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Via Email to mnichols@arb.ca.gov

The Honorable Mary D. Nichols
Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95812

Re: Southern California Public Power Authority Comment on Proposed AB 32 Implementation Fee Regulation

Dear Chairman Nichols:

The Southern California Public Power Authority ("SCPPA")[1] respectfully submits this comment on the staff's May 8, 2009 Initial Statement of Reasons ("ISOR") for a regulation that establishes fees to support the implementation and administration of Assembly Bill ("AB") 32 by the Air Resources Board ("ARB" or "Board").

SCPPA strongly supports the AB 32 goal of reducing California's greenhouse gas ("GHG") emissions to 1990 levels by 2020. Concomitantly, SCPPA also supports the establishment of administrative fees that are soundly founded in law, policy, and economics. A firm foundation is necessary to provide a secure source of funding for the ARB's implementation and administration of the panoply of programs that will be necessary to attain the AB 32 goal. Furthermore, SCPPA supports the staff's effort to bring a proposed administrative fee regulation before the Board for its consideration in timely fashion.

SCPPA submits this comment to bring to the Board's attention to several recommendations for modifying the staff's proposed regulation to assure that the administrative fees are well-founded. First, in order to avoid potential legal complications, SCPPA

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[1] SCPPA is a joint powers authority. The members are Anaheim, Azusa, Banning, Burbank, Cerritos, Colton, Glendale, Los Angeles Department of Water and Power, Imperial Irrigation District, Pasadena, Riverside, and Vernon. This comment is sponsored by Anaheim, Azusa, Banning, Burbank, Cerritos, Colton, Glendale, Imperial Irrigation District, Pasadena, and Riverside.

recommends that the scope of the fees be modified to exclude any application to imported electricity. In the alternative, if the Board desires to approve staff's proposal to apply the fee to imported electricity, SCPPA recommends that the Board seek an opinion from the California Attorney General about the legality of applying the fee to imported electricity and, additionally, that the Board provide a reasonably exhaustive analysis of the legality in the Final Statement of Reasons ("FSOR") that will be sent to the Office of Administrative Law ("OAL") with the administrative fee regulation.

Second, if the Board desires to approve staff's proposal to apply the fee to imported electricity, SCPPA recommends that the Board modify the proposed regulations so that the fee will not apply to various power transmission arrangements in which imported electricity passes through California but is not consumed within California.

Third, if the Board desires to approve staff's proposal to apply the fee to imported electricity, SCPPA recommends that the proposed regulations be modified so that the fee will not apply to electricity that is imported as part of an exchange arrangement that involves the return of an equivalent amount of specified California-generated electricity or unspecified system supply to an out-of-state counterparty.

Lastly, SCPPA urges the Board to consider putting a cap on the amount of funds that can be obtained annually through the fee to guard against future excesses that might detract from the integrity of the fee and erode public support for the AB 32 program.

I. THE BOARD SHOULD EVALUATE THE LEGALITY OF THE STAFF'S PROPOSAL TO EXTEND THE ADMINISTRATIVE FEE TO IMPORTED ELECTRICITY.

Throughout the public process of developing the administrative fee regulation that is now pending before the Board, the staff proposed that the administrative fee be applied to four fuels plus process emissions from refineries and cement manufacturers. Through most of the public process, the staff recommended that the fee not be applied to electricity regardless of whether the electricity was generated in California or imported. However, at the very end of the public process, the staff changed their position and proposed to extend the scope of the administrative fee so that it would apply to imported electricity, although the fee would still not apply to electricity generated in California.

The Board should scrutinize the staff's belated proposal to extend the scope of the fee to include imported electricity. There is a question about whether the application of the fee to imported electricity is beyond the scope of the statutory provision that authorizes the ARB to adopt a schedule of administrative fees. Additionally, the discriminatory application of the administrative fee to imported electricity but not to electricity generated within California is suspect on Constitutional grounds. Also, the application of the fee to imported electricity may be preempted by federal law.

The Board should narrow thee scope of the fee so as to exclude imported electricity in the interest of avoiding a legally suspect extension of the fee's coverage. At minimum, the Board should seek an opinion from the California Attorney General about the legality of extending the fee to imported electricity, and the Board should provide a reasonably exhaustive analysis of the legality of the application in the FSOR that the Board will submit to OAL for review.

A. Background: The Staff's Development of the Proposed Administrative Fee Regulation.

The staff's proposal to apply the administrative fee to imported electricity came late in the public process of developing the regulation that is now pending before the Board. At the initial "concept workshop" convened by the staff on January 27, 2009, the staff proposed a fee that would apply to four fuels: gasoline, diesel, coal, and natural gas. Staff Presentation, Slide 5 (January 27, 2009). Additionally, the fee would apply to "process emissions from refineries and cement manufacturers." *Ibid*. The Director of the Office of Climate Change, Charles Shulock, explained that the fee would apply neither to electricity that was generated within California nor to imported electricity. Mr. Shulock said that in the staff's view there was "no practical way" to extend the fee to imported electricity.

The staff convened a second workshop on February 25, 2009. For this workshop, the staff released a "Proposed Regulation Order" proposing a new Article 3 containing sections 95200 to 95209 to be added to Title 17 of the California Code of Regulations. Section 95201 was labeled "Applicability." It stated that the new Article 3 would apply to various entities including operators of gas utilities, operators of interstate or intrastate gas pipelines, producers or importers of California gasoline or diesel, owners of facilities that combust coal in California, refineries, cement manufacturers, and operators of oil fields. Proposed Regulation Order, §95201 (February 25, 2009). Once again, neither imported electricity nor California-generated electricity were identified as being subject to the administrative fee.

The staff scheduled its third and final workshop for April 20, 2009. On April 17, 2009, the staff released a "Proposed Regulation" for discussion at the workshop. The Proposed Regulation revealed that the staff had switched positions on applying the fee to imported electricity. The Proposed Regulation contained a new section 95201(a)(5) entitled "Retail Providers and Marketers of Imported Electricity." The new section would apply the fee to "[a]ny retail provider or marketer of imported electricity." The section provided: "A fee shall be paid for each megawatt/hour of imported electricity." Although the scope of the fee was extended to reach imported electricity, there was still no application of the fee to electricity generated within California.

