Brookfield

Brookfield Renewable Energy Group
Brookfield Energy Marketing LP
480 de la Cité Blvd
Gatineau, Québec J8T 8R3

Tel 819.561.2722
Fax 819.561.7188
www.brookfieldrenewable.com

Comments of Brookfield Energy Marketing LP ("Brookfield") to the California Air Resource Board on Proposed Changes the California Greenhouse Gas Cap-and-Trade Regulation

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I. Introduction

Brookfield appreciates the opportunity to submit comments on the proposed changes to the California Greenhouse Gas Cap-and-Trade Regulation (the "Cap-and-Trade Regulation"). Our comments are directed specifically at the language proposed for resource shuffling.

Brookfield supports the modifications proposed by CARB to the resource shuffling language in Section 95852 of the Cap-and-Trade Regulation to eliminate the attestation requirement as well as the addition of the safe harbors and specific examples that provide more clarity regarding the definition of resource shuffling. As described in more detail below, however, the regulations still remain silent in several key areas that need be addressed. Additional clarity must be provided by CARB through the Cap-and-Trade Regulation to allow the energy markets to operate efficiently and to avoid negatively impacting liquidity for imported power. Brookfield's concerns are as follows:

1) The Cap-and-Trade Regulation remains silent as to what extent the enforcement of resource shuffling activity could apply to historic procurement practices beyond the actions of the First Deliverer.
2) The proposed safe harbors focus only on conditions under which California utility legacy contracts of high emissions power might be diverted. It is still unclear whether or not market activities outside of this definition are considered resource shuffling.
3) The safe harbors defined for short-term trading activity contain vague language that creates too much uncertainty to be effective.

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4) The method through which resource shuffling "will be identified and investigated" is not explained in the regulation

II. The definition and enforcement of resource shuffling must be limited to the activities of the First Deliverer and not extend to other entities historical procurement patterns

Although the definition of resource shuffling states that *"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 undertaken by a First Deliverer of Electricity*…. it is unclear as to whether the CARB limits it definition of resource shuffling to the involvement in a scheme or artifice by the First Deliverer only or if the CARB intends to use historical procurement patterns performed by other entities that occurred prior to the importer procuring the energy as a baseline in determining whether a First Deliverer has engaged in resource shuffling. Brookfield believes that any definition of resource shuffling must be limited to the First Deliverer's actions. Anything beyond that exposes First Deliverers that are buyers of power to risks that cannot be controlled or mitigated. As the proposed regulations currently stand, First Deliverers are taxed with an unfair burden of due diligence to evaluate whether or not the historical procurement patterns that occurred previously do not fall into the definition of resource shuffling. If CARB takes into consideration the actions of the entity from whom the First Deliverer procures energy from in assessing whether resource shuffling has occurred, it would be necessary and prudent for the First Deliverer to complete a detailed review of the activities and historical patterns of such entity. It would be very difficult for a First Deliverer to determine with any certainty whether such activities have occurred. Due to confidentiality reasons, it is very unlikely that the entity from whom the First Deliverer is procuring energy from would allow the First Deliverer access to the records necessary to complete this review. Indirectly imposing such a burden on the First Deliverer is not only unreasonable and outside of current market practices, but could also have the effect of hindering the import of legitimate clean energy into California and disputing legitimate business activities.

Without further clarity, the regulation as it stands could deem any purchase of power, even short-term purchases, as possible subject to resource shuffling enforcement action. Consequently, a First Deliverer

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should only be held accountable for its own portfolio and historical procurement patterns and should not be held liable for the historical actions of suppliers further up the transaction chain. We propose the following changes to the definition of resource shuffling to achieve this goal.

