CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
AIR RESOURCES BOARD

COMMENTS, OBJECTIONS, AND RECOMMENDATIONS OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION ON THE NOTICE OF PROPOSED ACTION FOR ADOPTION OF REGULATIONS FOR THE MANDATORY REPORTING OF GREENHOUSE GAS EMISSIONS

November 30, 2007

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1 Executive Summary

Statutory authority granted to the California Air Resources Board ("CARB") is limited to "statewide greenhouse gas emissions" as that term is defined in AB 32 and does not include emissions from electricity generated out-of-state that is not delivered to and consumed within California. Importantly, AB 32 begins with a clear definition of the "statewide greenhouse gas emissions" which are the subject of regulation. Then, the successive sections prescribe CARB's requirements for implementing the key programmatic components in relation to the defined term "statewide greenhouse gas emissions." Conforming to the principles of statutory construction, the various AB 32 sections must be harmonized in the context of the statutory framework as a whole. Therefore, successive sections in AB 32 must be interpreted to apply *only* to "statewide greenhouse gas emissions" and CARB has not been authorized by AB 32 to implement regulations for any greenhouse gas emissions not fitting within the definition.

In order to be approved by the Office of Administrative Law, CARB's regulations must meet certain standards including necessity, authority, consistency, and clarity. Accordingly, the reporting regulations may only require entities to report emissions attributable to the amount of electricity actually delivered to and consumed in California. These statutory limitations necessitate the deletion of all proposed regulations involving the ownership share differential and adjusted ownership share differential. Eventually, under whatever regulatory mechanism CARB selects to achieve emission reductions for the power sector, reporting entities should only be attributed with the actual emissions from electricity actually received to serve their load in California.

2 Comments on the Initial Statement of Reasons ("ISOR")

2.1 Standards for CARB regulations

In these NOPA Comments, CMUA makes comments based upon the standards for necessity, clarity, consistency, and authority as mandated for regulations by the Administrative Procedure Act ("APA"). (GOV'T CODE § 11340, *et seq*.) CMUA describes below the meaning of those terms as they are interpreted by California law and as they will be used herein.

Pursuant to the APA, "necessity" means that "the record of the rulemaking proceeding demonstrates by substantial evidence the *need for a regulation to effectuate the purpose of the statute* . . . ." (GOV'T CODE § 11349(a) (emphasis added)). A court may invalidate a regulation if it finds "[t]he agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute . . . that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence." (GOV'T CODE § 11350(b)(1)). The court's inquiry is generally confined to the question of whether or not the regulation is "arbitrary, capricious or [without] reasonable or rational basis," however, "[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void . . . ." (*Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 11 (1998); *Henning v. Division of Occupational Saf. & Health,* 219 Cal. App. 3d 747, 758 (1990)).

The APA requirement for "authority" shall be presumed to exist only if CARB cites a California constitutional or statutory provision which: (1) expressly permits or obligates the agency to adopt the regulation; or (2) grants a power to the agency which impliedly permits or obligates the agency to adopt the regulation in order to achieve the purpose for which the power was granted. (GOV'T CODE § 11349(b); 1 CAL. CODE REGS. § 14).

The APA requirement for "consistency" means that the regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (GOV'T CODE § 11349(d)). Under the proper legal standard of review, a court will determine whether the agency reasonably interpreted its legislative mandate when deciding that the challenged regulation was necessary to accomplish the purpose of the statute. In other words, "the court will determine whether the regulation is reasonably designed to aid a statutory objective." (*Benton v. Board of Supervisors*, 226 Cal.App.3d 1467, 1479 (1991)).

The APA requirement for "clarity" means that the regulation is "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (GOV'T CODE § 11349(c)). "A regulation shall be presumed *not* to comply with the "clarity" standard if any of the following conditions exists: (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or (3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or (4) the regulation uses language incorrectly . . . .; or (5) the regulation presents information in a format that is not readily understandable by persons "directly affected" . . . ." (1 CAL. CODE REGS. § 16(a)).

Comment 1: AB 32 does not authorize CARB to exercise jurisdiction over the reporting of emissions that are not statewide greenhouse gas emissions.

Comment 2. CARB has no authority or necessity to regulate, monitor, or measure electricity transactions occurring entirely outside California.

CARB's statutory authority is limited to regulating "statewide greenhouse gas emissions" as that term is defined in AB 32 and does not include emissions from electricity generated out-of-state that is not delivered to and consumed within California. In order to be approved by the Office of Administrative Law, CARB's regulations must meet certain standards including necessity, authority, consistency, and clarity. Accordingly, the regulations may only require entities to report emissions attributable to the amount of electricity actually delivered to and consumed in California. Eventually, under whatever regulatory mechanism CARB selects to achieve emission reductions for the power sector, reporting entities should only be attributed with the actual emissions from electricity received to serve their load in California. (ISOR at vii, 6-7).

Comment 3: CARB has expressly stated that the emissions calculations included in Attachment C are interim and non-regulatory guidelines.

CMUA understands and notes that CARB affirms the interim scope of these regulations and also that the actual CARB process for setting emission obligations has yet to begin. CMUA, however, has concerns since the NOPA package includes both: (1) proposed regulations requiring retail providers to report wholesale sales from out-of-state generating sources to out-of-state sinks; and (2) a non-regulatory Attachment C with calculations attributing emissions to the retail provider for those same out-of-state wholesale sales. (Attachment C, *Interim Emissions Attribution Methods for the Electricity Sector*) The emission attribution in Attachment C is called the Adjusted Ownership Share Differential ("AOSD").