The April 17, 2009 Proposed Regulation contained a new and complex set of provisions for calculating the assessment of the fee of imported electricity. *See* Proposed Regulation, §95203 (April 17, 2009). The staff's slide presentation for the workshop revealed the complexity of the calculation. Staff Presentation, slides 29-31, (April 20, 2009). Staff said without any further elaboration or explanation that the staff now thought that extending the fee to imported electricity would be lawful.

SCPPA was concerned about the lack of any staff explanation for its newly announced view that applying the fee to imported electricity would be lawful. Shortly after the April 20, 2009 workshop, SCPPA submitted a comment to the staff in which SCPPA explained its concern:

> The extension of the fee to cover imported electricity but not electricity generated in California may violate the Commerce Clause of the United States Constitution. The Commerce Clause provides for federal regulation of interstate commerce. (U.S. Const., art I §8, cl. 3.) The courts have recognized that "this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute* (1989) U.S. 324, 326, fn 1. If a state regulation discriminates on its face against out-of-state businesses, then it is *per se* unlawful under the Commerce Clause: "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.* (1986) 476 U.S. 573, 579.

SCPPA Comment at 2 (April 24, 2009). SCPPA urged that in order to "avoid the legal complications that could arise from adopting a fee that violates the Commerce Clause and to avoid the practical inequities that could result from adopting such a fee," the staff should revert to its earlier position and avoid any application of the fee to imported electricity. *Ibid.* SCPPA further recommended that if the staff continued to believe it should include imported electricity within the scope of the fee, the staff should, at minimum, "include in the ISOR a comprehensive discussion of the legal basis for proposing an application of the administrative fee" to imported electricity." SCPPA Comment at 3 (April 24, 2009).

The staff released the ISOR on May 8, 2009. Even though SCPPA had pointedly urged the staff to include an explanation of the legality of extending the fee to imported electricity, the ISOR is devoid of any explanation of the staff's new view that the application of the fee to imported electricity would be lawful.

B. Applying the Administrative Fee to Imported Electricity Would Be Inconsistent with the Plain Meaning of HSC Section 38597.

Applying an administrative fee to imported electricity would be inconsistent with the AB 32 provision that authorizes the ARB to assess administrative fees, Health & Safety Code ("HSC") section 38597. That section explicitly provides for fees that are to be paid by *sources* of greenhouse gas emissions: "The state board may adopt by regulation, after a public workshop, a schedule of fees to be paid by the *sources* of greenhouse gas emissions regulated pursuant to this division…." HSC §38597 (emphasis added). Imported electricity is not a source of emissions. The generation facilities that are used to generate the electricity are sources of emissions, but imported electricity itself is not a source.

1. Imported Electricity Is Neither a Source of Emissions nor a Fuel that Is Consumed by a Source.

In the ISOR, the staff recognized that section 38597 requires that the fee be applied to *sources* of greenhouse gas emissions. Staff explained that some of the entities to which a fee would be applied are clearly "sources" of greenhouse gas emissions:

> First, some of the entities on which fees are imposed are clearly "sources" of greenhouse gas that are directly emitted into the atmosphere. These entities include refineries and cement producers (who generate process emissions from their operations) and facilities that burn coal. Stakeholders have not suggested otherwise.

ISOR at 35. The staff also recognized that the fuels to which the fee would be applied – natural gas, gasoline, and diesel – are not in themselves "sources" of emissions, but the staff argued that the application of the fee to the fuels would provide a mechanism for recovering the fee from the actual sources that combust the fuels:

> Second, to address emissions from natural gas and transportation fuels, the proposed regulation is simply an administrative mechanism for efficiently collecting fees on downstream "sources" of greenhouse gas emissions based on the assumption that the costs of the fees will be passed on to downstream end users who actually combust the natural gas and transportation fuel.
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> Gasoline and diesel fuels are burned by millions of individual motorists, as well as millions of individuals who operate small combustion sources such as construction and farm equipment, water pumps, lawn mowers, chainsaws, stoves and water heaters in homes, boats, off-highway all-terrain vehicles, snowmobiles and many others. Equipment that burns natural gas, gasoline, or diesel fuel is owned and operated by virtually every household and business in California. It would be inefficient, impractical and overly burdensome to impose fees on all of the individuals who own or operate such equipment. To do this, a fee would need to be imposed on essentially every person who resides in California.

Ibid.

Imported electricity is neither a source of emissions nor a fuel such that imposing a fee on it would result in the cost of the fee being passed downstream to entities that are, themselves, actual sources of emissions. Users of imported electricity do not combust anything. For imported electricity, the points of combustion are the generation stations that are *upstream* of the point at which the fee would be assessed, not downstream of that point. Applying the administrative fee to imported electricity would not result in the fee being imposed on any actual sources of emissions either directly or indirectly.

It would be consistent with section 38597 to impose the administrative fee on electricity generators, but it would not be possible for the ARB to impose the administrative fee on the out-of-state generators of imported electricity. The administrative fees cannot be applied to generators that are located outside of California because, as the staff recognizes, "California does not have jurisdiction over these entities." ISOR at 20. Similarly, the fee cannot be applied to entities that supply fuel to the out-of-state generation facilities because the ARB lacks jurisdiction over such suppliers. ISOR at 39. The staff correctly observes: "It is not possible for fees to be applied to out-of-state suppliers of electricity generation fuels, or to use [by] the generation facility located out of state as the point of regulation, because California does not have jurisdiction over these entities." *Ibid.*

2. AB 32 Did Not Authorize the Application of the Administrative Fee to All "Statewide Greenhouse Gas Emissions" as Defined in AB 32.

Upon recognizing the ARB's lack of jurisdiction over either the sources of emissions associated with imported electricity or the fuels that are consumed by those sources, staff appears to argue that insofar as the AB 32 definition of "statewide greenhouse gas emissions" includes emissions from the generation of electricity "delivered to and consumed in California…whether the electricity is generated in the state or imported," it would be permissible to extend the administrative fee to imported electricity. The staff says:

> AB 32 includes in its definition of "statewide greenhouse gas emissions" all emissions of greenhouse gases from the generation of electricity "delivered to and consumed in California, accounting for transmission and distribution losses, whether the electricity is generated in the state or imported" (HSC section 39505). Thus, AB 32 specifically requires ARB to consider imported electricity in the implementation of the statute.

