CP Energy Marketing (US) Inc.
Suite 1200, 401 – 9th Avenue S.W.
Calgary, AB T2P 3C5
Canada
www.capitalpower.com

May 10, 2012

Submitted electronically to http://www.arb.ca.gov

California Air Resources Board
1001 "I" Street
Sacramento, CA 95814

To Whom it May Concern:

Re: Comments of CP Energy Marketing (US) Inc. pertaining to May 4, 2012 Cap-and-Trade Program Electricity Workshop.

CP Energy Marketing (US) Inc. ("CPEMUS") appreciates the opportunity to provide comments to the May 4, 2012 Cap-and-Trade Program Electricity Workshop.

CPEMUS strongly supports California's efforts to move forward with its cap and trade mechanism, and appreciates the efforts by the California Air and Resources Board ("ARB") to continue to hone and clarify its regulations to provide for a fair and robust market. CPEMUS believes that the success of the cap and trade program depends on creation of the broadest possible market. This can only be accomplished by ensuring that (1) all participants have a level playing field on which to compete and (2) the regulations are sufficiently clear so that market participants can engage in transactions with confidence that their actions will not create regulatory risk from after-the-fact interpretations.

CPEMUS offers these limited comments for ARB Staff's consideration:

1. The limitation on use of allocated allowances must be preserved to maintain a level playing field.

ARB Staff has solicited comments on whether to retain the existing limitation on use of carbon allowances by electrical distribution utilities set out in 17 C.C.R. § 95892(d)(5) ("Section 95892(d)(5)"). CPEMUS urges ARB to retain this requirement as a fair and effective way to maintain a level playing field for all first sellers of power.

Under the Cap and Trade regulations, all electric power distributed in California is subject to compliance requirements. This is true whether the power is generated in California, or whether it is imported into California from out of state. In either case, part of the price that must be considered is the cost of carbon.

Electrical distribution utilities within California – many of which also own generation – are also entitled to an allocation of carbon allowances that help reduce their overall compliance costs. Section 95892(d)(5) of the current regulations prohibits any electrical distribution utility (including municipal utilities not subject to regulation by the CPUC) from using allocated allowance value other than for the benefit of ratepayers consistent with the goals of AB32, and specifically prohibits using such allowances "to meet compliance obligations for electricity sold into the California Independent System Operator markets." By limiting the use of allocated allowances in this manner, the regulations insure that the price of power, including the cost of carbon, is considered in all market transactions, regardless whether the power is generated within California or from a source outside the state, and regardless of whether it is generated by an investor-owned utility, a public utility, a municipal utility, a cooperative utility, an independent generator, or other type of entity. Absent this rule, some electrical distribution utilities within the state that own generation would be able to subsidize their market transactions in a manner not available to other generators, particularly those located out of the state, creating an unlevel playing field. In a competitive market, even a small subsidy could be enough to skew the market, and drive out competition.

Certain affected parties suggest that Section 95892(d)(5) creates additional administrative burdens and requires entities to participate in the cap and trade market to acquire compliance instruments not otherwise needed. CPEMUS does not disagree that the program may add some administrative burden – but that is true for all participants, including sellers of power generated out of state and small generators within the state. To the extent the regulation drives entities to participate in the cap and trade market, it will help make the market more robust and more liquid; this should be considered a benefit, not a burden.

To ease the potential regulatory burden created by the rules, CPEMUS urges the ARB to provide additional clarity regarding the use of advisors to assist in meeting compliance obligations, even if such advisor is also participating in the market on its own behalf or advises multiple clients. Clarifying that advisors may be shared (and that an advisor may also participate in the market) without violating the regulations will allow small entities to share the administrative burden of compliance with the rules, reducing costs for all. For example, Section §95914(d)(2)(A) should be modified to make it clear that an advisor that also participates in the market on its own behalf (or advises more than one entity) will not violate the rule against coordinating bidding strategy among participants to the extent such advisor acts in good faith and is not engaged in any form of fraud, artifice or market manipulation.

