PacifiCorp
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July 9, 2010

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

RE: COMMENTS OF PACIFICORP ON THE MAY 25, 2010 PROPOSED CALIFORNIA RENEWABLE ELECTRICITY STANDARD REGULATIONS

Dear Board Members:

PacifiCorp, dba Pacific Power ("PacifiCorp" or "Company") respectfully submits these comments as requested in the May 25, 2010 Notice of Public Hearing To Consider Adoption of a Proposed Regulation for a California Renewable Electricity Standard.[1] For the reasons provided below, the Renewable Electricity Standard ("RES") requires a number of modifications. These comments detail the need for those modifications and provide recommended changes to the Proposed Regulation Order ("PRO") in underscored and ~~strike-through~~ text in the attached appendix.

I. Overview of Comments

PacifiCorp commends the California Air Resources Board ("CARB") staff for its openness with stakeholders and receptiveness to stakeholder concerns. Staff was particularly helpful in working through stakeholder concerns regarding the need for flexibility in complying with the RES. Specifically, PacifiCorp strongly supports the PRO provisions that provide flexibility for RES-obligated entities in the use of Renewable Energy Credits ("RECs") or Tradable RECs ("TRECs")[2] by not proposing a deliverability requirement. This flexibility is particularly important to PacifiCorp because its status as a multi-jurisdictional utility ("MJUs") brings with it certain unique operational challenges. PacifiCorp operates its multi-jurisdictional service territory as a single system within its single balancing authority that is not part of the California Independent System Operator ("CAISO"). The Company does not track the physical

[1] See CARB, (May 25, 2010), Notice of Public Hearing To Consider Adoption of a Proposed Regulation for a California Renewable Electricity Standard, available at: http://www.arb.ca.gov/regact/2010/res2010/res10notice.pdf

[2] Hereinafter, unless otherwise distinguished, we refer to RECs to mean both RECs (representing a product of both bundled energy environmental attributes) and Tradable RECs ("TRECs") (representing the environmental attributes unbundled from the energy). PacifiCorp recognizes that the existing Draft Regulation explicitly defines RECs, and we presume no different treatment under the RES for RECs and TRECs.

flow of energy within the balancing authority with respect to state boundaries, so the flexibility to use unbundled RECs will help lower the RES-related cost impact on PacifiCorp's California customers. Those MJU characteristics are acknowledged and reflected in the existing RPS statute through Public Utilities Code Section 399.17. Should CARB's RES rules change in the future and require a deliverability showing for RECs, then additional provisions will be required to reflect the MJU's circumstances.

CARB staff was also receptive to stakeholder comments regarding the deadlines to retire RECs. PacifiCorp supports staff's proposed grace period following the end of a compliance period to retire RECs. As noted in PacifiCorp's PRO language modifications in Appendix A, PacifiCorp recommends further extending this timeframe, in light of the timeframe for the release of Western Renewable Energy Generating Information System ("WREGIS") certificates. PacifiCorp also commends staff for understanding that there may be instances when despite the best efforts of a regulated entity, the entity may not be able to procure enough RECs for its compliance obligation. To this end, the provision that would allow a regulated entity to submit a schedule to meet the shortfall provides an important degree of flexibility in the RES program.

PacifiCorp's primary concern with the PRO—which has been raised to staff a number of times since the preliminary draft materials were released—is the harm to the renewables market from failing to recognize that renewable energy credits ("RECs"), including WREGIS Certificates, constitute "property" with an intrinsic value in the marketplace. PacifiCorp is concerned the PRO's current language undermines the market value of RECs, and will have a chilling effect on investment for renewable resources, ultimately frustrating the fundamental goals of Executive Order S-21-09. CARB should *not* assert that a REC as used in the RES program *does not* constitute property. In today's power market, RECs and or TRECs constitute rights and benefits independent of compliance use that may have value and can be transferred as intangible property. If CARB determines that language asserting "RECs do not constitute property" with respect to RES compliance must be included in regulations, PacifiCorp strongly urges CARB to move away from the "generic" concept of a REC for RES compliance and create a RES-specific product, which is referred to here as a "RES-REC." Defining the RES-REC as the specific CARB compliance tool will avoid the concern raised by PacifiCorp regarding a potential taking of existing property reflected by the generic REC concept in the existing PRO language.

