

**BEFORE THE PUBLIC UTILITIES COMMISSION  
AND THE ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION  
OF THE STATE OF CALIFORNIA**

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Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emission Standards into Procurement Policies.

Rulemaking 06-04-009  
(Filed April 13, 2006)

Order Instituting Informational Proceeding – AB 32.

CEC Docket No. 07-OIIP-01

**SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY  
COMMENT ON MARKET ADVISORY COMMITTEE REPORT**

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In accordance with the July 19, 2007 Administrative Law Judge's Ruling Requesting Comments and Legal Briefs on Market Advisory Committee ("MAC") Report and Notice of En Banc Hearing ("Ruling") in the captioned proceedings, the Southern California Public Power Authority ("SCPPA")<sup>1</sup> respectfully submits this Comment. In accordance with the Ruling, this Comment is being submitted to both the California Public Utilities Commission ("CPUC") and the California Energy Commission ("CEC") (jointly, "Commissions").

On June 30, 2007, the Market Advisory Committee ("MAC") released Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California ("Recommendations"). The MAC recommended what it called a "first-seller" approach to establishing the point of

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<sup>1</sup> SCPPA is a joint powers authority. Twelve publicly owned utilities ("POUs") are members of SCPPA: Anaheim, Azusa, Banning, Burbank, Cerritos, Colton, Glendale, Los Angeles Water and Power, Imperial Irrigation District, Pasadena, Riverside, and Vernon. These POUs, in aggregate, serve over 2 million customer meters in a population of over 5 million people. SCPPA members own and control over 9,000 megawatts of electric generation capacity.

regulation of greenhouse gas (“GHG”) emissions under Assembly Bill (“AB”) 32, the Global Warming Solutions Act of 2006, California Health and Safety Code, Division 25.5. The Ruling requests comments on the MAC’s recommendation that the point of regulation for emissions in the electricity sector should be “first-sellers” rather than retail providers as had been previously proposed by the CPUC.

SCPPA members tend to own or control electrical generation resources that are adequate to assure full and reliable service to the customers within their service territory. The SCPPA members tend to be fully resourced. Accordingly, they would tend to be a point of regulation nearly as much under a “first-seller” approach as they would under a “load-based” approach in which retail providers would be the point of regulation. Nevertheless, SCPPA is concerned about the technical and legal viability and policy implications of the first-seller approach. The Ruling presents 53 thoughtful questions about the “first-seller” concept. SCPPA welcomes the Commission’s inquiry into the viability of the approach, and SCPPA attempts to answer the Commission’s 53 questions.

Regardless of which point of regulation is ultimately recommended by the Commission to the California Air Resources Board (“CARB”), “first sellers” or retail providers, SCPPA urges the Commissions to recognize the necessity of administratively allocating emission allowances to electric utilities such as the SCPPA members.

#### **I. SUMMARY OF SCPPA’S CONCERNS ABOUT THE FIRST-SELLER APPROACH**

The first-seller approach is novel. Thus, it raises novel technical, legal, and policy issues. Under the first-seller approach, both emission sources and marketers would be points of regulation. Thus, the first-seller approach would be unlike what the MAC calls “the leading US criteria polluting trading systems,” namely, the SO<sub>2</sub> Acid Rain Trading Program, the Southern

California Regional Clean Air incentives market, and the Northeast NOX Budget Program. *See* Recommendations at 89-95. Sources are the exclusive points of regulation under those programs. The first-seller approach would also be unlike the GHG cap-and-trade programs considered by the MAC, particularly, the European Union Emissions Trading Scheme (“EU ETS”) and the Northeast Regional Greenhouse Gas Initiative (“RGGI”), under which sources are the points of regulation. *See* Recommendations at 95-99.

The first-seller approach to GHG regulation is a hybrid. For intrastate sources, the point of regulation would be owners or operators of generation facilities that emit GHG. Thus, on an intrastate basis, the first seller approach is a “source-based” approach to GHG regulation. However, for energy that is imported into California from out-of-state, the point of regulation would be “the importing contractual party” or “the entity that first sells power into California’s electricity system” at the first point of delivery (“POD”) within California.

**A. The First-Seller Approach Raises Legal and Technical Issues.**

The marketers of electricity at wholesale in interstate commerce are subject to the jurisdiction of the Federal Energy Regulatory Commission (“FERC”) under the Federal Power Act. Thus, the first-seller approach raises, on its face, legal issues about the scope of the State’s jurisdiction that must be addressed. Further, establishing non-jurisdictional marketers as a point of regulation raises technical concerns about the potential for wholesale market distortions that may not arise if retail providers were the point of regulation as proposed under the “load-based approach that has been suggested by the CPUC. *See* Assigned Commissioner’s Ruling and Phase 2 Scoping Memo, R.06-04-009, page 1 (April 13, 2006) (“Scoping Memo”). The legal and technical issues raised by the hybrid first-seller approach as elicited by the questions asked by the Commissions and are discussed further below.

