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California Air Resources Board  
1001 "I" Street  
Sacramento, CA 95812

***Re: Comments of OLS Energy Chino, LLC on CARB's Proposed Amendments to the Cap-and-Trade Regulation***

OLS Energy Chino, LLC ("OLS") submits these comments on the proposed amendments to the California Cap-and-Trade Regulation ("Proposed Amendments") currently under consideration by the California Air Resources Board ("CARB"). OLS appreciates CARB's efforts to craft the new Section 95894, which would give effect to Board Resolution 12-33 by providing transition assistance to Legacy Contract Generators that are subject to contracts that do not provide a means to recover greenhouse gas compliance costs in accordance with Cap-and-Trade Program requirements ("GHG Compliance Costs"). However, as set forth in detail below, the definition of "Legacy Contract" requires further refinement in order for OLS and a small number of other combined heat and power ("CHP") Qualifying Facility ("QF") generators to obtain relief under the new Section 95894. They should be granted relief because they are subject to contracts that do not provide a means to recover GHG Compliance Costs, and they neither have had, nor will have, a meaningful opportunity to amend those contracts. In addition, for the reasons set forth below, OLS and similarly situated CHP QF generators operating under Legacy Contracts require transition assistance through the duration of their contracts, not only until the end of 2014. Further, OLS is a member of the California Cogeneration Council ("CCC") and fully supports the comments submitted today by the CCC.

Terms beginning with a capital letter not otherwise defined herein have the meanings set forth in the Proposed Amendments.

## **I. Background**

OLS operates a 30 megawatt ("MW") CHP QF generating plant located in Chino, California ("Chino Facility"), on the grounds of the California Institute for Men's correctional and rehabilitation facility ("CIM"). Since 1988, the Chino Facility has provided CIM with steam and power under a 30-year contract, which expires in 2018. In addition, the Chino Facility supplies Southern California Edison Company ("SCE") with 26 MWs of capacity and energy under a 30-year power purchase agreement that also expires in 2018 ("Chino PPA").

In 1998, SCE and OLS amended the Chino PPA to replace the standard short run avoided cost (“SRAC”) pricing provisions contained therein with unique pricing provisions negotiated and agreed-upon by the parties. The pricing amendment was executed to address issues specifically related to the Chino Facility and served as the basis for investment and finance decisions undertaken by OLS. As such, since 1998, energy sales between OLS and SCE have been governed by a QF contract with atypical pricing provisions (“Non-Standard QF Contract”).

As part of the Qualifying Facility and Combined Heat and Power Program Settlement Agreement, dated October 8, 2010, adopted by the California Public Utilities Commission (“CPUC”) in Decision 10-12-035 (“QF/CHP Settlement”), CHP facilities with standard legacy QF contracts were offered an amendment (“Legacy PPA Amendment”), which included SRAC pricing options for QFs paid under standard SRAC pricing. In contrast to the Non-Standard QF Contracts, the standard SRAC pricing under the legacy QF contracts are subject to adjustment by the CPUC from time to time. Integrated into each of the Legacy PPA Amendment standard SRAC pricing options were differing levels of recovery of GHG Compliance Costs. However, OLS and a small number of other CHP facilities with Non-Standard QF Contracts were not in a position to execute the Legacy PPA Amendment because their contracts have non-standard pricing terms, as opposed to standard SRAC pricing subject to adjustment by the CPUC from time to time. Executing the Legacy PPA Amendment would have required OLS and these other similarly situated CHP QF generators to forfeit their non-standard pricing terms. Because those non-standard pricing terms were the basis upon which OLS and these other generators had financed their CHP facilities, the losses that they would have incurred as a result of executing the Legacy PPA Amendment would have rendered the GHG cost recovery associated with the Legacy PPA Amendment meaningless, and OLS and these other generators would have been unable to meet their financial and operating obligations.

## **II. Recommended Changes to the Proposed Amendments**

### **A. Generators with Non-Standard QF Contracts Should Obtain Transition Assistance**

The definition of “Legacy Contract” included in the Proposed Amendments should be revised to make clear that the exclusion of contracts “already addressed under the Combined Heat and Power Program Settlement pursuant to CPUC Decision number D-10-12-035” does not exclude Non-Standard QF Contracts held by generators that could not execute the Legacy PPA Amendment. Under the QF/CHP Settlement, California’s investor owned utilities (“IOUs”), including SCE, agreed to allow CHP QF generators with existing QF contracts (defined as “Legacy PPAs” under the QF/CHP Settlement) to recover, through certain mechanisms approved as part of the QF/CHP Settlement, the GHG Compliance Costs imposed on their facilities by AB 32. The parties to the QF/CHP Settlement recognized that Legacy PPAs do not account for GHG Compliance Costs and that mechanisms providing for recovery of such costs were needed. Thus, the QF/CHP Settlement made available a single, pro forma standard amendment—the Legacy PPA Amendment—which, in part, provided options for such recovery. One uniform amendment would have been acceptable for all CHP QFs with Legacy PPAs if all CHP QF generators were equally positioned to execute it. However, as summarized above, they were not. CHP QF generators that had entered into Non-Standard QF Contracts prior to the QF/CHP Settlement, including OLS, had made investment and finance decisions based on facility-

specific, negotiated pricing provisions. If a CHP QF generator executed the Legacy PPA Amendment in order to receive compensation for its GHG Compliance Costs, it would also have been required to accept the new SRAC pricing provisions associated with the Legacy PPA Amendment. Simply put, the pricing options in the Legacy PPA Amendment, which were meant for QF contracts with standard pricing based on SRAC as set by the CPUC from time to time, do not reflect, and would effectively have abrogated, the unique pricing provisions included in some Non-Standard QF Contracts. As such, OLS and certain other holders of Non-Standard QF Contracts that had made investment and finance decisions based on unique pricing provisions were not in a position to execute a Legacy PPA Amendment.

