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

Subject: Comments of LS Power on the August 1, 2012 Notice of Public Hearing to Consider Amendments to the Mandatory Reporting of GHG Emissions, the AB 32 Cost of Implementation Fee Regulation and the California Cap on GHG Emissions.

Dear Clerk:

LS Power offers the following comments on the California Air Resources Board ("CARB") August 1st Notice regarding amendments to the Mandatory Reporting Regulation ("MRR"), Cap-and-trade, and AB 32 Cost of Implementation Fee Regulation (collectively "August 1, 2012 Amendments"). LS Power is engaged in the development, acquisition and management of power generation and transmission infrastructure. In addition to its natural gas-fired facilities, LS Power is currently investing in solar resources and transmission. As an importer of power into the CA markets, LS Power seeks, as do other market participants, regulatory certainty around the developing cap-and-trade market and to ensure that similarly situated entities are treated the same. LS Power remains concerned about the definition for "electricity importer". LS Power believes that CARB should not solely rely on e-tags in determining the electricity importer when power flows across balancing authority areas. As discussed below, CARB should amend the definition for "electricity importer" to clearly state the scope of CARB's jurisdiction. LS Power understands that CARB's goal is to develop and implement a definition of electricity importer that satisfies the objective of having the out-of-state resource or its importer be the carbon obligated entity. However, CARB should also ensure that the definition will likely stand up to the probable legal challenges to come.

The current version of the Cap-and-trade regulation, as well as the August 1, 2012 Amendments, do not adequately contemplate the interstate nature of the western electricity system, or the legal bounds of CARB's jurisdiction. The wholesale electricity markets are operated in real time, across state and international borders. In California, there are several balancing authority areas, some of which extend beyond the state's

borders. In other words, the western electricity system is a quintessential example of "interstate commerce", and CARB must carefully evaluate the legal scope of its jurisdictional reach as it seeks to regulate the California portion of this system.

The August 1, 2012 Amendments continue to obscure the line between regulating in-state activities and those which occur entirely out-of-state. Section 95802(a)(87) of the Cap-and-trade regulation would be amended to provide:

> (87) "Electricity Importers" ~~are marketers and retail providers that~~ deliver imported electricity. For electricity that is scheduled with a NERC e-Tag to a final point of delivery inside the state of California ~~delivered between balancing authority areas,~~ the electricity importer is identified on the NERC e-Tag as the purchasing-selling entity (PSE) on the last segment of the tag's physical path with the point of receipt located outside the state of California and the point of delivery located inside the state of California. For facilities physically located outside the state of California with the first point of interconnection to a California balancing authority's transmission and distribution system when the electricity is not scheduled on a NERC e-Tag, the importer is the facility operator or scheduling coordinator. Federal and state agencies are subject to the regulatory authority of ARB under this article and include Western Area Power Administration (WAPA), Bonneville Power Administration (BPA), and California Department of Water Resources (DWR).

In other words, when power crosses balancing authority areas (e.g., out-of-state sales into the CAISO markets), the electricity importer is solely identified as the PSE on the last physical path on the e-tag. Sole reliance on e-tags is problematic because e-tags were never intended to serve as a mechanism to track ownership of power. E-tags were designed to address and track compliance with the Western Electricity Coordinating Council's reliability standards, and do not definitively track title to power. There are many instances when a seller will be listed as the PSE on the physical path, even though delivery occurred (and title transferred) out-of-state. Thus, by relying solely on e-tags, CARB will invariably seek to regulate entities that completed their power transaction outside of California.

This extraterritorial reach will lead to a violation of the Interstate Commerce Clause because States cannot regulate commercial activities occurring wholly outside their borders. Article 1, Section 8, Clause 3 of the United States Constitution provides that "The Congress shall have power to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." The importance of the Commerce Clause extends beyond simply describing the power of Congress. The Commerce Clause has been interpreted by courts to implicitly govern the power of states. For example, in *New York Life Insurance Co. v. Head*, 234 U.S. 149 (1914), the U.S. Supreme Court determined that "it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers

by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends."

More recently, in *Edgar v. Mite Corp.*, the U.S. Supreme Court interpreted the Commerce Clause to "preclude the application of a state statute to commerce that takes place wholly outside of the State's borders, *whether or not the commerce has effects within the State*." (See, *Edgar v. Mite Corp.* 457 U.S. 624, 642, (1982), emphasis added.) This language was quoted by the Court in *Healy v. the Beer Institute*, 491 U.S. 324 (1989), when the Court struck down a Connecticut statute requiring out-of-state shippers to affirm that the prices charged to wholesalers in Connecticut were no greater than prices charged in neighboring states. In *Healy*, the Court concluded that the Connecticut statute had the "undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." (*Healy* v. *The Beer Institute,* at p. 337).