## **B. The First-Seller Approach Raises Policy Issues.**

The first-seller approach also raises important policy issues. The first-seller approach would be likely to have a substantial impact on one of the most cost effective means of achieving GHG emissions reductions, energy efficiency. For POUs that tend to be fully resourced, there probably would not much of a difference between having first-sellers as a point of regulation and having retail providers as a point of regulation. Substantially resourced POUs will evaluate generation options against the costs and benefits of energy efficiency programs in making a decision about how to provide service to their retail loads in the most cost effective and reliable manner consistent with meeting GHG reduction requirements. However, for retail providers that are not substantially or entirely resourced and which depend upon market purchases to serve substantial portions of their retail load, there may be a significant difference of behavior if first sellers were the point of regulation rather than retail providers.

If retail providers were the point of regulation, “the CPUC and the CEC (among other agencies) [would be able] to continue to utilize [their] policy levers for renewables and energy efficiency, because it puts the responsibility for achieving emissions, reductions on LSEs.” Scoping Memo at 9. However, the first-seller approach is similar to being a source-based approach. As a result, “it would be much more difficult to integrate energy efficiency and renewables policies into our overall climate strategy.” *Id.* Instead of having retail providers directly responsible for meeting emissions limits through a combination of energy efficiency and generation procurement strategies, first-sellers would be responsible for meeting emission limits. The State would be left with reduced “policy levers” for achieving energetic and cost effective retail provider efforts to attain energy efficiency goals. Apparently in recognition of this potential consequence of the first-seller approach, the MAC emphasizes the importance of selling GHG emission allowances to raise revenue that would be used “to promote investment in

low-GHG technologies and fuels (including energy efficiency) by providing incentives to firms and customers.” Recommendations at 56.

To the extent to which the Commissions and CARB are convinced that energy efficiency is a key tool to be used in obtaining GHG emission reductions, the Commissions should be concerned about the impact the first seller approach might have on the ability of the State to utilize “policy levers” to obtain efficiency gains through the activities of retail providers that are not as substantially resourced as the SCPPA members.

**C. The First-Seller Approach Is Inconsistent with the Legislative Intent Expressed in AB 32.**

In the course of considering the first-seller approach, the Commission should consider whether the approach would be consistent with AB 32. The Legislature clearly contemplated that “statewide greenhouse gas emissions” would include emissions associated with service to California electrical load. “Statewide greenhouse gas emissions” was defined in AB 32 as “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.” Cal. Health and Safety Code §38505(m).

Consistent with the understanding that the greenhouse gas emissions are to include all emissions associated with service to electrical load that is located in California, the mandatory greenhouse gas emissions reporting provisions of AB 32 require that CARB’s reporting regulations “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.” *Ibid.*, § 38530(b)(2). The requirement that the mandatory reporting regulations “account for greenhouse gas emissions from all electricity consumed in the

state” is intended to apply to “all retail sellers of electricity, including load-serving entities...and local publicly owned electric utilities....” *Ibid.*

If retail providers were the electric sector point of regulation as contemplated by the CPUC in the Scoping Memo, the resulting regulatory scheme would be consistent with the intent of the Legislature as expressed in AB 32. By contrast, under the first-seller approach, the regulation of emissions would reach beyond the load-based scope that was clearly intended by the Legislature. For example, electricity delivered by a marketer to a point of delivery within California for subsequent wheeling through California to an out-of-state destination would be a point of regulation under a first-seller approach.

It appears that the Legislature’s intent that the regulation of emissions associated with generation of electricity should be restricted to electricity that is generated to serve California load was carefully designed to avoid state interference in the interstate wholesale sales and transmission market that is subject to federal jurisdiction. The Commissions should be cautious about expanding the regulation of greenhouse emissions under AB 32 beyond the scope that was apparently intended by the Legislature.

## **II. SCPPA RESPONSE TO SPECIFIC QUESTIONS RAISED IN THE RULING.**

In this section of this Comment, SCPPA responds to the questions raised in the Ruling in the order in which the questions were posed by the Ruling.

### **A. Basic Definitions (Questions 1 through 8).**

#### **QUESTION NO. 1:**

*Is the above description of this deliverer/first-seller approach accurate? Comment on whether you agree with this description, and if not, explain how the first-seller approach should be described differently and why.*

## SCPPA RESPONSE:

The MAC's Definition of "First Seller": As conceived by the MAC, the first-seller approach "places the legal obligation for compliance [with regulations promulgated under AB 32] on the first-seller of power into California electricity market." Recommendations at 42. The MAC offered several definitions of "first-seller." At one point in the Recommendations, the MAC defined "first-seller" as being "the owner or operator of the California power plant, or the importing contractual party, depending whether the electricity involves in-state or out-of-state generation." Recommendation at 42. This definition raises questions that would need to be pursued if a first-seller approach were to be adopted. For example, entities that control the operation of California power plants under tolling agreements such as Southern California Edison Company ("SCE") are neither owners nor operators of the plants, but they are tantamount to being owners or operators in virtue of their tolling agreements. It appears that entities that control plants through tolling agreements should be points of regulation, but they would not be captured by the MAC's definition of the "first-seller."