By design, the AOSD is a calculation to determine a retail provider's penalty for certain power transactions that don't involve "acceptable" wholesale sales. (Proposed Regulation 95111(b)(3)(O); Attachment C at C-8, C-9). Even though the AOSD is not a part of the proposed regulations, it is relevant at this stage because information required in the proposed reporting regulations is there primarily for the purpose of enabling the AOSD penalty calculation. The ISOR states that this information is needed to prepare for a broad spectrum of possible regulatory schemes, including a load-based scheme. (ISOR at vii, 6-7). However, even under that particular scheme it is not clear why this information is required since these sales do not involve statewide greenhouse gas emissions.

CMUA recognizes that Attachment C is a non-regulatory document and will not be adopted by the Air Resources Board. However, Attachment C may be a portent for future regulations and CMUA provides these comments as if the calculations were proposed as regulations. Accordingly, the AOSD violates the necessity standard in at least two ways. First, the purpose underlying the AOSD is both flawed and not supported by AB 32. Second, the AOSD is substantially affected by another calculation found in Attachment C, the Emission Factor for Unspecified Wholesale Sales ("EF_{UWS}"). (Attachment C at C-11). The EF_{UWS} is

inappropriate for use in the AOSD because it does not bear a relation to the AOSD, does not support the purpose of AB 32, and is arbitrary.

The purpose underlying the AOSD is flawed and unsupported by AB 32

The AOSD finds its genesis in the concept pejoratively labeled "contract shuffling" by the recommendation made by the California Public Utilities Commission and California Energy Commission ("Joint Agencies"). (*Interim Opinion on Reporting and Verification of Greenhouse Gas Emissions in the Electricity Sector* at 17-30 (hereinafter "D.07-09-017")). Substantial portions of D.07-09-017 were translated into non-regulatory calculations in Attachment C. The determination in D.07-09-017 that certain wholesale sales would not achieve real emission reductions was clearly erroneous and was not supported by any evidence adduced by the Joint Agencies. The Joint Agencies collected no substantial evidence to demonstrate that any type of wholesale sale would be more or less likely to comply with AB 32.

Despite its lack of evidentiary support, D.07-09-017 recommended that "contract shuffling" transactions be penalized for resulting in mere "paper" emission reductions. One purported paper emission reduction subject to penalty involved a retail provider replacing power from its high-GHG emitting facilities or power purchase contracts with power from existing low-GHG emitting resources. The Joint Agencies stated that no net GHG reductions would occur since the low-GHG emitting resources already existed and the high-GHG emitting resources would continue to operate. CMUA rejects the logic of this argument, yet even if it were accepted, the current AOSD calculation does not solve the purported "contract shuffling" problem. This is because the AOSD calculation only penalizes retail providers that maintain ownership in a high-GHG emitting facility. However, there would be no penalty if the retail provider were to *sell its ownership share* and use the proceeds to purchase power from an existing low-GHG emitting resource. This contradicts the very logic that formed the basis for the Joint Agencies' penalty recommendation.

There is no purpose articulated in AB 32 which would support such a regulation. Therefore, the AOSD is not necessary to fulfill the purpose of AB 32.

The calculation for EF_{UWS} has no relation to the AOSD

The AOSD calculation is intended to penalize a retail provider for selling power from an owned plant to avoid the attribution of the emissions. This penalty is significantly impacted by the EF_{UWS} calculation. As discussed above, the EF_{UWS} calculation is based upon unspecified sales. This factor is then multiplied by the amount of power attributed to the retail provider in the AOSD calculation. However, the AOSD does not differentiate sales based on whether they are specified or unspecified. It is strange then to use an emission factor based only unspecified sales from in-state generation to determine a penalty for out-of-state generation. There is no evidence in the record to support using the EF_{UWS} to calculate the AOSD penalty, and to do so is both arbitrary and illogical.

The calculation for EF_{UWS} is arbitrary and does not support the purpose of AB 32

The purpose of AB 32 is to achieve the statewide greenhouse gas emission limit while minimizing costs, maximizing energy infrastructure, maintaining electric system reliability, maximizing additional environmental and economic benefits for California, and complementing the state's effort to improve air quality. (HEALTH & SAFETY CODE § 38500). The EF_{UWS} calculation, serves as a multiplier to determine a penalty for sales from owned plants for

"unacceptable" purposes. The primary "unacceptable" purpose is to reduce emissions attributed to the retail provider. However, because of the variables used to arrive at this number, the EF_{UWS} does not bear a clear relation to the level of GHGs actually emitted by a retail provider. The EF_{UWS} is based on the emission factor of the resources a retail provider uses for sales to unspecified sources. The percentage of sales that a retail provider makes that are unspecified may be very small or large. The calculation does not take into account how large a percentage of a retail provider's sales are unspecified. Therefore, it is possible for a retail provider with an overall mix of resources that, in the aggregate, are low-GHG emitting, to be penalized severely if only a small percentage of its sales are unspecified and it uses high-GHG emitting resources to make these sales. The opposite is also true. A retail provider with a resource mix that is made up of mostly high-GHG emitting resources would receive only a minor penalty, so long as it has a smaller percentage of unspecified sales.

Penalizing a retail provider based on the percentage of unspecified sales does not bear any reasonable relation to the goals of AB 32. No evidence in the record establishes that unspecified sales are in any way connected with increased GHG emissions.