Importantly, in both of these cases, the underlying activities that started the lawsuits had impacts on the states. Even though the commerce had effects within the state, the commerce occurred wholly outside the state's political borders. Similarly, in the context of an electricity import, when title to the power is transferred to a purchaser at a point physically located out-of-state, the commercial activity occurs wholly outside the State of California. Even though the power may eventually come into California, CARB's jurisdiction cannot extend to the sellers in these instances where the transaction is completed outside California without offending the Commerce Clause.

Thus, in the current form, the Cap-and-trade regulation creates a significant risk that the program could be challenged because it violates the Commerce Clause. Such litigation risk creates uncertainty for the program and undermines confidence in the cap-and-trade markets, which is especially needed in the incipient stages of the program. Moreover, out-of-state sellers participating in CAISO markets by delivering to out-of-state nodes, such as LS Power, who may choose not to challenge the regulations, will be at a competitive disadvantage compared to out-of-state sellers that may not choose to submit to CARB's jurisdiction. Such a result would create uncertainty in the regional markets with respect to pricing of interstate transactions at trading hubs located outside California's physical borders. In sum, the imprecise extension of CARB's jurisdiction through the importer definitions is a significant deficiency in the Cap-and-trade program that needs to be remedied before the program starts.

To address the concerns of stakeholders LS Power urges staff to take two courses of action. First, the electricity importer definition should be amended to more clearly reflect when CARB has jurisdiction over an out-of-state import. Previous iterations of the regulations should serve as a guide. In the October 27, 2011 version of the regulation, electricity importer was defined as "*the entity that holds title to delivered electricity* is identified as the purchasing selling entity (PSE) on the last segment of the tag's physical path, with the point of receipt located outside the state of California, and

the point of delivery located inside the state of California." (Emphasis added). CARB should re-incorporate the recognition of title into the Cap-and-trade regulation by revising the definition for electricity importer as follows (LS Power's revisions are noted in bold):

> (87) "Electricity Importers" ~~are marketers and retail providers that~~ deliver imported electricity. For electricity that is scheduled with a NERC e-Tag to a final point of delivery inside the state of California ~~delivered between balancing authority areas,~~ the electricity importer ~~**is**~~ **may be** identified on the NERC e-Tag as the purchasing-selling entity (PSE) on the last segment of the tag's physical path with the point of receipt located outside the state of California and the point of delivery located inside the state of California. **When an entity delivers power to a point located out of state, the electricity importer is the entity that holds title to the electricity on the physical transmission path crossing the California border, which may be determined by contract, settlement data or other relevant information presented to a verifier pursuant to the Mandatory Reporting Regulation**." For facilities physically located outside the state of California with the first point of interconnection to a California balancing authority's transmission and distribution system when the electricity is not scheduled on a NERC e-Tag, the importer is the facility operator or scheduling coordinator. Federal and state agencies are subject to the regulatory authority of ARB under this article and include Western Area Power Administration (WAPA), Bonneville Power Administration (BPA), and California Department of Water Resources (DWR).

These revisions will more clearly delineate the scope of CARB's jurisdiction, and thereby help avoid legal challenges on the basis of the Commerce Clause. LS Power urges CARB to integrate these changes as soon as possible, in order to provide the greatest clarity before regulated entities must begin purchasing allowances in November 2012.

In addition, CARB should also specify an ongoing process for addressing stakeholder concerns about the identification of electricity importers. LS Power urges CARB staff to specify future workshops to identify new mechanisms for tracking electricity imports. If e-tags are to be used for identification of electricity importers, then that use should be vetted among stakeholders in an open and transparent process. CARB should also investigate the value of new tracking mechanisms and software that are specifically designed to accommodate the Cap-and-trade program and that would be used by all importers to ensure a level playing field. The Western Renewable Energy Generation Information System ("WREGIS") might serve as a useful example. These and other mechanisms or tracking options will need to be vetted in an ongoing public process. LS Power requests that CARB staff schedule these workshops soon in order to provide stakeholders with greater certainty about the effect of the regulation.

LS Power looks forward to working with CARB and its staff towards the successful resolution of these concerns.

Sincerely,

Jennifer Chamberlin
LS Power