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Via Electronic Submission:

http://www.arb.ca.gov/lispub/comm/bcsubform.php?listname=ghgreductfund13&comm_period=N

April 24, 2013

Hon. Mary D. Nichols, Chairman
California Air Resources Board
1001 "I" Street
Sacramento, CA 95814

Subject: PE-Berkeley, Inc.'s Comments Regarding the Draft Cap-and-Trade Auction Proceeds Investment Plan: Fiscal Years 2013-14 through 2015-16

Dear Madame Chairman:

PE-Berkeley, Inc. (hereinafter, "PEB"), a 22.47 megawatt ("MW") cogeneration power plant located in Berkeley, California, and Olympus Power, LLC, the asset manager of PEB, appreciate the opportunity to provide these comments regarding the California Air Resources Board ("CARB" or the "Board") and the California Department of Finance's draft Cap-and-Trade Auction Proceeds Investment Plan: Fiscal Years 2013-14 through 2015-16 (the "Investment Plan").¹ The Investment Plan is an important part of CARB's implementation of the Cap-and-Trade Regulation ("Regulation") pursuant to the Global Warming Solutions Act of 2006 ("AB 32").

I. Introduction

The Investment Plan provides important recommendations to the Legislature for investments using cap-and-trade allowance auction proceeds. As noted throughout the Investment Plan, any potential investment must further the goals of AB 32 by, among other things, maximizing the economic, environmental and public health benefits to the state, fostering job creation by promoting in-state greenhouse gas ("GHG") emissions reduction projects, and complementing efforts to improve air quality. The Investment Plan specifically recommends that the energy efficiency and clean energy sector receive a significant allocation of auction proceeds.

As described below, combined heat and power ("CHP") facilities are a reliable and highly efficient energy source that are important to the State's ability to meet its AB 32 goals and investment in such facilities would adhere to the statutory directives of AB 1532,² SB 535,³

¹ Available at:

<http://www.arb.ca.gov/cc/capandtrade/auctionproceeds/DraftCapandTradeInvestmentPlan.pdf>

² AB 1532, the Greenhouse Gas Reduction Fund Investment Plan and Communities Revitalization Act, circumscribes CARB's use of auction revenues for GHG mitigation projects and requires multiple agencies,

and AB 32. Given the importance of this energy efficient technology, PEB believes that it is appropriate that CHP facilities subject to long-term, fixed-price (i.e., legacy) contracts be identified in the Investment Plan as a type of project that should receive an allocation of allowance auction proceeds. While PEB is hopeful that CARB will adopt the necessary regulatory amendments to address this issue, providing interim relief to such CHP facilities is consistent with the investment criteria provided in the Investment Plan. In making such a request, PEB does not seek in any way to profit from the receipt of such funds, but to simply be made whole for unrecoverable costs associated with PEB's legacy contract.

II. Background

PEB supplies thermal energy (i.e., heat in the form of steam) to the University of California-Berkeley ("UC-Berkeley" or the "University") and electric power to Pacific Gas & Electric Company ("PG&E") under separately memorialized long-term agreements. PEB entered into the contract with UC-Berkeley in 1987, nearly two decades before the California Legislature passed AB 32 and, consequently, well before the State ever contemplated the regulation and abatement of GHG emissions. As a result, PEB's contract with UC-Berkeley does not provide for the pass-through of GHG costs associated with compliance with the Regulation, despite the fact that UC-Berkeley is the end user of PEB's steam and is in the best position to reduce its energy use and resultant GHG emissions. PEB's contract with UC-Berkeley does not expire until 2017.

While the Board directed CARB staff to "develop a methodology that provides transition assistance to covered entities that have a compliance obligation cost that cannot be reasonably recovered due to a legacy contract" and to "return to the Board with proposed regulatory amendments in mid-2013,"⁴ it is expected that CARB will not adopt the necessary amendments to the Regulation to address this issue until October 2013 or, potentially, as late as mid-2014. Given this likely timing, PEB could very well not receive any regulatory relief by the November 1, 2014 deadline for PEB to submit its annual compliance obligation to CARB.⁵ Thus, until the Regulation is amended to fully address legacy contracts, it is entirely appropriate for CHP facilities, such as PEB, to receive transition assistance on a case-by-case basis in the form of allowance auction proceeds.

including CARB, to develop an auction revenue investment plan consistent with AB 1532's project eligibility criteria.

³ SB 535 requires that the AB 1532 investment plan allocate at least 25% of the CARB auction revenues to provide benefits to disadvantaged communities and at least 10% to fund projects located within disadvantaged communities.

⁴ CARB Resolution 12-33, at 3 (September 20, 2012).

⁵ See Tit. 17, Cal. Code Regs. §§ 95855, 95856(a), (d). A covered entity's annual compliance obligation equals 30% of emissions with a compliance obligation reported from the previous data year. A covered entity must surrender its annual compliance obligation by November 1st of the calendar year following the year for which the emissions were reported and the obligation calculated. Accordingly, PEB must surrender allowances equivalent to 30% of its 2013 emissions by November 1, 2014.

