M E M O R A N D U M

TO: California Air Resources Board Staff

FROM: Modesto Irrigation District
Redding Electric Utility
Turlock Irrigation District

SUBJECT: May 4, 2012 Public Meeting Regarding Compliance Requirements For First Deliverers Of Electricity

DATE: May 11, 2012

The Utilities

Modesto Irrigation District ("MID"), Redding Electric Utility ("REU"), and Turlock Irrigation District ("TID"), collectively the "Utilities,"[1] provide these comments on the May 4th, 2012 Public Meeting to Discuss Compliance Requirements for First Deliverers of Electricity ("Electricity Workshop"). The Utilities continue to support efforts to implement AB 32 in a manner that protects California's economy and ratepayers, and we appreciate staff working with stakeholders at the Electricity Workshop.

Introduction and Summary

CARB's regulation of the electricity sector presents numerous complicated issues, and it was clear at the Electricity Workshop that the program should be improved in certain areas. We request that staff address two areas that are of great importance to the Utilities: (1) coordination of the new 33% Renewable Portfolio Standard ("RPS") and Cap-and-trade programs, and (2) clarity regarding the resource shuffling provisions.

As currently conceived, the RPS Adjustment would set a hurdle in the burgeoning renewable energy markets by imposing a Renewable Energy Credit ("REC") retirement timeframe that is

[1] MID, REU, and TID are local publicly owned electric utilities. MID and TID are irrigation districts located in the Central Valley, while REU is a municipal utility within the City of Redding. MID serves approximately 113,000 electric customers with a peak load of over 600 Megawatts (MW). REU serves 42,000 customers with a peak load of 253 MW. TID serves about 100,000 electric customers with a peak load of approximately 600 MW. The Utilities maintain similar resource mixes, including hydroelectric, eligible renewable resources and fossil fuel sources.

inconsistent with the REC banking provisions in SB 2(1X). CARB should not require retirement of a REC in an annual compliance period, and instead should remove this requirement until the RPS and cap-and-trade program can be harmonized.

The Utilities are also concerned about the "resource shuffling" provisions for a number of reasons. First, the requirement is currently much too vague for the Utilities to authorize the execution of any attestation. Second, the requirement may discourage actions with GHG emission reduction benefits, particularly with respect to optimizing wholesale transactions and resources to minimize the GHG burden associated with an existing portfolio. The Utilities request that CARB specify a mechanism such as an advisory letter process or a regularly updated guidance document that will provide all regulated entities with greater clarity regarding the effect and intent of the resource shuffling provisions.

Discussion

1. **The RPS Adjustment Should Be Carefully Coordinated With RPS Program Development At Other Agencies, Including The Publicly Owned Utilities.**

The RPS Adjustment allows regulated entities to avoid a GHG emissions compliance obligation for electricity imported under a firming and shaping agreement into a California Balancing Authority Area. While the Utilities generally support this provision, we are concerned with the requirement in Section 95852(b)(4)(B), which provides:

> The RECs associated with the electricity claimed for the RPS adjustment must be used to comply with California RPS requirements during the same year in which the RPS adjustment is claimed.

Section 95852(b)(4)(B) is problematic because it will require regulated entities to retire their RECs in the same annual compliance period that the renewable generation actually occurred. Under the Mandatory Reporting Regulation, a regulated entity must report emissions for all imports that occurred within the previous calendar year, and the reported and verified emissions will form the basis for the regulated entity's annual compliance obligation. Thus, under Section 95852(b)(4)(B), in order to claim the RPS adjustment, the RECs must be retired in the same year that the regulated entity reports the emissions attributable to the import.

The Utilities are concerned that this Section is inconsistent with the new 33% RPS law (SB 2(1X), which allows RECs to be retired within the Western Renewable Energy Generation Information System ("WREGIS") and applied later in the multi-year compliance periods. To avoid the conflict, the Utilities request that CARB delete this subsection, and continue to work with the agencies responsible for RPS implementation, such as the CEC, CPUC, and the publicly owned utilities. One of the primary goals of the coordination should be to establish a mechanism to recognize the renewable imports, but not restrict the ability of utilities to manage their RPS compliance instruments by forcing the retirement of WREGIS Certificates by a particular date.