Given that the Legacy PPA Amendment was inadequate for CHP QF generators with Non-Standard QF Contracts, those generators were not provided a meaningful mechanism or means to recover their GHG Compliance Costs from the IOUs. As such, CHP QF generators with Non-Standard QF Contracts, like OLS, are, and should be treated as “Legacy Contract Generators” and thereby afforded the benefits of the new Section 95894 included in the Proposed Amendments. However, the definition of “Legacy Contract” included in the Proposed Amendments is unclear with regard to whether Non-Standard QF Contracts are included or excluded from that term. The definition provides:

For purposes of this regulation, legacy contracts exclude contracts with a privately owned utility as defined in the Public Utilities Code section 216 (referred to as an Investor Owned Utility or IOU) for contracts already addressed under the Combined Heat and Power Program Settlement pursuant to CPUC Decision number D-10-12-035 . . . .

Because the Legacy PPA Amendment offered to CHP QF generators with Legacy PPAs was not a meaningful option for OLS and certain other generators with Non-Standard QF Contracts, the CPUC did not provide them with a viable means to recover GHG Compliance Costs. However it is not clear that CARB has captured the unique position of these CHP QF generators in its proposed language. Therefore, OLS respectfully requests that CARB modify the Proposed Amendments as follows:

- Add the following two definitions, shown with double underline, to the Proposed Amendments:

“Non-Standard QF Contract” means a contract that does not include standard pricing based on short-run avoided costs, as set and adjusted from time to time by the California Public Utilities Commission (CPUC).

“Legacy PPA Amendment” means the pro forma standard amendment that was offered, under the Combined Heat and Power Program Settlement adopted by the California Public Utilities Commission (CPUC) by Decision number D-10-12-035, to combined heat and power qualifying facility (QF) generators that had existing QF contracts.

- Modify the definition of “Legacy Contract” by adding the text shown with double-underline, below:

For purposes of this regulation, legacy contracts exclude contracts with a privately owned utility as defined in the Public Utilities Code section 216 (referred to as an Investor Owned Utility or IOU) for contracts already addressed under the Combined Heat and Power Program Settlement pursuant to CPUC Decision number D-10-12-035 but does not exclude generators with Non-Standard QF Contracts that did not execute a Legacy PPA Amendment . . . .

These additions clarify that CHP QF generators with Non-Standard QF Contracts will not be precluded from the relief granted by the New Section 95894. That result is fair and reasonable, because these CHP QF generators are subject to contracts that do not provide a reasonable means to recover GHG Compliance Costs, and they neither have had, nor will have, a meaningful opportunity to amend those contracts.

**B. Transition Assistance should be Provided through the Duration of Legacy Contracts**

Transition assistance should be provided to all CHP Facilities with Legacy Contracts through the duration of those contracts or until the date that Legacy Contracts are amended. Based on earlier drafts of the Proposed Amendments and information provided at the May 1, 2013 CHP workshop, OLS expected that transition assistance allocated to Legacy Contract Generators would be provided until the earlier of the expiration of the Legacy Contract and the date of an amendment of the Legacy Contract, if any (as such an amendment would render the facility no longer eligible for transition assistance). However, the Proposed Amendments limit transition assistance to 2013 and 2014 emissions associated with that portion of a generator’s output subject to the Legacy Contract. This significant change in policy leaves generators like OLS without a means to recover their GHG Compliance Costs during any year after 2014 and appears to be based on unrealistic expectations.

The “Summary of Proposed Modifications” states that limiting the transition assistance to 2013 and 2014 “appropriately recognizes those that have remaining legacy contracts concerns while maintaining a strong incentive to continue renegotiation.”<sup>1</sup> However, there is no reason or incentive for SCE to renegotiate the Chino PPA. While some generators may have had some success in renegotiating contracts, OLS would need to have some leverage or a trade-off to offer SCE. OLS has neither. Further, the modifications of Subsections 95870(e)(4) and 95891(f), providing a true-up calculation to lessen the industrial allocation to an industrial entity that is an Industrial Sector Legacy Contract Counterparty, provides no means for OLS to obtain relief because OLS’ host, CIM, is a rehabilitation and correctional facility, not an entity in the industrial sector. CIM receives no free allocation of allowances, and OLS bears all of the GHG Compliance Costs associated with its operation of the Chino Facility.

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<sup>1</sup> <http://www.arb.ca.gov/cc/capandtrade/meetings/071813/ctnotice0713.pdf>, at p. 17.

The Chino PPA was amended many years prior to the passage of AB 32. As such, OLS should not be penalized because its PPA with SCE does not have a provision that would enable recovery of GHG Compliance Costs. OLS and similarly situated generators should be provided transition assistance for the duration of their Legacy Contracts. Therefore, OLS respectfully respects the following changes to Section 95894(6)(d)(1):

- For  $A_{2015}$ , the calculation set forth in Section 95894(6)(d)(1) should include compliance year 2015, not just 2013 and 2014, and
- An additional equation should be incorporated into Section 95894(6)(d)(1) that would similarly calculate an allowance allocation for any given compliance year, starting with 2016.

### III. Conclusion

In accordance with the specific recommendations set forth above, OLS respectfully requests that CARB (i) revise the definition of “Legacy Contract” included in the Proposed Amendments and (ii) extend the transition assistance currently proposed for Legacy Contract Generators through the end of the Legacy Contract term or until the date that the Legacy Contract is amended. Further, OLS reiterates that it fully supports the comments filed today by the CCC.

Sincerely,

Date: August 2, 2013

/s/ Jerry R. Bloom

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