ISOR at 19. It is true that HSC section 38505(m) defines "statewide greenhouse gas emissions as meaning "the total annual emissions of greenhouse gases in the state, including all emissions of greenhouse gases from the generation of electricity delivered to and consumed in California, accounting for transmission and distribution line losses, whether the electricity is generated in state or imported." However, it cannot be concluded that AB 32 authorized the extension of the administrative fees to cover all "statewide greenhouse gas emissions" as defined in section 38505(m).

If the Legislature wanted the administrative fee provision of AB 32 to apply to all "statewide greenhouse gas emissions" as defined in HSC section 38505(m), the Legislature could have made it clear that the provision had such broad coverage. The Legislature did so in other instances. For example, in requiring the ARB to adopt mandatory GHG reporting rules, the Legislature provided that "the state board shall adopt regulations to require the reporting and verification of *statewide greenhouse gas emissions…*" to make it clear that the ARB's reporting regulations shall apply to emissions associated with imported electricity. HSC §38530(a). The Legislature further required in HSC section 38530(b) that the reporting regulations shall "account for greenhouse gas emissions from all electricity consumed in the state, including transmission and distribution line losses from electricity generated within the state or imported from outside the state." HSC §38530(b)(2). Thus, the Legislature was well aware of how it needed to craft a provision of AB 32 so that the provision would extend to all "statewide greenhouse gas emissions" as defined in HSC section 38505(m).

However, the Legislature elected *not* to craft the section on administrative fees so that the fees would apply to "statewide greenhouse gas emissions" as defined in HSC section 38505(m). The Legislature might have crafted the section on administrative fees so as to read: "The State Board may adopt by regulation, after a public workshop, a schedule of fees to be *assessed on statewide greenhouse gas emissions*." Instead, the Legislature wrote the section on administrative fees to provide: "The State Board may adopt by regulation, after a public workshop, a schedule of fees to be paid by the *sources* of greenhouse gas emissions regulated pursuant to this division*…"* HSC §38597 (emphasis added).

The ARB should recognize the plain meaning of the language in the section of AB 32 that permits the Board to adopt administrative fees. The "fundamental task of statutory construction is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'"[2] The courts begin by examining the language of the statute: "Because the statutory language is generally the most reliable indicator of legislative intent, we first examine the words themselves, giving them their usual and ordinary meaning and construing them in context."[3] The actual "'statutory language… is the best indicator of legislative intent'" and reliance on the statutes' plain language is 'the most powerful safeguard for the courts' adherence to their constitutional role of construing, rather than writing, statutes…'"[4] If the statutory language is clear, courts "must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend."[5]

The plain language of HSC section 38597 provides for a schedule of fees that shall "be paid by the sources of greenhouse gas emissions…." The ARB should craft its administrative fee regulation to be consistent with the plain meaning of that provision. The administrative fee cannot apply to imported electricity insofar as imported electricity is not, itself, a source of greenhouse gas emissions, and neither the generators of imported electricity nor the fuels that are used by those generators are within the jurisdiction of the ARB.

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[2] *Medical Board of California v. Superior Court (Lam)*, 88 Cal.App.4th 1001, 1012, 106 Cal. Rptr. 2d 381 (2001), *quoting People v. Cruz*, 13 Cal.4th 764, 774-775, 55 Cal. Rptr. 2d 117, 919 P.2d 731 (1996).

[3] *Esberg v. Union Oil Co.*, 28 Cal. 4th 262, 268; 47 P.3d 1069; 121 Cal. Rptr. 2d 203 (2002).

[4] *Medical Board*, 88 Cal.App.4th at 1014, *quoting Williams v. Superior Court*, 5 Cal.4th 337, 350 (1993).

[5] *Coalition of Concerned Communities, Inc. v. City of Los Angeles*, 34 Cal. 4th 733, 737, 101 P.3d 563, 21 Cal. Rptr. 3d 676 (2004).

C. Applying the Administrative Fee to Imported Electricity Would Conflict With the Dormant Commerce Clause.

The proposed fee regulation suffers from another important legal defect: the application of the fee to electricity imported into California from other states, but not to electricity generated in California, would violate the Commerce Clause of the United States Constitution. Because the proposed rule would discriminate on its face between electricity generated in California and electricity generated in other states, it would be subject to strict Constitutional scrutiny, which the U.S. Supreme Court has described as "a virtually per se rule of invalidity." The proposed regulation would be invalid under the applicable legal tests established by the U.S. Supreme Court.

1. The Dormant Commerce Clause Limits State Power to Tax or Regulate Interstate Commerce.

The Commerce Clause of the U. S. Constitution authorizes Congress to regulate interstate commerce.[6] U.S. Constitution, article I, §8, cl. 3. The courts have recognized that "this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute,* 491 U.S. 324, 326, fn 1, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989). The dormant Commerce Clause limits the power of a state to regulate or tax interstate commerce, even in the absence of federal legislation on the subject.

State statutes and regulations which impose taxes or administrative fees on interstate commerce are subject to Commerce Clause scrutiny.[7] *See generally, Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). The transmission of electricity between states has been recognized to constitute interstate commerce. *New York v. Federal Energy Regulatory Comm'n*, 535 U.S. 1, 7, 122 S. Ct. 1012, 152 L. Ed. 2d 47 (2002). Thus, the application of the proposed administrative fees to imported electricity is subject to scrutiny under the dormant Commerce Clause.

The first step in analyzing any law subject to scrutiny under the dormant Commerce Clause is to determine whether it discriminates on its face against interstate commerce.

> As we use the term here, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. . . . It is well established . . . that a law is discriminatory if it 'tax[es] a

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[6] The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const., art. 1, § 8, cl. 3.

[7] The ISOR makes clear that the purpose of the proposed regulation is to raise revenue: "The purpose of this proposed regulation is to repay loans that were used to fund ARB and the California Environmental Protection Agency's (Cal/EPA) implementation of AB 32 in fiscal years 2007/2008 and 2008/2009 and to create a stable and steady funding source for state agencies to carry out AB 32 in future years." ISOR, pp. 28-29. *See also*, ISOR, Appendix C, "Program Costs".

> transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'"

Oregon Waste Systems, Inc. v. Dep't of Environmental Quality, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994); quoting *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992), and *Armco Inc. v. Hardesty*, 467 U.S. 638, 642, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984). *Oregon Waste Systems* reviewed an Oregon statute that imposed a surcharge on out-of-state shipments of solid waste to Oregon landfills. The surcharge was not imposed on shipments originating in-state. The statute was held to be facially discriminatory and invalid under the Commerce Clause.

If a state law discriminates on its face against businesses operating in interstate commerce, it is subject to strict scrutiny that the Supreme Court has described as "virtually per se invalid". *Oregon Waste Systems*, 511 U.S. 93, 99. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986). The Supreme Court has observed that under this strict scrutiny the State's burden of justification is so heavy that "facial discrimination by itself may be a fatal defect." *Oregon Waste Systems*, 511 U.S. 93, 101.

2. The Proposed Regulation Imposes Different Burdens On Imported Electricity.

The proposed regulation would impose fees on electricity generated in other states and imported into California. Specifically, the fee would be imposed upon: "Any retail provider or marketer that is the purchasing/selling entity at the first point of delivery in California of imported electricity. Fees shall be paid for each megawatt-hour of imported electricity." ISOR at 66, §95201(a)(5),

The amount of the fee on imported electricity ("Imported Electricity Fee Rate") would be based upon a calculated emissions factor for specified sources of out-of state generation, or upon a "default" emissions factor based on a regional average for the Western states. ISOR at 80-82, §§95203 (e) and (f); *see also* ISOR at 20-21.[8]

However, no fee would be imposed upon electricity generated in California. This creates an explicit distinction in the regulation between electricity generated in California and electricity imported from other states. As a result, there is a clear distinction in the treatment of entities who supply electricity generated in California and entities who supply electricity imported from other states.

[8] The default emissions factor was set to be artificially high, based upon certain administrative considerations, and not necessarily upon the most accurate estimates of the actual emissions. ISOR, Appendix D, p. 134.

The staff might claim that the proposed fee regulation imposes an indirect burden on electricity generated in California. The proposed regulation would impose fees on natural gas, which is the primary fuel used to generate electricity in California. ISOR at 65, § 95201(a)(1). The proposed fees on natural gas would be paid by the gas utility or pipeline operator, based on the number of therms delivered or distributed. *Ibid.* The proposed fees on coal would be paid by the owner or operator of a facility within California that combusts coal, based upon the reported emissions. ISOR at 66, §95201 (a)(6). However, to the extent that the proposed fees on coal or natural gas could be said to impose an indirect burden on electricity generated in California, those fees are imposed on different commodities, are based on different units of measurement, and would be paid by different persons.

The staff says that AB 32 "specifically requires ARB to consider imported electricity in the implementation of the statute" because emissions from the generation of imported electricity are included in the definition of "statewide greenhouse gas emissions." ISOR at 19. However, the statute does not require that the administrative fees be imposed upon imported electricity. Section 38597 provides that: "The state board may adopt by regulation, after a public workshop, a schedule of fees to be paid by the sources of greenhouse gas emissions regulated pursuant to this division, consistent with Section 57001. The revenues collected pursuant to this section, shall be deposited into the Air Pollution Control Fund and are available upon appropriation, by the Legislature, for purposes of carrying out this division." As discussed above, there is nothing in the language of section 38597 that requires or even suggests that the administrative fees should be allocated to all statewide greenhouse gas emissions as defined in section 38505(m).

3. The Proposed Regulation Facially Discriminates Against Interstate Commerce.

The proposed fee regulation, by its application to imported electricity but not to electricity generated in California, facially discriminates against interstate commerce. The proposed regulation has the effect of favoring in-state interests and burdening out-of-state interests. This is precisely the problem that is addressed by the dormant Commerce Clause.

The distinction between interstate and intrastate commerce is explicit in the regulation. The fee would be imposed "at the first point of delivery in California of imported electricity," ISOR at 66, §95201(a)(5), but no such fee would be imposed on electricity generated in California. The proposed fee is facially discriminatory because it plainly imposes a burden on interstate commerce that is not imposed upon intrastate commerce.

Because the proposed regulation is discriminatory, the rule of virtual per se invalidity applies. The proposed regulation will be invalid unless it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste Systems,* 511 U.S. 93, 100-101, quoting *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 278, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988).

In this case, the purpose of the proposed regulation – to raise revenue – does not justify imposing a fee on out-of-state interests. The discriminatory treatment of imported electricity would raise more revenue, but only by placing a greater burden on interstate commerce. Further, there are reasonable nondiscriminatory alternatives. It would be possible and appropriate to treat imported electricity on the same basis as electricity generated in California by excluding imported electricity from the fee.

4. The Facial Discrimination Cannot Be Justified by the Compensatory Tax Doctrine.

The staff asserts in the ISOR that the proposed fee on imported electricity would be equivalent to the fees on natural gas and coal:

> Although the units (therms of natural gas, short tons of coal, MWh of electricity) to which the Fee is applied may vary, the impact of the fee is equivalent for electricity generated in-state or out-of-state, because it is based on CO_2 emitted in the generation of electricity.
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> For electricity generated in-state, fees would be paid by entities that deliver natural gas for electricity generation, and facilities that consume coal for electricity generation. For imported electricity, it is not feasible for fees to be applied to suppliers of fuels, or to use the generation facility located out of state as the point of regulation, because California does not have jurisdiction over these entities. Instead, the fee would be applied to imported electricity when it is first delivered into California. The basis for calculating the Fee, the CO_2 emissions, is the same. However, the mechanism for collection and the entities subject to the Fee would be distinct.

ISOR at 20. On that basis, it might be argued that the proposed fees would not violate the Commerce Clause because the fee on imported electricity compensates for the fees on natural gas and coal, which may be passed along to in-state electric generators.

The Supreme Court has developed a specific test under the dormant Commerce Clause for taxes or fees on interstate commerce that are intended to compensate for a similar, offsetting burden borne by intrastate commerce. The proposed regulation does not satisfy the constitutional test that the Supreme Court has established.

