or 3) or an Electrical Cooperative (COOP) as defined in Public Utilities Code section 2776, that provides electricity to retail end users in California.”

II. Recommendation on Section 95802(a)(85) – Remove the new language defining an Electrical Distribution Utility as an “entity that owns or operates a distribution system” because it is not reasonably necessary to effectuate the purpose of the statute.

This definitional change is incorrect and not reasonably necessary to effectuate the purpose of the statute.⁵ Owning or operating an electric distribution system is not the touchstone for having the ability to pass allowance value onto ratepayers. As ARB staff correctly stated in *Appendix A*, having a direct transactional relationship between the entity providing “public utility” services and the retail ratepayer is the proper test. The original definition for an EDU in the First 15-Day Modifications provided sufficient clarity and was consistent both with the language of AB 32 and the Air Board’s direction in Resolution 10-42.

As shown below, several types of public entities are authorized to provide electric service to end-users. There is no requirement that these entities actually own or operate a distribution system in order to purchase electricity at wholesale, establish retail rates, and sell the electricity to end-use customers. The respective governing boards and/or councils of each entity type serves as the local regulatory authority (“LRA”) in regard to electricity rate-setting. These LRA’s are

² Appendix A, p. 1.

³ Appendix A, p. 16.

⁴ Appendix A, p. 16 (emphasis in original).

⁵ “Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.” Cal. Gov’t. Code § 11342.2.

authorized by law to make all the decisions that would affect low-income consumers, as well as the entity's investments in energy efficiency and renewable power.⁶ The following statutes make clear that each LRA's decisions are authorized by law without regard to whether the respective entity owns or operates a distribution system.

Pub. Util. Code § 224.3. "Local publicly owned electric utility" means a municipality or municipal corporation operating as a "public utility" *furnishing electric service* as provided in Section 10001, a municipal utility district *furnishing electric service* formed pursuant to Division 6 (commencing with Section 11501), a public utility district *furnishing electric services* formed pursuant to the Public Utility District Act set forth in Division 7 (commencing with Section 15501), an irrigation district *furnishing electric services* formed pursuant to the Irrigation District Law set forth in Division 11 (commencing with Section 20500) of the Water Code, or a joint powers authority that includes one or more of these agencies and that owns generation or transmission facilities, or *furnishes electric services over its own or its member's electric distribution system*.

Pub. Util. Code § 10001. "Public utility" as used in this article, *means the supply of a municipal corporation alone or together with its inhabitants, or any portion thereof, with . . . power, . . .*"

Pub. Util. Code § 11509. "Electricity district" means a municipal utility district formed under this division that *furnishes electricity* to more than 100,000 customers.

Water Code § 22120. A[n irrigation] *district may sell, dispose of, and distribute electric power for use* outside of its boundaries.

III. Conclusion

In order to achieve the statutory purposes for distributing allowances to the electric sector, the phrase "entity that owns or operates a distribution system" should be removed from Section 95802(a)(85) in the Second 15-Day Modifications. This language is neither consistent with the statute nor reasonably necessary to effectuate the purpose of the statute.

Thank you for considering these comments.

Bruce McLaughlin
Braun Blaising McLaughlin, P.C.
915 L Street, Suite 1270
Sacramento, CA 95814

⁶ See Resolution 10-42, p.16.