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Comments on AB1110 Implementation

Additional submitted attachment is included below.

**COMMENTS ON DRAFT MODIFICATIONS OF THE REGULATIONS GOVERNING
THE POWER SOURCE DISCLOSURE PROGRAM**

- 1. The CEC incorrectly relies on a Daily Journal letter from Assemblymember Ting to justify using CARB's MRR reporting despite the Legislature's specific rejection of this proposal in AB110 itself.**

Throughout the rulemaking process the CEC continues to rely on a Daily Journal letter from Assemblymember Ting¹ stating his intention that the CEC use CARB's MRR reporting methodology to develop AB1110's GHG emissions accounting methodology. This overlooks the significant fact that AB1110 was only adopted by the Legislature, and signed by the Governor, after the requirement that the CEC use the CARB MRR methodology was removed.² While Assemblymember Ting is entitled to express his personal preference about what the CEC should do, California courts have routinely concluded that:

[A] court will generally consider only those materials indicative of the intent of the Legislature as a whole.... because, as the Supreme Court explained in *Hutnick v. United States Fidelity & Guaranty Co.*, supra, 47 Cal.3d at page 465, footnote 7, "[I]t is reasonable to infer that those who actually voted on the proposed measure read and considered the materials presented in explanation of it, and that the materials therefore provide some indication of how the measure was understood at the time by those who voted to enact it." *Material showing the motive or understanding of an individual legislator, including the bill's author, his or her staff, or other interested persons, is generally not considered. This is because such materials are generally not evidence of the Legislature's collective intent.*³

While the CEC is able to use CARB's MRR methodology, if it is able to independently justify it, it cannot rely on Assemblymember Ting's personal preferences. As discussed below, the CEC has not justified the use of CARB's MRR.

- 2. The CEC incorrectly ignores a statutory requirement that renewable energy credits (RECs) include all of the environmental attributes (including GHG-free attributes) of the underlying generation in favor of a subordinate administrative determination.**

Throughout this proceeding, numerous parties have continually implored the CEC to recognize that, under state law, a renewable energy credit (REC) encompasses "all of the environmental attributes" which would include its GHG-reduction benefit. In contrast, the CEC is relying on a CARB administrative determination of how to determine GHG intensity.

¹ "Assemblymember Phil Ting's Letter to the Daily Journal" of August 31, 2016 cited in the ISOR, p. 38.

² The requirement to use CARB's MRR methodology was specifically deleted from AB1110 by the Legislature through the Senate's August 4, 2016 amendments to AB1110.

³ *Metropolitan Water District v. Imperial Irrigation District* [80 Cal. App. 4th 1426]

It is unclear if the CEC can arbitrarily ignore the statutory guidance regarding the GHG attributes of RECs. The California Supreme Court has clearly established the practice that California law requires giving meaning to and harmonizing legislative directions.

As the Supreme Court recently reaffirmed in *Lopez v Sony Electronics* (July 5, 2018):

We have recently emphasized the importance of harmonizing potentially inconsistent statutes. "A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. This rule applies although one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject." Thus, when "two codes are to be construed, they must be regarded as blending into each other and forming a single statute." Accordingly, they must be read together and so construed as to give effect, when possible, to all the provisions thereof (emphasis added).⁴

The CEC's approach clearly ignores the legislative requirement that RECs include all environmental attributes thus rendering this legislative section superfluous. Instead, the CEC proposes to substitute an administrative determination.

3. The CEC's own WREGIS/REC reporting system meets AB1110's requirements

The CEC was tasked with certifying that WREGIS accurately tracked electric generation throughout the Western United States and the associated environmental attributes. This system meets AB1110's requirement in that it includes the "most recent data" as RECs are issued within several months of actual generation, is verifiable, and accurate. For the CEC to now claim that the WREGIS/REC system which the CEC itself developed is not sufficient would call into question the accuracy of the entire RPS program.

4. CARB itself has recognized the entire REC framework as a valid means of tracking GHG reductions.

Although both the CEC and CARB now claim that RECs do not represent real reductions in GHG emissions, this conclusion is belied by CARB's own findings in developing its proposed Renewable Electricity Standard in 2010.

Frustrated by the Legislature's delay in adopting RPS legislation, Governor Schwarzenegger, through Executive Order S-21-09 directed CARB to develop a Renewable Energy Standard (RES) that would require California's LSEs to achieve a 33% renewable standard by 2020, similar to the finally adopted requirements of SBX1-2. The interaction between CARB's RES and the RPS program can be shown by Governor Schwarzenegger first asking CARB to delay adoption of the RES so that the Legislature could consider SB722, and then CARB approving its RES on September 23, 2010 when the Legislature failed to adopt SB722. SB722 then was introduced in identical language, in the following extraordinary session, as SBX1-2 and approved by the Legislature, eliminating the need for the RES.