In *Henneford v. Silas Mason Co.*, 300 U.S. 577, 81 L. Ed. 814, 57 S. Ct. 524 (1937), the Supreme Court approved a use tax that was imposed upon certain goods when they were brought into the state for the first time. Although the use tax discriminated against interstate commerce, the Court ruled that the tax did not violate the Commerce Clause because the use tax offset and compensated for a sales tax on similar goods that were first sold within the state. The Court approved the pairing of the sales and use taxes, imposed at the same rate on similar goods when they were sold in the state (sales tax) and first brought into the state from elsewhere (use tax).

Subsequent cases have developed a three part test of a valid compensatory tax. First, the State must identify the intrastate tax for which it seeks to compensate, and this intrastate tax must serve some purpose for which the State may otherwise impose a burden on interstate commerce. Second, the tax on interstate commerce must roughly approximate – but not exceed – the amount of the tax on intrastate commerce. Third, the compensating taxes must fall on substantially equivalent events. *Fulton Corp. v. Faulkner*, 516 U.S. 325; 116 S. Ct. 848; 133 L. Ed. 2d 796 (1995); *Oregon Waste Systems, supra,* 511 U.S. 93; *Maryland v. Louisiana*, 451 U.S. 725, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981).

To satisfy the first prong of the test, the State must identify the intrastate tax for which it seeks to compensate, and this intrastate tax must serve some purpose for which the State may otherwise impose a burden on interstate commerce. For example, in *Maryland* v. *Louisiana*, 451 U.S. 725, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981), Louisiana imposed a "first use" tax on natural gas brought into the state, mostly from production in federally-owned areas on the Outer Continental Shelf. The State claimed that the first use tax offset the State's severance tax on natural gas produced in Louisiana. The Supreme Court ruled that Louisiana's first use tax could not be offset by the severance tax, because, unlike the State's interest in the severance of resources from lands within the state, Louisiana had no sovereign interest in being compensated for the severance of resources from the federally owned OCS land. *Maryland* v. *Louisiana*, 451 U.S. 725, 758-759. Similarly, in *Fulton Corp. v. Faulkner, supra*, 516 U.S. 325, the Supreme Court rejected a compensatory tax argument because the State of North Carolina had no sovereign interest in taxing income earned out of state.

In this case, it might be argued that the proposed fee on imported electricity is intended to compensate for the fees on coal and natural gas. But, as the ISOR notes, California does not have the jurisdiction to impose fees on electric generation or fuel consumption in other states. ISOR at 20. Therefore, the supposedly "offsetting" fees would not serve a purpose for which the State may impose a burden on interstate commerce, because California lacks the right to tax electric generation or fuel consumption in other states.

Second, the tax on interstate commerce must roughly approximate – but not exceed – the amount of the tax on intrastate commerce. In this case, there is no direct comparison between the fees proposed for in-state and out-of-state electric generators, because no fee would be imposed on in-state generators. Further, an indirect comparison between the fees proposed for out-of-state electric generation and the fees on coal or natural gas requires speculation about what, if any, burden would actually be passed along to in-state electric generators.

The staff asserts that the financial burden of the fees on fuels may be passed along to end users, including in-state electric generators. ISOR at 13. However, the pass-through is not assured. Further, even if some of the fee burden is passed along, it is impossible to estimate the degree to which the fees may be passed along to various parties in the chain of distribution, e.g., from gas pipeline operators to gas users such as electric generators.

In addition, comparison of the proposed fees is problematical due to the complexity of the emissions calculations, the use of a default emissions factor for unspecified sources based upon regional averages, the adjustment of the default emissions factor based on administrative considerations, and the uneven application of the fee to various electricity wheeling and exchange arrangements. Thus, it is impossible to say that the fees on interstate commerce (i.e., on imported electricity) will approximate the fees on intrastate commerce.

Third, the compensating taxes must fall on substantially equivalent events. This prong of the test requires a close correspondence between the allegedly compensating taxes, so that in-state and out-of-state interests may compete on even terms. As the Supreme Court stated in *Fulton Corp. v. Faulkner, supra*:

> Although we found such equivalence in the sales/use tax combination at issue in *Silas Mason*, our more recent cases have shown extreme reluctance to recognize new compensatory categories. In *Oregon Waste*, we even pointed out that 'use taxes on products purchased out of state are the only taxes we have upheld in recent memory under the compensatory tax doctrine.'

Fulton Corp. v. Faulkner, 516 U.S. 325, 338. In *Fulton*, the Supreme Court invalidated a state intangibles tax on the value of foreign corporation stock owned by state's residents. The intangibles tax did not apply to shares of in-state corporations, but in-state corporations were subject to the state's income tax. The Court held that the intangibles tax and corporate income tax were not compensatory, in part because they were not imposed on substantially equivalent events.[9]

The State argued that corporate earnings and stock price are related, and that an apportionment formula had been used to tie the percentage of share value subject to the intangibles tax directly to the percentage of income earned within the state. However, the Court declined to consider such an economic incidence analysis, due to the complexity and uncertainty of such calculations. "[T]he general difficulty of comparing the economic incidence of state taxes paid by different taxpayers upon different transactions goes a long way toward explaining why we have so seldom recognized a valid compensatory tax outside the context of sales and use taxes." *Fulton*, 516 U.S. 325, 342.

In this case, the proposed fees would not be imposed on substantially equivalent events. The fees would be imposed on different commodities, i.e., kilowatt hours of electricity, therms of natural gas, and emissions from coal combustion. They would be paid by different parties, i.e., electricity marketers or retailers, natural gas utilities and pipeline operators, and owners or operators of facilities that combust coal. Finally, the proposed fees would be based on fundamentally different activities, i.e., importing electricity into California, supplying natural gas to end users or combusting coal. Although the ISOR claims that the economic impact of the fees

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[9] Other examples, where courts have found that two supposedly compensating state taxes were <u>not</u> imposed on substantially similar events, include *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160; 119 S. Ct. 1180; 143 L. Ed. 2d 258 (1999), (state franchise tax imposed on a foreign corporation's operations in the state was not similar in substance to a domestic shares tax imposed upon the ownership of shares in domestic corporations) and *Maryland* v. *Louisiana*, 451 U.S. 725, 758-759, (Louisiana's first use tax on natural gas brought into the state, and the state's severance tax on natural gas produced in Louisiana, were not imposed on substantially equivalent events.)

would be "equivalent" due to the calculations of CO_2 emissions, this is the same sort of economic incidence argument that the Supreme Court expressly rejected in *Fulton*.

