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California Air Resources Board

1001 I Street

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**RE: May 4, 2012 workshop on Electricity Issues**

Dear Board Members:

San Diego Gas and Electric Company (SDG&E) appreciates the opportunity to submit these written comments concerning “Resource Shuffling,” a topic of the May 4, 2012 workshop. The resource shuffling provisions, as currently in the regulation, are vague, overly broad, and lack the necessary clarity for compliance entities to understand whether or not they have engaged in resource shuffling. The extent of confusion over what constitutes and what does not constitute Resource Shuffling was abundantly evident at the workshop. Stakeholders presented many different scenarios and asked staff for a ruling on whether or not each scenario was considered a violation of the provision. Although ARB staff responded to each scenario, since they also indicated that the language cannot be tightened without violating the Interstate Commerce Clause, very little comfort was given to compliance entities, whose actions are left to the interpretation of ARB’s enforcement section. It is important that resource shuffling provisions be unambiguous both to ensure that the regulation can stand up to claims that they are unconstitutionally vague, and to provide market participants with sufficient certainty to enable them to make the transactions needed to serve electric load in the state reliably and at least cost. Both of these may be frustrated if the provisions invite ARB enforcement to take a different view than the ARB staff crafting the regulation as to what constitutes resource shuffling.

SDG&E’s preference is to have the language changed to be precise, however if the definition of Resource Shuffling cannot be tightened, then there must be a procedure developed to assist both compliance entities and regulators in decision-making. Below SDG&E proposes that the regulation be modified to allow any transaction to be submitted to ARB for approval as in compliance with ARB’s resource shuffling provisions and that once approved, the transaction cannot be later deemed resource shuffling based on the same set of facts. In addition, ARB should develop a list of approved transaction types. As more transaction types are approved, ARB can post them on its website to provide guidance to compliance entities and ARB’s enforcement section.

1. **Detailed Discussion**
2. **Definition of Resource Shuffling**

The current definition is vague by referring to “emissions reductions that have not occurred.” “Emissions reductions” implies a comparison of emissions to some prior time and reference to the MRR in the attestation would indicate a comparison to the emissions intensity of some prior year sales to the California grid. At the workshop, it was indicated that resource shuffling included “cherry picking” – choosing a low emitting resource to import; “facility swapping” – an asset-controlling supplier choosing to sell the low-emitting generation to California, replacing it with a high-emitting resource from its portfolio; and “laundering” – hiding the identity of a high-emitting resource so that it becomes an unspecified resource. It would appear that ARB intends that a compliance entity can only lower the emissions intensity of its imports to California by building new low-emitting facilities or retiring existing high-emitting facilities; all other emissions reductions would be “resource shuffling.”

However, the ARB has made other determinations that are at odds with the definition as written. Specifically, compliance with California’s Emissions Performance Standard (EPS) (California Public Utilities Code Sections 8340-8341) might technically be a form of resource shuffling under the current definition since the high-emitting resource may still exist after contract termination, so that replacing it with a lower emitting generation as required by law may not result in an emissions reduction WECC-wide. But ARB has determined that compliance with the state law is not resource shuffling. Therefore, the definition should be expanded by adding a statement to reflect that compliance with state or federal laws or regulations does not constitute resource shuffling.

**(251) “Resource Shuffling” means any plan, scheme, or artifice to receive credit based on emissions reductions that have not occurred, involving the delivery of electricity to the California grid. Resource shuffling does not include changes in delivery of electricity pursuant to state laws and regulations or federal laws and regulations.**

The exception for the EPS raises other questions such as whether there are other exceptions to the strict standard, such as importing power that is the least cost. The cap-and-trade program puts a price on carbon and thus rewards low-emitting electricity generating resources. It encourages low-emitting resources from out-of-state to sell into California’s market to obtain higher profits if the electricity prices that include a carbon price exceed line losses in transporting power to California. Will economic decisions run afoul of the resource shuffling provisions? SDG&E believes that ARB should determine that all contracting decisions with a single generator or an asset-controlling supplier that are economic due to the imposition of the carbon price should be acceptable transactions.

