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By E-Mail and Electronic Submission (<http://www.arb.ca.gov/lispub/comm/bclist.php>)

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

Re: Proposed Second 15-Day Modifications to the Proposed Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions

Dear Madame Chairman:

Calpine Corporation ("Calpine") appreciates the opportunity to provide these comments on the California Air Resources Board's ("CARB") Proposed Second 15-Day Modifications (hereinafter, "Second 15-Day Changes") to the Proposed Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions, California Code of Regulations ("Cal. Code Reg."), tit. 17, sections ("§§") 95100 *et seq.* ("Mandatory Reporting Rule" or "MRR").

I. INTRODUCTION AND SUMMARY OF COMMENTS

Calpine operates 5,800 megawatts ("MW") of operating electric generating capacity in California and is a long-time supporter of greenhouse gas cap and trade programs. Calpine would like to commend Chair Nichols, the CARB Board Members, and staff for their continued efforts to work with stakeholders since the Board's approval of the Proposed Cap-and-Trade Regulation (proposed Cal. Code Reg., tit. 17 §§ 95800 *et seq.*) and Proposed Amendments to the MRR this past December. Calpine seeks to work cooperatively with CARB to ensure the Cap-and-Trade program's success and viability and we offer the following summary of our comments on the Second 15-Day Changes to the Proposed Amendments to the MRR:

- The default emissions factor for unspecified power imported into California is too low. If CARB cannot increase the default emissions factor to better reflect the emissions rate of the marginal market-clearing out-of-state generators upon finalizing the Proposed Amendments, Calpine would strongly urge CARB to commence a separate rulemaking at the earliest opportunity to further evaluate this issue and the market distortions that could result from application of an emissions factor for unspecified power that is below the emissions rate of such market-clearing imports.
- Although the Second 15-Day Changes clarify that sources exempt from the Acid Rain Program will nevertheless be subject to the reporting requirements of the MRR, CARB

failed to include any applicability threshold for such sources. CARB should clarify, upon final promulgation of the Proposed Amendments to the MRR, that such sources will only be subject to the MRR if their emissions exceed 10,000 metric tons ("MT") carbon dioxide-equivalents ("CO₂e") per year.

- CARB should revise the Proposed Amendments to the MRR to confirm that, where regulated entities fail to comply with a provision of the MRR due to no wrongful behavior and the violation results in no harm to the environment, it will not seek exorbitant penalties from such entities. If CARB cannot provide such assurances upon finalizing the Proposed Amendments to the MRR, Calpine would request that CARB issue guidance providing such assurances or otherwise affirm its commitment to apply the relevant statutory criteria in a manner that will not result in extraordinary penalties for minor reporting errors.

II. DISCUSSION

A. CARB Should Increase The Default Emissions Factor For Unspecified Power; If It Cannot Do So Prior To Finalizing The Proposed Amendments To The MRR, It Should Commence A Rulemaking To Further Evaluate The Appropriate Rate And Market Distortions That Will Be Caused By Setting The Default Rate Lower Than The Emissions From Market-Clearing Marginal Sources Of Imported Power

In its prior comments on both the proposed amendments to the MRR released last autumn and the first 15-day changes released earlier this summer, Calpine commented that default emission rate for unspecified power was too low.¹ As currently proposed by the first 15-day amendments, the default rate would be set at 0.428 MT CO₂e per MWh. *See* Proposed Cal. Code Reg., tit. 17 § 95111(b)(1). For the reasons we previously articulated in our prior comments,² we continue to believe that the default emissions rate is too low and should be increased to avoid creating perverse incentives for importers of electricity not to specify their imports, so as to reduce their compliance obligation under the proposed Cap-and-Trade Program. If CARB cannot increase the default emissions rate in the final rule it sends to the Office of Administrative Law by October 28, 2011, it should commence a rulemaking at the earliest opportunity, to be completed prior to the first compliance date under the Cap-and-Trade Program (January 1, 2013), to further investigate and evaluate the appropriate rate for imported power and the market distortions that

¹ *See* letter to Hon. Mary D. Nichols, Chairman, from Kassandra Gough, re: Proposed Regulation to Implement the California Cap-and-Trade Program, December 9, 2010 ("December 2010 Comments"), available at: http://www.arb.ca.gov/lists/capandtrade10/253-carb_letter_re_cap-and-trade_20101209.pdf, 18; letter to Hon. Mary D. Nichols, Chairman, from Barbara McBride, re: Proposed 15-Day Modifications to the Proposed Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions, August 11, 2011 ("August 2011 Comments"), available at: http://www.arb.ca.gov/lists/ghg2010/84-8-11-2011_calpine_comments_re_proposed_15-day_modifications_-_mandatory_reporting_ghg.pdf, 6.

² *See supra* at nt. 1

will be caused by setting the rate lower than the emissions from marginal sources of imported power.