PacifiCorp offers several additional comments and specific language modifications in Appendix A which: (1) better reflect the timeframes for receipt of certificates from the WREGIS; (2) clarify the term "procurement"; (3) characterizes the compliance deadlines between 2014 and 2020 as "compliance targets" to allow greater flexibility in reaching a 33% by 2020 RES; (4) clarify provisions limiting REC trading from partially exempt entities; (5) provide greater certainty for CARB's verification of RES compliance; (6) clarify the applicability of penalty provisions during cure periods and when RECs are not available; and (7) allow entities to establish confidentiality for routine compliance materials before those documents are submitted to CARB.

II. Description of PacifiCorp

PacifiCorp is a regulated MJU serving 1.7 million retail electricity customers, in California, Idaho, Oregon, Utah, Washington, and Wyoming. PacifiCorp's primary function is to serve retail load. The Company serves approximately 46,500 customers in the northern reaches of California in Del Norte, Modoc, Shasta, and Siskiyou counties through its retail business unit, Pacific Power. PacifiCorp maintains a transmission and distribution system and is the Balancing Authority for the areas known as PacifiCorp West and PacifiCorp East. Approximately 35 percent of Pacific Power's California customers are estimated to be low-income, and therefore eligible for PacifiCorp's California Alternate Rates for Energy ("CARE") assistance program. As such, the Company is particularly sensitive about keeping costs as low as possible while continuing to provide safe and reliable electric service.

While a portion of PacifiCorp West is located in northern California, neither the PacifiCorp West nor PacifiCorp East control areas are part of the California Independent System Operator ("CAISO") controlled grid. Unlike other California investor-owned utilities ("IOUs"), PacifiCorp remains a vertically integrated multi-jurisdictional utility owning approximately 80 percent of its generation portfolio, and utilizing the majority of the electricity generated from those assets to serve customer retail load.

PacifiCorp's owned-generation portfolio is a mix of assets located within nine western states (Arizona, California, Colorado, Idaho, Montana, Oregon, Utah, Washington, and Wyoming). Consistent with a long-standing regulatory practice agreed to among the various state regulatory entities overseeing its operations, all energy produced by PacifiCorp-owned resources, as well as purchased energy delivered pursuant to a power purchase agreement, is referred to as "system" power. System power is electricity that is not specifically assigned by PacifiCorp for use within a particular state or balancing authority and is operated on a system wide basis. Unlike IOUs located entirely within California, PacifiCorp combines all of the costs for generating and maintaining the appropriate level of the power within its system and then allocates to each jurisdiction a proportionate share of system resources and related costs based upon the retail load served in that jurisdiction. PacifiCorp's California retail customers consume slightly less than a two percent (2%) share of PacifiCorp's system resources.

PacifiCorp combines all of the costs for generating and maintaining the appropriate level of the power within the integrated system and allocates most of the costs to each of the states based on the respective retail load served. For allocating most of its generation costs, PacifiCorp uses a system power cost allocation factor for each of its states. As a result of this shared resources approach, PacifiCorp's states receive cost savings associated with resource diversification. The cost allocation factor is part of a more comprehensive cost allocation methodology referred to as the PacifiCorp Multi-State Process ("MSP") Revised Protocol. The Revised Protocol is a cost allocation methodology agreed to by various utility commissions that regulate PacifiCorp.

III. The PRO Provides For An Important Degree Of Flexibility For Multi-Jurisdictional Utilities' Circumstances.

As previously noted, MJUs' circumstances differ in material ways from the other load serving entities located solely within California. The current RPS law recognizes the challenges facing California's MJUs by allowing the use of electricity associated from any RPS-eligible facility that is connected to the WECC transmission system. PacifiCorp believes a similar recognition should be explicitly memorialized in the PRO, particularly if the RES program is changed to require some "in-state" procurement obligation or a delivery requirement.

PacifiCorp procures and allocates generation costs and benefits to its California customers on a proportional basis from its integrated system. The California Legislature adopted provisions in the RPS law—Public Utilities Code Section 399.17[3]—that acknowledge the multi-state allocation mechanism.[4] As noted earlier, PacifiCorp does not track the physical flow of energy *within* its balancing authority with respect to the various state political boundaries, and it would be an uneconomic exercise to try to prove that its California customers physically receive a given quantity of renewable energy from specific generation within the integrated system. Placing few restrictions on the use of unbundled RECs recognizes the limitations PacifiCorp faces in delivering renewable electricity, with its limited access to the California transmission system, and allows greater flexibility in the procurement and reporting requirements associated with RES compliance.

If changes to the RES are considered by CARB that would require a REC delivery showing or an "in-state" procurement obligation—then PacifiCorp would ask that the PRO be modified to explicitly mirror the operational realities faced by MJUs as is found in Section 399.17.