Case law has established that regulations may not be "arbitrary, capricious, or entirely lacking in evidentiary support . . . ." (*Pitts v. Perluss*, 58 Cal. 2d 824, 833 (1962)). The EF_{UWS} calculation is arbitrary. The fact that different retail providers could have widely different EF_{UWS} calculations with the only differing variable being the percentage of sales that are unspecified means that this calculation is arbitrary. Nothing in AB 32 or in the record supports penalizing a retail provider based on its unspecified sales.

3 Comments on the scope of AB 32 authority

This section is offered to clearly demonstrate the scope of AB 32 authority. The tables below list the relevant sections of AB 32 describing its programmatic components. Importantly, AB 32 begins with a clear definition of the "statewide greenhouse gas emissions" which are the subject of regulation. Then, the successive sections prescribe CARB's requirements for implementing the key programmatic components in relation to the defined term "statewide greenhouse gas emissions." Conforming to the principles of statutory construction, "the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Moyer v. Workers' Comp. Appeals Bd.*, 10 Cal. 3d 222, 230-231 (1973)). Successive sections in AB 32 must be interpreted to apply only to "statewide greenhouse gas emissions." Accordingly, CARB has not been authorized by AB 32 to implement regulations for any greenhouse gas emissions not fitting within the definition.

3.1 The express statutory scope relates only to – statewide greenhouse gas emissions.

Language added to the Public Utilities Code by AB 32	§ 38505(m) "Statewide greenhouse gas emissions" means the total annual emissions of greenhouse gases *in the state*, including all emissions of greenhouse gases from the generation of electricity *delivered to and consumed in California*, accounting for transmission and distribution line losses, whether the electricity is generated in state or imported. (emphasis added)
CMUA's position	No other emissions may be included as statewide GHG emissions except those expressly defined. Emissions from electricity generated outside California that is not actually delivered to and consumed in California are not statewide greenhouse gas emissions.
CMUA's reasoning	• The statute expressly defines the tangible and measurable subject of regulation, i.e., *statewide* greenhouse gas emissions. The courts have articulated a canon of statutory construction applicable to AB 32, *expressio unius est exclusio alterius* ["the expression of certain things in a statute necessarily involves exclusion of other things not expressed"]. (*See Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1391 (1987); *Henderson v. Mann Theatres Corp.*, 65 Cal.App.3d 397, 403 (1976)). "In the grants [of powers] and the regulation of the mode of exercise, there is an implied negative; an implication that no other than the expressly granted power passes by the grant; that it is to be expressed only in the prescribed mode. . . ." (*Wildlife Alive v. Chickering*, 18 Cal.3d 190, 196 (1976)). Accordingly, CARB may not expand the scope of AB 32 to include emissions not expressly defined by the statute. • It is a general principle of statutory construction that a statute should be construed, if possible, to give effect to every word within it and one

	section should not be interpreted so as to destroy another. (2A SUTHERLAND, STATUTORY CONSTRUCTION, Section 46.06 at 119-120 (4th Ed. rev. 1992)). Interpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided. (*California Manufacturers Assn. v. Public Utilities Com.*, 24 Cal. 3d 836, 844 (1979)). CARB may not ignore the modifying term "statewide" in its interpretation of AB 32 and must give that term its full effect in regard to which greenhouse gases are subject to regulation. • "[An] erroneous administrative construction does not govern the interpretation of a statute . . . ." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379, 1396 (1987)). CARB is not obligated to follow interpretations of other California agencies if the interpretations are clearly erroneous. Furthermore, in this case, the recommendations from the CPUC and CEC carry virtually no weight since they are not quasi-legislative rules. Even more, AB 32 does not require or request CARB to consider recommendations from the Joint Agencies in regard to mandatory reporting issues. • AB 32 applies to "statewide greenhouse gas emissions" which "means the total annual emissions of greenhouse gases *in the state*, including all emissions of greenhouse gases *from the generation of electricity delivered to and consumed in California* . . . whether the electricity is generated in state or imported." (HEALTH & SAFETY CODE § 38505(m)). AB 32 does not purport to regulate greenhouse gas emissions from generation outside California if the electricity is not consumed in California. In no way does AB 32 authorize CARB to place restrictions on which out-of-state sink may be matched with each out-of-state source. Therefore, if a California retail provider procures low- or zero-GHG energy from an existing renewable facility, and pays to have it delivered to California, the GHG emissions from that generator are defined as statewide GHG emissions. • AB 32 does not authorize CARB to penalize retail providers for selling a higher-emission resource and replacing it with an existing lower-emission resource. Such a penalty would have the effect of impermissibly capping the GHG emissions of out-of-state sellers and out-of-state generation *not consumed in California*. As noted above, AB 32 limits the jurisdiction of CARB to reducing emissions from the generation of electricity delivered to and consumed in California.

3.2 The definition of the statutory goal for the emissions limit relates only to - statewide greenhouse gas emissions.

Language added to the Public Utilities Code by AB 32	§ 38505(n) "*Statewide greenhouse gas emissions* limit" or "*statewide* emissions limit" means the maximum allowable level of *statewide greenhouse gas emissions* in 2020, as determined by the state board pursuant to Part 3. (emphasis added)
CMUA's position	The 2020 emissions limit for California is for statewide GHG emissions only, as that term is expressly defined in § 38505(m).
CMUA's reasoning	• The goal and purpose of AB 32 is to produce emission reductions to achieve the 2020 limit. As of this date, CARB staff's recommended limit is 427 million metric tonnes of statewide greenhouse gas emissions. Statewide greenhouse gas emissions are the distinct and measurable emissions that were counted to calculate the limit. An inconsistency would result if CARB were to attribute emission obligations for non-statewide greenhouse gas emissions to measure achievement of the 2020 limit.

