PACIFICORP
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September 27, 2011

VIA ELECTRONIC MAIL

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

Re: Comments of PacifiCorp Regarding the California Air Resources Board September 12, 2011 Proposed 15 Day Modifications to the Regulation for Cap and Trade

Dear Board Members:

PacifiCorp respectfully submits these comments as requested in the September 12, 2011, "Notice of Public Hearing to Consider Adoption of a Proposed California Cap on Greenhouse Gas Emissions and Market Based Compliance Mechanisms Regulation, Including Compliance Offset Protocols" (hereinafter "Proposed Regulation" or "Cap-and-Trade Program").

PacifiCorp is a regulated multi-jurisdictional retail provider (MJRP) serving 1.7 million retail electricity customers, in Utah, Oregon, Wyoming, Washington, Idaho and California. The company operates two balancing authority areas within those states. PacifiCorp owns, or has interests in, 78 thermal, hydroelectric, wind-powered and geothermal generating facilities, with a net owned capacity of 10,623 megawatts. PacifiCorp owns, or has interests in, electric transmission and distribution assets, and transmits electricity through approximately 16,200 miles of transmission lines and 62,800 miles of distribution lines. PacifiCorp also buys and sells electricity on the wholesale market with public and private utilities, energy marketing companies and incorporated municipalities as a result of excess electricity generation or other system balancing activities. In California, PacifiCorp serves approximately 46,500 customers in Del Norte, Modoc, Shasta and Siskiyou counties. Approximately 35 percent of its California customers are eligible for PacifiCorp's California Alternate Rates for Energy (CARE) low-income assistance program.

PacifiCorp has participated extensively in the California Air Resources Board (ARB) rulemaking process for both the Mandatory Reporting Rule (MRR) and the Cap and Trade Rule (CT), and submits these comments as a supplement to its previously filed comments. PacifiCorp has worked closely with ARB staff and would like to commend them for their openness and professionalism. Further, PacifiCorp will make available its technical staff to assist ARB if needed.

PacifiCorp's comments below are summarized as follows:

1) PacifiCorp remains concerned that the regulation continues to rely on the use of e-Tags to determine when an entity is a first-deliverer under the definition Electricity Importer. The changes made do not resolve the fundamental problem with relying on e-Tags to establish the first-delivered and in fact exacerbate the risk of potential legal challenges to the regulations. To minimize these risks and provide greater clarity, PacifiCorp encourages ARB to identify the first deliverer provisions as an issue that will be further evaluated before the first cap-and-trade auction in July 2012.

2) ARB should consider Federal Energy Regulatory Commission (FERC) exclusive jurisdictional issues when it comes to the regulation of imported wholesale energy.

3) PacifiCorp supports the changes to the Resource Shuffling provisions and staff's indication that there will be an opportunity to provide further input on those sections. When ARB revises the Resource Shuffling sections, ARB should recognize that a multi-jurisdictional utility's resource decisions made pursuant to a multi-state cost allocation methodology does not constitute resource shuffling.

4) The offset invalidation rules should provide the same invalidation period for offsets approved by ARB as exist for offsets approved under other protocols such as The Climate Registry.

5) ARB should clarify what steps would need to be taken as it works with the U.S. Environmental Protection Agency (EPA) to align the California cap-and-trade rule with the EPA's proposed New Source Performance Standard (NSPS) for GHGs rule under the Clean Air Act Section 111.

Discussion

1. The Importer Provisions Should Not Exclusively Rely On NERC E-Tags, and ARB Should Not Remove Reference to Title and Potential Regulation of Downstream Purchasers in These Provisions.

The Proposed Regulation includes substantial revisions to the definitions for Electricity Importer (95802(a)(87)) and Imported Electricity (95802(a)(137)). The definitions no longer refer to the title holder when determining the entity that will be considered the importer subject to ARB jurisdiction, and thus the first deliverer with the cap-and-trade compliance obligation. Instead, the regulations rely exclusively on the purchasing-selling entity (PSE) identified on North American Electric Reliability Corporation (NERC) e-Tag. The regulations also remove language that would have provided: "When PSEs are not subject to the regulatory authority of ARB, including tribal nations, the electricity importer is the immediate downstream purchaser or recipient that is subject to the regulatory authority of ARB." Further, language was added to the definition of Electricity Importer stating that "for facilities physically located outside the state of California with the first point of interconnection to a California balancing authority's transmission and distribution system, the importer is the facility operator or scheduling

coordinator." These changes are problematic for three reasons: 1) they potentially violate the dormant commerce clause and will therefore expose the cap-and-trade regulation to litigation risk; 2) they do not solve the complex problem of how to identify the correct entity importing power into California that is consumed in California; 3) they lack clarity and will therefore create confusion and uncertainty for parties transacting at trading hubs outside California.

