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Via Electronic Submission

Clerk of the Board, Air Resources Board
1001 I Street
Sacramento, California 95814

Re: Comments of Powerex Corp. on the Proposed 15-Day Modifications to the Mandatory Reporting Regulation (Issued October 28, 2013)

Dear Chairwoman Nichols and Members of the Board:

On behalf of Powerex Corp. ("Powerex"), I submit the following comments on the California Air Resources Board's ("ARB's") proposed 15-day modifications to the Mandatory Reporting Regulation (the "MRR"), issued on October 28, 2013, pursuant to Board Resolution 13-43, adopted by the Board at its October 25, 2013 meeting.

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 power wholesale in the United States, pursuant to market-based rate authority granted by the Federal Energy Regulatory Commission in October 1997, renewed most recently effective January 1, 2009.

Powerex sells power from a portfolio of resources in the United States 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 United States and Canada. Powerex also buys and sells power in Canadian provinces other than British Columbia. Powerex has been delivering power to California since shortly after receiving its market-based rate authority and is currently registered with ARB as an Asset Controlling Supplier ("ACS").

Powerex appreciates ARB's efforts to create and implement a comprehensive GHG emission reporting program as well as a cap-and-trade program. In Powerex's view, both programs serve to fulfill the mandate in the California Global Warming Solutions Act ("AB 32") to reduce greenhouse gas emissions in California and to combat global climate change. In an

effort to help improve and refine the two programs consistent with the objectives of AB 32, Powerex offers the following comments on two discrete topics raised by the proposed 15-day modifications to the MRR: (1) seller control of the type of power sold by an ACS, and; (2) the treaty power provisions.

1. ARB Should Clarify Certain Definitions in the MRR and Provide Guidance in the Final Statement of Reasons ("FSOR") to Resolve the Seller Control Issue.

For the reasons expressed in our October 22, 2013 comments on the Proposed MRR Amendments, Powerex supports ARB's decision to adopt the proposed amendment to MRR § 95111(a)(5)(B). This language is critical to maintain the consistency between power sold by ACSs and non-ACS entities while confirming the written power contract requirement for specified power. However, Powerex is concerned by the following statement in ARB's "*Notice of Public Availability of Modified Text and Availability of Additional Documents*"[1]:

> Additionally, and in response to stakeholder comments, staff intends to issue revised statements in the Final Statement of Reasons to effectively withdraw the seller control interpretation for asset controlling suppliers associated with section 95111(a)(5)(B). This change is needed to ensure electric power entities know how to effectively report their purchases of asset controlling supplier power.

With respect to "seller control," Powerex understands that ARB is not concerned with a seller having control over what channel it may choose to access the market, whether via bilateral sales or via an exchange/broker arrangement. ACSs (in today's terms, both Bonneville Power Administration and Powerex) clearly have control over whether or not they sell power bilaterally or through an electronic exchange. We agree that this is not a concern. Powerex believes it is clear that deliveries of power, sold by an ACS through an electronic exchange or broker are not contracts for specified power, but are rather for unspecified power. Similarly, deliveries made under unspecified power contracts will be assessed the unspecified rate – even if they are coincidentally delivered from the system of an ACS.

Powerex understands that another form of seller control – whether or not an ACS has the ability to bilaterally sell unspecified power – is ARB's main concern. There are three related questions for which the answers are different **and** the question is complicated by existing ambiguous definitions:

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[1] Available at http://www.arb.ca.gov/regact/2013/ghg2013/ghg201315notice.pdf.

1. Does an importer have the right to claim power bilaterally purchased from an ACS as specified power if that power is not contingent upon delivery from the system of the ACS?

2. Does an ACS have the right to bilaterally sell specified power (*i.e.*, power contingent upon delivery from a specified source, including its ACS system) but choose not to confer on the buyer the right to make a specified source claim?

3. If an ACS can only sell from its generating system, should an importer be able to claim power purchased bilaterally from that ACS as specified power if the contract is not explicitly for specified power?"