3.3 The regulations for reporting emissions relates only to – statewide greenhouse gas emissions

Language added to the Public Utilities Code by AB 32	§ 38530(a) On or before January 1, 2008, the state board shall adopt regulations to require the reporting and verification of *statewide greenhouse gas emissions* and to monitor and enforce compliance with this program. (emphasis added) § 38530(b) The [reporting] regulations shall do all of the following: (1) Require the monitoring and annual reporting of greenhouse gas emissions from greenhouse gas emission sources beginning with the sources or categories of sources that contribute the most to *statewide emissions*. (2) Account for greenhouse gas emissions from all electricity *consumed in the state*, including transmission and distribution line losses from electricity *generated within the state or imported from outside the state*. (emphasis added)
CMUA's position	CARB is authorized to develop reporting regulations for statewide GHG emissions only, as that term is defined in § 38505(m). CARB has not been granted authority to develop regulations for any other GHG emissions.

CMUA's reasoning	• The reporting regulations are specifically directed to sources contributing to statewide emissions. In addition, the statute expressly states that CARB's reporting regulations must account for emissions from electricity consumed inside California.

3.4 The 2020 emissions limit relates only to – statewide greenhouse gas emissions

Language added to the Public Utilities Code by AB 32	§ 38550 By January 1, 2008, the state board shall, after one or more public workshops, with public notice, and an opportunity for all interested parties to comment, determine what the ***statewide greenhouse gas emissions*** level was in 1990, and approve in a public hearing, a ***statewide greenhouse gas emissions limit*** that is equivalent to that level, to be achieved by 2020. (emphasis added)
CMUA's position	The 1990 emissions level and the 2020 emissions limit for California is for statewide GHG emissions only, as that term is expressly defined in § 38505(m).
CMUA's reasoning	• "[T]he the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Moyer v. Workers' Comp. Appeals Bd.*, 10 Cal. 3d 222, 230-231 (1973). The principles of statutory construction require that the limit applies only to statewide greenhouse gas emissions.

3.5 The regulations for achieving emission reductions relate only to – statewide greenhouse gas emissions

Language added to the Public Utilities Code by AB 32	§ 38560.5(c) The [discrete early action] regulations adopted by the state board pursuant to this section shall achieve the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions from those sources or categories of sources, in furtherance of achieving the ***statewide greenhouse gas emissions*** limit.
CMUA's position	The regulations for discrete early actions shall apply to statewide GHG emissions only, as that term is defined in § 38505(m).
CMUA's reasoning	• "[T]he the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Moyer v. Workers' Comp. Appeals Bd.*, 10 Cal. 3d 222, 230-231 (1973). The principles of statutory construction require that the discrete early actions apply only to statewide greenhouse gas emissions.

Language added to the Public Utilities Code by AB 32	§ 38562(a) On or before January 1, 2011, the state board shall adopt greenhouse gas emission limits and emission reduction measures by regulation to achieve the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions in furtherance of achieving the *statewide greenhouse gas emissions* limit, to become operative beginning on January 1, 2012.
CMUA's position	The regulations for reduction measures apply to statewide GHG emissions only, as that term is expressly defined in § 38505(m).
CMUA's reasoning	• "[T]he the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Moyer v. Workers' Comp. Appeals Bd.*, 10 Cal. 3d 222, 230-231 (1973). The principles of statutory construction require that the reduction measures apply only to statewide GHG gas emissions.

Language added to the Public Utilities Code by AB 32	§ 38562(b) In adopting regulations pursuant to this section and Part 5 (commencing with Section 38570), to the extent feasible and in furtherance of achieving the *statewide greenhouse gas emissions* limit, the state board shall [among other things]: (8) Minimize leakage. (emphasis added)
CMUA's position	The concept of emission leakage applies to statewide GHG emissions only, as that term is expressly defined in § 38505(m).
CMUA's reasoning	• AB 32 defines "leakage" as "a reduction in emissions of greenhouse gases *within the state* that is offset by an increase in emissions of greenhouse gases *outside the state*." (HEALTH & SAFETY CODE § 38505(j) (emphasis added)) The AB 32 definition of leakage incorporates a geographical component that is based on where the GHG emissions are actually produced. The purest example of leakage is when a business shuts down an in-state facility in order to avoid California's GHG regulations and then replaces it with a similar facility outside the state. • For retail providers, the concept of leakage is approached head-on by AB 32, which provides that "statewide greenhouse gas emissions" include the GHG emissions "from the generation of electricity delivered to and consumed in California, . . . , whether the electricity is generated in state or imported." (HEALTH & SAFETY CODE § 38505(m)) The AB 32 definition of Statewide GHG Emissions for the electric sector has a geographical component based on *where the electricity is consumed*, regardless of where the GHG emissions are produced. Therefore, a retail provider may not avoid AB 32 regulation merely by serving its load with imported power to supplant generation resources located in California. This is an important distinction that substantially reduces the opportunities

	for electric utilities to cause leakage as defined by AB 32. • The statutory concept of "leakage" as defined in AB 32 is not implicated when a retail provider reduces the amount of out-of-state electricity it delivers to California that is consumed by its customers. (HEALTH & SAFETY CODE § 38505(j)).