In an attempt to define "first-seller" operationally, the MAC suggests that the first-seller would be "the entity that first sells power into California's electricity system, no matter where the power originated." *Ibid* at 45. This definition is also questionable. For example, it would omit as a point of regulation self-generators or distributed generators that generate electricity and then consume electricity without any intermediate sale.

CPUC/CEC Definition of First-Seller: Out of an apparent concern about the definitions proposed by the MAC, the Commissions define "first-seller" as follows: "(a) for in-state California generation, the first seller is a generator, in all cases; and (b) for imported power, the first seller is the entity that delivers electricity at a point of delivery within California." Ruling at

3 (footnote omitted). However, this definition raises issues that are similar to the issues raised by the MAC's definitions. For example, if the "first-seller" for in-state California generation is defined as being a "generator," there is still a question about whether entities that control the operation of generation facilities through tolling agreements would be considered to be "generators" so as to be points of regulation.

It is unlikely that any of the difficulties with defining "first seller" would ultimately be fatal flaws that would preclude pursuit of the first-seller approach. However, the definitional issues must be resolved by the Commissions and ultimately by CARB if they are to adopt first sellers as the point of regulation in the electric sector.

In virtue of their definition of a "first-seller" as being "the entity that first delivers electricity at a point of delivery within California," the Commissions say that they use the term "deliverer" and "first-seller" interchangeably. Ruling at 3. Consistent with the Ruling, SCPPA will follow the convention of using "deliverer" and "first-seller" interchangeably in this Comment.

The Commissions take the view that there are "two possible market designs" that would utilize the definition of "first-seller" as proffered in the Ruling. "The first is a market design in which the deliverer/first-seller is both the entity that reports its GHG emissions as well as the point of regulation (the entity required to comply with AB 32)." Ruling at 4. Under the second possible market design, "the deliverer/first-seller would report its GHG emissions, but the retail provider would be the point of regulation." *Ibid.* The MAC clearly conceives the "first-seller" approach as applying to the first of these two "possible market designs." That will be the "market design" that SCPPA will address in this comment.

**QUESTION NO. 2:**

*For imports, who has ownership of electricity when it enters California? Is the “Purchasing/Selling Entity” (on the North American Electric Reliability Corporation (NERC) E-tag) listed at the first Point of Delivery in California the deliverer/first seller? If this is generally the case, are there any exceptions?*

**SCPPA RESPONSE:**

For imports, the importer has ownership of electricity when it enters California. The party identified as the “Purchasing/Selling Entity” (“PSE”) on the North American Reliability Corporation (“NERC”) E-tag at the first point of delivery (“POD”) within California is clearly the first deliverer of electricity to California, as “deliverer” is used by the Commissions.<sup>2</sup>

Although E-tags may identify the first deliverer within California, there is a key limitation on the usefulness of E-tags for purposes of determining first seller compliance with California GHG regulations. The purpose of E-tags is to manage the reliability of the transmission system. E-tags provide information that can be used to determine whether transmission paths are becoming overloaded and to facilitate reductions in transmission load if necessary. However, E-tags do not contain information that can be used consistently to identify GHG emissions associated with electricity delivered under the E-tag.

Although E-tags typically specify both a source and a sink for a transaction after the transaction is completed, that information is not necessarily useful in identifying the GHG attributes of power that is being transmitted in the transaction. For example, if an entity provides electricity from its combined generation fleet, the electricity is a molded product. Absent designation of a specific source and the provision of information about the emission attributes of

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<sup>2</sup> Technically a transmission owner/operator, i.e., “Transmission Provider” as shown on a NERC E-tag, is the deliverer, not a Purchasing/Selling Entity as shown on an E-tag.

that source, the E-tags would not provide a reliable basis for identifying the emission associated with a first delivery into California under an E-tag.. Thus, as presently constituted, E-tags are questionable as a basis for identifying emissions associated with a first delivery into California.

**QUESTION NO. 3:**

*Are there any inter-Balancing Authority imports not accounted for by E-tags? If so, describe these instances and explain how these imports can be accounted for.*

**SCPPA RESPONSE:**

Inter-Balancing Authority transactions are accounted for by E-tags. Intra-balancing authority transactions may not be.

**QUESTION NO. 4:**

*What agency could/would identify importing contractual parties? Is there already a state or federal official compilation of these market participants?*

**SCPPA RESPONSE:**

The Western Electricity Coordination Council ("WECC") collects E-tags through the Western Interchange Tool ("WIT"). Thus, WECC through the WIT could identify PSEs that deliver to PODs within California. However, the information on E-tags is confidential except for the parties specifically identified on the E-tags. .

**QUESTION NO. 5:**

*Could the deliverer/first-seller be identified by means other than the NERC E-tag? If so, please explain.*

**SCPPA RESPONSE:**

SCPPA is unaware of an alternative.