The importer definitions potentially constitute an over-reach of California's jurisdiction. The aforementioned sentence beginning "when PSEs are not subject to the regulatory authority of ARB. . ." served as an explicit recognition that ARB does not have jurisdiction over interstate transactions occurring wholly outside the state. The previous version of the Proposed Regulation properly recognized that ARB can only regulate the entity that holds title when power crosses the state line, typically the downstream purchaser when title is passed to a purchaser at a delivery point physically located out of state. This legal structure has ARB jurisdiction properly attached when the power is within the state boundary. The removal of this language is exacerbated by the simultaneous deletion of reference to title in the beginning of the definition.

ARB relies on the PSE designation on the e-Tag, and specifically the PSE identified in the last segment of the physical path of the e-Tag to identify the electricity importer. As PacifiCorp noted in its comments on the July 25th version of the Proposed Regulation, e-Tags are not used to establish title to energy or transmission. Rather, e-Tags were originally designed as a tracking system for interchange transactions. As such, e-Tags facilitate communication and tracking of interchange transaction information between counterparties, balancing authorities, and transmission providers. Using e-Tags as the exclusive determinant for identifying electricity importers is inappropriate because, as is more fully described below, there are instances when the entity identified as the PSE in the last segment of the physical path crossing into California does not hold title to the power and is therefore not importing energy to be consumed in California. Further, because e-Tags are not intended to establish or confirm title, there are not currently mechanisms in place to monitor, track, and ensure that the PSE on the e-Tag is correctly identified in every instance. Adopting rules that impose compliance obligations based on e-Tag information will require PSEs to develop controls to ensure accuracy of *commercial* information on e-Tags, which are tools designed to ensure reliability and not to document commercial activity.

As will be more fully articulated below, attaching a California compliance obligation to an entity who is not importing energy into California could amount to California's regulation of activities outside of the state of California. The removal of the language in the definition that refers to the entity that holds title does not solve these fundamental flaws associated with the definition and the use e-Tags to identify importers.

PacifiCorp, in its capacity as a FERC-jurisdictional service provider, has wholesale transactions for its system power where it is identified as the PSE on the physical path for energy scheduled into California even though the purchasing entity took title to the power at a point within PacifiCorp's multi-state balancing authority area. As an example, PacifiCorp routinely sells energy to the CAISO in the real-time market at the California-Oregon border (COB), a trading hub made up of multiple scheduling points, including Captain Jack and Malin500. In this example, there are two relevant e-Tag line segments: 1) JohnDay-MALIN500; and 2)

MALIN500-NP15. PacifiCorp contends that the sale to the CAISO occurs at Malin. PacifiCorp has title to the energy from the source to Malin, where the CAISO takes title to the energy and delivers it into California, sinking the energy in NP15. However, in compliance with CAISO Operating Procedure – 2510, the e-Tag lists only PacifiCorp as a PSE. Most importantly, the e-Tag lists PacifiCorp as the PSE on the MALIN500-NP15 segment, where the energy enters California. In this example, then, PacifiCorp could be determined to be the electricity importer and be required to carry the cap and trade compliance obligation. PacifiCorp asserts that it is the CAISO, and *not PacifiCorp,* that is importing electricity into California to be consumed in California. It is not appropriate for the ARB to attach a compliance obligation on an out of state entity that is not importing electricity into California.

If these provisions are implemented as is, the Cap-and-Trade Program will be vulnerable to legal challenge.[1] The Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) empowers Congress to regulate interstate commerce. This provision has been interpreted by courts to prohibit states from regulating activities which occur wholly outside the state. For example in *Healy v. The Beer Institute*, 491 U.S. 324 (1989), the U.S. Supreme Court struck down a Connecticut law requiring wholesalers to post prices in Connecticut that were no higher than those sold in neighboring states. The Court noted that:

> The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," . . . a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.