B. Although CARB Has Amended The MRR's Applicability Provisions So They No Longer Unintentionally Exclude Electric Generating Facilities Exempt From The Acid Rain Program, CARB Should Clarify That Such Facilities Will Not Be Subject To The MRR Unless They Have Emissions Of More Than 10,000 Metric Tons CO₂e Per Year

In the first 15-day changes, CARB proposed to define applicability of the MRR by reference to Table A-3 of the U.S. Environmental Protection Agency's ("EPA's") Mandatory Greenhouse Reporting regulation, 40 Code of Federal Regulations ("CFR") Part 98. Calpine previously commented that, by relying upon the Tables appearing in EPA's reporting regulation, the Proposed Amendments to the MRR failed to capture those electric generating facilities that are not subject to EPA's Acid Rain Program and do not report emissions of CO₂ pursuant to 40 CFR Part 75. See August 11, 2011 Comments, 6-7. This would have had the absurd result of excluding facilities subject to a compliance obligation under the Proposed Cap-and-Trade Regulation from a reporting obligation under the MRR. In particular, it would impact facilities Calpine operates which are exempt from the requirements of Part 75, but nevertheless have emissions above the Proposed Cap-and-Trade Regulation's applicability threshold.

In the Second 15-day Changes to the Proposed Amendments to the MRR, CARB has included language to make clear that certain stationary fuel combustion or geothermal electric generation sources are, in fact, subject to the reporting obligation under the MRR, even though they may not be covered by EPA's reporting regulation. See Proposed Cal. Code Reg., tit. 17 § 95101(a)(1)(A). Calpine appreciates this change. However, Calpine notes that the Second 15-Day Changes fail to include any applicability threshold for these new categories of sources subject to the MRR. Thus, a source of stationary fuel combustion emitting only 100 metric tons per year CO₂e from operations as *de minimis* as periodic testing of an emergency fire pump could possibly be subject to the MRR. This obviously could greatly expand the scope of the MRR reporting obligation, with no environmental benefit. We do not believe that was CARB's intention. Accordingly, we would recommend amending the Proposed Amendments as follows:

§ 95101. Applicability.

(a) General Applicability.

(1) This article applies to the following entities:

(A) Operators of facilities located in California with source categories included in Tables A-3 and A-4 of 40 CFR Part 98, ~~and operators of facilities with emissions from stationary fuel combustion or geothermal electricity generation,~~ subject to the limitations of this section;

1. Facilities with source categories in Table A-3 are subject to this article regardless of emissions level.

2. Facilities with source categories in Table A-4 are subject to this article when stationary combustion emissions equal or exceed 10,000 metric tons CO₂e for 2012 or a later calendar year.
3. Facilities with source categories in Table A-4 are also subject to this article when emissions from all applicable source categories in paragraph (b) of this section equal or exceed 25,000 metric tone CO₂e, for 2011 or a later calendar year.
4. Facilities with emissions from stationary fuel combustion or geothermal electricity generation not listed in either of Tables A-3 or A-4 are subject to this article when emissions from all applicable source categories in paragraph (b) of this section equal or exceed 10,000 metric tons CO₂e for 2011 or a later calendar year.

C. CARB Should Reaffirm That It Will Not Seek Exorbitant Penalties For Violations Reflecting No Wrongful Behavior And Without Any Demonstrable Environmental Consequences

Calpine previously commented on the Proposed Amendments' provisions that would classify each day in which any required report is late or incomplete or each ton of emissions under-reported as a separate violation. *See* Proposed Cal. Code Reg., tit. 17 § 95107(b)-(c); August 11, 2011 Comments, 7-8. As Calpine previously conveyed, under these Proposed Amendments to the MRR, even an inadvertent data entry error could result in literally millions of individual violations of the Health and Safety Code.

Adherence to the detailed provisions of the MRR will be a major undertaking for reporting entities and one that is unlikely to be free of error, particularly in the first years of the MRR's implementation. Calpine is concerned that, as drafted, the Proposed Amendments could transform a seemingly innocuous and inadvertent human error into the subject of a major enforcement action, even though no impact on global climate change could likely be demonstrated as a result of the error.

Calpine believes CARB should provide the regulated community with assurances, either upon promulgation of the final amendments to the MRR or otherwise in guidance, that CARB will not wield its enforcement authority in a manner that fails to account for the severity of harm reflected by a particular violation. Where noncompliance has resulted from no wrongful behavior and does not result in any environmental harm, CARB should affirm that it does not intend to apply the relevant statutory criteria set forth by the Health and Safety Code so that inadvertent errors will result in millions of dollars of penalties to well-intentioned companies. If CARB cannot provide such assurances upon finalizing the Proposed Amendments to the MRR, Calpine would strongly urge CARB to issue regulatory guidance that clarifies its intention to not enforce the MRR in a manner that departs from the principles of proportionality and fairness inherent in the relevant statutory criteria at the earliest opportunity.

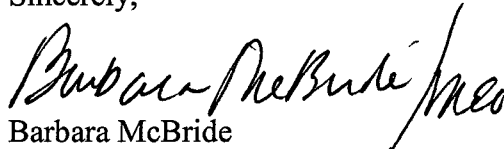
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Calpine looks forward to working with the Board and staff to ensure that timely and successful implementation of the Proposed Amendments to the MRR and the Proposed Cap-and-Trade Regulation.

Please feel free to contact me at 925.557.2238 with any questions or concerns regarding these comments. Thank you for the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Barbara McBride". The signature is fluid and cursive, with a long horizontal stroke at the end.

Barbara McBride
Director, Environmental, Health and Safety

cc: James Goldstene, Executive Officer
Edie Chang, Chief, Planning and Management Branch, Office of Climate Change
Steven S. Cliff, Ph.D., Manager, Program Evaluation Branch, Office of Climate Change
Claudia Orlando, Air Pollution Specialist, Office of Climate Change
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