**QUESTION NO. 6:**

*How would a deliverer/first-seller system deal with power marketers and brokers?*

**SCPPA RESPONSE:**

Power marketers would frequently be the first deliverers of electricity to a POD within California. Brokers would not be affected insofar as brokers arrange transactions but do not take title to electricity. Thus, brokers would not be the deliverer of energy to a POD within California and would not be points of regulation.

Under the first-seller approach, marketers would have to identify the source or sources of the energy that they deliver to first PODs within California. Insofar as the energy delivered to a first POD within California by a marketer could come from a variety of sources, the actual proportion in which energy came from each source could be lost in the course of upstream transactions that would occur prior to the delivery to the first California POD. To facilitate emissions tracking, there would need to be a requirement that upstream marketers record and pass on to downstream markets the emission content of electricity.

It is unclear whether California would have authority to impose the necessary reporting burden on upstream marketers. If California lacks authority, the most likely recourse would be for California to attribute default values to deliveries of electricity by marketers from a mix of upstream resources. However, attributing default values to California would be likely to lead to marketers selling resources that are associated with high emissions so as to take advantage of the default value. Marketers delivering electricity that have low emissions would endeavor to identify the precise emissions associated with the delivered energy so as to take advantage of the low emission quality of the delivered electricity. Thus, using default values for marketer deliveries could have a perverse result.

If the Commissions are to proceed with consideration of the first-seller approach, the Commissions should consider fully the impact of the approach on the behavior of marketers as well as the legal limitations on obtaining accurate information about marketer deliveries of electricity at first California PODs.

**QUESTION NO. 7:**

*How would treatment of imports differ in a deliverer/first-seller system compared to a load-based approach?*

**SCPPA RESPONSE:**

Imports for wholesale sales would be treated differently under a deliverer/first-seller system than under a load-based approach. Under the first-seller approach, entities that deliver electricity from out-of-state to first California PODs for purposes of executing wholesale sales would be subject to California GHG regulation. The deliverers would have to report the emissions associated with the electricity that they deliver to first California PODs, and they would have to acquire allowances equivalent to the emissions associated with the deliveries of electricity. By contrast, deliverers of electricity from out-of-state to first California PODs for wholesale sales would not be points of regulation under a load-based approach. They would not have to acquire allowances.

Imports by California retail providers to serve retail load would be subject to California GHG regulation under both the first-seller approach and the load-based approach. However, under the load-based approach, the point of regulation would not be at the first California POD at which a retail provider's imported electricity enters the state. It would be at the point of delivery to load.

Impact on Wholesale Prices: If a wholesaler were required to buy allowances sufficient to cover the emissions associated with electricity delivered to a first California POD, the wholesaler would most likely attempt to recover the cost of the allowances in the price charged in any wholesale sale that might occur at the POD or downstream from the POD in California. Given the FERC's pervasive jurisdiction over wholesale sales in interstate commerce and, specifically, the rates charged for wholesale sales of electricity in interstate commerce, there is an obvious legal question about the extent of California's authority to implement a program that would directly affect wholesale electricity rates.

By contrast, under a load-based approach as presented by the CPUC in the Scoping Memo, the electricity delivered to retail load would be the point of regulation. Entities that deliver electricity from out-of-state to first California PODs for purposes of wholesale transactions would not be a point of regulation. They would not be required to buy allowances for the electricity involved in the wholesale transaction, and the price that they charge for the electricity at wholesale would not be affected.

Impact on Wholesale Market Efficiency and Liquidity: Requiring wholesalers that deliver energy from out-of-state at California PODs to acquire allowances would have a potentially negative effect on the efficiency and liquidity of the wholesale power market. For example, under the first-seller approach, wholesalers that deliver electricity from out-of-state to California PODs for wheeling through California to out-of-state destinations would, nevertheless, be making deliveries at California PODs. Their deliveries would become points of regulation. The cost of California allowances may affect a wholesaler's decision about whether to engage in a wholesale transaction that might require wheeling through California. Wholesalers may attempt to avoid wheeling through California.

Likewise, entities that may otherwise be inclined to participate in economy exchanges with California entities may be deterred from entering into or continuing such arrangements under a first-seller regime. Under the first-seller approach, an out-of-state entity that delivers electricity to a first California POD would be required to acquire allowances. A California entity that participates in an exchange arrangement with the out-of-state entity would also be required to obtain allowances for the redelivered electricity. The need to obtain allowances both for both the incoming electricity and the subsequently generated outgoing electricity would tend to deter entering into or continuing exchange arrangements.

Insofar as deliveries to California PODs would not be a point of regulation under the load-based approach, that approach would not have an effect on wheeling through California, nor would it have an effect on exchange arrangements. In general, the load-based approach would not have the negative implications for the efficiency and liquidity of the wholesale market that the first-seller approach would have.

