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VIA ELECTRONIC SUBMISSION

California Air Resources Board
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Re: Comments of PacifiCorp on the July 23, 2013 Mandatory Reporting Workshop for Electric Power Entities to Discuss Potential Updates to the California Regulation for the Mandatory Reporting of Greenhouse Gas Emissions

PacifiCorp respectfully submits these comments as requested during the July 23, 2013 Mandatory Reporting Workshop for Electric Power Entities to discuss potential updates to the California Regulation for the Mandatory Reporting (hereinafter referred to as the “Mandatory Reporting Rule” or “MRR”) of Greenhouse Gas Emissions.

Introduction

The purpose of these comments is two-fold: 1) to provide clarification regarding the treatment of greenhouse gas (“GHG”) costs as part of the California Independent System Operator (“ISO”) proposal for an Energy Imbalance Market (“EIM”) and how the ISO’s proposal may affect the MRR; and 2) to explain why ARB should not modify its rules to calculate systems emissions for systems above the default emission rate.

Energy Imbalance Market

Currently, the ISO is in the process of modifying and extending its existing real-time energy market systems to provide EIM service to PacifiCorp and its transmission customers. The EIM will be a voluntary market for procuring imbalance energy to balance supply and demand deviations from forward energy schedules through a fifteen minute market and five minute dispatch in the combined network of ISO and EIM Entities.¹

Concurrently, the ISO launched a stakeholder process to design an EIM that may be offered to other balancing authorities. On July 2, 2013, the ISO issued a 2nd Revised Straw Proposal for the EIM.² Because the EIM will be dispatched in the combined network of the ISO and EIM Entities, imbalance energy is expected to be imported into California at times and exported out of California at times. The imports into California would potentially trigger a compliance

¹ Under the ISO’s 2nd Revised Straw Proposal, EIM Entities are defined as the balancing authority that enters into the pro forma EIM Entity Agreement to enable the EIM to occur in its balancing authority area. See <http://www.caiso.com/informed/Pages/StakeholderProcesses/EnergyImbalanceMarket.aspx>

² <http://www.caiso.com/informed/Pages/StakeholderProcesses/EnergyImbalanceMarket.aspx>

obligation under the MRR and Cap-and-Trade program for resources participating in EIM. Accordingly, in section 3.12 of its 2nd Revised Straw Proposal, the ISO included a proposal associated with treatment of greenhouse gas emission costs for imports into California.

In the 2nd Revised Straw Proposal, the ISO describes its proposal as follows:

In order to achieve an efficient dispatch of resources inside the EIM area and comply with CARB requirements, the EIM dispatch algorithm will evaluate the differences in GHG costs that these resources incur so that the energy from among a number of resources with different GHG emission rates may be differentiated.³

As currently proposed, EIM participating resource scheduling coordinators will be required to supply the ISO with the emission factors, by resource, for the purpose of dispatching single resources within the EIM. Participating resources that bid into the EIM may be dispatched on a resource-specific basis, with those going into California taking into account such associated GHG costs. However, the ISO's proposal does not currently contemplate that individual resource-specific e-Tags will be created for EIM imports into California.

As described in the 2nd Revised Straw Proposal:

The current CARB methodology for determining the GHG obligation for imports relies on the import quantity listed on the corresponding e-Tag. As described in section 3.7.6. of this paper that addresses Interchange Meter Data, the Market Operator will create e-Tags as part of the interchange checkout between the ISO and the EIM Entity. The dynamic interchange capacity between the ISO and an EIM Entity BAA will be tagged at the aggregate interchange level, *but individual e-tags for imports and exports at the resource level will not be created.* Alternatively, to facilitate GHG reporting under the EIM, the ISO will calculate the output of each EIM Participating Resource that is imported to California. *This amount will be reportable to the CARB as part of an annual emissions data report and will be the basis of the GHG compliance obligation.* The approach for determining the energy from each EIM Participating Resource that is imported to the ISO is described in detail further below.⁴

Resources that will bid into the EIM will do so on a resource-specific basis, and will be dispatched on a resource-specific basis. However, creating e-Tags for each individual resource would be burdensome, requiring the update of over 100 additional e-Tags per hour. These are

³ 2nd Revised Straw Proposal at 65.

⁴ 2nd Revised Straw Proposal at 67 (emphasis added).

dynamic e-Tags which, unlike static e-Tags, require real-time personnel to update the energy values on each e-Tag within 60 minutes after the end of the delivery hour. This would significantly increase work load for all entities listed on each e-Tag. As a result, the ISO has proposed to separately calculate the amount of energy imported into California by each participating resource as part of the EIM.