Language added to the Public Utilities Code by AB 32	§ 38562(d) Any regulation adopted by the state board pursuant to this part [4] or Part 5 (commencing with Section 38570) shall ensure all of the following: (1) The greenhouse gas emission reductions achieved are real, permanent, quantifiable, verifiable, and enforceable by the state board.
CMUA's position	The regulations ensuring the achievement of real reductions apply to statewide GHG emissions only, as that term is expressly defined in § 38505(m).
CMUA's reasoning	• AB 32 must be "harmonized by considering each particular clause and section in the context of the statutory framework as a whole." (*Moyer v. Workers' Comp. Appeals Bd.*, 10 Cal. 3d 222, 230-231 (1973). The definition of a "real" emission reduction must necessarily be interpreted as a reduction in statewide greenhouse gas emissions. The definition of "real" cannot be expanded to require a California retail provider to reduce emissions outside the scope of AB 32. • The Joint Agency recommendation in D.07-09-017 errs in its interpretation of real reductions by expanding the geographic scope of AB 32 to include emissions that have *no* connection with California. Pursuant to AB 32, a "real" reduction of statewide GHG emissions will actually occur if a retail provider reduces its "total annual emissions of greenhouse gases *in the state*, including all emissions of greenhouse gases from the generation of electricity *delivered to and consumed in California*, accounting for transmission and distribution line losses, whether the electricity is generated in state or imported." (HEALTH & SAFETY CODE § 38530(b)(2) (emphasis added)) The definition of "real" is necessarily limited to the jurisdictional scope of AB 32. • CARB is required to develop a reporting mechanism to ensure that statewide GHG emission reductions achieved are real, permanent, quantifiable, verifiable, and enforceable by CARB. As a necessary component of this, the reporting mechanism should be designed to prevent retail providers from *falsely* claiming that electricity consumed in California is coming from a designated resource when actually it is not. On the other hand, the reporting mechanism must also recognize legitimate and lawful business practices that pertain to the sale or purchase of electricity.

3.6 The optional regulations implementing a market-based mechanism relate only to – statewide greenhouse gas emissions

Language added to the Public Utilities Code by AB 32	§ 38562(c) In furtherance of achieving the *statewide greenhouse gas emissions* limit, by January 1, 2011, the state board may adopt a regulation [pursuant to Part 5 commencing with Section 38570] that establishes a system of market-based declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions, ..." (emphasis added)
CMUA's position	The optional regulations establishing a market-based mechanism may only apply to statewide GHG emissions, as that term is expressly defined in § 38505(m).
CMUA's reasoning	• "[T]he the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Moyer v. Workers' Comp. Appeals Bd.*, 10 Cal. 3d 222, 230-231 (1973). The principles of statutory construction require that any market-based mechanisms implemented by CARB shall apply only to statewide greenhouse gas emissions.

3.7 CARB's activities monitoring and enforcing compliance with the limit shall relate only to – statewide greenhouse gas emissions

Language added to the Public Utilities Code by AB 32	§ 38580(a) The state board shall monitor compliance with and enforce any rule, regulation, order, emission limitation, emissions reduction measure, or market-based compliance mechanism adopted by the state board pursuant to this division. (b) (1) Any violation of any rule, regulation, order, emission limitation, emissions reduction measure, or other measure adopted by the state board pursuant to this division may be enjoined . . . , and the violation is subject to . . . penalties . . . ."
CMUA's position	The activities for monitoring and enforcing compliance shall only apply to statewide GHG emissions, as that term is expressly defined in § 38505(m).
CMUA's reasoning	• "[T]he the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Moyer v. Workers' Comp. Appeals Bd.*, 10 Cal. 3d 222, 230-231 (1973). The principles of statutory construction require that any monitoring and enforcement regulations implemented by CARB shall apply only to statewide greenhouse gas emissions.

4 Recommended alternatives for the Proposed Regulation Order

4.1 Section 95101: Applicability

CMUA's objections specifically directed at the CARB's Proposed Action	
Comment 4: It is unclear whether the Proposed Regulation is intended to apply to activities that occur entirely outside California. If so, it is inconsistent with and in direct conflict with the statutory objectives of AB 32. **Comment 5: The Proposed Regulation lacks clarity and may be interpreted inconsistently with the statute and the legislative intent.** **Comment 6: CARB only has the authority to require reporting of statewide greenhouse gas emissions as that term is defined in AB 32.**	
CMUA's Recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	§ 95101(b) Except as provided in section 95101(c), this article applies to the statewide greenhouse gas emissions of the following entities conducting business in California:
Reference/ authority in AB 32 supporting CMUA's alternative	Health & Safety Code § 38505(m), Health & Safety Code § 38530(a)-(b)
Reasoning supporting CMUA's alternative	• AB 32 only applies to statewide greenhouse gas emissions as that term is defined in § 38505(m). This does not need to be a defined term in the CARB regulations since it is already defined in AB 32, and would therefore, be duplicative. However, to ensure the standard of clarity, this proposed alternative sets forth that the entire article is only applicable to statewide greenhouse gas emissions. Therefore, the remaining uses of the terms "greenhouse gas," "greenhouse gas emissions," or "greenhouse gas emission source" in the proposed regulations are modified by the amended § 95101(b).

