**BEFORE THE**
**AIR RESOURCES BOARD**
**OF THE**
**STATE OF CALIFORNIA**

# SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY COMMENT ON MODIFIED TEXT OF AB 32 COST OF IMPLEMENTATION FEE REGULATION


Norman A. Pedersen, Esq.
Lily M. Mitchell, Esq.
HANNA AND MORTON LLP
444 South Flower Street, Suite 1500
Los Angeles, California 90071-2916
Telephone: (213) 430-2510
Facsimile: (213) 623-3379
E-mail: *npedersen@hanmor.com*
*lmitchell@hanmor.com*

Attorneys for the **SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY**


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**SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY**
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## I. INTRODUCTION AND SUMMARY

The Southern California Public Power Authority ("SCPPA")[1] respectfully submits this comment on the February 26, 2010 modified text of the AB 32 Cost of Implementation Fee Regulation ("Fee Regulation"), and associated proposed changes to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions ("Reporting Regulation"). SCPPA previously filed comments on the draft Fee Regulation on June 18, 2009, September 3, 2009, and September 23, 2009.

SCPPA appreciates the changes made to the Fee Regulation to address SCPPA's earlier comments. However, the revised Fee Regulation does not address some material issues. Most notably, the definition of "Imported electricity", as amended, excludes wheeled power and imported power that is *simultaneously* exchanged for exported power, but does not exclude non-simultaneous electricity exchanges such as seasonal power exchanges between utilities in California and the Pacific Northwest. Therefore, electricity imported to and exported from California under seasonal exchange agreements would still be subject to double fees.

Changes to the reporting section of the Fee Regulation would also be desirable to clarify the reporting requirements if an entity is also reporting under the Reporting Regulation. In addition, it would be helpful to include details of the fee calculation in each fee determination notice.

[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.

### A. Summary of exchange transaction double counting issue

As currently drafted, the Fee Regulation will assess fees on both:

- the emissions associated with electricity that is imported into California under non-simultaneous exchange agreements; and
- the emissions associated with electricity that is exported under such agreements.

This effectively imposes double fees on the same use of power within California.

Assessing fees on both exchange import emissions and exchange export emissions would discourage parties from entering into energy exchange arrangements that benefit electricity consumers and society as a whole by reducing the cost of generating electricity and reduce emissions by maximizing the use of hydroelectric generating resources in the Pacific Northwest. In addition, assessing fees on both energy exchange imports and exports conflicts with the Commerce Clause of the U.S. Constitution.

As discussed below, SCPPA proposes that the Fee Regulation be modified to avoid imposing the fee on exchange import emissions. The fee could still be assessed on exchange export emissions.

Changes to the Reporting Regulation are also required to allow energy exchange transactions to be reported as exchanges rather than as separate imports and exports, providing the necessary data for the exclusion of energy imports from the fee.

### B. Summary of issues raised in previous submissions

The revised Fee Regulation does not address several other issues which SCPPA raised in its previous comments. SCPPA urges the Air Resources Board ("ARB") to give further consideration to these issues:

- 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, but neither imported electricity nor the act of importing electricity are a source of emissions. Although the AB 32 definition of "statewide greenhouse gas emissions" in HSC § 38505(m) includes emissions associated with imported electricity, the Legislature elected not to write HSC section 38597 so as to authorize fees to be assessed on "statewide greenhouse gas emissions." Rather, HSC section 38597 was written to authorize "fees to be paid by the *sources* of greenhouse gas emissions regulated pursuant to this division…." The difference is significant and should be recognized by limiting the fees to sources. *See* SCPPA June 18, 2009 Comment, pp. 4-7.

