

August 2, 2013

Client-Matter: 45917-060

***E-Filing***  
***ARB's Cap-and-Trade Website***

Dr. Steve Cliff  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95812-2828

**Re: Panoche Energy Center LLC Comments on Draft Cap-and-Trade  
Amendments and July 18, 2013, Public Workshop**

Dear Dr. Cliff:

On behalf of Panoche Energy Center LLC ("PEC"), we would like to thank the Air Resources Board ("CARB" or "Board") for releasing Draft Amendments and holding a Public Workshop on July 18, 2013, to present proposals to address issues identified in CARB Board Resolution 12-33. In particular, CARB Staff ("Staff") circulated Draft Amendments that define and provide limited transition relief to "legacy contract generators." Staff requested that interested parties submit comments on the draft amendments no later than August 2, 2013. PEC hereby provides its comments for staff's consideration.

**1. BACKGROUND**

PEC is a large natural gas peaking plant with a tolling contract for the exclusive sale of electric power to Pacific Gas & Electric Company ("PG&E") that was executed in March 2006 ("PEC PPTA"). PEC's PPTA does not allow for the recovery of GHG compliance costs. PEC's comments are limited to the draft amendments concerning relief for legacy contract generators and legacy contracts. PEC generally supports the draft amendments and suggests only minor changes. PEC participated in the two workshops held by the CARB and has previously submitted informal comments to the original draft proposal for legacy contract relief.

Board Resolution 12-33, issued September 20, 2012, states: "WHEREAS, entities with legacy contracts that were entered into prior to AB 32 may not have an appropriate mechanism for recovery of carbon costs associated with the Cap-and-Trade Regulation: ..." The Resolution further states: "BE IT FURTHER RESOLVED that the Board directs the Executive Officer to develop a methodology that provides transition assistance to covered entities that have a compliance obligation cost that cannot be reasonably recovered due to a legacy contract."

**PEC strongly supports these foundational policy directions.**

California Air Resources Board  
August 2, 2013  
Page 2

Staff has consistently expressed a preference for renegotiations between parties to these legacy agreements as a solution. Over the last two years PEC has attempted to engage in good faith negotiations with our legacy contract counterparty, but so far they have not been productive. PEC will continue to pursue resolution of its issues but joins many other legacy contract generators in the belief that settlement of the remaining disputes between legacy contract holders and their counterparties is unlikely, as those counterparties have no business incentive to negotiate a resolution at this time.

Entities such as PEC are waiting for the next necessary step in providing needed transition relief for these last agreements where the covered entity does not have a means to pass through the Cap-and-Trade program's fundamental policy price signals to the end-use consumers. For most, good faith negotiations failed long ago, now it is time for CARB to resolve one of the program's last lingering issues.

CARB has consistently recognized that a cornerstone of California's climate program is to pass on price signals of the cost of carbon and carbon reduction efforts to consumers -- and has specifically intended to NOT harm generators by stranding them with compliance costs. Failure to provide relief will certainly harm if not cause total project failure for some legacy contracts, such as PEC.

**For the foregoing reasons, PEC supports providing relief to legacy contract holders using the eligibility criteria provided in the staff proposal.**

## **2. COMMENT SUMMARY**

### **a. Eligibility Criteria**

In the Draft Amendments, staff put forth eligibility criteria for legacy contracts to qualify for relief as follows (Discussion Draft, pg. 28):

- Contract was executed before September 1, 2006;
- Contract is in place and has not been subsequently amended;
- Contract does not allow for recovery of the costs associated with compliance with the Cap and Trade Regulation;
- Contract is not covered by the CPUC CHP settlement.

**PEC supports these criteria, but suggests clarifying language regarding subsequent amendments (see comment (d) below).**

At the Workshop, certain legacy contract generators argued that the definition of legacy contracts be divided into two categories – those with contracts with investor-owned utilities who, they argue, should receive only short-term transition relief as provided in the draft, and those with other parties who should receive permanent relief through the life of the agreement. PEC opposes this suggestion. First, it provides a level of discriminatory treatment between parties based on the corporate organization of the counterparty, is opposed in the letter from CPUC President Peevey distributed at the workshop, and assumes that utilities are somehow easier to negotiate with. While PEC appreciates the view of other legacy contract generators that they should receive permanent relief, the arguments for bifurcating the limited class of legacy contract holders is inappropriate and would create legal error in the rules if adopted.

