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Via Email to jcostant@arb.ca.gov and jblakesl@arb.ca.gov

Mr. Jon Costantino
Manager
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Re: Southern California Public Power Authority Comment on April 17, 2009 Draft Proposed Regulation Establishing Administrative Fees for Sources of Greenhouse Gas Emissions

Dear Mr. Costantino and Ms. Blakeslee:

The Southern California Public Power Authority ("SCPPA") appreciates this opportunity to comment on the April 17, 2009 draft Proposed Regulation to Establish Administrative Fees. The April 17, 2009 draft differed from the February 19, 2009 draft and the concepts presented at the January 27, 2009 workshop by adding a significant new feature: the April 17, 2009 draft would apply an administrative fee to imported electricity.

As explained at the April 20, 2009 workshop on the new draft, the primary perceived benefit of extending the fee to electricity imports is that the pool of emission sources that would be reached by the administrative fee would be expanded by approximately 12 percent. However, there is a cost to extending the fee to cover electricity imports. Applying the fee to imports could result in litigation over the legality of the administrative fee, potentially delaying the collection of administrative fees.

SCPPA members support AB 32 and the Air Resources Board ("ARB") efforts to implement the statute. In order to avoid the legal complexities that might result from extending the administrative fee to electricity imports, SCPPA recommends that the staff return to the more cautious approach that was reflected in the earlier draft of the proposed regulation and desist from extending the fee to imported electricity.

If, contrary to SCPPA's recommendation, the staff elects to issue an Initial Statement of Reasons ("ISOR") that would extend the administrative fee to imported electricity, SCPPA recommends that the ISOR contain a comprehensive discussion of all factors and arguments that the staff views as supporting the legality of extending the administrative fee to imported electricity. Additionally, the staff should expand the proposed revisions to the mandatory greenhouse gas ("GHG") emissions reporting regulations to allow full reporting of wholesale sales of out-of-state electricity to out-of-state entities to assure that the administrative fee will be applied only to net megawatt hours that are actually imported into California. Likewise, the staff should revise the proposed regulation to assure that the administrative fee will not be levied on electricity that is imported into California and subsequently commingled with utility system supplies for sale to out-of-state entities.

I. THE ARB SHOULD AVOID ADOPTING AN ADMINISTRATIVE FEE THAT INVITES LITIGATION THAT COULD IMPAIR THE SUCCESSFUL IMPLEMENTATION OF THE AB 32 PROGRAM.

SCPPA and its members are strongly supportive of California's leadership role in reducing greenhouse gas emissions. SCPPA members are committed doing their part to assure that AB 32 emission reduction goals are met. For example, Pasadena recently adopted a 40 percent renewable portfolio standard. The Los Angeles Department of Water and Power ("LADWP") has been widely applauded for its singular efforts to attain a 35 percent renewable portfolio standard by 2020. Other SCPPA members such as Burbank and Riverside have adopted a 33 percent renewable portfolio standard.

Consistent with their support for GHG emission reduction efforts, the SCPPA members support an administrative fee that would assure that AB 32 implementation and administration costs are adequately and appropriately funded. However, it would be counterproductive to attempt to expand the scope of the fee beyond the bounds that are permitted by law.

As previously proposed by staff, the ARB administrative fee would apply to four fuels--gasoline, diesel, coal, and natural gas--that are consumed in California, and the fee would apply to process emissions from refineries and cement manufacturers in California, but the fee would not apply either to electricity that is generated in California or to imported electricity. Under the April 17, 2009 draft, however, the fee would be extended to cover imported electricity, but the fee would still not apply to electricity generated in California. On its face, the administrative fee as now proposed appears to be discriminatory against imported electricity in favor of in-state electricity.

The extension of the fee to cover imported electricity but not electricity generated in California may violate the Commerce Clause of the United States Constitution. The Commerce Clause provides for federal regulation of interstate commerce. (U.S. Const., art I §8, cl. 3.) The courts have recognized that "this affirmative grant of authority to Congress also encompasses an implicit of 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute* (1989) U.S. 324, 326, fn 1. If a state regulation discriminates on its face against out-of-state businesses, then it is *per se* unlawful under the Commerce Clause: "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.* (1986) 476 U.S. 573, 579.

The facial discrimination against imported electricity in favor electricity that is generated in California exposes imported electricity to bearing a double burden. Among the states, California is the recognized leader in adopting and implementing GHG emissions reduction legislation and regulation, and California is the leader of the Western Climate Initiative ("WCI"), which includes states and provinces that are likely to be the source of electricity that is destined for importation into California. If California were to adopt an administrative fee as designed in the April 17 draft regulation, California's WCI Partners would be likely to follow California's lead. That would result in WCI Partners imposing administrative fees on facilities that burn coal. Thus, electricity that is generated at coal-fired generation stations in, for example, Utah or New Mexico, would bear the burden of the host state's administrative fee plus the burden of the administrative fee imposed by California. Adherence to the dormant Commerce Clause ban on facial discrimination against out-of-state businesses, in this case, electricity generation, would avoid the potential for this double burden.

