Adrianna B. Kripke
Senior Environmental Counsel

San Diego Gas & Electric Company
8330 Century Park Court, CP32C
San Diego, CA 92123
Tel: 858-654-1536
akripke@semprautilities.com

January 4, 2016

California Air Resources Board
1001 I Street
Sacramento, CA 95812

Re: San Diego Gas & Electric Company's Comments on the Renewable Portfolio Standard Adjustment Following the December 14, 2015 Workshop on the Proposed Amendments to the Cap-and-Trade Regulation

Dear California Air Resources Board:

San Diego Gas & Electric Company (SDG&E) appreciates the opportunity to comment on the proposed amendments to the cap-and-trade regulation. Thank you for considering the following comments on the Renewable Portfolio Standard (RPS) adjustment in response to the December 14, 2015 workshop.

I. Introduction

SDG&E, Pacific Gas & Electric Company, and Southern California Edison Company presented concerns about potential changes to the RPS adjustment in their October 19, 2015 comment letter and in subsequent workshops. This letter explains how a plain meaning interpretation of the cap-and-trade regulation and mandatory reporting regulation for greenhouse gas (GHG) emissions (collectively, "Regulations") already protects against double counting and need not place an undue administrative burden on the California Air Resources Board (ARB).

The plain meaning interpretation also maintains the integrity of the cap-and-trade program and consistency with the federal Clean Power Plan. A different interpretation creates new reporting problems and is not necessary to determine actual electricity consumed by Californians. SDG&E hopes that this clarifying information facilitates ARB's ongoing implementation of the RPS adjustment, which plays an important role in reducing GHG emissions.

II. The Plain Meaning of the Regulations Already Protects Against Double-Counting

SDG&E shares ARB's commitment to maintaining the integrity of the cap-and-trade program by avoiding double counting when entities claim an RPS adjustment. Fortunately, the plain meaning of the Regulations already protects against this problem.

The cap-and-trade regulation states: "No RPS adjustment may be claimed for an eligible renewable energy resource when its electricity is *directly delivered*."[1] Under the mandatory reporting regulation for greenhouse gas emissions (MRR), directly delivered electricity includes electricity that "is scheduled for delivery from the *specified source*."[2] A specified source means "a facility or unit which is *permitted to be claimed* as the source of electricity delivered. The "reporting entity must have either full or partial ownership in the facility/unit or a *written power contract* to procure electricity generated by that facility/unit."[3]

The Regulations therefore define directly delivered electricity as electricity that comes from a specified source, which is a facility or unit that can claim the source of delivered electricity through a written power contract. When the facility or unit has a written power contract, electricity can be directly delivered only if the written power contract establishes that the electricity and its Renewable Energy Credits (RECs) are bundled together.

If the written power contract has stripped the electricity of the RECs, then the renewable electricity cannot be directly delivered and the RECs remain available for the RPS adjustment. Review of the written power contract therefore protects against double counting.

III. The Plain Meaning of the Regulations Requires Review of Written Power Contracts and Need Not Place an Undue Administrative Burden on ARB

ARB has expressed concern about the administrative burden of confirming claims of an RPS adjustment or direct delivery of renewable electricity through a written power contract. The plain meaning of the Regulations nevertheless require this confirmation. To avoid any undue administrative burden, ARB can clarify the responsibilities of the third-party verifiers retained by the entities claiming either an RPS adjustment or the direct delivery of renewable electricity. This clarification would require the third-party verifiers to review the written power contracts as part of the verification process under the MRR. SDG&E's experience is that third-party verifiers have effectively reviewed written power contracts in the past.[4]

In their October 19, 2015 comment letter, SDG&E and the other utilities proposed regulatory modifications to provide additional protection against double counting and to streamline ARB's administrative responsibilities. Given the requirement to confirm direct delivery of renewable electricity through a written power contract, SDG&E encourages ARB to

---

1 Cal. Code Regs. tit. 17, 95852(b)(4)(D) (emphasis added).

2 *Id.* § 95102(a)(124)(C) (emphasis added).

3 *Id.* § 95102(a)(436) (emphasis added).

4 ARB has referenced a confidentiality concern with reviewing written power contracts. SDG&E is unaware of any confidentiality issue and welcomes discussion of this potential issue in a future workshop.

make these modifications. The modifications will ease ARB's administrative burden while ensuring proper implementation of the Regulations.

IV. A Plain Meaning Interpretation Is Needed to Maintain the Integrity of the Cap-and-Trade Program

A plain meaning interpretation of the Regulations is needed to maintain the integrity of the cap-and-trade program. Any different interpretation introduces uncertainty into the program because the regulated community can no longer rely on the plain meaning of the text that ARB adopted through its rulemaking process. Any different interpretation also unfairly penalizes California's utility ratepayers by negating their past investments in renewable electricity, which were made in reliance on the plain meaning of the Regulations. Ratepayers would then need to spend millions of dollars to procure additional cap-and-trade allowances. This leads to an impermissible result under the principles of statutory interpretation established by the California courts.