IV. A Renewable Energy Credit Is A Property Right, And CARB Should Create A RES-REC.

As currently drafted, PRO Section 97002(a)(16) states that "[a] REC does not constitute property or a property right." PacifiCorp disagrees and asserts that this is factually and legally incorrect because RECs are much more than a CARB-created compliance tool. During the RES stakeholder workshops and in discussions with staff, PacifiCorp urged CARB to delete the sentence stating a REC is not a property right. As detailed below, this statement will have a deleterious impact on the renewable energy markets, and could give rise to the very type of litigation CARB seeks to avoid. In order to avoid these problems, PacifiCorp continues to urge CARB to delete the sentence. Alternatively, CARB should adopt language that would create a product that is unique to the program: a "RES-REC".

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[3] Pub. Utilities Code Sec. 399.17, codified by Chapter 50, Statutes of 2005 (Assembly Bill 200), available at: http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0151-0200/ab_200_bill_20050718_chaptered.pdf

[4] Sec. 399.17 applies to utilities that serve less than 60,000 California customers and also have operations in other states.

In its current form, the PRO will have a chilling effect on investment in renewable technologies throughout the West. As noted in the Initial Statement of Reasons ("ISOR") for the PRO, "RECs represent the environmental attributes of electricity generated from a renewable resource."[5] The essential purpose of a transaction with this type of a facility is to purchase or sell the renewable component associated with the power production from specific generation technologies utilizing certain types of fuels. The electric power itself could be produced more cheaply, and often more reliably by a conventional resource, and the marketplace tends to view the electricity created by all generators as a fungible commodity. Thus, from the perspective of participants in the *renewables* generation business (both sellers and buyers), the production, ownership, and trading of a REC, and their application to meet market or regulatory demands, is the essential purpose distinguishing investments in renewable generation facilities.

If this renewable energy characteristic does not constitute property, it cannot be made the subject of a security interest. Without a security interest in the renewable component of a new generation project, renewable energy developers will not be able to obtain financing for their projects. A bank will never recognize the value of renewable power because the essential purpose of a PPA for a renewable facility's power would have no value. Moreover, since the REC demand in California under a 33% renewable procurement standard will be one of the largest markets in the world, the ripple effect of CARB's policy will be disastrous for the entire renewable industry. Finally, CARB's policy will serve as an example for other renewable programs because it is the most aggressive goal in the country, and California is considered a leader in environmental policy. If other states or countries mirror the CARB policy, the detrimental effect will further ripple through the renewable industry.

On numerous occasions, CARB staff opined that the property right language was intended to reflect the structure used by CARB in its regulatory programs for other criteria pollutants. However, the RES program is *not* like CARB's other regulatory programs for criteria pollutants. Put simply, CARB *is not creating and allocating the RECs at issue*. The United States program for trading sulfur dioxide ("SO_2") allowances (a sulfur dioxide allowance is a permit to emit a quantity of pollutant) under the Clean Air Act Amendments specifically provides that those allowances are "authorizations," not "property rights."[6] This regulatory structure was necessary so that if the total allowances provided under the SO_2 program were reduced, those to whom the allowances had previously been allocated would not have claims against the United States for a government taking.[7]

The legislated non-property nature of government authorizations to emit pollutants—namely allowances—must be distinguished from the power market's development of RECs as a

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[5] See Initial Statement of Reasons at P. VII-16, available at: http://www.arb.ca.gov/regact/2010/res2010/res10isor.pdf

[6] See, 42 U.S.C. §7651b(f): "An allowance allocated under this subchapter is a limited authorization to emit sulfur dioxide in accordance with the provisions of this subchapter. Such allowance does not constitute a property right. Nothing in this subchapter or in any other provision of law shall be construed to limit the authority of the United States to terminate or limit such authorization."

[7] See generally Gerhring & Streck, Eissions Trading: Lessons from SOx and NOx Emissions Allowance and Credit Systems, 35 Envtl. L. Rep. 10220 at 3-4 (Apr. 2005).

product created by a certain class of generating resources. RECs include rights and benefits, independent of compliance use, that have value and can be transferred as a form of intangible personal property. Among the bundle of rights and claims represented by RECs, it is only the ability to use the RECs for a specific compliance purpose under an identified compliance program that is a use or authorization created by the government. RECs are much more than a compliance instrument and exist outside of the CARB program. Thus, CARB will not resolve the risk of takings claims by simply stating in the regulations a REC is not a property right. Rather, that statement *in and of itself* could give rise to a takings claim because CARB will be issuing a regulation that states that something which exists outside of CARB regulation (a REC) is not property.