1. **Safe Haven**

Since the resource shuffling definition is vague, compliance entities need a safe haven to avoid ARB enforcement where application of the Resource Shuffling provision is uncertain. For example, compliance with the EPS is not resource shuffling even though there may be no WECC-wide emissions reduction. ARB has also indicated that early compliance with the EPS is not resource shuffling, with early compliance meaning a termination of a long-term contract before the existing termination date. On the other hand, at the workshop it appears the implication is that a California entity with a long-term contract with a high-emitting resource would be resource shuffling if it sold the power out-of-state and replaced the power with unspecified imports from the same region. Such a transaction looks exactly like early termination (which is exempted from resource shuffling) except without the contract termination papers.

Another example of the uncertainty created by the current definition of “Resource Shuffling” is a case where an Energy Service Provider (ESP) is at the end of a 3 year contract with a high-emitting coal resource. If gas resources are cheaper than coal when the carbon price is included, would the ESP be guilty of resource shuffling by replacing the energy from the expired contract with supply from a different, lower emitting source? ARB should provide guidance by making a determination that such a transaction not resource shuffling to avoid an undesirable uneconomic outcome. The transaction looks exactly the same as the EPS, but is not covered by the EPS since the contract is less than 5 years. Under the current language, the transaction could be considered resource shuffling or not depending on ARB enforcement section interpretation. The definition of “Resource Shuffling” in the current regulation is too vague to provide market participants appropriate guidance on what is permissible conduct and so the regulation should be modified to provide compliance entities with a safe haven.

The regulation should be modified to allow compliance entities to be able to rely on ARB for guidance and not be subject to interpretation by ARB’s enforcement section. The enforcement branch will read the regulation and enforce it as they interpret it unless there is a specific provision that prevents such second guessing. SDG&E recommends the following be added to the section 95852(b)(2) of the cap-and-trade regulation to provide such protection.

**(2) Resource shuffling is prohibited and is a violation of this article. Compliance entities can request guidance from ARB on transactions and any transaction deemed acceptable by ARB cannot later be subject to an ARB enforcement action for resource shuffling based on the same set of facts.**

ARB should develop and post a list of acceptable transactions – transaction types that are not deemed resource shuffling – that can be relied on for short-term transactions. Such a list is required for compliance entities to have sufficient certainty to enable them to enter into acceptable short-term transactions since requesting guidance for each transaction is impractical given the potential volume of short-term electricity transactions.

The types of transactions that ARB should provide guidance on include those shown in the following table.

|  |  |
| --- | --- |
| **Type of Transaction** | **Reason Guidance Needed** |
|  |  |
| Sale of power by an entity that has not previously sold power to California | "Emissions reduction that has not occurred" does not seem to apply to an entity that has not previously sold power into CAISO markets since it has no baseline for “emission reductions” |
| Sale of power by Northwest hydro entities that sold to California in 1990 | "Emissions reduction that has not occurred" does not seem to apply to an entity that sold to CA in 1990 since the emissions would be the same as in the inventory and thus no emission reduction has occurred |
| Sale of power by asset-controlling entities | If an entity requests status as an asset-controlling entity, GHG of its power sales into California would be based on an emissions factor developed from the entity’s historical emissions intensity, "Emissions reduction that has not occurred" would not seem to apply since the factor would be based on historical emissions. |
| Purchase and import of economically beneficial power | If an importer buys low-emitting power from an out-of-state entity for economic reasons - lower cost due to the carbon price – it should be an acceptable transaction if the facility selling power would be determined not to have engaged in resource shuffling if it had directly imported the power to California. |
| Sale of power from an out-of-state high-emitting facility under contract to a CA entity due to transmission constraints and replacement with natural gas generation | Historically, there have always been some sales of power out-of-state due to transmission issues. "Emissions reduction that has not occurred" does not seem to apply if the sales out-of-state due to operational constraints are similar to what has occurred in the past. |

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c: Ms. Claudia Orlando

Mr. Bill Knox

Mr. Greg Mayeur

Ms. Mary Jane Coombs