In order to avoid the legal complications that could arise from adopting a fee that may violate the Commerce Clause and to avoid the practical inequities that could result from adopting such a fee, SCPPA recommends that the ARB staff revise the April 17 draft to revert to the February version and eliminate the application of the administrative fee to imported electricity. If, contrary to SCPPA's recommendation, the staff elects to include imported electricity in the ultimately proposed regulation, SCPPA recommends that the staff include in the ISOR a comprehensive discussion of the legal bases for proposing an application of the administrative fee that appears on its face to violate the Commerce Clause.

II. IF THE ARB STAFF CONTINUES TO EXTEND THE ADMINISTRATIVE FEE TO IMPORTED ELECTRICITY, THE STAFF SHOULD PROPOSE A REVISION OF THE MANDATORY RECORDING REGULATIONS TO ASSURE THAT THE FEE APPLIES ONLY TO ELECTRICITY THAT IS ACTUALLY IMPORTED INTO CALIFORNIA.

In the section of the April 17draft regulation that would apply the administrative fee to imported electricity, there is a provision that would apply the fee to "values reported under the Mandatory Reporting Regulations." Proposed Regulation, p. 18, §95203(e). This could lead to the fee being applied to electricity that is generated outside of California and consumed outside of California without having any contact with California whatsoever. Under §95111(b)(3)(Q) of the Mandatory Reporting Regulations, a retail provider such as the SCPPA members is required to provide the "facility name, ARB designated facility ID, generating unit ID as applicable, percentage ownership share at the facility level, ownership share of the generating unit level as applicable, and net powered generated in the report year (MWH)…." As a result, a SCPPA member that participates in a generation facility such as the Intermountain Power Project ("IPP") in Utah is required to report its share of the power generated at IPP.

If a portion of the retail provider's share of electricity that is generated at, for example, IPP during the year is sold at IPP to an out-of-state wholesale buyer, the retail provider is permitted to report the sale and have the sold megawatt hours deducted from the retail provider's share of the power generated at IPP *only if* the out-of-state sales to the out-of-state entities were power that could not be delivered to the retail provider due to congestion on the transmission system, or the retail provider did not need the power for reasons unrelated to reducing the retail provider's responsibility for GHG emissions. Section 95111(b)(3)(R) of the Mandatory

Reporting Regulation contains the provision that limits the retail provider's reporting of wholesale sales at out-of-state facilities to out-of-state entities:

> 1. Wholesale sales (MWh) made by the retail provider or on behalf of the retail provider from the facility or unit to counterparties located outside California where:
>
>   i. 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 or;
>
>   ii. 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, 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).

The provision restricts the reporting of out-of-state sales to out-of-state entities so that electricity that is generated at a unit like IPP would be attributed to a retail provider even though the electricity had no nexus with California whatsoever. The provision should be eliminated from the Mandatory Reporting Regulations if the administrative fee is to be applied to imported electricity on the basis of "values reported under the Mandatory Reporting Regulations." The provision unduly restricts the reporting of wholesale sales that are made outside of California to out-of-state entities so that the sales cannot be fully subtracted from a retail provider's share of electricity that is generated at an out-of-state facility such as IPP. Such and undue restriction could lead to the administrative fee being imposed on electricity that is generated and consumed entirely outside of California.

III. IF THE ADMINISTRATIVE FEE IS TO BE EXTENDED TO IMPORTED ELECTRICITY, THE DRAFT PROPOSED REGULATION SHOULD BE REVISED TO ASSURE THAT THE FEE WILL NOT APPLY TO IMPORTED ELECTRICITY THAT IS PART OF THE MIX OF ELECTRICITY THAT IS INCLUDED IN SYSTEM SALES TO OUT-OF-STATE ENTITIES.

If the administrative fee is to be imposed on imported electricity, the draft proposed regulation should be revised so that the fee will not apply to imported electricity that is included in the mix of electricity that is sold for consumption out-of-state when a retail provider such as a SCPPA member makes a system sale of electricity to an out-of-state entity such as, for example, Portland General Electric. The Mandatory Reporting Regulations permit an importer of electricity to exclude power that is "wheeled through" California. Section 95111(b)(1)(C) provides:

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

However, electricity that is imported and then included in system supply for subsequent sale through a wholesale sale of system supply to an out-of-state entity is not power that is "wheeled through" California. Thus, it is not exempted from reporting under the Mandatory Reporting Regulations by applying Section 95111(b)(1)(C). The Mandatory Reporting Regulations should be revised to assure that administrative fees would not be assessed on imported electricity that is mixed with system supply for sale to out-of-state entities.

IV. CONCLUSION.

For the reasons discussed above, SCPPA recommends that the staff eliminate the provisions in the April 17, 2009 draft proposed regulation that would extend the administrative fee to imported electricity. If the staff allows those provisions to remain in the regulation that is ultimately proposed for adoption by the Board, SCPPA recommends that the staff include in the ISOR a full explanation of what the staff believes to be the legal justification for applying the administrative fee to imported electricity. Further, SCPPA recommends that the Mandatory Reporting Regulations be revised to eliminate the restriction on the ability of retail providers to report sales from out-of-state facilities to out-of-state buyers, and that the Mandatory Reporting Regulations be additionally revised to preclude the application of the administrative fee to electricity that is imported into California but is then mixed with other electricity for sale as system supply to an out-of-state purchaser.

Respectfully submitted,

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