The ISOR for the PRO suggests that CARB believes the term "REC" as used in the PRO is unique to the RES program:

> The term as used in the RES regulation has a specific meaning. ARB has created unique parameters for eligibility. What is to be considered as 'renewable' is a matter of law, and before generation can be considered as eligible to produce a REC for RES purposes, it must meet specific requirements unique to that program. The RES regulation defines what generation is acceptable for use in meeting its requirements, and does not attempt to define or limit the uses of generation from resources for any other reason or purpose.[8]

While CARB's intent may be to limit the term "REC" to its proposed RES program, the term is used generically throughout the industry and in other compliance programs. In fact, the exact same term is used in the RPS to describe the same type of compliance instrument (i.e., a MWh metric of renewable generation).[9] If CARB does not eliminate the property right language in its entirety, at the very least, CARB should clarify its intent to create a REC that is clearly exclusive to the RES program. CARB should define the compliance instrument eligible only for the RES program a "RES-REC."

V. Conclusion

In sum, PacifiCorp strongly urges CARB to recognize in the PRO that RECs, including WREGIS Certificates, constitute property rights that have been acquired for adequate consideration. In particular, CARB should not assert that a REC as used in the RES program does not constitute property, but rather clarify that a compliance instrument for the RES program is a "RES-REC". With respect to the use of RECs, PacifiCorp also commends CARB for not placing restrictions on the use of RECs. Allowing unrestricted use of unbundled RECs generated within the WECC will allow a needed degree of flexibility in complying with the RES. However, if CARB contemplates restricting RECs, then the unique circumstances of the MJUs will need to be explicitly recognized in the PRO by mirroring language used to create the

[8] See Initial Statement of Reasons at P. VII-16.

[9] See Public Utilities Code Section 399.12(h)(2).

structure found in Public Utilities Code Sec. 399.17. These and other specific language modifications to the Draft Regulations are detailed in Appendix A.

Should you have any questions about these comments, please do not hesitate to contact the below listed signatories. PacifiCorp appreciates the opportunity to submit these comments.

Respectfully Submitted,

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July 9, 2010

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APPENDIX A

REDLINED PROVISIONS OF THE PROPOSED REGULATORY ORDER FOR THE RENEWABLE ELECTRICITY STANDARD

- *Amend § 97002(a) to add a definition for multi-jurisdictional utilities:*

"Multi-jurisdictional Utility" means a retail provider that provides electricity to end users in California and in one or more other states.

- *Amend § 97002(a)(4) to recognize that a deadline of March 31 will not provide sufficient time for WREGIS to issue RECs and covered entities to retire the RECs:*

"Compliance Deadline" means ~~March 31~~ June 1 of the year following the end of each compliance interval.

- *Amend § 97002(a)(13) to clarify the definition of "procurement" by amending the following language:*

"Procure or procurement" as related to renewable energy means an ownership or contractual ~~investment~~ arrangement to acquire the physical electrical output of an eligible renewable generating resource, and/or the acquisition of a REC or TREC.

- *Amend § 97002(a)(16) by deleting the second to last sentence:*

(16) **"Renewable Energy Credit or REC"** means one MWh of electricity generated by an eligible renewable energy resource. A REC does not include an emission reduction credit issued pursuant to Health and Safety Code section 40709. A REC also does not include any allowance issued pursuant to a cap and trade or similar program. ~~A REC does not constitute property or a property right.~~ ARB reserves the right to alter or amend the definition of a REC as it is used for demonstrating compliance with this Article.

Alternatively, ARB should amend § 97002(a)(16) to limit the property right language to the RES program:

(16) **"RES-Renewable Energy Credit or RES-REC"** means one MWh of electricity generated by an eligible renewable energy resource. A RES-REC does not include an emission reduction credit issued pursuant to Health and Safety Code section 40709. A RES-REC also does not include any allowance issued pursuant to a cap and trade or similar program. A RES-REC does not constitute property or a property right. ARB reserves the right to alter or amend the definition of a RES-REC as it is used for demonstrating compliance with this Article.

- *Amend Sections 97004 and 97006 regarding Renewable Electricity Standard Obligations and reporting requirements to provide greater flexibility in meeting the RES targets, by replacing the interim compliance intervals with interim compliance targets:*

Except as provided in Section 97003, each Regulated Party (other than DWR and WAPA) shall ~~retire an amount of WREGIS certificates sufficient to demonstrate compliance with the Regulated Party's RES Obligation for each compliance interval~~ report its progress towards its RES target on an annual basis. ~~Compliance intervals and the associated REC percentages are specified in Table 1. WREGIS certificates retired for the purpose of demonstrating compliance with the RES Obligation for each compliance interval shall be retired no later than the Compliance Deadline for each compliance interval.~~ The RES obligation shall be calculated as follows:

RES Obligation = Sum of sales to retail end-use customers for the compliance interval × the RES-REC percentage for the compliance interval.