In the context of electricity imports, when title is conferred from the seller to the purchaser at a location outside of California, the commercial transaction takes place wholly outside of California. ARB may have authority to regulate the purchaser that is delivering energy to be consumed in California, but ARB will not have jurisdiction over the seller. However, if the selling entity is nevertheless identified on the e-tag as the PSE on the physical path coming into California, and ARB seeks to regulate the selling entity as the importer, then ARB will exceed the extent of its jurisdiction in violation of the Commerce Clause. These risks should be avoided because they will create uncertainty and price volatility in the cap-and-trade markets.

PacifiCorp is sympathetic to ARB's desire to have a simple mechanism that will clearly identify the entity importing electricity into California to be consumed in California. However, due to complexity of the wholesale market and transmission scheduling systems, it is highly unlikely that there is any way to simply and clearly establish the entity that actually holds title to energy as it crosses into California and then is consumed in California. Certainly, for the reasons

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[1] PacifiCorp has raised these issues in prior comments to ARB, see, e.g. PacifiCorp's Comments on the Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California (June 15, 2007).

described above, the desired data is not practically captured via an e-Tag. Further, reliance on the e-Tag mechanism to identify the importer is also problematic because it calls into question the constitutionality of the Cap-and-Trade Program as it implies to importers.

PacifiCorp proposes that a more practical and legally supported solution would be to calculate, on some regular interval, the quantity of unspecified net imports and require the buyer/importer (located in California) to allocate the related compliance obligation to sellers. This would more accurately and easily account for imported energy, as well as wheels and exports, and does not rely on scheduling information that may be subject to change and does not necessarily reflect actual energy flow. In this way, imports could be calculated based on actual flow data that already is or could be captured by the CAISO. The buyer/importer would be identified as the entity with the compliance obligation and it would then determine how to spread the costs of compliance to sellers. Further, this solution could allow for more certainty in the wholesale market and could more accurately capture the allowance price embedded in the price of energy because the price will be based on a net consumption amount.

In sum, the risk of litigation and lack of clarity created by the importer definitions is an issue that needs resolution by ARB. Regardless of whether or not ARB is willing to consider the solution described above, more work is needed in order to work through the complexities associated with identifying the electricity importer. Since staff has indicated that there will not be another 15 day rulemaking package released before the October Board hearing, PacifiCorp requests that ARB identify the importer definitions and first deliverer provisions generally as a topic area subject to further rulemaking activity in 2012. These issues should be resolved well before the July 2012 start of the cap-and-trade auctions. PacifiCorp continues to encourage ARB staff to consult a range of technical experts on issues affecting the wholesale energy market and continues to offer its own technical expertise from the perspective of a balancing authority and a MJRP.

2. **ARB Should Consider Federal Energy Regulatory Commission (FERC) Exclusive Jurisdiction Issues When it Comes to the Regulation of Imported Wholesale Energy.**

The definitions of electricity importer and imported electricity, as well as many other elements of the proposed regulations that may impact the wholesale energy market (inside and outside California), may be problematic in light of the Federal Energy Regulatory Commission's (FERC) exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities.[2] To the extent that the Cap-and-Trade Program regulates the wholesale energy market by setting prices or establishing conditions for participation in the market, it may be subject to federal preemption. PacifiCorp strongly encourages ARB to engage FERC staff to ensure that no aspects of the Cap-and-Trade Program are pre-empted by federal law and do not violate the Federal Power Act.[3]

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[2] 16 U.S.C. §§ 824, 824d, 824e (2006); *e.g., Mississippi Power & Light Co. v. Mississippi ex. Rel. Moore*, 487 U.S. 354 (1988).

[3] PacifiCorp has raised these issues in prior comments to the California Public Utilities Commission, see, e.g. PacifiCorp's Response to Administrative Law Judges' Ruling Requesting Comments and Legal Briefs on Market Advisory Committee Report in Docket R06-04-009 (August 6, 2007), pp. 11-13.

3. **PacifiCorp Supports the Changes to the Resource Shuffling Provisions and Plans to Further Revise and Clarify Their Applicability**.

