

April 15, 2011

VIA ELECTRONIC MAIL

Mr. Paul Jacobs
Chief of Mobile Source Enforcement
California Air Resources Board
1001 I Street
Sacramento, California 95814
pjacobs@arb.ca.gov

Re: Comments of PacifiCorp on the California Air Resources Board Draft Enforcement Policy pursuant to Senate Bill 1402

Dear Mr. Jacobs,

PacifiCorp offers the following comments on the *Draft Enforcement Penalties: Background and Policy* prepared by the California Air Resources Board (“CARB”) pursuant to Senate Bill 1402 (hereinafter “Enforcement Policy”).

PacifiCorp is California’s only multi-jurisdictional utility, providing retail electric service in six states (including California). As such, PacifiCorp faces a unique compliance obligation under CARB’s programs—in particular, the programs and regulatory obligations implemented under Assembly Bill 32 (“AB 32”)—and is concerned that the Enforcement Policy lacks clarity with respect to how it would be applied to the AB 32 measures that have not yet been finalized by CARB. Furthermore, PacifiCorp recommends that CARB establish two enforcement tiers: a less formal process for minor compliance and reporting violations, and a more formal process for serious, intentional program violations. Finally, CARB should provide a notice and opportunity to cure for enforcement issues, towards the purpose of securing full compliance prior to engaging in any penalty processes. PacifiCorp urges CARB to make a revised draft of the Enforcement Policy available for public comment before the Enforcement Policy is finalized.

I. BACKGROUND

PacifiCorp is a multi-jurisdictional retail provider (“MJRP”) that provides retail electric service to approximately 1.7 million retail customers located within the states of California, Idaho, Oregon, Utah, Washington and Wyoming. In California, PacifiCorp serves approximately 46,500 customers in Del Norte, Modoc, Shasta and Siskiyou counties. Approximately 35 percent of its California customers are eligible for PacifiCorp’s California Alternate Rates for Energy (“CARE”) low-income assistance program.

PacifiCorp’s unique regulatory challenges are highlighted in the context of the cap-and-trade program, which contains provisions specific to MJRPs. Depending on the outcome of the regulatory requirements flowing from AB 32, PacifiCorp may be directly responsible for

surrendering greenhouse gas (“GHG”) emissions allowances by virtue of serving California retail load, regardless of the fact that it has no generation facilities in California that emit greenhouse gas. PacifiCorp would then be required to participate in the cap-and-trade auctions in order to procure the allowances required to meet its cap-and-trade compliance obligation. PacifiCorp’s interest in clarifying the Enforcement Policy falls primarily within the context of this compliance obligation and other requirements under Assembly Bill 32.

II. DISCUSSION

A. The Enforcement Policy lacks clarity with respect to how it would be applied to AB 32 programs.

Final rules are not yet available for PacifiCorp to determine how the AB 32 programs may be impacted by the draft Enforcement Policy, which contemplates violations of emissions limits for criteria pollutants at stationary sources and mobile source emissions requirements. The Matrix of ARB Regulations and Corresponding Penalties included in Appendix B of the “Proposed Enforcement Penalties: Background and Policy” document released for public comment on February 25, 2011 includes the AB 32 mandatory GHG reporting requirements – presumably because a “violation” of the reporting requirements would subject the named violator to the penalty policy. This presumption is indicative of the lack of specificity over applicability of the penalty/enforcement policy that is of primary concern to PacifiCorp.

Programs such as the cap-and-trade and mandatory greenhouse gas reporting regulations constitute an entirely different type of regulatory paradigm than other CARB programs, under which violations and enforcement actions are largely determined on a more prescriptive and long-standing set of regulations and/or permit limits. The mandatory GHG reporting requirements themselves pose a particular challenge in making a determination of how enforcement and penalties under the proposal at hand would be implemented. For example, an entity may unintentionally overstate its greenhouse gas emissions, resulting in a material misstatement and subsequent an adverse verification from its third-party verifier. In such a circumstance, strict application of the Enforcement Policy, based on a strict liability standard, appears to be punitive and against the goals of CARB’s penalty policy, which is to provide leadership in implementing and enforcing air pollution control regulations and ensure that decisions are based on the best possible scientific and economic information.

PacifiCorp strongly recommends that CARB clarify how it would apply the Enforcement Policy to AB 32 programs. CARB should hold a workshop to focus on this particular issue and release revised draft provisions of the Enforcement Policy applicable to the cap-and-trade and other AB 32 requirements for further public comment.

B. CARB should create two enforcement tracks to differentiate treatment of minor violations from more serious, intentional violations.

PacifiCorp urges CARB to create two enforcement tiers. One tier would consist of relatively minor violations, where there is an indication that the entity made a good faith effort to comply, the deviation from compliance is administrative and/or minor, and there is no significant environmental harm. The second tier should be reserved for entities that fail to show an intention to comply with the regulatory requirements, such as those who show little or no progress toward fulfilling compliance obligations or who are clearly and significantly violating CARB regulation or statutes.

Creating two compliance tiers will force CARB to consider the severity of the violation when contemplating penalties and helps ensure a potential penalty stays reasonably commensurate with the violation. Such guidance would be highly appropriate within the context of the mandatory reporting regulation, where an unintentional oversight that leads to a failure to report one metric ton of GHG emissions could theoretically result in millions of dollars in penalties when multiplied by per-day and per incident penalties. In addition, having two compliance tiers should help reserve CARB's administrative burden of processing enforcement actions for the more severe violations, while minor violators would more easily and quickly be able to meet compliance.

C. CARB should provide advance notice of enforcement action, with sufficient opportunity to cure.

While the Enforcement Policy provides some discussion of how and when violators would be notified of a violation, it is unclear that there would be sufficient notice and therefore the reasonable opportunity to cure a violation prior to the assessment of a penalty. In its final draft of the Enforcement Policy, CARB should (1) establish that violating entities will be given advance notice of the pending enforcement action and be allocated a sufficient period of time to resolve the violation, and (2) specifically address how curing a violation would indeed mitigate or address the potential enforcement action. PacifiCorp feels that these changes would encourage entities to promptly resolve outstanding compliance issues prior to engaging in strict formal enforcement proceedings, and therefore avoid incurring higher costs and administrative burden for both the regulated entity and the CARB staff.

III. CONCLUSION

PacifiCorp appreciates the opportunity to provide these comments on the Enforcement Policy. PacifiCorp urges CARB to conduct a workshop to discuss how the Enforcement Policy should be applied to AB 32 programs and address the other issues discussed above. Following that workshop, CARB should make a revised draft of the Enforcement Policy available for public comment before the Enforcement Policy is finalized.

If you have any questions on these comments or require any additional information, please contact Cathy Woollums (Senior Vice President of Environmental Services and Chief

Comments of PacifiCorp
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Environmental Counsel at MidAmerican Energy Holdings Company) at (563) 333-8009 or
CSWoollums@midamerican.com.

Thank you for your consideration of these comments.

Dated: April 15, 2011

Respectfully submitted,

By

A handwritten signature in black ink, appearing to read "Eric Chung". The signature is written in a cursive, flowing style with a long horizontal stroke extending to the right.

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