**QUESTION NO. 8:**

*To sum up your answers to the previous questions, provide a succinct but complete definition that identifies, for each way in which electricity could be delivered to the California grid, the entities that would be responsible for compliance with AB 32 regulations under a deliverer/first-seller approach.*

**SCPPA RESPONSE:**

As discussed in the response to Question No. 1, neither the MAC in its Recommendations nor the Commissions in the Ruling have provided a definition that satisfactorily identifies the entities that would be the point of regulation under the first-seller approach. For example, if the point of regulation is identified as being in-state generators (including retail providers to the

extent that they generate electricity), it is unclear whether parties that control generation through tolling agreements would be points of regulation. If the point of regulation is identified operationally as the entity that makes the first sale of electricity within California, it is unclear whether self-generators that do not enter into a sales arrangement at any point in the delivery chain would be points of regulation. It would be incumbent upon the Commissions and CARB to develop an accurate definition as a condition for adopting the first-seller approach.

**B. General Policy Issues (Questions 9 through 16).**

**QUESTION NO. 9:**

*Compare and contrast the environmental integrity of a deliverer/first-seller and a load-based approach. How would a deliverer/first-seller approach address leakage? How would a deliverer/first-seller approach address contract shuffling?*

**SCPPA RESPONSE:**

Leakage: In considering the need to reduce greenhouse gas emissions within California, the Legislature was clearly concerned that California might reduce its emissions by shifting emission intensive activities to other states. The Legislature was concerned that industrial activities or electrical generation may be shifted to other states that do not have GHG emission restrictions with the product being transported to California. This would result in a reduction in California's GHG emissions but would not result in a net reduction in emissions that would be seen by the atmosphere. The Legislature called this "leakage" and defined it as follows: "A reduction in emissions of greenhouse gases within the state that is offset by an increase in emissions of greenhouse gases outside the state." Cal. Health and Safety Code §38505(j). CARB was specifically directed to adopt regulations that "in furtherance of achieving the statewide greenhouse emissions limit" shall "minimize leakage." Cal. Health and Safety Code §38562(b)(8).

A cardinal feature of the load-based approach to GHG emission regulation for the electricity sector is that by making service to retail load the point of regulation, it would fully address leakage as required by AB 32. As explained by the CPUC:

Taking a load-based approach for the electricity sector... allows us to capture emissions associated with California's significant electricity imports. A load-based approach is totally consistent with AB 32. I also note that approximately half of our emissions footprint is associated with our imported power and not with power produced within California.

Scoping Memo at 9. SCPPA is unaware of any claim by any party that the load-based approach would fail to contain electricity sector leakage as required by AB 32.

The first-seller approach also addresses leakage. By designating deliveries of electricity to first PODs within California as being points of regulation, the first-seller approach prevents the electricity sector from reducing emissions by shifting generation from sites within California to sites outside of California. The MAC concluded that both the load-based approach and the first-seller approach “would control leakage by attributing emissions to imported electricity, thus avoiding incentives to meet the emissions cap simply by shifting from in-state generation to out-of-state power.” Recommendations at 44. The MAC concluded: “Neither approach seems clearly superior to the other in terms of its ability to control leakage.” *Ibid.*

Contract Shuffling: Contract shuffling is different from leakage. As defined by the staffs of the Commissions: “Contract shuffling is the practice of claiming that one resource is sent to California, while leaving the high carbon intensive power to be sold in states which do not have a tracking system or a cap that requires allowances.” Administrative Law Judges’ Ruling Regarding Comments on Staff Reporting Proposal, Att. A, Joint California Public Utilities Commission and California Energy Commission Staff Proposal for an Electricity Retail Provider

GHG Reporting Protocol, R.06-04-009 and D.07-0IIP-01 (June 12, 2007) (“Proposed Reporting Protocol”) at 34.

In the view of the staffs, there are two ways that contract shuffling can occur. “One form is facility-swapping, in which a California retail provider claims to receive power from a specific facility, when its purchases actually induce generation from another facility or a mix of facilities.” *Ibid* at 35. A second way that contract shuffling can occur is by shifting imports to California from one regional pool to another: “A variation on contract shuffling and leakage is the practice of masking the carbon emissions factor of a source by claiming that it comes from a regional pool with a lower carbon factor. For example, a high-emitting unit could sell its power to the California-Oregon Border hub, and then claim that its power should be given the lower Northwest regional default value.” *Ibid* at 36. The first variant of contract shuffling is the one that concerns the staffs the most. *Ibid*.

Contract shuffling might be done by California retail providers that are subject to the jurisdiction of California authorities as well as by wholesale marketers. *Ibid* at 35. Although it might be done in such a way as to constitute leakage of emissions from inside California to other states, it might occur entirely out-of-state. For example, a California retail provider that has a contract for electricity from an out-of-state resource that emits GHG could swap the contract with an out-of-state entity that is not subject to GHG emissions regulation in exchange for a contract for electricity from an out-of-state low or zero emission resource. *Ibid* at 36. As a result of such a “contract shuffle,” the emissions associated with electricity delivered to serve the California retail provider’s load would be reduced, but there would be no physical reduction in overall emissions that are seen by the atmosphere.

