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October 19, 2011

**Via Electronic Submission**

Clerk of the Board  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95812

**Re: Comments of Powerex Corp. on the Proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation**

Dear Chairman Nichols and Members of the Board:

On behalf of Powerex Corp. (“Powerex”)<sup>1</sup>, I submit the following comments on the California Air Resources Board’s (“ARB’s”) final proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation (the “Cap-and-Trade Rule”), which was released by ARB on October 10, 2011. Powerex applauds ARB’s efforts to create and implement a comprehensive greenhouse gas (“GHG”) cap-and-trade program. With the two sets of 15-day rule modifications that ARB made this summer to the Cap-and-Trade Rule as well as the Mandatory Reporting Rule (the “MRR”), ARB has made significant progress toward fulfilling the mandate of the California Global Warming Solutions Act (“AB 32”) to reduce GHG emissions in California and to combat global climate change.

Powerex submitted comments on both sets of ARB’s recently proposed 15-day rule modifications.<sup>2</sup> Some of Powerex’s comments on the first set were addressed in the second set.

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<sup>1</sup> Powerex is a corporation organized under the Business Corporations Act of British Columbia, with its principal place of business in Vancouver, British Columbia, Canada. Powerex is the wholly-owned energy marketing subsidiary of the British Columbia Hydro and Power Authority (“BC Hydro”), a provincial Crown Corporation owned by the Government of British Columbia. Powerex sells wholesale power in the U.S., pursuant to market-based rate authority granted by the Federal Energy Regulatory Commission (“FERC”) in October 1997, renewed most recently effective January 1, 2009. Powerex sells power from a portfolio of resources in the U.S. and Canada, including Canadian Entitlement resources made available under the Columbia River Treaty, BC Hydro system capability, and various other power resources acquired from other sellers within the U.S. and Canada. Powerex also buys and sells power in Canadian provinces other than British Columbia and in Mexico. Powerex has been delivering power to California since shortly after receiving its market-based rate authority in 1997.

<sup>2</sup> Powerex’s comments on ARB’s first set of 15-day rule modifications were submitted on August 11, 2011, and assigned Comment No. 1510 on the Cap-and-Trade Rule and Comment No. 46 on the MRR. Powerex’s comments

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However, none of Powerex's comments on the second set were addressed in the final proposed rule. We write today to reiterate those comments, as they address problems with the Cap-and-Trade Rule that potentially imperil the program. Powerex supports ARB's efforts to develop a cap-and-trade program to reduce GHG emissions and combat climate change. Hence our concern, for as currently drafted the Cap-and-Trade Rule will be vulnerable to legal challenge.

Powerex calls upon the Board to adopt a resolution directing ARB staff in early 2012 to initiate a new rulemaking process to amend the Cap-and-Trade Rule as well as the MRR to address the issues that Powerex has identified. Alternatively, the Board could adopt a resolution similar to Resolutions 10-42 and 10-43 last year directing ARB staff to undertake certain, minor modifications to the Cap-and-Trade Rule and the MRR pursuant to Government Code Section 11346.8 (*i.e.*, the 15-day rule modification process utilized this year). Doing so will help to ensure that California's cap-and-trade program is less vulnerable to legal challenge and will function properly when it goes into full operation in 2013.

Below we briefly reiterate Powerex's comments that need to be addressed in early 2012. For a more complete discussion of them, we direct the Board to Powerex's comments dated September 27. Given the limited amount of time that stakeholders have had to review and comment upon ARB's two sets of 15-day rule modifications, other issues may well be identified in the interim that also will need to be addressed in order to ensure the success of the program.

**I. ARB Should Amend the Cap-and-Trade Rule and the MRR to Clarify that Entities other than BPA may be Classified as "Asset-Controlling Suppliers."**

In Powerex's August 11, 2011 comments, we expressed concern that the definition of "asset-controlling supplier" in both the MRR and the Cap-and-Trade Rule could be interpreted inappropriately to mean that no entity other than BPA could be an asset-controlling supplier. Limiting the eligibility to BPA would be to the detriment of comparable hydropower resources in the Pacific Northwest such as those owned and controlled by Powerex's parent BC Hydro.

In Powerex's September 27 comments, we explained that ARB has "National Treatment" obligations to Powerex under Chapters Six and Eleven of the North American Free Trade Agreement ("NAFTA"), Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 289, chaps. 6, 7 (1993). Because Powerex is indistinguishable from BPA in terms of government ownership, Powerex is entitled to parity treatment with BPA. This requirement extends to the compliance obligations placed by ARB on first deliverers of imported electricity. We direct the Board to Powerex's September 27 comments for specific proposals to mitigate the potential for a NAFTA claim.