The California courts have established that the key to statutory interpretation is applying the rules of interpretation in their proper sequence.[5] The first rule is to look to the plain meaning of the statutory language.[6] If the plain meaning is clear, then no further analysis is needed: "It is only when the meaning of the words is not clear that courts are required to take a second step and refer to the legislative history."[7]

The plain meaning of the Regulations requires review of written power contracts to determine whether electricity is not directly delivered and the RECs remain available for the RPS adjustment. The plain meaning is clear and avoids double counting. The statutory interpretation is therefore complete.[8]

In the presentation for the December 14, 2015 workshop, ARB Staff indicated that two of the Final Statements of Reasons to amend the Regulations support rejecting the plain meaning interpretation of the Regulations.[9] The principles of statutory interpretation, however, establish that any ambiguity in the legislative history for the Regulations should not affect the statutory

---

5 *See, e.g.*, *Mt. Hawley Insurance Co. v. Lopez*, 215 Cal. App. 4th 1385, 1396-97 (2013).

6 *Id.*

7 *Id.* at 1397.

8 *See id.*

9 *See* ARB, *RPS Adjustment: Past and Future* at 4, 6-7 (Dec. 14, 2015), *available at* http://www.arb.ca.gov/cc/capandtrade/meetings/20151214/rpssb350.pdf (quoting ARB, Final Statement of Reasons – Amendments to the Cap-and-Trade Regulation at 209 (May 2014), *available at* http://www.arb.ca.gov/regact/2013/capandtrade13/ctfsor.pdf; ARB, Final Statement of Reasons – Amendments to the MRR at 108-09 (Oct. 28, 2010), *available at* http://www.arb.ca.gov/regact/2010/ghg2010/mrrfsor.pdf).

interpretation when the plain meaning is clear.[10] The plain meaning interpretation of the Regulations should therefore control.

V. A Plain Meaning Interpretation Is Needed to Maintain Consistency with the Federal Clean Power Plan

The plain meaning interpretation of the Regulations is also needed to maintain consistency with the federal Clean Power Plan. Any different interpretation introduces a new risk of double counting. Assume that ARB does not require directly delivered electricity to be from a specified source with a written power contract that bundles the RECs with the electricity. Then, a new renewable electricity facility built in a rate-based state could count a REC as an Emission Reduction Credit under the Clean Power Plan while still claiming that any associated electricity imported into California is renewable under the cap-and-trade program.

Applying a plain meaning interpretation of the Regulations avoids this double counting and potential conflict with the Clean Power Plan. Federal treatment of RECs supports the plain meaning interpretation. The website on RECs for the U.S. Environmental Protection Agency (EPA) states: "If the physical electricity and the associated RECs are sold to separate buyers, the electricity is no longer considered 'renewable' or 'green.' The REC product is what conveys the attributes and benefits of the renewable electricity, not the electricity itself."[11]

VI. ARB Staff's Rejection of the Plain Meaning Interpretation Creates Reporting Problems

In the presentation for the December 14, 2015 workshop, ARB Staff stated, "REC serial numbers must be reported (if applicable) to support transparency, but specified emission factor remains valid and import still must be reported as specified regardless of REC reporting."[12] The implication is that RECs are not available for the RPS adjustment if the associated electricity is imported into California, even if the written power contract establishes that the electricity was not directly delivered because it was stripped of the RECs.

This position fails to acknowledge that the Regulations define directly delivered electricity as electricity that comes from a specified source, which is a facility or unit that can claim the source of delivered electricity through a written power contract. This rejection of the plain meaning of the Regulations creates reporting problems not contemplated by the Regulations by divorcing the renewable attributes of electricity from the RECs.

---

10 *See Mt. Hawley*, 215 Cal. App. 4th at 1396-97.

11 EPA, *Renewable Energy Certificates (RECs)*, http://www3.epa.gov/greenpower/gpmarket/rec.htm (last visited Jan. 4, 2016).

12 *RPS Adjustment: Past and Future* at 7.

Since the percentage of electricity that will be imported without the RECs is uncertain in a given year, an entity must wait to claim the RPS adjustment until the following year and cannot rely on the written power contract to calculate its RPS adjustment. Instead, the RPS adjustment depends on the actions of a third party importer over which the entity claiming the RPS adjustment has no control.

VII. ARB Staff's Position Is Not Needed to Determine Actual Electricity Consumed by Californians

In the presentation for the December 14, 2015 workshop, ARB Staff stated: "AB 32 seeks to reduce statewide GHG emissions, including 'all emissions of greenhouse gases from the generation of electricity delivered to and consumed in California'" so that there is a "[n]eed to track actual electricity consumed in California."[13] ARB Staff also stated: "Emissions reporting and accounting is built on direct delivery of electricity."[14]

These statements, however, do not apply to accurate reporting and accounting of imported electricity. Reported GHG emissions may differ from actual GHG emissions for facilities with E-tags for delivered electricity, as shown by the following examples:

- Electricity purchased out of a trading exchange outside of California is given a default value of 0.438 MT/MWh regardless of whether the E-tag shows that it was derived from renewable power.