There is no prohibition against contract shuffling in AB 32. Contract shuffling is not even mentioned. This omission is consistent with the Legislature's interest in promoting renewable resources. If retail providers were prevented from contracting with owners of low or zero emission resources for electricity so as to substitute low or zero emission electricity for emission-burdened electricity, the commercial value of the low or zero emission resources would be substantially diminished. Diminishing the value of renewable resources by reducing the pool of prospective customers for the output from renewable projects would be inconsistent with California's policy of encouraging the development of renewable resources.

It is unclear that "contract shuffling" will result in any significant shift of low-GHG electricity to California and away from other states. The MAC worried about comments by "some observers...that there is sufficient generation capacity within the eleven states in the western power interconnect to entirely comply with expected emission reductions in California without any real change in generation." Recommendations at 44. However, it is increasingly clear that there is a nationwide concern about global warming. Every state is going to have an interest in attracting low-GHG resources. As recent letters to the Commissions in this proceeding from Oregon and Washington attest, no state is likely to be willing to become a host to high-GHG electricity while low-GHG electricity flows to California.

In any event, to the extent to which it might occur, "contract shuffling" may occur under both the load-based approach and the first-seller approach, as observed by the MAC: "Both the load-based and first-seller approach appear to provide similar incentives for contract shuffling." Recommendations at 44. Exposure to contract shuffling is not a basis for deciding whether to adopt the first-seller approach as opposed to a load-based approach.

**QUESTION NO. 10:**

*Would the scale of possible emissions leakage or contract shuffling differ under the deliverer/first-seller approach compared to a load-based approach?*

**SCPPA RESPONSE:**

Insofar as both the first seller approach and the load-based approach address leakage, albeit in different ways, it is unlikely that the scale of emissions leakage would differ under a deliverer/first-seller approach in comparison to a load-based approach. Likewise, contract shuffling could occur under either approach.

**QUESTION NO. 11:**

*Is there any advantage to applying the deliverer/first-seller approach to reporting only, while having the retail providers be the point of regulation (as with load-based)? Why or why not?*

**SCPPA RESPONSE:**

The imposition of reporting burdens should be symmetrical with the imposition of compliance obligations. Entities should be subject to reporting requirements to the extent to which they are subject to GHG emissions regulation as points of regulation. Thus, for example, if a first-seller approach were adopted and, as a consequence, wholesale marketers that deliver electricity to California PODs were subject to California GHG emissions regulation, the wholesale marketers should be subject to reporting requirements to the extent necessary to impose effective regulation. However, if a load-based approach were adopted, wholesalers should not be subject to reporting requirements.

The Legislature maintained symmetry between reporting burden and compliance obligation in crafting AB 32. AB 32 imposes a mandatory greenhouse gas emissions reporting

burden on “all retail sellers of electricity, including load-serving entities... and local publicly owned electric utilities...” Cal. Health and Safety Code §38530(b)(2). This appears to be consistent with the apparent presumption by the Legislature that the point of regulation within the electric sector would be retail sellers of electricity.

**QUESTION NO. 12:**

*Compare and contrast the deliverer/first-seller and load-based approaches in terms of their impacts on electricity prices, costs, and reliability for consumers.*

**SCPPA RESPONSE:**

Impact on Electricity Prices: As discussed above, if marketers that deliver to first California PODs are subject to California GHG regulation, those marketers will face the prospect of having to obtain allowances to the extent of GHG emissions associated with the electricity that they are delivering to the PODs. It is reasonable to expect that the marketers will increase the price of electricity that they charge in wholesale transactions at or downstream of the first PODs at which the deliveries occur. This increase in wholesale prices for electricity will increase electricity costs.

Some parties contend that this is a positive development insofar as it results in the cost of GHG emissions being internalized in the price of electricity that is paid by consumers: “Under a source-based or First Seller approach emission costs are internalized for generators..., and the market clearing price reflects this economic adjustment.” Southern California Edison Company (“SCE”) Comments on GHG Reporting Protocol at 17, R.06-04-009 (July 2, 2007) (“SCE Comment”).

However, the cost of GHG regulatory compliance would also be reflected in electricity rates under a load-based approach. Retail providers would recover the cost of regulatory

compliance through rates charged to consumers. Thus, while the first-seller approach might result in higher wholesale prices than under the load-based approach, retail prices charged to consumers would increase under both approaches. This was recognized by the MAC:

An important feature of LSEs in California, including investor-owned utilities and municipal utilities, is that they operate under general cost recovery rules that base electricity prices on their average cost of servicing customers. As discussed immediately below, the impact of the cap-and-trade program on electricity prices to consumers does not depend on whether a first-seller or load-based approach is applied to the electricity sector.