Given the substantial differences in the imposition of the proposed fees, they could not be sustained as valid compensatory taxes. The proposed fee regulation does not meet any of the three tests of the "compensatory tax" doctrine. Since the proposed fee on imported electricity facially discriminates against interstate commerce, and cannot be sustained under the well-established doctrines of the dormant Commerce Clause, the proposed fee regulation would be invalid under the Commerce Clause.

D. Applying the Administrative Fee to Imported Electricity Would Be Preempted Under the Federal Power Act.

In addition to violating the dormant Commerce Clause, the application of the administrative fee to imported electricity would be preempted under the Federal Power Act ("FPA"). Section 95201(a)(5) would apply the administrative fee regulation to "any retail provider or marketer that is the purchasing/selling entity at the first point of delivery in California of imported electricity." ISOR at 66, §95201(a)(5). However, the FPA grants exclusive jurisdiction over wholesale sales of electricity in interstate commerce to the Federal Energy Regulatory Commission ("FERC"). Thus, the application of the administrative fee to wholesale sales of electricity "at the first point of delivery in California of imported electricity" would intrude into a federally occupied field.[10]

Federal preemption of the wholesale sales of electricity in interstate commerce has its roots in a series of early twentieth century Supreme Court decisions limiting, under the Commerce Clause of the Constitution, the states' ability to regulate interstate transactions involving electricity and natural gas. *See* Nicholas W. Fels & Frank R. Lindh, *Lessons from the California "Apocalypse:" Jurisdiction Over Electric Utilities*, 22 Energy L.J. 1, 2 (2001); Frank R. Lindh, *Federal Preemption of State Regulation in the Field of Electricity and Natural Gas: A Supreme Court Chronicle*, 10 Energy L.J. 277, 285-86 (1989). These Supreme Court cases culminated in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) ("*Attleboro*"). *Attleboro* involved an attempt by the Rhode Island Public Utilities Commission to regulate the rate at which a Rhode Island utility sold electric power at wholesale, effectively across a state line, to a utility in Massachusetts. The Supreme Court found that this regulation of the wholesale transaction places "a direct burden upon interstate commerce, from which the State is restrained by the force of the Commerce Clause…." *Id.* At 89.

Part II of the FPA was enacted in 1935. The Natural Gas Act ("NGA") was enacted three years later. Both were intended to "fill the gap" in utility regulation left by the *Attleboro* line of cases:

[10] Field preemption exists when a federal scheme is comprehensive, leaving no room for state regulation. Conflict preemption exists when state regulation would conflict with federal regulation. *See Public Utility v. Dynegy Power Marketing* (9th Cir. 2004) 384 F.3d 756 *(Snohomish); Public Util., Grays Harbor, WA v. Idacorp* (9th Cir. 2004) 379 F.3d 641*(Grays Harbor); California ex rel. Lockyer v. Dynegy, Inc.* (9th Cir. 2004) 375 F.3d 831 *(Dynegy)*.

> Part II [of the FPA] is a direct result of *Attleboro.* They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales. Discussion of … that statute and the Natural Gas Act in recent cases supports this conclusion. Especially in the litigation arising under the Gas Act has this Court expressed the view that the limitations established on Commission jurisdiction therein were designed to coordinate precisely with those constitutionally imposed on the states.

United States v. Pub. Util. Comm'n of Cal., 345 U.S. 295, 311 (1953) (citations omitted).

It has been recognized that the *Attleboro* line of case does not reflect modern Commerce Clause jurisprudence, where the trend is "to look in every case to the nature of the state regulation involved, the objective of the state and the effect of the regulation upon the national interest in the commerce." *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n,* 461 U.S. 375, 392 (1983) (internal quotations omitted). However, that modern trend in Commerce Clause jurisprudence does not change the preemption analysis under the FPA. That is because, as a matter of statutory interpretation:

> What Congress did [in enacting the FPA] was to adopt the test developed in the *Attleboro* line which denied state power to regulate a sale "at wholesale to local distributing companies" and allowed state regulation of a sale at "local retail rates to ultimate consumers."

Fed. Power Comm'n. v. S. Cal. Edison Co., 376 U.S. 205, 214 (1964). *See also Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n,* 461 U.S. 375, 392 (1983).

As noted in *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (2004) ("*Dynegy*") the authorities under the Federal Power Act ("FPA") and the Natural Gas Act ("NGA") are relied on interchangeably in cases where the two Acts contain materially parallel provisions. *See Fed. Power Comm'n v. Sierra Pac. Power Co.,* 350 U.S. 348, 353 (1956); *Permian Basin Area Rate Cases*, 390 U.S. 747, 820-21 (1968). The provisions of the Acts concerning federal jurisdiction over wholesale transactions are an example of provisions that are materially parallel.

NGA cases hold that exclusive federal jurisdiction over wholesale transactions in interstate commerce extends to matters in addition to rates. *N. Natural Gas Co. v. Kansas*, 372 U.S. 84 (1963) (ratable purchase obligation imposed on interstate pipeline); *Transcont. Gas Pipe Line Corp. v. State Oil & Gas Bd. Of Miss*., 474 U.S. 409 (1986) (same).

The *Dynegy* decision refers to the interchangeability of FPA and NGA authorities concerning federal jurisdiction. *Dynegy* also deals with the issue of whether state regulation unrelated to price is preempted under the FPA. The decision holds that it is:

> California does not contest FERC's exclusive jurisdiction over interstate wholesale power rates; rather, it urges that such authority does not extend over every aspect of the wholesale market….
>
> We cannot agree with California's theory…., our cases specifying the nature and scope of exclusive FERC jurisdiction make clear that interstate "transmission" or "sale" of wholesale energy pursuant to a federal tariff – not merely the "rates" – falls within FERC's exclusive jurisdiction…. [W]e have enunciated a bright-line distinction between wholesale sales, which fall within FERC's plenary jurisdiction, and retail sales, over which the states exercise jurisdiction.

