

October 23, 2013

E-Filing
ARB's Board Docket: capandtrade13

Clerk of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95812-2828

Re: Panoche Energy Center LLC Comments on Proposed Cap-and-Trade Amendments

Clerk of the Board:

On behalf of Panoche Energy Center LLC ("PEC"), we would like to thank the Air Resources Board ("CARB" or "Board") and its Staff for working to craft a proposed solution to address the issue of "AB 32 legacy contracts". The entire process, including the earlier draft amendments, the July 18, 2013 Public Workshop and the interagency cooperation with the Public Utilities Commission provided an open and interactive opportunity to address the issues and develop a workable interim resolution. Consistent with the 45-day review period for the Proposed Amendments, PEC submits its comments in support of the Staff's proposal as detailed below. Further, while PEC understands that the official comment period for the October 16, 2013 Staff recommendation to provide an additional three years of transition assistance will come at a later date, PEC also fully supports the revised recommendation.

PEC is a large natural gas peaking plant with a tolling contract for the exclusive sale of electric power to Pacific Gas & Electric Company ("PG&E") that was executed in March 2006 ("PEC PPTA"). PEC's PPTA does not allow for the recovery of GHG compliance costs. PEC's comments are limited to the Proposed Amendments concerning relief for legacy contract generators and legacy contracts. PEC participated in both workshops held by CARB and has previously submitted comments on the earlier draft proposals.

Board Resolution 12-33, issued September 20, 2012, states: "WHEREAS, entities with legacy contracts that were entered into prior to AB 32 may not have an appropriate mechanism for recovery of carbon costs associated with the Cap-and-Trade Regulation: ..." The Resolution further states: "BE IT FURTHER RESOLVED that the Board directs the Executive Officer 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." The Proposed Amendments are consistent with this direction.

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Covered entities, such as PEC, that do not have a means to pass the Cap and Trade Program's fundamental policy price signals through to the end-use consumer under their contracts, have been waiting for needed transition relief. For those covered entities, good faith negotiations appear to have failed long ago. Now it is time for CARB to resolve one of the program's lingering issues, and we support the Staff's recommendations in this regard.

CARB has consistently recognized that a cornerstone of California's climate program is to pass on price signals of the cost of carbon and carbon reduction efforts to consumers -- and was specifically intended to NOT harm generators by stranding them with compliance costs. Failure to provide the proposed relief will certainly harm, if not cause, total project failure for some legacy contracts, such as PEC's.

Though Staff has consistently expressed a preference for renegotiations between parties to these legacy agreements, these amendments concede that negotiations may not be successful at this juncture. Over the last two years, PEC has attempted to engage in good faith negotiations with our legacy contract counterparty, and remains willing to accept Staff's offer to facilitate a renegotiation session. PEC will continue to pursue resolution of its issues but joins many other legacy contract generators in the belief that settlement of the remaining disputes between legacy contract holders and their counterparties is unlikely, as those counterparties have no business incentive to negotiate a resolution at this time. And in fact, PEC's counterparty has consistently been the primary opposition to providing transition relief to any Legacy Contract Generator. Therefore PEC believes this issue may likely need to be revisited by CARB in the future.

For the foregoing reasons, PEC supports providing relief to legacy contract holders using the eligibility criteria provided in the Proposed Amendments.

1. COMMENT DETAILS

a. Eligibility Criteria

In the Proposed Amendments, staff put forth eligibility criteria for legacy contracts to qualify for relief applicable to PEC (Section 95894):

- Contract was executed before September 1, 2006;
- Contract does not allow for recovery of the costs associated with compliance with the Cap and Trade Regulation;
- Contract remains in place and has not been subsequently amended to address GHG compliance costs; and

- The Legacy Contract holder has made a “good faith” effort to renegotiate with contract counterparty to address GHG costs issues.

PEC supports these straightforward criteria.

b. Process for Receiving Allocations

The Proposed Amendments provide a process for allocation of allowances to Legacy Contract Generators in newly drafted Section 95894. The process generally consists of a request by the legacy contract generators and a subsequent eligibility determination by the CARB Executive Officer. In order to receive allowances eligible for 2013 and 2014 compliance on October 15, 2014, legacy Contract Generators must submit the following information in writing via certified mail to the Executive Officer by June 30, 2014, or within 30 days of the effective date of this regulation, whichever is later:

- A letter stating the covered entity name, identification of counterparty, and a statement requesting transition assistance for emissions reported and verified for the 2012 data year.
- A copy of portions from the legacy contract for which it is seeking an allocation as to the dates of effective commencement and cessation of the term of the contract, terms governing price per unit of product; and signature page.
- An attestation, under penalty of perjury, that the contract meets the eligibility criteria listed above and that the Legacy Contract Generator has conducted renegotiation efforts in “good faith.”

PEC supports this simple administrative criteria.

c. Process for Determination of Eligibility

PEC understands the intent of Section 95894(b) to be relatively straightforward, but seeks clarity in either Board Resolution or in response to comments in the Final Statement of Reason that the “Determination of Eligibility” is a compliance process by which CARB will review and process the filings. PEC further believes that such information must be treated by CARB as confidential in that sensitive market and pricing information is required for submittal.

PEC supports the need for CARB Staff to review sufficient detail to determine whether the generator qualifies for the proposed transition relief. However, PEC requests that CARB confirm that the process will be an internal compliance process conducted by CARB,

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not subject to a public review and comment process, especially as market-sensitive pricing information is required for submittal.

If you have any questions, please give me a call at 415-291-7430, or Jon Costantino at 916-552-2365.

Sincerely,

/s/ David L. Huard

David L. Huard

cc: Mary Nichols-Chairman
CARB Board Members
Virgil Welch-Chairman's Advisor
Richard Corey-Executive Officer
Edie Chang-Deputy Executive Officer
Cynthia Marvin-SSD Division Chief
Steve Cliff-SSD Assistant Division Chief
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