Recommendations at 46. The ultimate impact of GHG regulation on the price of electricity charged to retail consumers does not depend on internalizing the price of GHG allowances into the wholesale price of electricity. Rather, it depends upon whether allowances are auctioned or given away for free. The MAC correctly observed: “[T]he consumer price impacts under both approaches depend on whether allowances are auctioned or given away for free and, if they are given away for free, to whom are they offered.” *Ibid.*

Impact on Reliability. The first-seller approach may have a different impact than the load-based approach on reliability of electrical service to consumers. As discussed above, making marketers the point of GHG regulation at first California PODs may result in decreased efficiency and liquidity in the wholesale market for electricity. Diminishing the liquidity or efficiency of the wholesale market may have consequences for reliability of service to end users. If the Commissions intend to pursue the first-seller approach, SCPPA recommends that the Commissions model the potential impact on the efficiency and liquidity of the wholesale market and model the potential effect that reduced liquidity might have on reliability of service to California consumers.

**QUESTION NO. 13:**

*Would a deliverer/first-seller approach and a load-based approach have different impacts on wholesale power prices? Which would result in higher prices? Why? Is this good or bad?*

**SCPPA RESPONSE:**

As discussed above, insofar as the first-seller approach would impose GHG regulatory costs on marketers that are selling into California in the wholesale market, the first-seller approach would have an impact on wholesale power prices. *See* SCE Comment, at 17. This would not occur under the load-based approach. *Ibid.* However, as also discussed above in the response to Question No. 12, although the first-seller and load-based approaches would differ in impacts on wholesale power prices, the ultimate impact on consumer prices would be the same, as observed by the MAC. Recommendations at 46. The ultimate impact of GHG regulation on consumer prices, as observed by the MAC, depends upon how allowances are made available, not whether the first-seller approach or load-based approach is adopted.

**QUESTION NO. 14:**

*What impact would a deliverer/first-seller approach have on long-term investment in low-GHG emitting generation technologies? Is this better or worse than under a load-based cap? Why?*

**SCPPA RESPONSE:**

Under the first-seller approach, low-GHG emitting generation technologies may be provided an incentive to the extent that GHG regulation drives up the wholesale price of electricity. As discussed above, the first-seller approach would result in the cost of allowances being internalized in the wholesale price for electricity. Insofar as low-GHG emitting resources

would have a lower cost of production than higher GHG-emitting resources, the low-GHG emitting resources could take advantage of higher wholesale prices to reap greater profits. This would tend to provide an incentive to invest in low-GHG emitting generation.

However, there would also be an incentive to invest in low-GHG emitting generation under the load-based approach. Retail providers, as portfolio managers, will have a powerful incentive to make the right resource acquisition decisions. As explained in the Scoping Memo, the load-based approach would allow state agencies to utilize their “policy levers” to encourage retail providers to invest in low-GHG emitting generation. Scoping Memo at 9. “If we were to take a source-based approach and apply emissions caps only to generators, then it would be much difficult to integrate energy efficiency and renewables policies into our overall climate strategy.” *Ibid.*

**QUESTION NO. 15:**

*How would a deliverer/first-seller approach interact with an upstream program design as articulated in Chapter 4 of the Market Advisory Committee report? Explain your answer in detail.*

**SCPPA RESPONSE:**

The MAC proposed four options for the scope of the California GHG regulatory program:

- *Program 1— Coverage of medium and large point sources of emissions, and of some suppliers of high-GWP gases; coverage at point of combustion.* This program is similar in scope to the EU ETS in that it covers medium and large GHG emitting facilities such as electric power plants and energy-intensive industries such as refining and cement production. Recommendations at 28-29.
- *Program 2 – Program 1 plus upstream coverage of CO<sub>2</sub> emissions from transportation.* This program includes all of the sources covered in Program 1 plus CO<sub>2</sub> emissions from the combustion from gasoline and diesel in the transportation sector. Recommendations at 29.

- *Program 3 – Program 2 plus upstream coverage of fossil fuel combustion by other sources.* This program includes the sources covered under Programs 1 and 2 but would add upstream coverage of CO<sub>2</sub> emissions from fossil fuel combustion at small industrial and commercial facilities, and by all residential users. Recommendations at 30.
- *Program 4 – Upstream coverage of CO<sub>2</sub> from fossil fuel combustion, and downstream coverage of large sources of non-CO<sub>2</sub> gases and some suppliers of high-GWP gases.* This program differs from Programs 1, 2 and 3 in that it takes an upstream approach to covering all CO<sub>2</sub> emissions from the combustion of natural gas, petroleum and coal in California, including the emissions from the medium and large point sources covered under Programs 1, 2 and 3. For CO<sub>2</sub> emissions from California combustion, the points of regulation would be natural gas delivery points from interstate pipelines or processing plants, petroleum refineries, and importers of refined products. Recommendations at 27, 31.

The points of regulation for the electricity sector under Programs 1, 2 and 3 would be the same as under the first-seller approach. However, the Program 4 points of regulation would be “natural gas delivery points from interstate pipelines or processing plants, petroleum refineries, and importers of refined products.” *Ibid.* Intrastate generation would not be a point of regulation. However, in order to avoid leakage as mandated under AB 32, there would continue to be a need to impose GHG regulation on deliverers of electricity at first California PODs.