4.2 Section 95111(b)(2): Substitute power for firming intermittent renewable resources

CMUA's objections specifically directed at the CARB's Proposed Action	
Comment 7: It is unclear whether the Proposed Regulation is intended to apply to activities outside California. If so, it is in direct conflict with the statutory objectives of AB 32. **Comment 8: The Proposed Regulation lacks clarity and may be interpreted inconsistently with the statute and the legislative intent.**	
CMUA's Recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	Add in its entirety: § 95111(b)(2)(H) Power purchased from identified California eligible renewable resources in which the generating facility is an intermittent resource in which the reporting entity has retired the WREGIS certificate. The retail provider or marketer shall specify the energy purchases from the intermittent renewable resource or from substitute unspecified resources that do not exceed the total reasonably expected output of the identified renewable powerplant over the term of the contract.
Reference/ authority in AB 32 supporting CMUA's alternative	Health & Safety Code § 38505(m), Health & Safety Code § 38530(a)-(b)
Reasoning supporting CMUA's alternative	• In the proposed regulations, § 95111(b)(1)(A)(10) provides that retail providers and marketers shall "[s]pecify purchases of substitute energy and provide the same information required for other types of power purchases in this article as applicable." Retail providers must be permitted to utilize existing firming contracts for renewable resources such as wind. Wind is an intermittent resource that must generally be firmed by thermal generation. The typical firming contract, however, results in the full contracted amount of renewable energy being delivered to the retail provider. In order to encourage the building of new renewable generation, the regulations should recognize firming contracts using substitute power as an acceptable form of prudent utility practice.

4.3 Section 95111(b)(3)(F)(1)-(2): Large hydroelectric and nuclear facilities

CMUA's objections specifically directed at the CARB's Proposed Action	
Comment 9: The Proposed Regulation lacks authority and no California constitutional or statutory provision expressly or impliedly permits or obligates the CARB to adopt this regulation. **Comment 10: Determining that the Proposed Regulation is reasonably necessary to effectuate the purpose of the statute is not supported by substantial evidence.** **Comment 11: The Proposed Regulation is inconsistent with the statutory objectives of AB 32.**	
CMUA's Recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	Delete this section in its entirety: ~~(F) Power purchased or taken (MWh) from hydroelectric generating facilities with nameplate capacity of > 30 MW or from nuclear facilities (that are not California eligible renewable resources) shall be listed as one of the following:~~ ~~1. Power purchased with a contract in effect prior to January 1, 2008 that remains in effect or has been renewed without interruption;~~ ~~2. Power purchased not meeting the stipulation specified in section 95111(b)(3)(F)(1).~~
Reference and authority in AB 32 supporting CMUA's alternative	There is no authority in AB 32 that supports this regulation as proposed by CARB. *See* Health & Safety Code §§ 38505(m), 38530(a)-(b), 38550, 38551.
Reasoning supporting CMUA's alternative	• This proposed regulation contradicts the express requirements of AB 32 for accuracy. CARB may not supplant actual, known emissions with a default, especially when the facility is a zero-emission source. • AB 32 requires CARB to develop regulations that "[e]nsure rigorous and consistent accounting of emissions . . . ." (HEALTH & SAFETY CODE § 38530(b)(4)) The proposed regulations should be deleted since, in conjunction with the non-regulatory Attachment C, knowingly and expressly assign an incorrect emission rate to verifiably clean resources.

	• The proposed regulation is inconsistent with the AB 32 requirements for the emission limit determination, which AB 32 requires to be "the most accurate determination feasible . . . ." (HEALTH & SAFETY CODE § 38550) The accuracy of the limit is critical since it shall "be used to maintain and continue reductions in emissions . . . ." (HEALTH & SAFETY CODE § 38551(b)) However, the proposed regulations should be deleted since they, in conjunction with the non-regulatory Attachment C, knowingly and expressly assign an incorrect emission rate to verifiably clean resources.

4.4 Sections 95111(b)(3)(N), (R): Concept and calculations related to Ownership Share Differential

CMUA's objections specifically directed at the CARB's Proposed Action	
	Comment 12: The Proposed Regulation lacks authority and no California constitutional or statutory provision expressly or impliedly permits or obligates the CARB to adopt this regulation. **Comment 13: Determining that Proposed Regulation is reasonably necessary to effectuate the purpose of the statute is not supported by substantial evidence.**
CMUA's Recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	(N) ***Ownership Share ~~Differential~~.*** Retail providers shall report the following information for facilities that are fully or partially owned by the retail provider ~~and that have CO2 emissions greater than 1,100 lbs of CO2 per MWh based on the most recent verified greenhouse gas emissions data report or on CO2 emissions reported to U.S.EPA under 40 CFR Part 75~~. 1. Facility name, ARB designated facility ID, and generating unit ID as applicable 2. Percent ownership share at the facility level and ownership share at the unit level as applicable ~~3. By facility or generating unit as applicable the amount of power to be called the "ownership share differential" that is calculated as follows:~~ ~~$OSD_{MWh,\,i} = 0.9(OS_i)(NG_{MWh,\,i}) - GF_{MWh,\,i}$~~ ~~Where:~~ ~~$OSD_{MWh,\,i}$ = power ownership share differential for facility i, MWh per year~~ ~~OS_i = ownership share of facility i, percentage expressed as a value from 0-1 (e.g., 50% = 0.5)~~

	~~$NG_{MWh,i}$ = total net generation of facility i, MWh per year~~ ~~$GF_{MWh,i}$ = net generation taken from facility i, MWh per year~~ ~~(R) For facilities fully or partially owned by the retail provider not reported in section 95111(b)(3)(N), include facility name, ARB designated facility ID, generating unit ID as applicable, percent ownership share at the facility level, and ownership share at the generating unit level as applicable.~~
Reference / authority in AB 32 supporting CMUA's alternative	Health & Safety Code §§ 38505(m), 38530(a)-(b).
Reasoning supporting CMUA's alternative	• It is reasonable for CARB to collect information to determine a plant ownership share. The concept of ownership share *differential* based on the difference between an owner's contractual allocation and the electricity actually taken is unnecessary. Since AB 32 only applies to statewide greenhouse gas emissions as that term is defined in § 38505(m), a load-based reporting mechanism only requires information on the electricity actually received to serve load in California. • Once § 95111(b)(3)(N) is amended to include ownership information from all owned plants located out of state, § 95111(b)(3)(R) is duplicative and should be deleted in its entirety.