**b. Process for Receiving Allocations**

The Draft Amendments provide a process for allocation of allowances to legacy contract generators in newly drafted Section 95894 (Discussion Draft, pg. 175). The process generally consists of a request by the legacy contract generators and a subsequent eligibility determination by the CARB Executive Officer. In order to receive allowances eligible for 2013 and 2014 compliance on October 15, 2014, legacy Contract Generators must submit the following information in writing via certified mail to the Executive Officer by June 30, 2014, or within 30 days of the effective date of this regulation, whichever is later:

- A letter stating the covered entity name, identification of counterparty, and statement requesting transition assistance for emissions for the previous years emissions.
- A copy of portions from the legacy contract for which it is seeking an allocation as to the dates of effective commencement and cessation of the term of the contract, terms governing price per unit of product; and signature page.
- An attestation that the contract meets the eligibility criteria listed above and that the legacy contract generator has conducted renegotiation efforts in “good faith.”

PEC understands the intent of Section 95894(b) to be relatively straightforward, but seeks clarity in either amendment language or in the Initial Statement of Reason that the “Determination of Eligibility” is a compliance process by which the CARB will review and process the filings. PEC further believes that such information must be treated by CARB as confidential in that sensitive market and pricing information is required for submittal.

Suggested amendments are as follows:

*(b) Determination of Eligibility. Upon receipt of the confidential information required by paragraph (a) of this section, the Executive Officer shall determine whether the party submitting such information meets the established criteria to be a ~~has demonstrated that it is~~ eligible to receive a direct allocation of allowances pursuant to this section and shall notify that party by September 30, 2014 if it is eligible to receive allocation for the following compliance year.*

**PEC supports the need for CARB staff to review the required detail to determine whether the generator qualifies for limited transition relief.** However, PEC requests that CARB confirm that the process will be an internal compliance process conducted by CARB, not subject to a public review and comment process, especially as market-sensitive pricing information is required for submittal.

**c. Calculation of Allowance Value**

The proposal would adopt the year 2012 as a single year upon which to base the amount of 2015 allowances that will be provided for 2013 and 2014 eligible compliance relief. PEC notes that in almost every other instance in which an allowance base has been established in the program, an average of two years is used. As is well known, peaking power plants with tolling agreements do not know from year to year how much they will be dispatched. Thus using the single-year 2012 operating results may be inappropriate. PEC suggests the use of an average of 2011 and 2012 as a more appropriate benchmark base.

The suggested amendment to Section 95894(c)(1) is as follows:

$$A_{2015} = (EEm_{lc} * Ca_{2013}) + (EEm_{lc} * Ca_{2014})$$

*“EEm<sub>lc</sub>” is the emissions reported, in MTCO<sub>2e</sub>, associated with average electricity sold under the legacy contract in 2011 and 2012; and*

**d. Additional Issue -- Contract Amendment Language**

While not part of the draft language revisions to the regulations, it was made clear at the workshop that it is CARB’s intent that 2013 and 2014 allowance allocations would not be impacted if the subsequent negotiations urged by the staff resulted in an amendment of the legacy contract. **PEC supports this concept**, but would like to suggest the following amendments to ensure it is clearly drafted in the regulation.

*Section 95894*

- (f) *Contract Expiration ~~or Amendment~~. Once a legacy contract expires or the legacy contract generator closes operations, the legacy contract generator will no longer be eligible for free allocation. If the legacy contract expires before 2015, the allocation will be prorated for the time in which the contract was eligible.*