The dynamic interchange capacity between the ISO and an EIM Entity balancing authority area will be e-Tagged at the aggregate interchange level. This means that there will be one e-Tag, submitted by the purchasing-selling entity (“PSE”) using the transmission path reservation, that will represent all EIM flows into California for each path. This PSE will obtain the actual energy transferred on the path from the ISO via a scheduling coordinator. Accordingly, to implement ISO’s proposal, the MRR may require modification: EIM imports, and therefore first deliverers for EIM purposes, should be identified based on data provided by the ISO and should *not* be identified based on the aggregate EIM e-Tag. Accordingly, ARB will still receive information regarding the quantity and origin of EIM energy imported into California, however, the information will come from the ISO.

PacifiCorp is interested in engaging ARB and the ISO in further discussions regarding specific language changes that may be necessary in order to accommodate the EIM.

System Emission Factors

In the July 23 workshop, ARB indicated that it intends to propose changes to the MRR to calculate emission rates for system power for systems with an emission factor above the default rate. This would suggest that PacifiCorp’s system power would be given a higher emissions rate as source, unspecified or otherwise, than would emissions of other sellers in out of state markets. PacifiCorp understands that ARB shall calculate system power emission factors, and staff advised those attending the workshop that they could estimate the emission factor that ARB could eventually assign PacifiCorp’s power from publicly available information. In addition, ARB staff indicated that if an energy transaction was executed on the Intercontinental Exchange⁵ vs. directly with PacifiCorp the same system power generated by PacifiCorp “surplus system energy” would be given a default emission rate rather than a PacifiCorp specified emission factor. This was also said to be the case for transactions executed through brokers.

Bilateral Wholesale Market & EIM

At the outset, PacifiCorp offers a clarification regarding the relationship between the bilateral market and the EIM. Unspecified resources may not be bid into the EIM. As just described, EIM is the economic dispatch of specified resources based on their individual location and characteristics (including a GHG component) on a five minute basis. In contrast, the sellers in the bilateral market generally make system sales which are not resource specific and are calculated using a system GHG default rate. Accordingly, the development of system emission factors has no impact whatsoever on the EIM dispatch.

⁵ <https://www.theice.com/homepage.jhtml>

Impact on Wholesale Market

PacifiCorp continues to have significant concerns regarding what is increasingly becoming ARB's attempt to regulate wholesale power markets in the West and ARB's attendant lack of authority over those wholesale power markets, inside and out of California. Allowing or requiring the use of system emission factors for some subset of (or all) entities in the West is discriminatory and has the effect of setting a different price for the energy from one specific wholesale market participant versus another. It also creates a situation where each wholesale product must be tracked from source to sink. Because wholesale market products are generally from unspecified resources and not differentiated by system, the application of system emission factors has the potential to cause a significant shift in the entire market. It is therefore highly likely that ARB's shift toward system-specific pricing will result in unintended consequences.

PacifiCorp understands ARB's motivation and shift toward system emission factors. Indeed, this approach may be consistent with the Staff intent respecting the MRR and the cap-and-trade program, which is specifically designed to ensure a carbon price is incorporated into commodity pricing. As will be described in detail below, ARB does not have the jurisdiction or authority to regulate imported power or electricity importers, or to modify the bilateral wholesale market to accommodate system-specific pricing.

Further, it is problematic that ARB does not currently have an effective enforcement mechanism for ensuring that system-specific or resource-specific emission factors are consistently applied or claimed. This again would require greater jurisdiction over the wholesale energy markets. ARB does not have the authority or jurisdiction to impose its program outside of the state of California or on the wholesale market.

The issue of "leakage" that ARB is attempting to address by calculating system emission factors is simply not one that ARB currently has the authority to resolve. ARB's regulations should recognize ARB's limited jurisdiction and not seek to regulate energy imports or importers. PacifiCorp recommends that the GHG obligation and cost associated with energy imports or importers be the obligation of the source (load) utilizing the energy. ARB has the authority to regulate costs and obligations associated with GHG in the state of California. The GHG obligation associated with energy that is imported into California should fall to the load in California and not be an obligation of the out of state energy importer. This could be achieved if ARB required all system power (include that from asset-controlling suppliers) be deemed unspecified and apply the default emission factor, regardless of the entity, into the economics of the entity purchasing the energy to serve load. Parties serving load in California would factor in the cost of the GHG associated with energy from out of state prior to purchasing the imported energy. Further detail regarding the legal basis for why ARB does not have authority over wholesale power markets or imported power is provided below.