> *"Resource Shuffling" means any plan, scheme, or artifice directly undertaken by a First Deliverer of Electricity to substitute electricity deliveries from sources with relatively lower emissions for Electricity deliveries from sources with relatively higher emissions resources to reduce its emissions compliance obligation.*
>
> *Resource shuffling does not include substitution of electricity deliveries from sources with relatively lower emissions for electricity deliveries from sources with relatively higher emissions resources when the substitution occurs pursuant to the conditions listed in section 95852(b)(2)(A).*
>
> *A determination of whether or not an entity has engaged in resource shuffling, whether for enforcement purposes or otherwise, shall be limited to the market transactions directly initiated by the First Deliverer. For the avoidance of doubt, any determination of resource shuffling shall not consider any actions or behavior engaged in by parties other than the First Deliverer.*

If CARB is unable or unwilling to exclude historic procurement practices of entities other than the First Deliverer from its determination of resource shuffling activity then the regulation must be modified to explain in detail how procurement patterns would be utilized and for what timeframe. Also, more scenarios will need to be added to the list of safe harbors to provide market certainty. To that end, Brookfield recommends a one year time limit be enacted for evaluation of historical procurement patterns and the addition of a new safe harbor that exempts new incremental contracts for energy.

Therefore entities that do not have existing contracts or that do not exit existing contracts cannot be deemed to have resource shuffled as they are not changing historical behavior or substituting power.

The task of modifying the regulation to an extent that would allow the market to function properly under these ambiguous conditions will be extremely burdensome for CARB. Consequently, if these requirements are left unaddressed the result will be continued market uncertainty and paralysis. The

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best solution is for CARB to focus on what it can control through its jurisdiction which is actions performed by the First Deliverer only.

III. Brookfield requests CARB propose specific contract language that if included in a bilateral contract or a pre-certification option that will ensure a buyer will not be held liable for other entities' resource shuffling activities

As noted above, Brookfield is very concerned that the existing regulations would permit CARB to pursue enforcement action against a First Deliverer for resource shuffling due to the actions of the seller or supplier that may occur further up a chain of market transactions. If CARB intends to expose buyers to scrutiny for actions taken by entities other than the First Deliverer, then guidance must be provided by CARB which will allow First Deliverers to protect itself from consequences as a result of these actions. Brookfield proposes three possible solutions which would address this concern.

1) CARB approved language that bilateral counterparties can include in their contracts that ensures that power sold does not meet the definition of resource shuffling. For example, the seller would certify to the buyer that low emissions power is being sold and that it is not replacing energy from a high emissions facility that previously served California load or that the low emissions power being sold is in excess of the load serving entities' load serving obligations The First Deliverer would request specific representations from its counterparties that would allow the First Deliverer to import purchased power with the comfort that such import would not constitute resource shuffling. If this language is included in a bilateral contract and signed by the parties the First Deliverer would not be held liable by CARB for resource shuffling activities specific to that particular energy transaction. If the First Deliverer were able to rely on these CARB approved representations, then it would be relieved from having to complete an unreasonable level of due diligence.

2) Tri-party agreement signed by CARB, First Deliverer, and supplier that confirms that the market transaction is certified as a resource shuffling safe harbor.

3) Provide suppliers an avenue through CARB to pre-certify their power as resource shuffling free. The seller could then provide this signed certification to the buyer and this certification could

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continue to stay with the chain of market transactions that might result from the original source.

Under all three options proposed above no further proof would be required for carbon reporting verification.

Brookfield recommends CARB institute a stakeholder process immediately whereby the alternatives we suggest above and others can be further explored and developed. This is critical to provide buyers and sellers an alternative to avoid resource shuffling. Currently, the only way for buyers to avoid the risk of resource shuffling in its entirety is to stay out of the market.

IV. If CARB is solely concerned about resource shuffling of high emissions resources the regulation should be explicit and/or a specific list of impacted contracts be provided to the market

The current language suggests that CARB is only concerned with resource-shuffling of high emissions resources. The existing safe harbor provisions focus only on conditions under which California utility legacy contracts of high emissions power might be diverted and do not provide any clarity for market transactions outside of this definition.

If CARB is only concerned about resource shuffling of high emissions resources as the regulation seems to indicate, then Brookfield requests the language explicitly state this fact and include a list of impacted fuel types. To go even further, and provide more assurance to the market, CARB could list specifically the contracts and companies that hold those contacts that cannot be changed that fall within the definition that is alluded to in the regulation. The market is aware of most of these contracts so why not explicitly name them and limit the definition of resource shuffling to market transactions around these specific facilities.