Table 1. Compliance Intervals and REC Percentages

Compliance Intervals	REC Percentage
~~2012 through 2014~~	~~20~~
~~2015 through 2017~~	~~24~~
~~2018 through 2019~~	~~28~~
2020 and annually thereafter	33

§ 97006. Monitoring, Verification, and Compliance

(C)(2) RES Annual Progress Information

(1) Number of WREGIS certificates retired for reporting year by facility identification number; ~~and~~

(2) Amount of sales to retail end-use customers for reporting Year; and

(3) progress towards the following procurement targets:

Compliance Targets	REC Percentage
2012 through 2014	20
2015 through 2017	24
2018 through 2019	28
2020 and annually thereafter	33

- *Amend Section 97004(a) to reiterate the requirement that a RES REC must be generated within the WECC to be eligible for RES compliance.*

RES-RECs must be tracked by the WREGIS system and generated within territory of the Western Electricity Coordinating Council to be eligible to satisfy the requirements of section

97004. Consistent with the definition of "eligible renewable energy resource" in section 97002(a)(8), RES-RECs used for compliance with this Article may only be acquired from:

- *Delete Section 97004(d) because counterparties to RES-REC transaction with a partially exempt entity may not be aware of that entity's partially exempt status. In addition, a partially exempt entity may be a co-owner of an otherwise eligible resource, and Section 97004(d)(4) could render the entire output of the renewable resource ineligible for the RES.*

~~(d)(4) RECs generated or procured by a Regulated Party operating under the partial exemption in subsection 97003, are not eligible for sale, banking or trading.~~

- *Add Section 97006(b)(3) to provide greater consistency with the existing RPS program and allow MJUs to submit integrated resource plans consistent with Public Utilities Code Sec. 399.17:*

(3)A multi-jurisdictional utility may, in lieu of submitting an achievement plan pursuant to subsection (2), will submit a report using an integrated resource plan prepared in compliance with the requirements of another state utility regulatory commission, that is submitted to the CPUC pursuant to Public Utilities Code Section 399.17(d), if that report also includes information regarding the status of efforts toward the procurement of renewables to satisfy the RES, or provided that the multi-jurisdictional utility supplements the report submitted to the CPUC to address the procurement of renewables required to meet the RES.

- *Add Section 97006(d)(4)(C) to clarify that an enforcement action will not be invoked until after the cure period, and violations will not accrue while the regulated entity is working towards curing the compliance deficiency.*

(C) If CARB commences an enforcement action against a regulated entity, a violation of the provisions in this Article will only be calculated as of the end of the year following the compliance interval, and only in instances where the regulated entity has failed to diligently pursue the procurement efforts reflected in its progress reports.

- *Add Section 97006(d)(4)(D) regarding ARB's review and verification of compliance to provide greater certainty regarding enforcement possible enforcement actions.*

(D) The ARB will verify compliance and provide notice to any regulated entity that is not in compliance with ninety (90) days of the submission of any compliance plan or report. The regulated entity will then have thirty (30) days within which to respond to any assertion of non-compliance by the ARB.

- *Amend Section 97009(b)(2) regarding enforcement to provide greater consistency with the existing RPS program:*

(b)(2) If a Regulated Party fails to retire a sufficient number of WREGIS certificates to meet its RES Obligation by the date specified in section 97004, there is a separate violation of this Article for each required WREGIS certificate that has not been retired by the Compliance Deadline. There is also a separate violation for each day or portion thereof after the Compliance Deadline that each required WREGIS certificate has not been retired. Prior to commencing any enforcement action against a regulated entity under this Article, ARB will coordinate with the CPUC to avoid unnecessary administrative costs to ARB and the CPUC so there will not be duplicative enforcement proceedings twice penalizing a common set of circumstances.

- *Amend Section 97010 regarding Treatment of Confidential Information to create advanced determinations of confidentiality similar to existing RPS rules:*

Information submitted pursuant to this article may be claimed as confidential. A Regulated Party shall designate such information as confidential at the time it is submitted and shall describe the basis for such designation. Information claimed as confidential shall be handled in accordance with the procedures specified in Cal. Code Regs., title 17, sections 91000 – 91022. Upon request, the ARB may issue advanced determinations of confidentiality such that a regulated entity is not required to assert confidentiality in every report, plan or compliance filing submitted in accordance with this Article.