BEFORE THE
AIR RESOURCES BOARD
OF THE
STATE OF CALIFORNIA

SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY FURTHER COMMENT ON PROPOSED AB 32 IMPLEMENTATION FEE REGULATION

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TABLE OF CONTENTS

I. THE PROPOSED REGULATION SHOULD BE MODIFIED TO ASSURE THAT THE ADMINISTRATIVE FEE WILL NOT BE APPLIED TO ARRANGEMENTS IN WHICH ELECTRICITY IS WHEELED THROUGH CALIFORNIA UNDER BUY/SELL ARRANGEMENTS WITHOUT BEING CONSUMED IN CALIFORNIA. 3

II. THE PROPOSED REGULATION SHOULD BE MODIFIED SO THAT THE ADMINISTRATIVE FEE WOULD NOT BE APPLIED TO BOTH THE IMPORT SIDE AND THE EXPORT SIDE OF ENERGY EXCHANGE ARRANGEMENTS. 6

A. Energy Exchanges Are Socially Beneficial. 6

B. The Proposed Administrative Fee Regulation Could Discourage Socially Beneficial Energy Exchanges. 7

C. Adopting a Single Charge for Exchanges Would Be Consistent With AB 32 Policy. 7

D. Adopting a Double Charge Leads to Absurd Results. 8

E. SCPPA Has Recommended that the Mandatory Reporting Regulation Be Amended to Permit Reporting of Exchanges. 9

F. The Staff Opposes Modification of the Mandatory Reporting Regulation at this Time. 9

G. An Interim Measure Is Necessary if the Staff Defers Revising the Mandatory Reporting Regulation. 10

III. COGENERATION FACILITIES SHOULD BE TREATED LIKE OTHER GENERATION FACILITIES WITH FEES BEING ASSESSED DIRECTLY ON THE BASIS OF TOTAL EMISSIONS. 11

IV. CONCLUSION. 12

SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY
FURTHER COMMENT ON
PROPOSED AB 32 IMPLEMENTATION FEE REGULATION

The Southern California Public Power Authority ("SCPPA")[1] respectfully submits this further comment on the May 8, 2009 Initial Statement of Reasons ("ISOR") for a regulation establishing fees to support the implementation and administration of Assembly Bill ("AB") 32 by the Air Resources Board ("ARB"). This further comment is prompted by a white paper entitled "Proposed Regulatory Changes to the AB 32 Cost of Implementation Fee – Electricity" ("White Paper"). The White Paper was prepared for a workshop that was convened by the ARB staff on August 25, 2009.

In the White Paper, the staff proposes to change the regulation that was proposed in the ISOR "to provide more consistent treatment of in-state and imported electricity." The staff's summary of the proposed electricity-related changes is as follows:

- Applicability (Point of Regulation)
    - Treat both instate and imported electricity the same. The fee would no longer apply to fuels used for instate electricity generation. Instead, it would apply directly to electricity that power plants deliver to the California transmission and distribution system. This "first deliverer" approach means that in-state deliveries from electricity generating facilities at the bus bar (where the facility connects to the California system) would be treated the same as imported electricity delivered at the first connection to the California grid.
    - Cogeneration facilities would be treated as industrial facilities, with fees assessed through their

[1] SCPPA is a joint powers authority. The members are Anaheim, Azusa, Banning, Burbank, Cerritos, Colton, Glendale, Los Angeles Department of Water and Power, Imperial Irrigation District, Pasadena, Riverside, and Vernon. This comment is sponsored by Anaheim, Azusa, Banning, Burbank, Cerritos, Colton, Glendale, Imperial Irrigation District, Pasadena, and Riverside.

fuels or on their emissions, but not on their electricity.

- The fee would not be charged on electricity from any facility that either emitted less than 2,500 $MTCO_2e$ during the reporting year, or has less than 1 megawatt of capacity.

- Fees would still be charged on fuels (emissions from combusting fuel) from coal, natural gas, coke, and refinery gas, when the fuels are used for cogeneration or any use other than electricity generation.

The staff's proposal to "treat both in-state and imported electricity the same" is clearly intended to address a concern about the legality of the May 8, 2009 proposal to assess an administrative fee on electricity imported into California from other states but not on electricity generated in California. Such discriminatory treatment may violate the Commerce Clause of the United States Constitution. *See* SCPPA June 18, 2009 Comment at 8-14.