Cal. Ex. Rel. Lockyer v. Dynegy, 375 Fd.3d 831, 850-51 (2004) (citation omitted). Thus, federal preemption of the field of wholesale transactions goes well beyond pricing issues. The FERC regulation of wholesale power attaches to all aspects of a jurisdictional seller and a jurisdictional transaction. The administrative fee would constitute a state intrusion into this fully federally-occupied field and, accordingly, would be unlawful.

E. Recommendations.

Given that the proposal to apply AB 32 administrative fees to imported electricity is legally suspect, SCPPA continues to recommend as it did in its April 24, 2009 comment to staff that the staff and the Board return to the more cautious approach that was reflected in the materials that were made available for the staff's January 27, 2009 and February 25, 2009 workshops and desist from extending the administrative fee to imported electricity. The flow of revenues derived by the ARB from assessment of the administrative fee would be made more secure insofar as eliminating the application of the fee to imported electricity would reduce the potential for future litigation over the legality of the administrative fee.

Narrowing the scope of the administrative fee so that it would not apply to imported electricity would not significantly impair achieving the staff's goal "to cover greenhouse gas emissions as broadly as possible to spread the cost burden over the majority of emission sources." ISOR at 8. As proposed in ISOR, the fee "would cover three different groups of emission sources that together comprise approximately 85 percent of California's total greenhouse gas emissions." *Ibid*. Imported electricity accounts for only 10-13 percent of total California greenhouse gas emissions. ISOR at 19. Thus, eliminating imported electricity from the scope of the administrative fee would result in the fee applying to 72-75 percent of California's total greenhouse gas emissions. The fee would still meet the staff's objective of spreading the cost burden over the "majority of emission sources" even if imported electricity were excluded from the scope of the fee.

If, contrary to SCPPA's recommendation, the Board elects to approve the staff's proposal to apply the fee to imported electricity, SCPPA recommends that the Board take the precaution of seeking a formal opinion from the California Attorney General assessing the legality of applying the administrative fee to imported electricity, given the narrowness of HSC section

38597 and the Constitutional issues that would arise if the fee were applied to imported electricity. Additionally, if the Board elects to adopt the staff's proposal, SCPPA recommends that the FSOR contain a comprehensive discussion of all factors and arguments that the Board views as supporting the legality of extending the administrative fee to imported electricity.

SCPPA strongly supports a secure and legally impervious funding mechanism to support the Board's efforts to implement AB 32. Seeking an Attorney General's opinion and expanding an FSOR would be relatively modest steps to take in order to make more secure the legal underpinnings of the administrative fee.

II. IF THE BOARD DESIRES TO APPROVE THE STAFF'S PROPOSAL TO APPLY THE ADMININSTRATIVE FEE TO IMPORTED ELECTRICITY, THE PROPOSED REGULATION SHOULD BE MODIFIED SO THE FEE WILL NOT BE APPLIED TO ARRANGEMENTS IN WHICH ELECTRICITY IS TRANSMITTED THROUGH CALIFORNIA WITHOUT BEING CONSUMED IN CALIFORNIA.

If, contrary to SCPPA's recommendation, the Board adopts the staff's proposal to apply the administrative fee to imported electricity, SCPPA recommends that the Board revise the definition of "imported electricity" as proposed by the staff to assure that the fee will not be applied to electricity that is transmitted or "wheeled" from one point outside of California to another point outside of California regardless of how the transmission arrangement is structured.

If electricity is wheeled through California from one state such as Arizona to another state such as Oregon without being consumed in California, the electricity that is wheeled through California should not be subject to the administrative fee. Accordingly, the definition of "imported electricity" in staff's proposed section 95202(a)(45) provides that power wheeled through California would not be considered to be "imported electricity."

> "Imported electricity" means electricity that is generated outside of California and delivered into California. Imported electricity does not include power wheeled through California, which is power that is imported into California that terminates in a location outside of California.

ISOR at 73. This definition of "imported electricity" clearly applies to a situation in which title to the electricity does not pass to a California retail provider that provides "wheeling through" service without taking title to the electricity. However, power may be wheeled through California under a buy-sell arrangement in which a retail provider or marketer buys electricity from a party at a delivery point outside of California, imports the electricity into California, and simultaneously sells the same amount of electricity to the same party at a different delivery point outside of California.

It appears that "wheeling through" under a buy/sell arrangement would be exposed to the administrative fee even though the electricity is not consumed in California. Section 95201(a)(5) of the staff's proposed regulation provides that the fee applies to a "retail provider or marketer that is the purchasing/selling entity at the first point of delivery in California of imported electricity." ISOR at 66, §95201(a)(5).

If the electricity that is wheeled through California is not consumed in California, the electricity should not be exposed to the administrative fee regardless of whether the electricity is wheeled without title passing to the party that provides the wheeling service or the electricity is wheeled with title passing in a buy/sell transaction. Thus, SCPPA recommends that the proposed regulation be modified to assure that, in addition to wheeling arrangements in which title does not pass to the party that is performing the wheeling function, wheeling that is performed through buy-sell arrangements would be exempt from the administrative fee. Specifically, SCPPA recommends that the definition of "imported electricity" in the proposed regulation be modified by adding a clarifying phrase to the proposed section 95202(a)(45) definition of "imported electricity" as shown below:

> "Imported electricity" means electricity that is generated outside of California and delivered into California. Imported electricity does not include power wheeled through California, which is power that is imported into California that terminates in a location outside of California regardless of whether the import into California and simultaneous export to a location outside of California is performed without title passing to the retail provider or marketer that provides the wheeling service or is performed through a buy-sell arrangement in which title does pass to the retail provider or marketer.

III. IF THE BOARD DESIRES TO APPROVE THE STAFF'S PROPOSAL TO APPLY THE ADMININSTRATIVE FEE TO IMPORTED ELECTRICITY, THE PROPOSED REGULATION SHOULD BE MODIFIED SO THAT ELECTRICITY THAT IS IMPORTED UNDER AN EXCHANGE AGREEMENT WITH CALIFORNIA-GENERATED ELECTRICITY OR SYSTEM SUPPLY BEING RETURNED TO AN OUT-OF-STATE COUNTERPARTY WOULD NOT BE SUBJECT TO THE FEE.