4.5 Section 95111(b)(3)(O): Criteria for "acceptable" wholesale sales

CMUA's objections specifically directed at the CARB's Proposed Action	
Comment 14: The Proposed Regulation lacks authority and no California constitutional or statutory provision expressly or impliedly permits or obligates the CARB to adopt this regulation. **Comment 15: Determining that the Proposed Regulation is reasonably necessary to effectuate the purpose of the statute is not supported by substantial evidence.**	
CMUA's Recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	Delete in its entirety: ~~(O) For retail providers that report a positive ownership share differential from a facility in section 95111(b)(3)(N), the retail provider shall specify the amount of wholesale sales (MWh) made by the retail provider or on behalf~~

	~~of the retail provider from the facility to counterparties located outside California that meets either one of the following criteria and shall retain documentation for verification purposes.~~ ~~1. The power could not be delivered to the reporting entity during the hours in which it was sold due to congestion in the transmission and distribution system or similar issues;~~ ~~2. The retail provider did not need the power during the hours in which it was sold for reasons not related to reducing the retail provider's greenhouse gas emissions responsibility. Reasons may include, but are not limited to, that the retail provider's own load was met by resources that were less expensive than the specified facility (excluding any value associated with greenhouse gas mitigation).~~
Reference and authority in AB 32 supporting CMUA's alternative	Health & Safety Code §§ 38505(m), 38530(a)-(b).
Reasoning supporting CMUA's alternative	• AB 32 only applies to statewide greenhouse gas emissions as that term is defined in § 38505(m). AB 32 does not proscribe wholesale sales from plants outside California. • There is no evidence in the record to support a notion that certain wholesale sales are unacceptable based upon the seller's purpose. (Proposed Regulation § 95111(b)(3)(O)). This concept was pejoratively labeled "contract shuffling" in the recommendation made by the Joint Agencies that is incorporated in Attachment C. The determination in D.07-09-017 that certain wholesale sales would not achieve real emission reductions was clearly erroneous and was not supported by any evidence adduced by the Joint Agencies. The Joint Agencies collected no substantial evidence to demonstrate that any type of wholesale sale would be more or less likely to comply with AB 32. • These Proposed Regulations include regulatory language that incorporates the unsupported recommendations of the Joint Agencies. CMUA is unaware of any activities undertaken by CARB to collect *any* evidence to support the necessity for these regulations. There was no discussion or explanation in the ISOR describing the need for regulations to distinguish between different reasons for a retail provider making wholesale sales. These concepts were briefly mentioned in non-regulatory Attachment C (*Interim Emissions Attribution Methods for the Electricity Sector*), but essentially by stating that the Joint Agencies "noted" that California retail providers could "potentially" modify contracts whereby emissions would

remain unchanged. (e.g., Attachment C at C-8, C-9).

- The under girding of the Joint Agency recommendation is a clearly erroneous interpretation of AB 32. The Joint Agencies state their belief that certain wholesale sales do not result in "real" reductions as required by AB 32. (D.07-09-017 at 17-30). The Agencies' belief, however, depends upon enlarging the scope of AB 32 authority to encompass the "atmosphere" anywhere in the world without geographic limitation. Neither of the Joint Agencies has been charged with developing the reporting regulations for AB 32 compliance and neither can make the claim of having special expertise in the reporting of air emissions. Hence, the Joint Agencies' interpretation merits virtually no weight. (*Western States Petroleum Assoc. v. Superior Court*, 9 Cal. 4th 559, 575-576 (1995)). In this case, moreover, the interpretation was conceived without adequate consideration. At no point in D.07-09-017 do the Joint Agencies include a thorough discussion of the most basic issue - the statutory definition and limitations of "statewide greenhouse gas emissions."

- The courts are required to overturn erroneous administrative constructions. CARB has no authority to implement regulations based upon erroneous interpretations of AB 32 by proposing arbitrary and capricious rules that have no rational basis. This unlawfully blurs the line distinguishing between activities that are lawful and beneficial as opposed to any heretofore undefined activities designed by retail providers to purposely circumvent AB 32.

- There should be no presumption of illegitimacy for a retail provider's resource sales from out-of-state facilities or procurements from out-of-state low- and zero-GHG facilities. A contract that at the time it was made, had both sufficient consideration and a lawful object, is enforceable and should have a presumption of legitimacy. (CAL. CIV. CODE §§ 1550, 1595, 1596, 1607, 1614, 1615; CAL. EVIDENCE CODE § 500) There is no record evidence in CARB's rulemaking to support any conclusions of malfeasance when retail providers engage in wholesale sales from high-GHG facilities. Therefore, there is no evidence that would overcome the validity of a contract between consenting parties that has sufficient consideration (a market-based price in exchange for the delivery of energy that includes all environmental attributes) and a lawful object (the procurement of low- or zero-GHG resources for the purpose of reducing a utility's resource emissions). Furthermore, the legitimacy and lawfulness of this contract could hardly be suspect as a consequence of subsequent and unrelated acts of the non-California party. For instance, if at some point later the non-California party procures high-GHG resources to replace the low-GHG resources it lawfully sold to the California retail provider, this lawful subsequent act does not nullify the consideration or object of the original contract. The courts will not invalidate a contract unless its contravention of sound public policy is entirely plain and the burden is on the contract's

opponent to show that a contract's enforcement would be in violation of settled public policy. (*Rosen v. State Farm General Ins. Co*., 30 Cal. 4th 1070, 1082 (2003); *Moran v. Harris*, 131 Cal. App. 3d 913, 920 (1982)). CARB should steer far from declaring that certain wholesale sales are "unacceptable" and that all wholesale sales exceeding 10% of an ownership share from out-of-state facilities come equipped with a presumption of impropriety. (*Bovard v. Am. Horse Enters*., 201 Cal. App. 3d 832, 839 (1988)).