- Assessing the fee on imported electricity at "a first point of delivery" of electricity in California would be preempted under the Federal Power Act. The Federal Power Act grants exclusive jurisdiction over wholesale sales of electricity in interstate commerce to the Federal Energy Regulatory Commission ("FERC"). Federal preemption of the field of wholesale transactions goes well beyond pricing issues. The FERC regulation of wholesale power attaches to all aspects of a jurisdictional seller and a jurisdictional transaction. ARB applying an administrative fee to wholesale sales of "electricity that is generated outside California and delivered to a first point of delivery into California" (revised Fee Regulation at section 95202(a)(56)) would intrude into a federally occupied field and would be unlawful. *See* SCPPA June 18, 2009 Comment, pp. 14-16.
- Cogeneration facilities should be treated like other generation facilities, with fees assessed directly on the basis of total emissions. The White Paper prepared for the Fee Regulation proposed that cogeneration facilities "would be treated as industrial facilities, with fees assessed to their fuels or on their emissions, but not on their electricity." This is reflected in the revised Fee Regulation at section 25201(a)(4)(C): "No fee shall be paid for any

megawatt-hour of electricity generated at a cogeneration facility." 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 fee except indirectly to the extent that upstream fuel suppliers elect to bill cogenerators to recover the suppliers' costs of paying the fee to the 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. *See* SCPPA September 3, 2009 Comment, pp. 11–12.

- The ARB should set a cap on the revenues that would be collected through the administrative fee. Section 95303(a) defines the "Total Required Revenue" ("TRR") that would be recovered annually through the administrative fee. It appears from section 95303(a) that the primary parameter for determining the TRR would be "the number of personnel positions, including salaries and benefits and all other costs, as approved in the California Budget Act for that fiscal year." Appendix C to the ISOR lists a plethora of programs for which funding would be provided through the administrative fee. The list and the accompanying staffing requirements could grow substantially in the future unless there is some reasonable constraint on the TRR that could be recovered each year through the administrative fee. SCPPA encourages the ARB to adopt a provision for a reasonable cap that would apply to administrative fees. *See* SCPPA June 18, 2009 Comment, p. 20

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

In accordance with some of SCPPA's previous comments, the Fee Regulation has been revised to exclude fees on imported electricity that is simultaneously exchanged for exported

electricity (new section 95202(a)(56)(B)). By the same reasoning, i.e., to avoid imposing double fees on the same use of power within California, fees should also be excluded on imported electricity that is exchanged with exported electricity on a non-simultaneous or seasonal basis.

Seasonal exchanges do not involve a greater use of electricity or result in greater greenhouse gas emissions than would be the case if each of the parties to the exchange generated the power it needs at the time it needed it. The Fee Regulation should reflect this fact.

SCPPA recommends that the ARB revise the Fee Regulation and make appropriate conforming changes to the Reporting Regulation so that the fee is not payable on electricity that is imported under an exchange agreement with an out-of-state counterparty, to the extent that electricity generated in California is exported to the counterparty under that agreement. This would require the following change to section 95202(a)(56) (as amended by the ARB staff):

> "Imported electricity" means electricity that is generated outside of California and delivered to a first point of delivery into California with a final point of delivery in California. Imported electricity does not include:
>
> (A) Power wheeled through California, which is power that is imported into California that terminates in a location outside of California; or
>
> (B) Power transactions in which imported power is ~~simultaneously~~ exchanged for exported power, whether simultaneously or through a non-simultaneous exchange agreement, as reported under section 95111(b)(1)(A)(9).

Fees would remain payable on the basis of the emissions from the power generated in California that is exported under an exchange agreement, in accordance with section 95201(a)(4)(A), as revised by the ARB staff. This is consistent with the AB 32 requirement that the fee be paid by "sources" of greenhouse gas emissions (HSC 38597). The generation of electricity in California is a source of emissions, whereas the importation of electricity is not.

Applying double fees to interstate exchange arrangements would discourage these arrangements, which benefit society by reducing the cost of electricity generation, and would also discriminate against interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

### A. Charging the Fee on Both the Import Side and Export Side of Exchange Arrangements Would Discourage Arrangements that Benefit Society.

Electricity exchanges are important tools used by retail providers to reduce the cost of electricity for the benefit of electricity consumers and ultimately society as a whole. Exchange arrangements between retail providers are contractual tools that permit each retail provider to generate electricity when it is cheaper for that retail provider to generate electricity. In the absence of an exchange agreement, each retail provider is required by the laws of physics to generate electricity at precisely the same time that demand occurs in its service territory. 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.