The mandatory annual retirement should not preclude the Utilities' ability to bank REC's for future compliance.

The need for greater coordination among CARB and the agencies responsible for RPS implementation is underscored by the fact that the RPS program is still in the early stages of development. Key issues like REC retirement and banking have not been resolved, as evidenced by the CEC's recent direction to Stakeholders in the draft RPS Eligibility Guidebook: "RPS Procurement for 2011 should not be retired or reported until the sixth version of the *RPS Eligibility Guidebook* is finalized, which will provide instructions on reporting 2011 and later data."[2] Until the agencies responsible for developing the RPS program are able to work through issues like retiring and banking RECs through WREGIS, CARB should avoid imposing rules that directly conflict with and limit the implementation of California's 33% RPS program.

2. CARB Should Provide a Public Mechanism to Respond to Stakeholder Questions Regarding Resource Shuffling.

The Utilities agree that an intentional act to commit resource shuffling purely to game the cap-and-trade market and avoid an emissions obligation should be discouraged. However, there are existing California statutes that encourage the delivery of zero emitting GHG resources (e.g., SB 2(1X)). At the May 4th, 2012 Electricity Workshop, staff stated that CARB must "prevent leakage," and seemed to suggest that unless there is an overall reduction in emissions throughout the regional WECC market, a utility's decision to replace the use of a resource historically serving its load would constitute prohibited resource shuffling.[3] CARB's presentation of the resource shuffling issue caused concern for many workshop participants because: (1) the resource shuffling provision lacks the clarity required by California's Administrative Procedures Act to protect against impermissibly vague regulations; (2) regulated entities must attest under penalty of perjury to not engaging in resource shuffling; (3) the requirement for net reductions in WECC-wide emissions could render countless wholesale market transactions unlawful; and (4) regulated entities may be prohibited from achieving the other goals of AB 32 (i.e., switching to lower carbon sources of power).

In light of these concerns, the Utilities request that staff re-assess its approach to Resource Shuffling and place these provisions in the proper context of AB 32 and the Administrative Procedures Act. First, AB 32 does not require CARB to "prevent leakage". Health and Safety Code Section 38562(b)(8) directs CARB to "minimize leakage." The distinction is important because CARB must balance leakage minimization with its other legislative directives. Other directives include minimizing the administrative burden of complying with the regulation, considering cost effectiveness, and achieving the overall AB 32 GHG emission reduction goal. [4]

---

[2] *Lead Commissioner Draft, Renewables Portfolio Standard Eligibility Guidebook, Fifth Edition.* California Energy Commission, Efficiency and Renewable Energy Division. Publication Number: CEC-300-2012-002-LCD, Page 109, available at: http://www.energy.ca.gov/2012publications/CEC-300-2012-002/CEC-300-2012-002-LCD.pdf.

[3] See Electricity Workshop presentation at Slide 18, available at: http://www.arb.ca.gov/cc/capandtrade/meetings/050412/may4electricityppt.pdf

[4] Health and Safety Code section 38562(b)(7).

By prohibiting otherwise-lawful wholesale power transactions that would allow an entity to switch from a historic, high-carbon content resource, the resource shuffling provisions may directly contradict the AB 32 objectives and create unnecessary confusion in the regional wholesale bulk power markets.

There is also potential for contradiction when a utility seeks to divest its interests in a high emitting resource or utilize lower emitting sources before divestiture can take place. If a utility seeks to switch to a lower emitting resource and still has an ownership interest in a high emitting resource, the utility will need the flexibility to sell the output of the high emitting resource in order to minimize impacts on the utility's ratepayers. Such can be the case if the utility is over-resourced. A utility may have a historical contract (i.e., before AB 32 adoption) in which the utility sells the higher emitting resource out-of-state in exchange for a lower emitting resource brought into the state. Decisions concerning contracts in existence prior to the passage of AB 32 must not be considered as resource shuffling. These resource decisions are economic in nature, and should be dictated by the carbon price signal put in place at the California border by the Cap & Trade Regulation. They are no different than how decisions about out-of-state procurement have historically been made. Further, early termination of such contracts should not be forced due to this provision. Underlying all of these scenarios is the concern that utilities will not be able to effectively reduce their reliance on high emitting resources under the current resource shuffling provisions.