⁴ Citing back to the Court's decision in *State Dept. of Public Health v. Superior Court* (60 Cal.4th 940, 955 (2015))

In reviewing CARB's Initial Statement of Reasons (ISOR)⁵ for the RES, CARB itself concluded that the WREGIS REC program met all of the criteria required as a GHG-reduction measure under AB32 California's Global Warming Solutions Act. This included CARB concluding that the use of RECs met the requirement that:

The greenhouse gas emission reductions achieved are real, permanent, quantifiable, verifiable, and enforceable by the State board.⁶

As the ISOR specifically noted:

- *Real Reductions.* Staff believes that the GHG emission reductions from increased renewables procurement would be real because they will be based on the actual procurement of RECs that represent the environmental attributes of renewable generation. RECs retired for compliance with the RES Program would be tracked by the WREGIS system. In addition, RECs used for compliance with the regulation must come from eligible renewable energy resources. These eligible resources must be certified by the CEC or the ARB.
- *Permanency.* The proposed regulation would require the regulated parties to provide increasingly higher percentages of renewable generation until 33 percent is achieved in 2020 and thereafter. In order to ensure that the RES targets are met, a regulated party is required to permanently retire RECs tracked by the WREGIS system. By permanently retiring RECs, the GHG emission reductions are ensured to be permanent.
- *Quantification and Verification.* Compliance with the proposed regulation is demonstrated through the acquisition and retirement of RECs. RECs must be tracked by WREGIS to satisfy the percent renewables requirements. The proposed regulation would require the regulated parties to maintain annual records of RECs (i.e., WREGIS certificates) retired and total retail electricity sales to end-use customers. Some additional information is required to demonstrate compliance over the interim compliance intervals. This documentation must be supplied to ARB via annual progress reports and compliance interval reports that would be used to verify the accuracy of the records. The annual reports sent to ARB will be used to estimate the annual GHG emission reductions from regulated parties. Using the reported information, megawatt-hours (MWh) of eligible generation would be converted to tons of GHG reductions using established GHG emission factors for each renewable energy technology to determine the GHG benefits from the use of renewables. The estimated GHG emissions and benefits will be made available to the public via the ARB's Internet website.
- *Enforceability.* The regulation, as proposed, contains requirements which support enforcement efforts, including report submissions with data that can be verified for compliance purposes.

⁵ Proposed Regulation for a California Renewable Electricity Standard Staff Report: Initial Statement of Reasons (June 2010)

⁶ CARB ISO, p. II-4

CARB's RES proposal would have included unbundled and out-of-state RECs as part of the RES, meaning that they too would have met the permanent and verifiable requirements of AB32.⁷

In conclusion as both CARB and the CEC believe that RECs do represent real GHG reductions the CEC should rely on the RPS/REC methodology to track GHG emissions for purposes of AB1110.

5. CARB continues to use RECs to represent real reductions in GHG emissions

As many parties have noted throughout this rulemaking, CARB has specifically adopted a RPS Adjustment that reduces a LSE's GHG cap-and-trade reporting requirement to reflect the use of Bucket 2 RPS resources.

While both CARB and the CEC state that this is an "adjustment" and not an actual crediting of RECs as a GHG reduction, CARB itself has recognized that RECs do represent a reduction in GHG emissions.

The Voluntary Renewable Electricity (VRE) Program allows purchasers of renewable electricity and renewable energy credits (RECs) above RPS requirements to retire these RECs in exchange for a direct and corresponding retirement of a cap-and-trade GHG allowance.

CARB's Low Carbon Fuel Standard (LCFS) adopts a similar approach allowing entities to retire RECs directly in exchange for a corresponding GHG reduction under the program.

6. The CEC is incorrect that CARB's MRR methodology was used to set the GHG emissions cap for the electric sector under SB100. Instead the cap was set using the same methods (the underlying RPS program and CARB's cap-and-trade program) that the CEC claims are ineffective in assigning GHG emissions to LSE..

The CEC's Notice of Proposed Action states that "CARB further applied MRR's GHG emissions accounting method to determine the sectoral emissions reduction target for retail suppliers are required by SB350."⁸ This is incorrect.