Exchanges often involve counterparties that are located outside of California. For example, during the spring and summer, it might be more cost effective for a California party to buy electricity from electric generating facilities in the Pacific Northwest ("PNW") that have surplus hydroelectric generating capacity. During the fall and winter, it might cost less for the California party to generate electricity than 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 generation resources by both retail providers.

As currently proposed, the administrative fee would tend to discourage California retail providers from entering into exchange agreements with out-of-state counterparties, due to having to pay the administrative fee on both the imported and exported power. If a California retail provider meets a kilowatt hour of its local demand using its own local generation, then the fee would be imposed only on the emissions associated with generating one kilowatt hour of electricity.

However, if a California retail provider enters into an exchange arrangement with a PNW counterparty, the California retail provider would be charged two fees:

- one fee when electricity is delivered to California from the PNW party (unless the power is specified as originating from a zero greenhouse gas emission generating facility); and
- another fee when electricity is returned to the PNW party from California.

The double assessment of administrative fees would discourage retail providers from realizing the efficiencies that can be gained from entering into exchange agreements. Discouraging retail providers from realizing efficiencies for the benefit of electricity consumers and society as a whole would be poor public policy.

### B. The Regulation as Applied to Interstate Exchange Arrangements Would Discriminate Against Interstate Commerce In Violation of the Commerce Clause of the U.S. Constitution.

Charging the fee on emissions on both sides of interstate exchange arrangements discriminates against interstate exchange arrangements as opposed to intrastate arrangements. If a California retail provider enters into an agreement with a California counterparty, the California retail provider would pay an administrative fee only when it generates electricity for

delivery to its California counterparty. However, if a California retail provider enters into an exchange agreement with an out-of-state counterparty, the California retail provider would pay administrative fees twice, once on the exchange import emissions and again on the exchange export emissions.

The burden on interstate commerce is further illustrated by assuming that other states follow California's lead and adopt similar administrative fees. Consider the situation if California were to apply administrative fees on both the import leg and the export leg of energy exchanges and, for example, Oregon were to do the same. If a California party and an Oregon party entered into an exchange arrangement and two kilowatt hours of electricity were produced to meet two kilowatt hours of demand, one in California and one in Oregon, *four* charges would be assessed on the exchanged electricity, two by Oregon and two by California. If the California and Oregon retail providers avoided interstate exchange agreements and limited themselves to exchange agreements with counterparties in their own states, they would pay a total of two fees instead of four.

Thus, the Fee Regulation discriminates against interstate commerce by imposing additional fees upon interstate exchange arrangements in contrast to intrastate exchange arrangements. This would be unconstitutional.

The applicable constitutional principles were outlined in SCPPA's June 17, 2009 comments on the draft Fee Regulation. In summary, the "dormant" Commerce Clause (U.S. Constitution, article I, §8, cl. 3) limits the power of a state to regulate or tax interstate commerce, even in the absence of federal legislation on the subject. State statutes and regulations that impose taxes or administrative fees on interstate commerce, including interstate transmission of electricity, are subject to Commerce Clause scrutiny. If a state law discriminates on its face against businesses operating in interstate commerce, the law is subject to strict scrutiny that the

Supreme Court has described as "virtually *per se* invalid". *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality*, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994).

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986).

The revised Fee Regulation, by imposing more fees on interstate exchanges than intrastate exchanges, facially discriminates against interstate commerce. Consequently, the rule of virtual *per se* invalidity applies. The Fee Regulation will be invalid unless it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste Systems*, 511 U.S. 93, 100-101, quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988).

In this case, there are reasonable nondiscriminatory alternatives. In order to avoid the unfair double imposition of administrative fees on interstate exchanges of electricity, the Fee Regulation can be amended as set out above, accompanied by amendments to the Reporting Regulation to permit the reporting of exchanges as a separate category of transactions (see below). These amendments would allow for a more evenhanded treatment of interstate and intrastate exchange arrangements. Thus, there are reasonable nondiscriminatory alternatives to the Fee Regulation, and the Fee Regulation as applied to interstate exchange arrangements would not survive strict scrutiny under the dormant Commerce Clause.