However, the proposal to "treat both in-state and imported electricity the same" does not address other concerns about applying an administrative fee to imported electricity. One of these additional concerns is that applying an administrative fee on imported electricity would be inconsistent with Health & Safety Code ("HSC") section 38597, the section that authorizes the ARB to assess administrative fees. That section specifically provides for fees to be paid by *sources* of greenhouse gas emissions. Imported electricity is not a source of emissions. *See* SCPPA June 18, 2009 Comment at 4-7. Another concern is that assessing the fee on imported electricity "at the first point of delivery of electricity" would be preempted under the Federal Power Act. *See* SCPPA June 18, 2009 Comment at 14-16. Insofar as SCPPA discussed these additional concerns in its June 18, 2009 comment, SCPPA does not address them further here, but SCPPA urges the Board to consider the issues.

The staff's White Paper also fails to address other issues that were raised in SCPPA's June 18, 2009 comment on the ISOR. First, the staff does not propose any modifications to the proposed regulation to assure that the administrative fee would not be applied to arrangements in which electricity is transmitted through California under buy/sell arrangements without being consumed in California. Second, the staff's White Paper fails to propose any modifications to the proposed regulation to avoid the fee being assessed on both the importation of electricity and the subsequent exportation of electricity under economic exchange agreements.

As discussed below, SCPPA proposes that the proposed regulation be modified to assure that there will be no imposition of the administrative fee on electricity that is wheeled through California under buy/sell arrangements and to avoid the imposition of the fee on both sides of an exchange arrangement. Further, as discussed below, SCPPA questions staff's White Paper proposal to treat cogeneration facilities as industrial facilities instead of as electrical generation facilities.

I. THE PROPOSED REGULATION SHOULD BE MODIFIED TO ASSURE THAT THE ADMINISTRATIVE FEE WILL NOT BE APPLIED TO ARRANGEMENTS IN WHICH ELECTRICITY IS WHEELED THROUGH CALIFORNIA UNDER BUY/SELL ARRANGEMENTS WITHOUT BEING CONSUMED IN CALIFORNIA.

SCPPA recommends that the definition of "imported electricity" as proposed by the staff be revised to assure that the administrative fee will not be applied to electricity that is transmitted through California under arrangements for the simultaneous purchase and sale of electricity.

There are several ways in which electricity may be transmitted through California from one state to another without being consumed in California. The electricity might be wheeled through California without title passing to the California retail provider that provides the transmission service. In this case, the electricity that is transmitted through California is reported

as "power wheeled through California" rather than as an import and export. The ARB's Mandatory Reporting Regulation provides:

> (C) **Power Wheeled Through California**. When reporting power transactions involving imports into California or exports out of California, the retail provider or marketer shall exclude the amount of power imported into California that terminates in a location outside of California, as measured at the first California point of delivery.

17 Cal. Code of Regs. §95111(b)(1)(C).

Consistently with the Mandatory Reporting Regulation, the definition of "imported electricity" in section 95202(a)(45) of the proposed administrative fee regulation provides that power that is wheeled through California shall not be considered to be "imported electricity" within the meaning of the regulation:

> "Imported electricity" means electricity that is generated outside of California and delivered into California. Imported electricity does not include power wheeled through California, which is power that is imported into California that terminates in a location outside of California.

ISOR at 73. Thus, electricity that is "wheeled through" California by a retail provider without the retail provider taking title to the electricity at any point is excluded from being reported as "imported power" under the Mandatory Reporting Regulation, and the electricity would be excluded from being "imported electricity" for purposes of assessing the administrative fee.

A second way in which electricity may be transmitted through California without being consumed in California is through a simultaneous purchase and sale or "buy/sell" transaction. In such an arrangement, a retail provider or marketer might buy electricity from a party at a first point of delivery in California, transmit the power through California, and simultaneously sell the electricity to the same or even a different party at a different delivery point outside of California. Such transactions are sometimes called "virtual transmission" because they are functionally equivalent to wheeling power.