III. The Investment Plan Should Recommend That CHP Facilities Subject To Legacy Contracts Receive Allowance Auction Proceeds

The draft Investment Plan recommends that the energy efficiency and clean energy sector receive a significant allocation of allowance auction proceeds, as “the energy sector represents the second largest portion of GHG emissions and California will need to improve energy efficiency . . . to achieve GHG reduction targets.”⁶ In particular, the Investment Plan suggests that the California Energy Commission (“CEC”) and the California Public Utilities Commission (“CPUC”) modify or develop program criteria to provide grants or incentives to industrial energy efficiency projects.⁷ As described below, because CHP lowers demand on the electricity delivery system, frequently reduces reliance on traditional energy supplies, and reduces GHG emissions and criteria pollutants, CHP facilities subject to legacy contracts should receive allowance auction proceeds.

CHP, also known as cogeneration, is the concurrent production of electricity or mechanical power and useful thermal energy (heat) from a single source of energy. By capturing and utilizing heat that would otherwise be wasted, CHP is more efficient than traditional separate electricity generation and heat production, thereby using less fuel and emitting lower levels of GHG and criteria pollutants. As a consequence, CARB’s Climate Change Scoping Plan relies on CHP for reducing 6.7 million tons of GHGs (CO₂ equivalent basis) and recommends constructing 4,000 MW of additional CHP.⁸ Further, the CPUC, the CEC, and CARB all recognize that CHP is an important part of reducing GHG emissions.⁹ Indeed, it is “***the policy of the state to encourage and support the development of cogeneration*** as an efficient, environmentally beneficial, competitive energy resource that will enhance the reliability of local generation supply, and promote local business growth.”¹⁰

As discussed throughout the rulemaking for the Regulation, a limited number of CHP facilities in California are parties to long-term contracts with no available pass-through mechanism for allowance costs related to steam supply. As noted above, in the case of PEB, it entered into a contract to supply steam in 1987 (well before carbon emissions regulations were even contemplated). While PEB is hopeful that CARB will adopt the appropriate regulatory amendments to fully address this issue, given that CHP is one of the most cost-effective methods of reducing GHG emissions and advances California’s lofty energy and environmental policy goals, it is appropriate for the Investment Plan to recommend that CHP facilities subject to legacy contracts receive allowance auction proceeds.

⁶ Investment Plan, at 28.

⁷ *Id.*, at B-11.

⁸ CARB, Climate Change Scoping Plan, at 44 (December 2008).

⁹ CPUC Decision, 10-12-035, at 38 (December 16, 2010) (citing CPUC Decision D.08-10-037, at 237-38; CARB, Climate Change Scoping Plan, at 43-44; and CEC 2009 Integrated Energy Policy Report, at 97-98); *see also* CPUC Decision R.06-04-009, at 104 (October 22, 2008) (“Overall, we support the identification of CHP as already included in ARB’s Draft Scoping Plan. This is primarily due to the ability of CHP to reduce overall GHG emissions by producing two products (heat and electricity) with one fuel input. Classifying CHP as an emission reduction measure would complement the market demand for less GHG-intensive electricity.”)

¹⁰ Pub. Utilities Code, § 372(a) (emphasis added).

If PEB is not provided the necessary relief, its facility may be forced to shut down, which would require UC-Berkeley to operate its older, less-efficient boilers—that emit higher levels of GHG and criteria pollutants—in order to provide steam to the University’s campus. In such an event, it would take several years, with no assurance of success, to site and build a new facility in the Berkeley area to replace PEB. As a result, there is a substantial risk of backsliding on CARB’s air pollution goals, if auction revenue is not provided to such facilities. The Investment Plan’s recommended investments “provide substantial co-benefits, such as reducing air pollution, improving public health and helping achieve air quality standards.”¹¹ Increased operation of the University’s higher polluting boilers would undoubtedly undermine this important investment principle. Thus, providing relief to PEB through an allocation of auction proceeds would ensure that PEB can continue operations, thereby avoiding any potential increase in air pollution from operating the likely alternative energy source (UC-Berkeley’s boilers) and furthering the key investment principles outlined in the Investment Plan.¹²

IV. Conclusion

CHP is an integral part of reaching AB 32’s benchmark of reducing statewide GHG emissions to 1990 levels by 2020. However, CHP facilities subject to legacy contracts face enormous unrecoverable costs due to the Regulation with no corresponding benefit of GHG emissions reductions, due to the University (the end user of steam) not experiencing any change in its energy costs. Further, if PEB is forced to close and is effectively replaced by the University’s boilers, corresponding GHG emissions would certainly increase. While PEB is hopeful that CARB will provide the necessary regulatory amendments to address legacy contracts, PEB respectfully requests that the Investment Plan include a recommendation that CHP facilities subject to legacy contracts receive allowance auction proceeds in the interim. Finally, absent such relief, any new CHP investments in California will likely be discouraged given the material risk of economic harm created by this type of regulatory uncertainty.

Respectfully submitted,



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P.E. Berkeley, Inc.



Sean P. Lane
General Counsel and Secretary
Olympus Power, LLC

cc: George Haley, Esq., Counsel to P.E. Berkeley, Inc.
Peter H. Weiner, Esq., Counsel to Olympus Power, LLC

¹¹ Investment Plan, at 29.

¹² See *id.*, at 33 (“Investments should focus on two broad project types: [1] Projects that achieve near-term GHG emissions reduction; [2] Projects that support the development of the transformative technologies/approaches needed to achieve the State’s long-term GHG emissions reduction goals and maximize air quality benefits.”)