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October 15, 2013

VIA ELECTRONIC SUBMISSION

Clerk of the Board
Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments of PacifiCorp on the September 4, 2013 Proposed Amendment to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms and the Mandatory Reporting of Greenhouse Gas Emissions

PacifiCorp respectfully submits these comments in accordance with the public notices issued September 4, 2013 on proposed amendments to the California Cap on Greenhouse Gas Emissions and Market Based Compliance Mechanisms ("Cap-and-Trade Program") and the California Mandatory Reporting of Greenhouse Gas Emissions ("Mandatory Reporting Rule" or "MRR").

Introduction

The purpose of these comments is three-fold: 1) to explain why ARB should not modify its rules to calculate systems emissions for systems above the default emission rate, 2) suggest re-evaluation and elimination of the Asset Controlling Supplier ("ACS") designation and replacement with specific contracts with emission factors that are tied directly to the generator or pool of generators; and 3) to provide some further clarification regarding the proposed modifications to the regulations as they relate to the California Independent System Operator ("ISO") proposal for an Energy Imbalance Market ("EIM").

System Emission Factors

Under proposed section 95111(b)(5) of the MRR, ARB proposes to calculate a system emission factor for all system power suppliers for use in determining emissions associated with system power. ARB also introduces a definition of system power in section 95102(451), which will apply in cases where the carbon intensity of the system power supplier's weighted average power output is greater than the default emission factor. Essentially, in adding this definition, ARB has created a new category wherein the requirements that currently apply to ACS entities will apply to entities whose system emission factor is greater than the default emission factor. However, instead of being voluntary, similar to the current ACS designation, this new category will be mandatory and will apply an emission calculation generated by ARB.

PacifiCorp continues to have significant concerns, further evidenced by the changes described above, 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 intent of the MRR and the Cap-and-Trade Program, which is specifically designed to ensure that a carbon price is incorporated into commodity pricing. However, 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 greenhouse gas ("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 ACS entities) 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.

Reconsideration of Asset-Controlling Supplier Power

Notwithstanding the jurisdictional limitation arguments set forth above, PacifiCorp respectfully suggests that CARB should revisit the ACS designation and rules in light of the ARB goals articulated in the proposed rulemakings and 2013 workshops. Specifically, ACS entities seem to be able to de-designate themselves as a specified source, and sell unspecified rather than specified power, in circumstances in which the generation providing entity of a specified source would not be able de-designate itself as a seller from a specified source with a mandatory emissions factor.

Under 95111(f) of the MRR, specific requirements are set forth related to ACS which includes the development of an ACS-specific emission factor. The following is required: 1) written contract, 2) identification of the resource in the contract, and 3) direct delivery to California. ARB now proposes an amendment to the definition of ACS that states: "Asset Controlling Suppliers are considered specified sources." This change effectively allows ACS entities to select whether they are providing a specified source or energy that is considered ACS energy. The ACS entity could make this choice even for generation coming from the same resource. This is problematic because it allows an ACS entity to sell the same generation, with the same emission profile, at different prices.

Proposed section 95111(a)(5) clearly provides for an 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[1]" for the Bonneville Power Administration (BPA) as an ACS. An ACS entity should not be able to distinguish if the generation is system or surplus but rather if it is an ACS all the generation should be part of the calculation to determine its emission factor. In addition, 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 portfolio or a non-ACS "portfolio" that is registered under the same legal entity or marketing agency. Further, the rules should not allow for an ACS entity to import specified or unspecified power into its balancing authority "sink the generation" and then by an effective de-designation or non-designation, regenerate ACS energy and sell it at a different emission factor. The lack of a transparent and clear method for calculation of the ACS emission factor only further exacerbates the potential that ARB will have difficulty enforcing its rules outside of California or the United States.

Currently, there are two ACS registered entities. PacifiCorp encourages ARB to eliminate ACS entities and require all parties to sell from a specified resource to obtain an emission factor that is not the default rate. To do otherwise results in resources outside of California that give a free premium pricing option to ACS entities that will impact overall wholesale pricing in the Western Electric Coordinating Council.

The ability of ACS entities outside of the state of California to determine whether the identical energy scheduled under identical circumstances does or does not have specified source characteristics or is unspecified power creates concerns and implications on wholesale pricing outside of California. PacifiCorp urges ARB to consider the elimination of ACS as a designation and implement stand-alone contracts, or pools of resources, consistent with the specified resource requirements, to minimize disruption in wholesale markets in the WECC.

ARB Jurisdiction

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[11] Path outs are excess power originally procured as part of U.S federal mandate to serve the operational or reliability needs of a U.S federal system but which are no longer required due to changes in demand or system conditions.

The MRR and Cap-and-Trade Program intrude on an area of regulation subject to the exclusive jurisdiction of FERC. The Federal Power Act ("FPA") 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.

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 15-minute market and five minute dispatch in the combined network of ISO and EIM Entities.[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. PacifiCorp expects the imports into California will trigger a compliance obligation under the MRR and Cap-and-Trade Program for resources participating in EIM. Accordingly, the proposed revisions to the MRR and Cap-and-Trade Program include revisions to the definition of Electricity Importer and Imported Electricity to account for energy imported into California as a result of EIM.

In general, PacifiCorp is supportive of the proposed modifications to accommodate the ISO's EIM proposal. However, PacifiCorp provides the below suggested modifications to the definitions to further increase clarity and consistency with the ISO's EIM proposal:

As proposed, the definition of Electricity Importers will be revised to include:

> EIM Participating Resource Scheduling Coordinators serving the EIM market whose transactions result in electricity imports into California.

PacifiCorp proposes the following revisions:

> EIM Participating Resource Scheduling Coordinators <u>which facilitate dispatch of EIM Participating Resources which</u> ~~serving the EIM market whose transactions~~ result in electricity imports into California.

This revision is proposed to ensure consistency with the current version of the ISO's EIM proposal, in which "EIM Participating Resource Scheduling Coordinator" and "EIM Participating Resource" are distinct terms and may be distinct entities. While an EIM Participating Resource may choose to also be the EIM Participating Resource Scheduling Coordinator for purposes of dispatching resources in the EIM, an EIM Participating Resource may also choose to engage another entity to be its Scheduling Coordinator. Also, technically the EIM Participating Resources are dispatched while the EIM Participating Resource Scheduling Coordinators facilitate that dispatch. The proposed modification clarifies these distinctions.

As proposed, the definition of Imported Electricity will be revised to include:

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[2] Under the ISO's Proposal, EIM Entities are is 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

> Energy Imbalance Market (EIM) dispatches designated by the CAISO's EIM optimization model and reported by the CAISO to EIM Participating Resource Scheduling Coordinators as electricity imported to serve retail customers load that is located within the State of California.

PacifiCorp proposes the following revisions:

> Energy Imbalance Market (EIM) dispatches ~~designated~~ instructed by the CAISO's EIM market operator ~~optimization model~~ and reported by the CAISO to EIM Participating Resource Scheduling Coordinators as electricity imported into ~~serve retail customers load that is located within the State of~~ California.

This revision is proposed to provide a simplification and clarification of the proposed language. In the EIM proposal, the terms "EIM dispatches" and "designated" are not used in the manner currently proposed in the revised definition of Imported Electricity. The ISO market operator instructs the dispatch of EIM Participating Resources. In addition, according to the way the optimization model is designed, the ISO market operator will only identify and report electricity imported into California where California is the final destination – it will not identify energy wheeled through California. Therefore the language "to serve retail customer load located within the State of California" is superfluous.

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.

Dated: October 15, 2013

Respectfully submitted,

By

/s/Mary Wiencke

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