Under the May 8, 2009 proposed administrative fee regulation, it appears that "wheeling through" under a buy/sell arrangement would be exposed to the administrative fee even though they are the functional equivalent of wheeling and the electricity is not consumed in California. Section 95201(a)(5) of the proposed administrative fee regulation provides that the fee applies to "a retail provider or marketer that is a purchasing/selling entity at the first point of delivery in California of imported electricity."

The ARB's mandatory reporting staff has provided oral guidance that for purposes of reporting under the Mandatory Reporting Regulation, all transactions that are the functional equivalent of wheeling power through California should be excluded from being reported as "imported electricity." Under this oral guidance, electricity that is transmitted through California under a buy/sell arrangement would not be reported as imported electricity. Likewise, electricity that is transmitted through California under a buy/sell arrangement should be excluded from application of the administrative fee.

However, proposed section 95201(a)(5) appears to compel application of the fee in situations in which a retail provider or marketer transmits power through California under a buy/sell arrangement. To avoid any confusion, SCPPA recommends that the definition of "imported electricity" in the proposed administrative fee be modified so it will be clear that all power that is transmitted through California will be excluded from being treated as imported electricity for purposes of applying the administrative fee. SCPPA's proposed modification of the definition in section 95202(a)(45) of the proposed regulation is as follows:

> "Imported electricity" means electricity that is generated outside of California and delivered into California. Imported electricity does not include power wheeled through California, which is power that is imported into California that terminates in a location outside of California <u>regardless of whether the import into California and simultaneous export to a location outside of California is performed without title passing to the retail provider or marketer that provides the wheeling service or is performed through a buy-</u>

sell arrangement in which title does pass to the retail provider or marketer.

SCPPA June 18, 2009 Comment at 18.

II. THE PROPOSED REGULATION SHOULD BE MODIFIED SO THAT THE ADMINISTRATIVE FEE WOULD NOT BE APPLIED TO BOTH THE IMPORT SIDE AND THE EXPORT SIDE OF ENERGY EXCHANGE ARRANGEMENTS.

Emissions associated with electricity that is imported under an energy exchange agreement should not be subject to the administrative fee to the extent to which the emissions are offset by the emissions associated with subsequently returned electricity that are subject to the fee.

A. Energy Exchanges Are Socially Beneficial.

As SCPPA explained in its June 18, 2009 comment, energy exchanges are important tools that are used by retail providers to reduce the cost of electricity for the benefit of California electricity consumers. Exchanges often involve counterparties that are located outside of California in, for example, the Pacific Northwest ("PNW"). It might be more costly for a California party to generate electricity at a time when it is less costly for the PNW party to generate electricity. Conversely, it might be less costly for a California party to generate electricity when generation is more costly for the PNW party.

An exchange arrangement enables the PNW party to generate when its costs are lower and permits the California party to generate when its costs are lower. The result is a more efficient use of society's generation resources. The increase in efficiency benefits society as a whole.

Thus, economic exchange agreements should be encouraged by policy makers. They should certainly not be discouraged.

B. The Proposed Administrative Fee Regulation Could Discourage Socially Beneficial Energy Exchanges.

Unfortunately, as proposed by the staff, the administrative fee regulation could discourage socially beneficial exchange arrangements by assessing the administrative fee on both the import and export legs of exchange transactions. An administrative fee would be assessed when a California party imports electricity under an exchange arrangement from, for example, the PNW. An additional fee would be assessed on electricity that is generated in California and returned at a later time to the out-of-state exchange partner.

It would be both unwise public policy and unfair to charge an administrative fee twice by charging the fee on the imported electricity and also charging the fee on the returned electricity. The fee should be charged only once, not twice. If the fee is charged on the emissions associated with the in-state generation of the returned electricity, those emissions should be subtracted from the emissions associated with the imported electricity in computing the fee on the imported electricity.

C. Adopting a Single Charge for Exchanges Would Be Consistent With AB 32 Policy.

Adopting a single charge for exchanges instead of a double charge would be consistent with the AB 32 policy of covering both in-state emissions and emissions associated with imported electricity. Consider what happens functionally in an economic exchange. Typically, if a retail provider in, for example, Oregon has a kilowatt hour of demand in its service territory, the retail provider needs to produce a kilowatt hour to meet that demand, and the kilowatt hour must be produced at the instant of demand. Likewise, if a retail provider in California has a kilowatt hour of demand, the retail provider needs to produce a kilowatt hour to meet that demand, and the kilowatt hour must be produced at the instant of the demand.