If, contrary to SCPPA's recommendation, the Board adopts the staff's proposal to apply the administrative fee to imported electricity, SCPPA recommends that the Board further revise the definition of "imported electricity" as proposed by the staff so that electricity that is imported under an exchange agreement with specified California-generated electricity or unspecified system supply being returned to any out-of-state counterparty would not be subject to the fee.

Electricity exchanges are important tools that are used by retail providers to reduce the cost of electricity for the benefit of California electricity consumers. Exchanges often involve counterparties that are located outside of California in, for example, the Pacific Northwest ("PNW"). It might be more costly for a California party to generate electricity at a time when it is less costly for the PNW party to generate electricity. Conversely, it might be less costly for a California party to generate electricity when generation is more costly for the PNW party. An exchange arrangement enables the PNW party to generate when it costs are lower and permits the California party to generate when its costs are lower. The result is a more efficient use of generation resources.

As proposed by the staff, the administrative fee regulation could discourage exchange arrangements by impairing the economics of the arrangements because the fee would be assessed on both legs of the exchange transaction. Under the proposed regulation, an administrative fee would be assessed when a California party imports electricity in an exchange arrangement from, for example, the PNW. The fee would be assessed again either directly or indirectly on the export of power to the out-of-state exchange partner. For example, if the California party is required to return electricity at a later time by generating the electricity in California using specified gas-fired generation, the California party involved in the exchange arrangement would be billed for the cost of the administrative fee on natural gas by the serving natural gas utility. Likewise, if the electricity is to be returned from unspecified system supply, the fee would have been paid indirectly on the gas-fired generation portion of system supply and directly on any imported electricity that is included in system supply.

It would be both uneconomic and unfair to charge an administrative fee twice on exchanges by charging a fee directly on the initially imported electricity and charging another fee indirectly through the fee on the natural gas used to generate the returned electricity or directly on imported electricity that is included in system supply. The effect would be to burden the California consumer with two administrative fees even though only the kilowatt hours that were delivered through one side of the exchange were actually consumed in California by the California consumers.

In order to avoid the unfair double imposition of administrative fees on California consumers, SCPPA recommends that the reporting regulations be amended to permit an exclusion for imports that are tied to exports through an exchange arrangement. To this end, SCPPA recommends that a sentence be added as a further modification to section 95202(a)(45) definition of "imported electricity" to exclude imports that are tied to exports of California-generated electricity or system supply in an exchange:

> "Imported electricity" means electricity that is generated outside of California and delivered into California. Imported electricity does not include power wheeled through California, which is power that is imported into California that terminates in a location outside of California regardless of whether the import into California and simultaneous export to a location outside of California is performed without title passing to the retail provider or marketer that provides the wheeling service or is performed through a buy-sell arrangement in which title does pass to the retail provider or marketer. <u>Imported electricity also does not include imports that are tied to exports of specified California-generated electricity or unspecified California system supply in an exchange arrangement.</u>

This further modification of the definition of "imported electricity" in the proposed regulation would assure that administrative fees would not be applied twice in the course of an exchange arrangement, remedying the inequity in the regulations as proposed in the ISOR.

IV. THE BOARD SHOULD ESTABLISH A CAP ON THE REVENUES THAT WOULD BE GENERATED THROUGH THE ADMINISTRATIVE FEE.

Under the regulation as proposed in ISOR, there is no cap on the revenues that might be recovered in any given year through the administrative fees that are proposed in the rules. Section 95303(a) defines the "Total Required Revenue" ("TRR") would be recovered annually through the administrative fee as including the following four components:

> **1.** The Required Revenue (RR) shall be the total amount of funds necessary to recover the costs of implementation of AB 32 program expenditures for each Fiscal Year, based on the number of personnel positions, including salaries and benefits and all other costs, as approved in the California Budget Act for the fiscal year.
>
> **2.** For Fiscal Years 2009/2010, 2010/2011, 2011/2012, 2012/2013, and 2013/2014, the RR shall also include the payments required to be made by ARB on the Debt.
>
> **3.** The RR shall also include any amounts required to be expended by ARB in defense of this article in court.
>
> **4.** If there is any excess or shortfall in the actual revenue collected for any fiscal year, or if any collections are less than the Revenue Requirement, such shortfall or excess shall be carried over to the next year's calculation of the Total Revenue Requirement. The annual Total Revenue Requirement is equal to the annual RR adjusted for the previous fiscal year's excess or shortfall amount.

ISOR at 77-78.

It appears from section 95303(a)(1) as quoted above that the primary parameter for determining the TRR would be "the number of personnel positions, including salaries and benefits and all other costs, as improved in the California Budget Act for that fiscal year." Appendix C to the ISOR lists a plethora of programs for which funding would be provided through the administrative fee. The list and the accompanying staffing requirements could grow substantially in the future unless there were some reasonable constraint on the TRR that could be recovered each year through the administrative fee. SCPPA encourages the Board to expand the regulation proposed in the ISOR so as to include a provision for a reasonable cap that would apply to administrative fees.

V. CONCLUSION.

For the reasons discussed above, SCPPA recommends that the regulation proposed in the ISOR be modified to exclude imported electricity from the scope of the proposed administrative fee. If the Board declines to adopt this recommendation, then SCPPA recommends that the Board seek an opinion from the California Attorney General regarding the legality of applying the proposed administrative fee to imported electricity and that the Board provide in its FSOR a reasonably exhaustive analysis supporting the Board's judgment that applying the administrative fee to imported electricity would be lawful.

If the Board elects to adopt the proposed regulation applying the administrative fee to imported electricity, SCPPA recommends that the proposed regulation be modified as discussed above so as to prevent any assessment of the administrative fee on electricity that is wheeled through California either by a party that does not take title to the wheeled electricity or by a party that takes title through a buy-sell arrangement. Likewise, SCPPA recommends that the proposed regulation be modified to prevent any assessment of the administrative fee on power that is imported into California under an exchange arrangement that involves the subsequent return of specified California-generated electricity or system supply for delivery back to the out-of-state exchange counterparty.

Lastly, SCPPA recommends that the proposed regulation be modified to include a provision that caps the TRR at a reasonable level to provide the public with assurance against excessive administrative fees.

Respectfully submitted,

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