- A central tenet in the Joint Agencies' *theory* of contract shuffling is that a non-California party in a region with no GHG cap will make a knowing exchange of its low-GHG resource and then replace it with a wholesale purchase of higher emitting resources from a California seller. The theory presupposes that the non-California party will have no regulatory requirements to purchase low-GHG resources, and therefore, may "shuffle" resources with impunity. Yet, this theory does not take into account that renewable portfolio standard (RPS") requirements will inhibit the benefits of "shuffling" and almost all of the states in the western interconnect have significantly stringent RPS requirements. CMUA believes that claims of widespread contract shuffling are both unrealistic and unsupportable *since there is no record evidence in this rulemaking and little reason to think* that California utilities will have the only claim on available low- and zero-GHG resources in the western interconnect. Therefore, CMUA argues that it's basically moot whether or not other states have GHG caps. The renewable resources will be in demand for their renewable attributes and California utilities will procure them on the market in the future just as they do today. There is *every reason to think* that the environmental attributes for these low-GHG resources will remain bundled with the energy and it seems illogical that non-California entities would be willing to "shuffle" their contracts when those resources are needed to meet their own RPS requirements.

- The Final Market Advisory Committee ("MAC") Report shows minimal concerns regarding contract shuffling. The MAC Report states that the "introduction of a California cap-and-trade program could induce . . . [t]his shuffling of contracts" and that "some observers are concerned that contract shuffling could dramatically undermine a California cap-and-trade program" by noting that "there is sufficient generation capacity within the eleven states in the western power interconnect to entirely comply with expected emission reductions in California without any real change in generation." (*Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California*, Market Advisory Committee Report (June 30, 2007) at 44). The MAC Report, however, downplays this and states that "the opportunities for contract shuffling may be more limited than would initially appear" mainly due to the CPUC's procurement rule, the emission performance standard of SB 1368, and the fact that coal-fired plants which have the only significant incentive to shuffle comprise ***less than 1 percent***

	of the imported power. (*Id.*) In light of this, the solution from the MAC Report "encourages" CARB "to develop an extensive plan for how to account for emissions associated with imported power." (*Id.*)

4.6 Section 95111(b)(3)(P): Adjusted Ownership Share

CMUA's objections specifically directed at the CARB's Proposed Action	
Comment 16: The Proposed Regulation lacks authority and no California constitutional or statutory provision expressly or impliedly permits or obligates the CARB to adopt this regulation. **Comment 17: Determining that the Proposed Regulation is reasonably necessary to effectuate the purpose of the statute is not supported by substantial evidence.**	
CMUA's Recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	Delete in its entirety: ~~(P) ***Adjusted Ownership Share Differential.*** Retail providers that report a positive ownership share differential in section 95111(b)(3)(N) shall report the difference in this amount of power and the amount of wholesale sales that meet the criteria in section 95111(b)(3)(O). The difference shall be called the "adjusted ownership share differential". The adjusted ownership share differential may be reduced further as specified in section 95111(b)(3)(Q).~~
Reference and authority in AB 32 supporting CMUA's alternative	Health & Safety Code §§ 38505(m), 38530(a)-(b).
Reasoning supporting CMUA's alternative	See CMUA's reasoning for Comments 12 through 15.

4.7 Section 95111(b)(3)(Q): Adjustments

CMUA's objections specifically directed at the CARB's Proposed Action	
Comment 18: The Proposed Regulation lacks clarity and may be interpreted inconsistently with the statute and the legislative intent. **Comment 19: CARB only has the authority to require reporting of greenhouse gas emissions in California, including all emissions of greenhouse gases from the generation of electricity delivered to and consumed in California.**	
CMUA's Recommendation for a more effective and less burdensome alternative	
CMUA's proposed alternative language	(Q) Retail providers ~~that report a positive adjusted ownership share differential in section 95111(b)(3)(P) for a specified facility~~ may retain for purposes of verification, documentation that the facility reduced operations as a result of a reduced demand for power by the retail provider. ~~The retail provider may reduce the adjusted ownership share differential by the amount of power generation that was reduced.~~
Reference and authority in AB 32 supporting CMUA's alternative	Health & Safety Code §§ 38505(m), 38530(a)-(b).
Reasoning supporting CMUA's alternative	• The deleted portions relate to language deleted pursuant to Comments 12 through 17. • AB 32 only applies to statewide greenhouse gas emissions as that term is defined in § 38505(m). The language retained in CMUA's alternative concerns the verification of power that was delivered and consumed in California. It is not used to penalize the retail provider for power that was delivered and consumed outside California.

5 Conclusion

CMUA respectfully requests the Board to consider and incorporate CMUA's recommendations into newly revised Proposed Regulations, including CMUA's proposed alternative language identified above. Furthermore, CMUA requests responses to all NOPA Comments included herein, as required by Government Code § 11346.9(a)(3).

Dated: November 30, 2007

Respectfully submitted,

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