All that happens under an exchange arrangement is that the timing of generation is changed so that instead of each retail provider being required to generate electricity at precisely the same time that demand occurs in its service territory, it can generate electricity at a different time when it is cheaper for it to generate electricity. Thus, an exchange arrangement permits each retail provider to maximize the efficient use of generating resources by generating electricity non-coincidentally with demand in its service territory instead of generating coincidentally with demand. Even though the timing of generation is changed so that generation occurs at a time that is non-coincidental with demand, each retail provider still produces only one kilowatt hour of electricity to meet one kilowatt hour of demand in a typical exchange situation.

Imposing a single charge on exchanges would recognize that only one kilowatt hour of electricity is generated in California or is imported into California to meet a kilowatt hour of demand in California. Consistent with AB 32, the administrative fee would cover in-state emissions and emissions associated with imported electricity *with recognition that some generation occurs at a moment that is non-coincidental with demand as a result of an exchange arrangement being in place*.

D. Adopting a Double Charge Leads to Absurd Results.

If California were to apply administrative fees on both the import leg and the return leg of energy exchanges and, for example, Oregon were to do the same thing, the result would be absurd as well as unjust. Two kilowatt hours would be produced to meet two kilowatt hours of demand, one in California and one in Oregon. However, *four* charges would be assessed on exchange electricity, two by Oregon and two by California. Regulations that have absurd as well as unjust consequences should be avoided.

E. SCPPA Has Recommended that the Mandatory Reporting Regulation Be Amended to Permit Reporting of Exchanges.

In order to avoid the unfair double imposition of administrative fees on exchanges of electricity, SCPPA has recommended to the staff that the ARB's Mandatory Reporting Regulation be amended to permit the reporting of exchanges as a separate category of transactions. Specifically, SCPPA has recommended to the staff that section 95111(b)(1)(A) of the Mandatory Reporting Regulation be modified so as to read as follows:

> 9. **Energy Exchanges between California and Out-of-State Entities.** ~~Specify~~ Report energy exchanges that involve importing and exporting electricity to and from California by counterparty, aggregated on an annual basis as follows: 1) electricity received under exchange agreements (as measured at the point of receipt, specifying the source if known or the region of origin), ~~as purchases~~ and 2) electricity delivered under exchange agreements (as measured at the point of delivery, specifying the source if known or the region of origin). ~~as wholesale sales.~~ The retail provider or marketer shall retain, for purposes of verification, exchange agreement contracts, NERC e-tags, settlement data, or other information to confirm the transactions. Energy exchanges that do not involve importing and exporting electricity to and from California are not subject to reporting.

This modification to the Mandatory Reporting Regulation would permit reporting of imports and exports under exchange arrangements as linked transactions so that the staff would have available to it data that would permit the staff to subtract emissions associated with exchange exports from emissions associated with exchange imports. If that data were available to the staff, the staff could calculate administrative fees so that there would not be a payment of fees on both the emissions associated with exchange exports and emissions associated with exchange imports.

F. The Staff Opposes Modification of the Mandatory Reporting Regulation at this Time.

At the August 25, 2009 workshop, the staff stated unequivocally that any modification of the Mandatory Reporting Regulation as proposed by SCPPA would have to await a more comprehensive revision of the Mandatory Reporting Regulation after the ARB finalizes its cap-

and-trade program. Thus, a revision of the Mandatory Reporting Regulation that would permit the submission of data that would be adequate to offset the emissions associated with exchange exports against the emissions associated with exchange imports would not occur until, possibly, 2011 or even later.

G. An Interim Measure Is Necessary if the Staff Defers Revising the Mandatory Reporting Regulation.

The imposition of an administrative fee on both the emissions associated with exchange imports and the emissions associated with exchange exports until such time as the Mandatory Reporting Regulation can be amended would be unfair, unjust, and unreasonable. To avoid the inequity, SCPPA proposes that the ARB adopt an interim measure that could be implemented without any change in the current Mandatory Reporting Regulation.

