*A subsidiary of Pinnacle West Capital Corporation*

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Arizona Public Service Company (“APS”) is a wholly-owned subsidiary of Pinnacle West Capital Corporation. APS is engaged in the business of generating, transmitting, and distributing electricity in Arizona and serves more than one million retail electric customers within the state. In addition, APS participates in the wholesale energy market. Although APS owns generation outside the state of California and has long-term contracts for generation resources, it does not directly deliver energy from any of those sources to California entities. From time to time, APS purchases energy from and sells excess, dispatchable, marginal resources to the California Independent System Operator (“CAISO”).

On September 4, 2013, the California Air Resources Board (“CARB”) posted proposed amendments to its mandatory reporting of greenhouse gas emissions regulations (“MRR”) and greenhouse gas cap-and trade regulations. We appreciate the opportunity to comment on certain aspects of these proposed amendments.

1. Calculating GHG Emissions of Imported Electricity Supplied by System Power Suppliers (§ 95111(b)(5)): CARB is proposing that in the event system power imports are above the default emission factor for unspecified electricity imports, if the electricity is not tagged as originating from unique specified sources of generation but instead tagged as system power, it cannot be claimed as coming from an unspecified source. Conversations with CARB staff have indicated the potential for retroactive applicability of this rule.

This proposed change will create a significant level of uncertainty for wholesale market participants transacting in the California electricity market. Such transactions often include packaged electricity that originates from multiple sources having different emission factors. Tracing each electron to its source under such circumstances will not be feasible and will leave participants wondering how to comply. Such a result can be expected to have the undesired effect of reducing entry into the California import market, thereby decreasing liquidity and potentially creating supply problems therein.

In discussing this issue with CARB staff, APS was informed that if APS does not register as an asset-controlling supplier, CARB will calculate and assign a system rate to APS. However, as we previously explained to CARB (*see* letter to CARB declaring APS’s reporting status under the MRR dated November 19, 2012), the electricity APS sells into the CAISO is from a combination of purchased power and from facilities owned or operated by APS. The MRR in no way prescribes that an out-of-state entity, like APS, selling fungible, excess power serving the bulk power system must register itself to be an asset-controlling supplier. Were such registration required, it would be unlawful for lack of fundamental fairness in that it would require out-of-state generators not purposely engaging in the sale of electricity for delivery to the California grid to register as asset-controlling suppliers notwithstanding the fact that the electricity they send to the CAISO is generated from sources outside of California and, without the generators’ knowledge or control, purchased by entities in California for consumption within the state. Such disparate treatment would unfairly penalize out-of-state sellers by making it more expensive for them to sell their electricity to the CAISO.

In any event, to the extent CARB intends for this rule change to apply to transactions consummated prior to its final promulgation, such a result would constitute an impermissible retroactive application. Government agencies may not promulgate a new rule that has a retroactive effect on a regulated entity’s prior actions. In other words, CARB may not promulgate and use a new regulation to establish a new requirement that would change the legal consequences of an electricity importer’s past conduct. Such an impermissible retroactive application of the law would place an undue burden on the entity. Regulated entities make important decisions and adjust their behavior based on the law in effect at the time, and they should not be penalized by later-enacted regulatory changes having retroactive applicability. California courts recognize the well-established presumption against retroactive application of laws. This presumption is deeply rooted in American jurisprudence, and CARB’s actions are constrained by the general requirement that all laws and regulations shall have only future effect unless the text of the authorizing statute explicitly states otherwise.

We understand CARB is considering withdrawing the proposed language that is the subject of this comment. To the extent this is the case, we support such action for the reasons discussed above.

1. Requirements for Registration with CARB (§ 95830(c)(1)(I)): CARB is proposing to require that covered entities file a registration application for an account in the compliance allowance tracking system, which would include the “[n]ames and contact information for *all persons employed by the entity in a capacity giving them access to information on compliance instrument transactions or holdings*, or involving them in decisions on compliance instrument transactions or holdings.” (Emphasis added.) This requirement is overly broad, vague, and unnecessarily intrusive.

Under California law, a regulation is unconstitutionally overbroad or vague if it is not sufficiently definite to provide fair notice of the conduct proscribed or required and fails to provide sufficiently definite standards of application to prevent arbitrary and discriminatory enforcement. The proposed requirement that would require the submission of names and contact information of “all persons employed by the entity in a capacity giving them access to information on compliance instrument transactions or holdings” is overly broad. Moreover, it is impermissibly vague. And the scope of this proposed requirement is overreaching and unnecessary in that it would be applicable to every individual in the company that might potentially see such information. Individuals at the lowest level of the company could potentially be pulled in by this regulation, though their access to information regarding compliance instruments is minimal or insignificant. Because this proposed regulatory language is overbroad and vague, it is impossible for regulated entities to know which personnel they must register and which personnel they need not register. Accordingly, the proposed regulatory language will lead to unlawful arbitrary and discriminatory enforcement.

Moreover, the over-expansive scope of the proposed amendment is unnecessarily intrusive in that it would reach far beyond CARB’s function of monitoring the market. CARB’s Compliance Instrument Tracking System Service (CITSS) user registration process requires that persons who “have access to the CITSS” provide certain identifying documentation to their employer to “help ensure the security of the [CITSS.]” This is reasonable given these individuals actually have access to the system. However, it is unnecessary to require the “names and contact information” of individuals whose job responsibilities have no connection to making decisions on holding and/or transferring compliance instruments. The fact that neither Federal Energy Regulatory Commission nor Commodity Futures Trading Commission regulations require such information is indicative of the overreaching and unnecessary scope of proposed Section 95830(c)(1)(I).

1. Transfers of Compliance Instruments Between Accounts (§ 95921(a)(4)): The proposed amendment to Section 95921(a)(4) would provide that “[a]ny entity may not submit a transfer request to another registered entity without an existing transaction agreement with that party authorizing a transfer.” Currently, APS only purchases California carbon allowances on ICE through ICE clearing. APS will not be notified of the counterparty’s name by our clearing bank until the settlement date. We believe the current ICE standard contract is “an existing transaction agreement.” We also believe our current business practice satisfies the requirement of this proposed language. We request clarification if CARB disagrees with our interpretation and analysis.

APS appreciates the opportunity to submit these comments and thanks CARB for its consideration thereof.

Sincerely,

Justin Thompson

Director of Business Support, Marketing & Trading