Identification of Non-federal Asset-Controlling Supplier Power

Proposed section 95111(a)(5) clearly provides for an asset-controlling supplier (ACS) power claim to be identified through the first line of the physical path of the e-Tag "specifying the generation control area" of the ACS, with the exception of "path-outs" for the Bonneville Power

Administration (BPA) as an ACS. Without qualifying or limiting comments here and elsewhere regarding (i) ARB's jurisdiction over imported power, (ii) equal protection of laws, or (iii) use of e-Tags. concerning power imports, but speaking here with respect to the goal of providing clear rules, ARB should clearly articulate in its rules that only two elements need to be met for an ACS power claim- (a) the power contract is with the ACS legal entity or purchaser from the ACS legal entity, and (b) the ACS generation control area is the first line of the physical path of the e-Tag. For example, an ACS entity should not be permitted to say that the same ACS control area source can have different factors for different buyers that may be directly contracting with that ACS, depending, for example, if the ACS entity is selling from its ACS or non-ACS "portfolio."

ARB Jurisdiction

The MRR intrudes on an area of regulation subject to the exclusive jurisdiction of FERC. The Federal Power Act vests in FERC exclusive jurisdiction over, among other things, the rates, terms, and conditions for the sale of electric energy in instate commerce. *See, e.g.*, 16 U.S.C. §§ 824(a), 824d (2006); *New York v. FERC*, 535 U.S. 1 (2002). Indeed, FERC recently itself held that although it lacks jurisdiction over sales of renewable energy certificates (RECs) standing alone, it has jurisdiction over RECs and allowances when bundled with energy otherwise subject to FERC's jurisdiction. *See, e.g., WSPP Inc.*, 139 FERC ¶ 61,061 (2012) (finding that (1) an unbundled REC transaction that is independent of a wholesale electric energy transaction does not fall within FERC's jurisdiction under sections 201, 205 and 206 of the FPA, but that (2) a bundled REC transaction, where a wholesale energy sale and a REC sale take place as part of the same transaction, does fall within FERC jurisdiction under FPA sections 205 and 206, as to both the wholesale energy portion of the transaction and the RECs portion of the transaction, and regardless of whether the contract price is allocated separately between the energy and RECs). Further, FERC has also held that, if a wholesale sale of electric energy by a public utility requires the use of an emissions allowance, that sale, and the cost of allowances in connection with it, is subject to review under FPA section 205. *Id.* at P 23 (citing *Edison Elec. Inst.*, 69 FERC ¶ 61,344 at 62,289 (1994) and explaining that such a sale or transfer of an emissions allowance may "affect" the rates a utility charges "for or in connection with" jurisdictional service, which triggers FERC jurisdiction under the language of Section 205 of the FPA). FERC also found in the *Edison Electric* order that, if the sale or transfer occurs independent of a sale of electric energy for resale in interstate commerce, it is outside of FERC review under FPA Section 205, unless a public utility seeks to flow through the costs in its wholesale rates. *Id.*

The adoption and use of system emission factors for entities outside California interferes with FERC's regulation of interstate energy transactions because it effectively imposes a different mechanism for pricing wholesale transactions. Legal precedent is clear that state laws cannot interfere with or frustrate federal laws. *See, e.g., Printz v. U.S.*, 521 U.S. 898, 913 (1997) (noting that all state officials have a duty to enact, enforce, and interpret state law in such fashion so as not to obstruct the operation of federal law, and that all state actions constituting such obstruction, even legislative acts, are *ipso facto* invalid); *Felder v. Casey*, 487 U.S. 131, 138 (1988) ("any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.") (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)); *see also De Canas v. Bica*, 424 U.S. 351, 357 (1976) ("Of course, even state regulation designed to protect vital state interests must give way to paramount federal legislation.").

FERC has exclusive jurisdiction over wholesale markets. In exercising that jurisdiction, FERC would not be enforcing California's GHG rules or laws. Furthermore, short of an act of congress, FERC's jurisdiction over wholesale power markets is not a substitute for ARB's jurisdiction. While ARB does not have the authority to regulate and enforce wholesale market activities, FERC similarly does not have the authority to regulate or enforce California law. Therefore, unless new laws are passed by the United States congress, neither ARB nor FERC have the ability to regulate and enforce a multi-state cap-and-trade program.

Conclusion

PacifiCorp appreciates the opportunity to submit these comments and is also available to discuss the issues addressed herein with ARB staff if doing so would be constructive.

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Respectfully submitted,

By

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