The MRR's current definitions of "specified source" and "asset-controlling supplier" confuse the issue with respect to all three of these questions by including within the definition of a specified source an ACS rather than the ***system*** of an ACS. This must be clarified and is addressed in Section 1.a below.

In regards to Question #1, if ARB does not clarify that a specified source is the system of an ACS, but leaves the definition as is, some parties will interpret this such that they are able to bilaterally contract with an ACS for the delivery of power from sources unrelated to the system of the ACS and be able to claim the corresponding import as from a specified source (the ACS) simply by being able to dial the phone number of ACS's trading desk. This clearly would have unintended and far reaching consequences.

In regards to Question #2, any bilateral transactions in which the contractual terms identify the source of generation and clearly obligate the seller to deliver from that source (whether it is the system of an ACS or a single electricity generating facility) should be eligible to be claimed as being from a specified source.

In regards to Question #3, it is insufficient for an importer to rely on the belief that an ACS can only sell from its generating system as the basis for a specified power claim. The only way to be sure is to explicitly contract for sources in the ACS's system. This is not the same as a seller control issue where the seller deems two different treatments for the same product; it is a matter of product clarity, and a contract that is contingent upon delivery from the specified source is the key issue. The following example may be helpful.

Consider a contract for power that includes deliveries over multiple periods where the seller owns a wind facility and has access to no other sources of generation; however, the contract is not contingent upon deliveries from that facility. On the surface, despite the fact that the contract was not explicitly for specified power, it would appear reasonable to claim any associated imports as specified power as it could not have come from any other source. The problem is that things change. Consider the possibility that shortly after the contract is executed the seller purchases the output of a thermal generating unit. Because the contract is not

contingent upon deliveries from the wind facility, the seller could fulfill the contract with deliveries from the thermal unit. Clearly, this does not meet the conditions for specified power. Even the energy delivered prior to the purchase of the thermal generation should not be claimed as specified power since the contingent delivery requirement was not met "at the time the transaction [was] executed." Instead, had the contract met the contingent delivery requirement, the seller's subsequent power purchase would not have impacted the delivery requirement and a specified power claim would have been justified.

The same would apply to an ACS. Just because an ACS can only sell power from its ACS system today does not mean that that will continue tomorrow. Many aspects of this could change. The ACS may alter its activities, it may change the footprint of its ACS system, or certain statutes may change that would allow an ACS to deliver power from other sources. Accordingly, it is imperative that specified power claims explicitly meet the requirements of a "written power contract."

The common denominator is the "written power contract" requirements for "specified" power claims. Provided "specified" power claims are governed by the "written power contract" requirements – and the definitions are clarified as recommended below – the seller control issue can be resolved via specific guidance directing whether certain contracts meet the "written power contract" requirements in that special case. Accordingly, we recommend ARB include language along the lines of the following in the FSOR to address this:

> **Response:** We agree that regardless of any seller control restrictions placed on asset-controlling suppliers, the written power contract requirements govern for all specified power claims.

In order to ensure specified power claims are applied consistently ARB must clarify two critical definitions in the MRR so as to not create unintentional consequences. Our comments below address this issue.

a. ARB Should Modify Certain Definitions Related to ACSs.

A source of confusion and uncertainty in the wholesale power market results from ambiguity in MRR § 95102(432) and § 95102(20), the definitions of "specified source" and "asset-controlling supplier," respectively. It is critical that ARB modify these definitions so that there is a clear distinction between an entity registered as an ACS and the system of an ACS. The current MRR does not do this and ARB's goal in making changes "… to ensure electric power entities know how to effectively report their purchases of asset controlling supplier power" [2] cannot be met without clarifying these definitions.

[2] Notice of Public Availability of Modified Text and Availability of Additional Documents, October 25, 2013, page 3.