As CARB's staff report noted:⁹

Resolution 17-46 adopted by CARB directs staff to use the 2017 Scoping Plan Update to inform the GHG planning targets for the electricity sector and each retail electricity provider pursuant to SB 350.¹⁰

⁷ Leakage occurs when State policy results in a reduction in GHG emissions within the State that is offset by an increase in GHG emissions outside California. Leakage under the RES could occur if a California retail seller buys unbundled RECs (RECs without the electricity), but the electricity is claimed as renewable in another state. In addition, leakage could occur if a California retail seller claims RES credit by purchasing RECs from an already existing renewable facility. RPS program requirements, which are subsumed by the proposed regulation, would limit these leakage scenarios—specifically, tracking of RECs in WREGIS and eligibility requirements for new out-of-state facilities. ISOR, p. ES-4).

⁸ CEC Notice of Proposed Action, p. 6

⁹ California Air Resources Board Staff Report: Senate Bill 350 Integrated Resource Planning Electricity Sector Greenhouse Gas Planning Targets - July 2018 (Staff Report)

¹⁰ Staff Report, p. 14

The 2017 Scoping Plan Update, in turn, did not rely on CARB's MRR methodology to set these limits but instead relied on the 2017 Scoping Plan Update identification of:

[A]n achievable and cost-effective path to reduce GHG emissions, which includes specific electricity sector actions such as implementation of the 50 percent RPS, doubling of energy efficiency savings, and additional emissions reductions via the Cap-and-Trade Program.¹¹

Compounding this problem, in trying to assign total electric sector GHG emissions to individual Load Serving Entities (LSEs), CARB staff, based on the CEC's own recommendation:¹²

Proposes to utilize the information developed for CARB's Cap-and-Trade Program 2021-2030 allowance Allocation to Electric Distribution Utilities as the basis of apportionment for POUs and IOUs. The information in the EDU Allocation Spreadsheet includes estimated future GHG emissions for each of these entities. These estimates provide a transparent basis for calculating the relative proportion of GHG emissions in 2030 associated with individual POUs and IOUs. The methodology to allocate allowances to EDUs, including the data in the EDU Allocation Spreadsheet, was developed through a multi-year public process. It was adopted by the Board in July 2017 and became effective October 1, 2017.¹³

In other words, the GHG emission reductions set by CARB were based on the California RPS program and CARB's Cap-and-Trade program, both programs that the CEC is not relying on to determine GHG emission levels. Thus the CEC is creating an inherent mismatch between the GHG reduction targets set by CARB (which include not only RPS reductions but also reflect the "RPS Adjustment Factor") and the PCL methodology in which these very same load-serving entities will report their efforts to their retail customers their achievement of these goals. As noted above, CARB has determined that this methodology provides "a transparent basis" for calculating GHG emissions and the CEC should adopt a similar approach.

7. Under the CEC's proposal, a retail seller would be able to sell the GHG-attribute of RPS-eligible generation to a third-party, while still retaining the full RPS value of the generation for itself.

Under the CEC's logic, the owner of a RPS energy facility could conceivably sell the energy (along with its GHG attribute) to another party, while still retaining the associated REC as a PCC1 REC.

8. The CEC's reliance on TURN's description of double-counting is incorrect, raises issues significantly beyond the CEC's statutory authority under AB1110 and is not solved by its proposal.

In support of its conclusion that unbundled RECs should not be counted, the CEC relies on an example provided by TURN of a solar rooftop where the owner has sold the RECs but still claims to be renewable. This example bears no relationship to AB1110. As Section 398.1(b) notes: "The purpose of this article is to establish a program under which entities offering electric services in California disclose...information on the sources of energy, and the associated emissions of greenhouse gases..." AB1110 only applies to

¹¹ Staff Report, p. 14, emphasis added

¹² As the Staff Report (p. 19) states: "Both CEC and CPUC recommended a process that apportions the electricity sector planning target to POUs and CPUC jurisdictional LSEs based on estimated GHG emissions for the year 2030 from information developed for CARB Cap-and-Trade Program 2021-2030 Allowance Allocation

¹³ Staff report, p. 26. The Staff Report was subsequently adopted by CARB.

the claims of retail sellers, not other claims that solar owners may or may not claim. How non retail sellers claim GHG reductions is beyond the CEC's statutory jurisdiction. Similarly, nothing in TURN's example would be solved by AB1110. The rooftop solar that an owner claims, could just as well been sold as a bundled PCC1 REC depending upon the contract terms, meter location, etc. AB1110 was not designed to provide GHG guidance to motorists or other passers-by, only to limit the claims of retail sellers regarding the GHG intensity of their offerings.