*Section 95802*

- (YYY) *“Legacy Contract” means a written contract or tolling agreement governing the sale of electricity and/or qualified thermal energy from an electric generating facility or cogeneration facility at a price, determined by either a fixed price or price formula, that does not allow for recovery of the costs associated with compliance with this regulation. For purposes of this regulation, legacy contracts exclude contracts with a privately owned utility as defined in the Public Utilities Code section 216 (referred to as an Investor Owned Utility or IOU) for contracts already addressed under the Combined Heat and Power Program Settlement pursuant to CPUC Decision number D-10-12-035, and only include contracts originally executed prior to September 1, 2006, that have remained in effect and have not been amended ~~since~~ between September 1, 2006 and July 18, 2013 to change the terms governing the California greenhouse gas emissions responsibility, price or amount of electricity or Qualified Thermal Output sold, or the expiration date. A legacy contract does not apply to opt-in covered entities.*

e. **Additional Issue -- Availability of Allowances for First Compliance Period**

At the workshop it was clarified that it is staff’s intent to allow for legacy contract vintage 2015 transition relief allowances (Section 95894(c)) issued in October 2014 to be eligible for use in the First Compliance Period. The staff emphasized that the draft amendments discussed at the workshop do not yet have clear language to reflect that intent. **PEC strongly supports staff clarification and recommends that additional language be drafted to ensure clarity on this point**, and PEC reserves the right to comment on such language when issued.

California Air Resources Board  
August 2, 2013  
Page 6

If you have any questions, please give me a call at 415-291-7430, or Jon Costantino at 916-552-2365.

Sincerely,

*/s/ David L. Huard*

David L. Huard

cc: Mary Nichols-Chairman  
Sandy Berg-Board Member  
Virgil Welch-Chairman's Advisor  
Richard Corey-Executive Officer  
Edie Chang-Deputy Executive Officer  
Cynthia Marvin-SSD Division Chief  
Steve Cliff-SSD Assistant Division Chief  
Elizabeth Scheele-Manager  
David Allgood-CARB Lead Staff

## Cap-and-Trade Regulation Amendment Request

### General Information

Date: August 2, 2013

Submitted by: Jon Costantino

Affiliation: Panoche Energy Center

Contact Phone: 916-552-2365

E-mail: jcostantino@manatt.com

### Section

Primary section(s): Section 95894(b)

Related section(s):

### Amendment Request

Type of amendment:  Policy  Error  Clarity

Reason for amendment:

PEC understands the intent of Section 95894(b) to be relatively straightforward, but seeks clarity that the "Determination of Eligibility" is a compliance process by which the CARB will review and process the filings.

Additional information:

Suggested amendment:

*(b) Determination of Eligibility. Upon receipt of the confidential information required by paragraph (a) of this section, the Executive Officer shall determine whether the party submitting such information meets the established criteria to be a ~~has demonstrated that it is~~ eligible to receive a direct allocation of allowances pursuant to this section and shall notify that party by September 30, 2014 if it is eligible to receive allocation for the following compliance year.*

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Additional information:

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$$A_{2015} = (EEm_{lc} * Ca_{2013}) + (EEm_{lc} * Ca_{2014})$$

*“EEm<sub>lc</sub>” is the emissions reported, in MTCO<sub>2e</sub>, associated with average electricity sold under the legacy contract in 2011 and 2012; and*



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### Section

Primary section(s): Section 95894(f)

Related section(s): 95802 (YYY) Legacy Contract Definition

### Amendment Request

Type of amendment:  Policy  Error  Clarity

Reason for amendment:

While not part of the draft language revisions to the regulations, it was made clear at the workshop that it is CARB's intent that 2013 and 2014 eligible allowance allocations would not be impacted if the subsequent negotiations urged by the staff resulted in an amendment of the legacy contract. PEC but would like to suggest the following amendments to ensure it is clearly drafted in the regulation.

Additional information:

*Suggested Amendments:*

*Section 95894*

*(f) ~~Contract Expiration or Amendment.~~ Once a legacy contract expires or the legacy contract generator closes operations, the legacy contract generator will no longer be eligible for free allocation. If the legacy contract expires before 2015, the allocation will be prorated for the time in which the contract was eligible.*

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Related section(s):

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At the workshop it was clarified that it is Staff's intent to allow for legacy contract vintage 2015 transition relief allowances issued in October 2014 to be eligible for use in the First Compliance Period. The staff emphasized that the draft amendments discussed at the workshop do not yet have clear language to reflect that intent. PEC strongly supports staff clarification and recommends that additional language be drafted to ensure clarity on this point and PEC reserves the right to comment on such language when issued.

Additional information:

n/a