SCPPA proposes that for the period between the implementation of the administrative fee regulation and the effectiveness of a revision of Mandatory Reporting Regulation that would permit the precise offset of exchange export emissions against exchange import emissions, emissions associated with a retail provider or marketer's gross exports as reported under the current Mandatory Reporting Regulation should be subtracted from the emissions associated with the reporting party's gross imports for purposes of billing the administrative fee.

Offsetting gross export emissions against gross import emissions would be a reasonable proxy for the more precise offset of exchange export emissions against exchange import emissions that could be calculated after revising the Mandatory Reporting Regulation as proposed by SCPPA. For SCPPA members, exchange exports are most if not all of their total exports during a given year. For example, 100 percent of Riverside's exports are made under exchange agreements. Over 95 percent of Pasadena's exports are made under exchange arrangements. For the largest SCPPA member, the Los Angeles Department of Water and Power ("LADWP"), approximately 84 percent of all exports are made under exchange agreements,

based on 2008 data. Thus, total exports are a reasonable substitute to use for exchange exports for the period of time until the Mandatory Reporting Regulation can be revised to permit a precise offset of exchange export emissions against exchange import emissions.

There may be other interim measures that could be adopted prior to revising the Mandatory Reporting Regulation to remedy the inequity that would result if the administrative fee were assessed on both the emissions associated with exchange imports and the emissions associated with exchange exports. SCPPA welcomes dialogue with the staff and other interested stakeholders about such other remedies. Absent any such other remedies being proposed, SCPPA recommends that the Board adopt the interim measure that SCPPA has proposed to avoid the unfair double assessment of the administrative fee on energy exchanges.

III. COGENERATION FACILITIES SHOULD BE TREATED LIKE OTHER GENERATION FACILITIES WITH FEES BEING ASSESSED DIRECTLY ON THE BASIS OF TOTAL EMISSIONS.

At the August 25, 2009 workshop, although the staff proposed to "treat both in-state and imported electricity the same" so that the administrative fee would apply directly to emissions associated with electricity generated at California power plants, the staff proposed in the White Paper that cogeneration facilities "would be treated as industrial facilities, with fees assessed to their fuels or on their emissions, but not on their electricity." As a result, electricity that is delivered to the grid by generators would bear the burden of a direct imposition of the administrative fee, but electricity that is delivered to the grid by cogenerators would not bear the burden of the administrative fee except to the extent that upstream fuel suppliers elected to bill cogenerators to recover the supplier's cost of paying the fee to ARB.

Staff has not presented any cogent rationale for discriminating between cogenerators and generators. Just as the fees can be directly assessed on the emissions from generation facilities, fees could be directly assessed on emissions from cogeneration facilities. Although the

combustion of fuel at a cogeneration facility might be used both to generate electricity and to satisfy some need for heat at the host facility, the fee could be charged on total emissions, thus relieving the fuel supplier of any need to charge the fee on any portion of the fuel that is delivered to the cogenerator.

The staff has expressed a desire to limit the number of entities that might be directly billed for the administrative fee to reduce the administrative burden on the ARB. The staff proposed at the August 25, 2009 workshop to limit the direct application of the administrative fee so that it would apply only to larger generators: "The fee would not be charged on electricity from any facility that either emitted less than 2,500 $MTCO_2e$ during the reporting year, or has less than 1 megawatt of capacity." White Paper. Just as that provision can limit the number of generation facilities that are directly billed by the ARB, the same provision could be applied to limit the number of cogeneration facilities that are directly billed by the ARB. That would alleviate the administrative burden of directly billing generators and cogenerators while maintaining parity treatment of the two.

IV. CONCLUSION.

For the reasons set forth above, SCPPA recommends that the ARB direct the staff to revise the proposed administrative fee regulation (1) to avoid any imposition of the administrative fee on electricity that is transmitted through California under buy/sell arrangements, (2) to permit the emissions associated with a retail provider's or marketer's exported electricity to be subtracted from the emissions associated with the retail provider's or marketer's imported electricity as an interim measure until the Mandatory Reporting Regulation can be revised to permit the precise offset of exchange export emissions against exchange import emissions, and (3) to treat generators and cogenerators similarly.

Additionally, SCPPA recommends that the ARB address all of the issues raised in SCPPA's June 18, 2009 comment about imposing the administrative fee on imported electricity.

Respectfully submitted,

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