The definition of "specified source" states that a "[s]pecified source also means electricity procured from an asset-controlling supplier." The notion of a "specified source" is that of a generation source throughout the MRR, rather than that of an entity that owns or has rights to the output of the generation source. Under the current definition of a specified source there is insufficient clarity to distinguish between these two very different ideas:

- The system of an ACS (in Powerex's case, the BC Hydro system) is a source of power and acts as the source of generation on a NERC e-Tag.

  As compared with

- An ACS that is an ARB registered commercial entity that contracts, imports, exports, arranges transmission and is the "purchasing-selling entity" on the NERC e-Tag.

The two are not the same, and must be treated differently within the MRR. Parts of the MRR recognize this important distinction. See for example the MRR's definition of "written power contract," which provides that "[a] power contract for a specified source is a contract that is contingent upon delivery of power from a particular facility, unit, or ***asset-controlling supplier's system*** that is designated at the time the transaction is executed." (MRR § 95102(351)(emphasis added.). It is critical that the MRR recognize this distinction consistently throughout the Regulation. To leave it internally inconsistent creates ambiguities that foster confusion within the industry. This inconsistency is made clear by the case of Powerex. Powerex has the ability to source power from a number of sources other than the BC Hydro system.

To avoid ambiguity, the following modification should be made to the definition of "specified source":

> **§95102(432)** "Specified source of electricity" or "specified source" means a facility or unit which is permitted to be claimed as the source of electricity delivered. The reporting entity must have either full or partial ownership in the facility/unit or a written power contract to procure electricity generated by that facility/unit. Specified facilities/units include cogeneration systems. Specified source also means electricity <u>delivered from the system of</u> ~~procured from~~ an asset-controlling supplier recognized by the ARB.

The inconsistency problem arises in the MRR's definition of asset-controlling supplier. MRR § 95102(20) states that "[a]sset-controlling suppliers are considered specified sources." The MRR's definition of an ACS should be re-worded so as to be consistent. We suggest making the following modification to do so:

> **§95102(20)** "Asset-controlling supplier" means any entity that owns or operates inter-connected electricity generating facilities or serves as an exclusive marketer for these facilities even though it does not own them, and is assigned a supplier-specific identification number and system emission factor by ARB for the wholesale electricity procured from its system and imported into California. An Asset-controlling supplier's system may be ~~are~~ considered a specified source~~s~~.

If these definitions are not modified, electric power entities may not know how to properly report their ACS power purchases. It is important to ensure that imports arising from a bilateral transaction with Powerex, where there are no deliveries from the BC Hydro system, are not claimed as a "specified source" at the Powerex ACS emission rate.

Similarly, Powerex's ACS emission rate should not be claimed for imports from either a Powerex bilateral transaction or exchange transaction where the contract was not contingent upon delivery from a "specified source," but where a portion of the deliveries coincidentally may have come from the BC Hydro system. Simply receiving a delivery from an ACS as a marketer in the chain of transactions should not be considered a relevant factor for a "specified source" claim. The relevant factor is whether or not parties contracted for delivery from the system of the ACS and then that delivery actually occurred (*i.e.*, whether or not the requirements of a "written power contract" were met).

If ARB does not amend the definitions, in the alternative, ARB should provide clarity in its FSOR to remove the ambiguity. Powerex recommends that the FSOR include language along the lines of the following:

> **Response:** Our intent for specified sources is to apply similar treatment between an electricity generating facility or generating unit and the inter-connected electricity generating facilities that make up the system of an asset-controlling supplier. We agree that specified sources are a source of generation as identified on a NERC e-Tag. The same applies to the system of an asset-controlling supplier. The MRR requires that specified sources are directly delivered to a California balancing authority and as a result it is only deliveries from the system of the asset-controlling supplier as demonstrated on the NERC e-Tag that may be the specified source and not simply the presence of the entity registered as an asset-controlling supplier on the NERC e-Tag.

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2. If ARB Withdraws the Treaty Power Provisions, it Must Clarify how Such Power is to be Treated Under the MRR.

a. Background.