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on ARB's second set of 15-day rule modifications were submitted on September 27, 2011, and assigned Comment No. 1677 on the Cap-and-Trade Rule and Comment No. 138 on the MRR.

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**II. The Renewable Portfolio Standard Adjustment Includes a Potentially Fatal Flaw that can be Easily Fixed.**

Powerex understands that the Renewable Portfolio Standard (“RPS”) Adjustment provisions are critical to ensure that the zero-emission components of renewable energy are properly counted under the RPS, the MRR and the Cap-and-Trade Rule. Powerex supports the inclusion of some form of RPS Adjustment in the Cap-and-Trade Rule. However, as currently drafted, the RPS Adjustment is at risk of legal challenge on two grounds. It may impermissibly intrude upon the jurisdiction of FERC, and the restriction of the RPS Adjustment to California load serving entities makes it vulnerable to a Commerce Clause challenge. We direct the Board to Powerex’s September 27 comments for specific, simple changes that would make both rules less vulnerable to court challenges.

**III. The Qualified Export Adjustment Requires Adjustment.**

Section 95852(b)(5)(A) of the Cap-and-Trade Rule allows for an adjustment to a PSE’s emissions obligation for times when that PSE imports and exports electricity in the same hour (a “QE Adjustment”). Powerex supports ARB’s proposal to include a QE Adjustment. Unfortunately, as currently drafted, the QE Adjustment has substantial potential to distort the underlying power markets. We direct the Board to Powerex’s September 27 comments for suggested modifications to the QE Adjustment’s calculation method that will improve its ability to prevent unnecessary wheel through transactions in which power moves through the state rather than incurring compliance obligations for electricity that was not consumed in California.

**IV. The Resource Shuffling Provisions Require Additional Clarification.**

Powerex appreciates that ARB revised the definition of “resource shuffling” in response to the concerns raised by stakeholders in comments on ARB’s first set of proposed 15-Day Modifications. However, the newly proposed definition is sufficiently vague that the regulated community does not have certainty as to what ARB would consider legitimate imports of electricity and what it would consider to be illegal “resource shuffling.” Accordingly, Powerex urges ARB to clarify the scope of the resource shuffling provisions of the Cap-and-Trade Rule. We direct the Board to Powerex’s September 27 comments for specific proposed changes that will provide the clarity needed to guide the regulated community.

**V. The Board Should Direct ARB Staff to Work with Stakeholders in Early 2012 to Address these and Other Issues Prior to Full Implementation of the Cap-and-Trade Program in 2013.**

With AB 32’s mandatory emission reduction goal looming, Powerex understands the need to finalize the Cap-and-Trade Rule and the MRR. Powerex applauds ARB’s commitment to meet AB 32’s goal and its extensive public outreach efforts. Despite this effort, however,

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gaps and inconsistencies remain in the two rules as currently drafted which threaten the success of the programs. These include the major infirmities discussed above, as well as others that may not have been identified during the expedited rulemaking process in 2011.

Therefore, as noted at the beginning of these comments, Powerex calls upon the Board to adopt a resolution directing ARB staff to initiate a regulatory refinement process in early 2012 that includes active stakeholder participation and addresses these important issues as well as others that may be identified in the interim. This process could take the form of a new rulemaking detailing discrete amendments to the Cap-and-Trade Rule and the MRR, or it could be modeled upon Resolutions 10-42 and 10-43 last year directing the ARB Executive Officer to prepare additional 15-day rule modifications. Either way, the objective must be to resolve these issues prior to the Cap-and-Trade Rule's full implementation in 2013. These additional steps would not interfere with the Board's approval of the Cap-and-Trade Rule on October 20. They would, however, enable ARB to refine the cap-and-trade and emission reporting programs to ensure both their functionality and legal defensibility prior to full implementation in 2013.

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Thank you for your consideration of these comments. Again, Powerex applauds ARB for its continued work to implement the mandate of AB 32 and, in particular, its work on market-based compliance mechanisms. If you have any questions on the enclosed comments, please contact me, at 415-262-4008 or [nvanaelstyn@bdlaw.com](mailto:nvanaelstyn@bdlaw.com), or my colleague, Amy Lincoln, at 415-262-4029 and [alincoln@bdlaw.com](mailto:alincoln@bdlaw.com).

Sincerely,



Nicholas W. van Aelstyn

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