Second, the California Administrative Procedures Act requires regulatory agencies to ensure that their regulations provide sufficient clarity.[5] A regulation does not meet the clarity standard if any one of the six conditions specified in 1 Cal. Code Reg. Sec. 16(a) is satisfied. For example, a regulation lacks clarity if it can be logically interpreted to have more than one meaning. A regulation can also lack clarity if the regulation presents information that is not readily understandable by persons directly affected.[6] Based on the significant questions posed by stakeholders at the Electricity Workshop, it is unequivocally clear that the Resource Shuffling provisions lack a sufficient degree of clarity as required by the Administrative Procedures Act. Absent correction, the deficiency may result in the regulation being set aside as void for its vagueness.

The Utilities appreciate staff's concern about the infeasibility of providing clarity by narrowing the definition of Resource Shuffling. However, in light of the clear legal need for clarity and consistency with the AB 32 emission reduction goals, examples should be provided and there

---

[5] See Govt Code Sec. 11349.1(a)(4).

[6] 1 Cal. Code Reg. Sec. 16(a) provides in full: "a regulation shall be presumed not to comply with the clarity standard if any of the following conditions exists: (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or (3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or (5) the regulation presents information in a format that is not readily understandable by persons "directly affected;" or (6) the regulation does not use citation styles which clearly identify published material cited in the regulation."

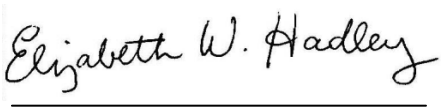
should be a discrete mechanism adopted whereby regulated entities can gain a better understanding of resource shuffling as new situations arise. At the Electricity Workshop, staff noted its willingness to meet with stakeholders on an informal basis, but indicated that staff will not provide advisory opinions or other publications on specific questions. The Utilities request that CARB reconsider this position. Informal stakeholder meetings will not allow regulated entities to gain sufficient conclusions within short time frames when the regulated entities must make real time decisions about transactions. Moreover, publicly available information – such as through a guidance document - about a variety of circumstances and permissible transactional structures will provide the best basis for regulated entities to understand the scope and effect of the resource shuffling prohibitions. Absent such mechanisms, it is unlikely that covered entities will be able to execute the required attestations because legal counsel or governing boards will be unable to independently ascertain compliance based on the statute as currently written. Therefore, the Utilities request that CARB provide advisory opinions or a guidance document that is regularly updated as new situations arise to allow all stakeholders to see how various forms of proposed transactions and CARB's assessment of whether or not such proposals violate the Resource Shuffling prohibition.

Conclusion

The Utilities appreciate staff working with stakeholders on some of the especially thorny, but critical compliance issues surrounding California's regulation of the electricity sector. The Utilities request that CARB prioritize the issue of consistency with the developing 33% RPS Program in staff's list of issues to be resolved in 2012. In addition, the Utilities request that CARB rectify the vagueness problems with the Resource Shuffling provisions and provide a mechanism, such as an advisory opinion process or regularly updated guidebook that will provide all regulated entities with greater clarity regarding the effect and intent of the resource shuffling provisions. The Utilities look forward to working with staff on these and other issues relating to the electricity sector, and towards the successful implementation of AB 32.

Respectfully submitted,

Joy Warren
MODESTO IRRIGATION DISTRICT



Elizabeth Hadley
REDDING ELECTRIC UTILITY

Dan Severson
TURLOCK IRRIGATION DISTRICT

CC: Andrea Coon, WREGIS
Kate Zocchetti, Lorraine Gonzalez, CEC