2. Clarity regarding "resource shuffling" requirements and restrictions will increase regulatory effectiveness.

ARB has received several comments requesting clarity around the specific actions that may be considered resource shuffling under the regulations. Though ARB has provided a definition of resource shuffling and clear guidance that resource shuffling requires intent, interpreting what actions and *mens rea* constitute an intentional "plan, scheme, or artifice to receive credit based on emissions reductions that have not occurred," can be difficult for both ARB Staff and market participants. *See* definition of "resource shuffling" at 17 C.C.R. §95802(a)(251). This lack of clarity was readily apparent from comments made at the May 4 workshop.

ARB has created restrictions on resource shuffling in order to ensure a net reduction in greenhouse gas ("GHG") emissions, as required by AB32. To make these targeted reductions successful, market participants must understand and comply with the regulations. Willing market participants cannot accomplish consistent compliance without clarity about what the rules allow, and what the rules prohibit. Absent reasonable clarity, some participants may elect to simply withdraw from the market, or reduce their level of participation, out of fear of potential regulatory liability. Clear, consistent and specific guidance from ARB on compliance obligations and restrictions on resource shuffling is imperative for a robust market.

CPEMUS recognizes that it is not be possible for ARB staff to anticipate and specify the legality of every trade permutation before the fact, and CPEMUS appreciates ARB's willingness to work with stakeholders to help inform them of whether specific actions constitute resource shuffling (May 4, 2012 Cap and Trade Program Electricity Workshop, slide 23). CPEMUS suggests that this process be formalized through a "no-action" letter process under which an entity may obtain formal, written, and confidential guidance whether a proposed transaction would constitute resource shuffling. No-action-letters are frequently issued by other regulatory agencies, including the Federal Energy Regulatory Commission, the Commodity Futures Trading Commission and the Securities and Exchange Commission.[1] CPEMUS submits that adoption of a similar approach would allow ARB to provide clarity on the requirements of the regulations prior to actions being taken, which will increase the effectiveness of the regulations' targeted emissions reductions, decrease regulatory risk, and increase confidence and participation in the market.

3. The QE Adjustment should be eliminated because it complicates reporting and does not have a material impact on the accuracy of compliance calculations.

The current regulations include a "QE Adjustment" mechanism that is designed to recognize that power wheeled through California and power that enters California as part of a simultaneous out-of-state exchange (in which an equivalent quantity of power exits the state) does not have in-state GHG consequences that should be subject to the cap and trade regulations. However, the current regulatory language neither limits the QE Adjustment to simultaneous exchanges, nor captures all simultaneous exchanges that were meant to be included. (May 4, 2012 Cap and Trade Program Electricity Workshop, slide 28). To address this issue, ARB Staff has solicited comments as to whether the QE Adjustment should be maintained, eliminated or modified.

CPEMUS submits that the QE mechanism should be eliminated. Whereas simultaneous exchanges may occur from time to time, they are not likely to be a significant portion of the power imported into California. Creating a set of rules that adequately captures all facets of the policy, and could be applied whether or not imports are documented on NERC E-tags, would require the imposition of extensive tracking and record keeping requirements. Such requirements would create substantial additional burdens on ARB Staff and market participants, but only allow for a relatively minor net increase in the overall accuracy of compliance calculations. Thus, the QE Adjustment should be eliminated to avoid substantial burdens on reporting requirements for an insubstantial net benefit.

[1] *See* 17 C.F.R. § 202.1(d) (2005) (SEC); 17 C.F.R. § 140.99 (2005) (CFTC) and 18 C.F.R. § 388.104(a) (FERC).

Again, CPEMUS appreciates the opportunity to provide comments in connection with this matter and thanks ARB for its consideration of our comments.

Sincerely,

CP ENERGY MARKETING (US) INC.

Per: Z. Nagy-Kovacs

Zoltan Nagy-Kovacs
Senior Legal Counsel