- Electricity from the asset controlling suppliers Bonneville Power, Powerex, and Tacoma Power are not assigned the GHG emissions of the specified facility delivering the power. Instead, ARB has assigned a value set to this electricity.

- Electricity from the asset controlling suppliers Bonneville Power, Powerex, and Tacoma Power must be supported by written power contracts stating that the imported power was purchased as specified. Otherwise, the emissions of the specified facility delivering power will be assigned the unspecified GHG emissions rate.

- An entity's GHG emissions from imported electricity increase if GHG emissions from a specified plant with an emissions factor higher than the default factor reduce actual imports to California.

Review of the written power contract remains a valid method to determine whether electricity has been stripped of its RECs and to determine the amount of electricity actually consumed by Californians. Emissions reporting and accounting need not depend on direct

---

13 *Id.* at 3 (emphasis in original).

14 *Id.* at 4.

delivery of electricity, and it should not be a basis to reject the plain meaning interpretation of the Regulations.

VIII. The Cap-and-Trade Regulation Should Continue to Include the RPS Adjustment Because Firmed and Shaped Contracts Reduce California's GHG Emissions

The RPS adjustment affects RECs associated with firmed and shaped renewable electricity contracts that provide delivery of renewable electricity to California with substitute energy. These firmed and shaped contracts address the variability of renewable energy production and reduce the GHG emissions of the retail sellers who entered into them.

In 2002, the California legislature adopted Senate Bill 1078, which required all retail sellers including utilities, community choice aggregators, and energy service providers, to procure a minimum percentage of their electricity from eligible renewable energy resources. The bill also required the California Energy Commission (CEC) to certify eligible renewable energy resources.

The CEC 2008 guidebook titled *Renewables Portfolio Standard Eligibility* (2008 Guidebook) confirms that firmed and shaped contracts meet the eligibility criteria for renewable energy delivered to California. The 2008 Guidebook states:

> For RPS compliance, electricity is deemed delivered if it is either generated at a location within the state or is scheduled for consumption by California end-use retail customers . . .
>
> Electricity may be delivered into California at a different time than when the RPS-certified facility generated electricity . . . . Further, the electricity delivered into California may be generated at a different location than that of the RPS-certified facility. In practical terms, out-of-state energy may be "firmed" or "shaped" within the calendar year. Firming and shaping refers to the process by which resources with variable delivery schedules may be backed up or supplemented with delivery from another source to meet customer load.[15]

The CEC thus treated the entire output of the renewable energy facility covered by firmed and shaped contracts as renewable energy delivered to California for consumption of the retail seller's customers. This output therefore reduces the GHG emissions for each retail seller.

---

[15] CEC Guidebook, *Renewables Portfolio Standard Eligibility*, 3d ed., CEC-300-2007-006-ED3-CMF, at 23 (Jan, 2008), *available at* http://www.energy.ca.gov/2007publications/CEC-300-2007-006/CEC-300-2007-006-ED3-CMF.PDF.

The 2008 Guidebook also explains that a firmed and shaped contract can include the following contracting structure:

> A third party could provide firming and shaping services. For example: a retail seller could buy energy and [Renewable Electricity Credits (RECs)] from an RPS-eligible facility and execute a second [Power Purchase Agreement] to resell the energy from the RPS-eligible facility, but not the RECs, to a third party that provides firming and shaping services. Then, the third party could provide the retail seller with a firm schedule for delivery into California.[16]

ARB incorporated the RPS adjustment provisions into the cap-and-trade regulation as an elegant way to account for the reduction in GHG emissions that this contracting structure provides. Since then, SDG&E and other retail sellers have relied on the RPS adjustment when entering into this contracting structure as part of their efforts to reduce GHG emissions. Given this important role in reducing GHG emissions, the cap-and-trade program should continue to include the RPS adjustment.

IX. Conclusion

The plain meaning interpretation of the Regulations should apply to ARB's ongoing implementation of the RPS adjustment. The plain meaning interpretation already avoids double counting and need not place an undue administrative burden on ARB. The plain meaning interpretation also ensures the integrity of the cap-and-trade program and consistency with the federal Clean Power Plan. A different interpretation introduces new reporting problems and is not needed to determine actual electricity consumed by Californians.

The RPS adjustment plays an important role in reducing GHG emissions and should continue to be part of the cap-and-trade program. SDG&E looks forward to working with ARB on regulatory modifications to provide additional protection against double counting and to streamline ARB's administrative responsibilities.

---

16 *Id.* at 23-24 n.2.

Thank you for considering this information. Please contact me if you have any questions.

Sincerely,

Adrianna B. Kripke

Adrianna B. Kripke
Senior Environmental Counsel
San Diego Gas & Electric Company