## III. THE REPORTING REGULATION SHOULD BE AMENDED TO ADDRESS EXCHANGE TRANSACTIONS.

The ARB staff is proposing changes to the originally proposed amendment to the Reporting Regulation, section 95104(e), to support the revisions to the Fee Regulation.

If the Reporting Regulation is amended in accordance with the ARB staff's proposal to support reporting under the Fee Regulation, it should also be amended to permit reporting of electricity exchanges as a separate category, to support the carve-out in the Fee Regulation of electricity imported under exchange agreements.

Specifically, SCPPA proposes that section 95111(b)(1)(A)(9) of the Reporting Regulation be modified as follows:

> 9. ~~Specify~~Report energy exchanges that involve importing electricity into and exporting electricity 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 wholesale sales~~ (as measured at the point of delivery, specifying the source if known or the region of origin). The retail provider or marketer must 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 electricity into and exporting electricity from California are not subject to reporting.

This modification to the Reporting Regulation would permit reporting of imports and exports under exchange arrangements as linked transactions. This would enable electricity imported under an exchange agreement to be quantified, for the purposes of exclusion from the definition of "Imported electricity" in the Fee Regulation.

## IV. THE REPORTING REQUIREMENTS OF THE FEE REGULATION SHOULD BE CLARIFIED.

The revised Fee Regulation lists general reporting requirements in section 95204(b), which are similar but not identical to those in the Reporting Regulation. The new requirements to provide details of the official responsible for payment and the billing address are specific to the Fee Regulation.

In section 95204(g), the Fee Regulation also specifies that:

(1) All electricity generating facilities shall provide the same information that is required to be submitted under the Mandatory Reporting Regulation. …

(2) All electricity importers must report all information required to be submitted under the Mandatory Reporting Regulation.

This could be interpreted to mean that electricity generating facilities and electricity importers must report the same information twice, once to comply with the Reporting Regulation and once to comply with the Fee Regulation. For clarity, SCPPA suggests the following additional section be included in section 95204(g):

(3) An electricity generating facility or an electricity importer will have complied with the reporting requirements of this section 95204 if it has submitted:

(A) a report in compliance with the relevant sections of the Mandatory Reporting Regulation; and

(B) details of the official responsible for payment of the fee and the billing address of the facility.

## V. FEE DETERMINATION NOTICES SHOULD BE ITEMISED.

The revised Fee Regulation provides detailed formulas for calculating the fees for each affected entity. It would be helpful if the figures used in calculating the fee each year were set out in the fee determination notice provided to each affected entity under section 95205. This would allow affected entities to confirm that their fees were correctly assessed.

SCPPA suggests the following amendments to the second sentence of section 95205(a):

The amount of the fee shall be based on the reports submitted pursuant to section 95204 and the fee calculation formulas set forth in section 95203, and the details of the calculation shall be set out in the fee determination notice.

## VI. CONCLUSION

For the reasons set forth above and in its previous comments, SCPPA recommends that the ARB revise the Fee Regulation to eliminate the application of the fee to imported electricity in order to remove the inconsistency with HSC §38597 and to avoid federal preemption.

If the ARB declines to eliminate the application of the fee to all imported electricity, the ARB should remedy the problems created by applying the fee to both the import and the export sides of exchange transactions by amending the Fee Regulation and the Reporting Regulation as proposed above.

The ARB should also revise the Fee Regulation to ensure that the reporting requirements are clear, that fee determination notices contain details of the fee calculation, and that generators and cogenerators are treated equally. Lastly, the ARB should set a cap on the revenues that may be collected through the administrative fees.

SCPPA appreciates the opportunity to submit these comments.

Respectfully submitted,

*/s/ Norman A. Pedersen*

Norman A. Pedersen, Esq.
Lily M. Mitchell, Esq.
HANNA AND MORTON LLP
444 South Flower Street, Suite 1500
Los Angeles, California 90071-2916
Telephone: (213) 430-2510
Facsimile: (213) 623-3379
E-mail: *npedersen@hanmor.com*
*lmitchell@hanmor.com*

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