In its comments on ARB's July 17, 2013 discussion draft of proposed MRR amendments, Powerex proposed, among other things, that ARB amend the MRR so as to accommodate power imported under an international treaty.[3] As Powerex noted, power received pursuant to international treaties, including, but not limited to, the Columbia River Treaty, does not fit within the MRR's existing framework.[4] While CE power meets the "spirit" of specified power and should be treated as specified power given its origins, under the MRR it does not cleanly meet the current definition of specified power because it does not appear to meet the definition of a written power contract. To address this problem, Powerex proposed definitions for "international treaty," and "treaty power," as well as other minor adjustments to the MRR.

Recognizing the need to address this issue, ARB included amendments in its September 4, 2013 45-day package of proposed MRR amendments that were similar to Powerex's proposal. The proposed amendments included a new definition for "treaty power" (MRR Section 95102(a)(476)); treaty power also was incorporated into both the specified source calculation (MRR Section 95111(b)(3)) and the ACS application process (MRR Section 94111(f)(5)(F)), and into the definition of a Power Contract (MRR Section 95102(a)(351)). The changes adequately addressed Powerex's concerns regarding the treatment of CE energy for the purposes of specified source calculations and ACS applications.

While Powerex had proposed a broad definition of "treaty power" that would encompass any international treaty, ARB chose a different, limited definition of "treaty power" that covered only CE energy. *See* MRR Section 95102(a)(476) ("Treaty Power" means electricity returned to Canada from the United States under the Columbia River Treaty."). It appears that such a narrow definition caused some stakeholders to become concerned that ARB's treatment of treaty power could be seen as interference by California with ongoing Columbia River Treaty negotiations. Apparently to avoid such an interpretation, ARB now proposes to strike all of its proposed "treaty power" amendments that were included in the 45-day proposed amendments.

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[3] Powerex's comments on ARB's July 17 discussion draft were submitted on August 15, 2013 (the "August Comments"), and are hereby incorporated by reference.

[4] Under the Columbia River Treaty, a certain amount of electricity must be delivered each year by the United States to Canada to reflect and compensate Canada for its 50% share of the downstream power benefits derived from the operation of Canadian storage dams. This obligation is known as the Canadian Entitlement ("CE"). Canada assigned the right to receive CE energy to the Province of British Columbia, which later assigned it to Powerex.

b. Deleting the Treaty Power Provisions Does Not Resolve the Problems in reporting Treaty Power.

Powerex believes that stakeholder comments did not necessitate ARB's complete elimination of treaty power from the MRR, and ARB still needs to resolve how treaty power is to be treated under the MRR. Otherwise, Powerex will have no way of knowing how it should treat CE energy in its annual ACS applications. Under the MRR's current definitions, it appears as though it can be classified as specified power, nor is it appropriate to classify it as unspecified power. There are no other "buckets" to which to assign this power though. Therefore, to address the concerns raised by certain stakeholders while still accommodating treaty power, we recommend that ARB adopt the proposals set forth in Powerex's August Comments.

If ARB concludes that regulations dealing with treaty power cannot be incorporated into this round of MRR amendments, at a minimum ARB should provide clear guidance in its FSOR upon which Powerex can rely. That guidance should state that that CE energy will be treated as specified source power until such time as ARB promulgates regulations specifically dealing with treaty power, regardless of the fact that treaty power does not fit the exact definition of specified source power because it lacks a written contract. Otherwise, low-carbon energy managed under international treaties such as the Columbia River Treaty will have to be managed as unspecified power to avoid a claim that Powerex is improperly claiming energy as a specified power in its ACS application. Unspecified source designation is inappropriate for hydroelectric CE energy, and is inconsistent with the goals of the program.

As discussed above, ARB should instead adopt the broad language Powerex proposed in its August Comments. In the alternative, Powerex strongly encourages ARB to include language in the FSOR along the lines of the following:

> **Response:** We agree that Canadian Entitlement power should be treated as specified power for Powerex's annual ACS applications.

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Thank you for your review and 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.

Sincerely,

Nicholas W. van Aelstyn

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