If CARB is concerned with other market transaction types additional specific conditions must be included to the safe harbors as well as transactions types not allowed under the resource shuffling definition. Since there will always be market transactions that fall outside of the scenarios that CARB could list in the regulation there must be an avenue for a market participant as we describe above, to get pre-approval for these market transaction.

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Brookfield realizes that this process could be very onerous but unless the definition of resource shuffling is narrowed significantly there will continue to be a larger burden placed upon the CARB to resolve the market uncertainties.

V. New proposed additions to the safe harbor language in 95852 (b)(2)(A)(9)for electricity imported under short-term contracts is problematic and should be deleted

In order for the markets to function efficiently there must be a clear safe harbor defined for short-term trading activities. The language designated below that is proposed to be added to section 95852 (b)(2)(A)(9) is ambiguous, problematic, and opens up an unknown range of possibilities that could deem a short-term transaction as part of a resource shuffling scheme. It is unclear how sales of other similar resources would be compared to or even be relevant towards evaluating a specific market transaction as part of a resource shuffling scheme. Even worse is the addition of the wording "other factors" that will be unknown and cannot be controlled by the First Deliverer. We propose this language be deleted from the proposed regulation.

In evaluating these short term deliveries of electricity, ARB will consider the levels of past sales and purchases from similar resources of electricity, among other factors, to judge whether the activity is resource shuffling.

VI. CARB must define in the regulation what comprises a linked activity as it is used in Section 95852 (B)(2)(a)(10)

Short-term transactions and contracts for delivery of electricity with terms of no more than 12 months are included as a safe harbor unless, as the regulation states, "such activity is linked to the selling off of power from, or assigning of a contract for, electricity subject to the EPS rules from a power plant that does not meet the EPS with which a California Electricity Distribution Utility has a contract, or in which a California Electricity Distribution Utility has an ownership share…."

CARB must be clear in the regulation as to what comprises a linked activity for this safe harbor to be of any value. Again, this raises concern as to whether the linked activities referenced herein are activities performed by the First Deliverers themselves or by another entity. The ambiguous reference to linked

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activities could potentially expose a First Deliverer to risks that are beyond its control and continued concerns regarding liability for resource shuffling due to another parties' actions.

VII. A transparent process is needed for the investigation and enforcement of resource shuffling activity.

CARB must include in the regulation what methods will be used to identify resource shuffling activities and what process would be followed to investigate a First Deliverer once the activity is identified. This should include a time limit for notification by CARB once potential resource shuffling activities are identified (i.e. within 30 days of identification) a timeline for responses from the First Deliverer to produce necessary data and documentation, and a timeline for when the total investigation must be completed. Once an investigation is completed next steps should be identified. The regulation is completely silent on this detail which is problematic as it appears there are no bounds around what could happen and in what timeframe.

VIII. Conclusion

The development of resource shuffling language that provides sufficient clarity to provide market certainty continues to be a challenge. The more ambiguous and broad the language remains the larger the burden that will be placed on CARB to resolve market uncertainties as well as increased exposure to legal challenges.

In summary our recommendations are as follows:

- Clarify that the First Deliverer will not be held liable for resource shuffling performed by a supplier or another power entities historical action that occurred further up a market transaction chain
- Narrow definition of resource shuffling to be specific to the lay-off of high emissions power and include impacted fuel types and possibly companies and contracts
- Provide a channel either through bilateral contracting language or pre-certification to allow buyers and sellers to manage resource shuffling risk
- Address problematic language in the regulation is it pertains to safe harbors for short-term transactions to allow the market to operate efficiently

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- Provide a transparent process for how resource shuffling will be identified and investigated

Brookfield appreciates the opportunity to submit comments and recommends that CARB adopt the recommendations outlined herein.

Respectfully,

Margaret Miller
Director of Western Regulatory Affairs
margaret.miller@brookfieldrenewable.com
(916) 673-3082