PacifiCorp is pleased to see that the September 12th update to the Proposed Regulation addresses PacifiCorp and other parties' concerns about the Resource Shuffling provisions by removing reference to fraud and the confusing standards for "historically serving load in California" (see 95802(a)(251)). Currently, the definition provides that "Resource Shuffling" means any plan, scheme, or artifice to receive credit based on emissions reductions that have not occurred, involving the delivery of electricity to the California grid." The regulation also still requires regulated entities to attest to not engaging in Resource Shuffling (Section 95852(b)(2)). As a MJRP, PacifiCorp allocates its resources to loads in different states consistent with regulatory directives. In their current form, the Resource Shuffling provisions still lack clarity with respect to the treatment of a MJRP's resources and should not be adopted in their current form, unless the staff explicitly notes in the regulation or elsewhere that the Resource Shuffling provisions will be subject to further revision and clarification in 2012. When ARB revises the Resource Shuffling provisions, ARB should recognize that a multi-jurisdictional utility's resource decisions are made pursuant to a specific cost allocation methodology, and potentially other legitimate regulatory or commercial activities such as the provision of ancillary services, and will not constitute resource shuffling.

4. **ARB's Offset Invalidation Rules Should Provide the Same Invalidation Period for Offsets Approved by ARB as Exist for Offsets Approved Under Other Protocols Such As The Climate Registry.**

Section 95985(b) was amended to provide for a shorter, three-year invalidation period for offsets that are approved under an ARB-approved offset protocol. There is still an eight year invalidation period for other offset types, such as those approved under The Climate Registry. The regulation does not provide a clear rationale for this differing treatment. To avoid unintended impacts and potential favoritism for certain offset programs, PacifiCorp encourages ARB to apply the same invalidation period to all types of offsets.

5. **ARB Should Clarify What Steps Would Need to be Taken as it Works with the U.S. EPA to align the California cap-and-trade rule with the EPA's proposed New Source Performance Standard (NSPS) for GHGs rule under the Clean Air Act Section 111.**

PacifiCorp understands that ARB has been working with the US EPA to recognize the state's greenhouse Cap-and-Trade Program as equivalent to the EPA's proposed New Source Performance Standards (NSPS) for GHG emissions under the Clean Air Act pursuant to §111(b) for new sources or §111(d) for existing sources.[4] Specifically, PacifiCorp understands that ARB has requested reciprocity for sources located in California that will be subject to the EPA's new NSPS GHG rule since those sources will also be required to comply with the state's GHG cap-and-trade program. PacifiCorp is concerned that reciprocity for in-state sources may have a

[4] See, http://www.epa.gov/airquality/listen.html#session3

discriminatory impact on out-of-state sources that import electricity into California. Out-of-state sources importing power into California will potentially be subject to the new NSPS GHG rule in the state where the source physically resides. When another state in which PacifiCorp operates develops its implementation plan to satisfy its obligations required by the new NSPS GHG rule, California's reciprocity, if it does not exempt out-of-state sources from the state's Cap-and-Trade Program will create a situation where an out-of-state source is regulated twice under the new NSPS GHG rule – once in the state where it physically resides and again in California. This issue should be clarified. PacifiCorp specifically requests that ARB consider how reciprocity would affect out-of-state sources, and specifically consider how reciprocity for in-state sources may create a discriminatory impact on out-of-state sources, and whether changes to California's Cap-and-Trade Program would be necessary. Though as not currently imminent, a discriminatory impact on out-of-state sources may also occur if and when a federal or other state GHG cap is imposed. PacifiCorp recognizes that ARB is cognizant of this issue and respectfully requests that ARB continue to consider this in future changes to the Cap-and-Trade Program.

Conclusion

PacifiCorp appreciates the opportunity to provide comments on the September 12th 15-day modifications of the Proposed Regulation. Overall, we would like to remind the Board that a multi-jurisdictional utility has unique reporting and compliance challenges, and that the Proposed Regulation should be subject to further stakeholder vetting to ensure that the Cap-and-Trade Program is properly considers interstate activities such as the sale and operation of the western-wide wholesale electricity markets. The final regulation as implemented in July 2012, when the first auction occurs, should strive to better recognize the extent of ARB's jurisdiction over out-of-state activities. Also, PacifiCorp reiterates its proposal to apply the Cap-and-Trade compliance obligation based on a calculated net import amount to identify the electricity importer and PacifiCorp looks forward to working with staff towards the successful adoption and implementation of the Cap-and-Trade Program.

Thank you for your consideration of these comments.

Dated: September 27, 2011 Respectfully submitted,

By

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