#### **QUESTION NO. 16:**

*What impact would a deliverer/first-seller approach have on electricity service providers?*

#### **SCPPA RESPONSE:**

To the extent that electricity service providers (“ESPs”) buy electricity at wholesale for re-sale to retail customers, ESPs would escape being a point of regulation under a deliverer/first-seller approach.

**C. Interaction with Energy Markets (Questions 17 through 19).**

**QUESTION NO. 17:**

*Compare and contrast the impact that a deliverer/first-seller and a load-based system would have on the existing wholesale energy markets, both at the California Independent System Operator (CAISO) and outside of it.*

**SCPPA RESPONSE:**

As discussed above, the deliverer/first-seller approach would have an impact on prices and potentially liquidity in wholesale energy markets, whereas as a load-based system would not have such an impact.

**QUESTION NO. 18:**

*For those entities participating in the CAISO markets, what would be the likely differential impacts of a deliverer/first-seller versus a load-based system on the CAISO's implementation of the Market Redesign and Technology Update (MRTU) system, including day-ahead and real-time markets for energy, transmission, and reserves?*

**SCPPA RESPONSE:**

See the Response to Question No. 17.

**QUESTION NO. 19:**

*To what extent would either approach (deliverer/first-seller or load-based) be likely to alter the dispatch of existing generation units in the near-term? Why? If there is a difference between the approaches, how significant would it be?*

**SCPPA RESPONSE:**

Both the deliverer/first-seller approach or the load-based approach would be likely to alter the dispatch of existing generation units. That is the objective of the GHG program. Over time, the dispatch of generation units that are characterized by relatively high GHG emissions

will tend to be reduced. Under either approach, the retail provider, as portfolio manager, will see the cost of GHG emissions at the margin and will make the appropriate economic decisions.

The dispatch of existing generation units is also likely to be altered by the need to firm intermittent or seasonal renewable resources such as wind or solar. Dispatchable generation will be needed to firm intermittent renewable energy in order to provide reliable service to retail load. Utilities that have dispatchable hydroelectric resources will be positioned to use those resources to firm intermittent renewable resources. Utilities that do not have ready access to dispatchable hydroelectric resources will need to rely upon, most likely, gas-fired generation. This could lead to a change in the pattern of dispatching gas-fired generation insofar as dispatching may be increasingly determined by the need to firm intermittent renewable generation.

The change in dispatching will be likely to occur either under the first-seller or load-based approach insofar as it would be caused by increased reliance upon renewables, not the determination of the point of regulation for GHG regulation purposes. However, to the extent to which a load-based approach results in more development of intermittent renewable resources that would occur under the first-seller approach as postulated in the Scoping Memo (at 9), the dispatch of gas-fired generation units to firm renewables could be greater under the load-based approach than the first-seller approach.

**D. Interaction with Existing Programs and Policies (Questions 20 through 25).**

**QUESTION NO. 20:**

*How would a deliverer/first-seller approach interact with the Public Utilities Commission's Resource Adequacy requirements and procurement/portfolio oversight? How would this approach affect efforts to maintain resource adequacy by the publicly-owned utilities (POUs)?*

**SCPPA RESPONSE:**

SCPPA members will maintain resource adequacy regardless of the selection of the point of regulation under a GHG regulatory program.

**QUESTION NO. 21:**

*How would a deliverer/first-seller approach interact with the Public Utilities Commission's promotion of end-use efficiency? How would this approach affect energy efficiency programs for the POUs? Under which system (deliverer/first-seller or load-based) would the penetration of end-use efficiency likely be greater? Why?*

**SCPPA RESPONSE:**

As discussed above and as indicated by the Scoping Memo (at 9), the first-seller approach may result in less end-use efficiency penetration than under the load-based approach.

**QUESTION NO. 22:**

*How would a deliverer/first-seller approach interact with the State's Renewable Portfolio Standard requirements (both existing and proposed)?*

**SCPPA RESPONSE:**

To the extent to which retail providers are required to meet California renewable portfolio standards ("RPS"), those standards will be met independently of the need to meet GHG regulatory requirements. The obligation to meet the RPS and the obligation to meet GHG reduction goals are separate obligations. However, meeting the RPS will be likely to contribute significantly to achieving GHG emission reduction targets. In fact, it may be possible to achieve AB 32 targets as a result of meeting RPS alone without more.

**QUESTION NO. 23:**

*How should renewable energy generators be treated under a deliverer/first-seller system?*

**SCPPA RESPONSE:**

In general, renewable energy generators will produce electricity with zero associated emissions. Regardless of whether they are located intrastate or out-of-state with electricity being delivered to a California POD, they would not need to buy allowances due to the zero GHG attributes of the delivered electricity.

However, there is a residual issue about how to attribute emissions to renewable resources for which the owners have sold the associated renewable energy credits ("RECs"). In developing the GHG Emissions Performance Standard ("EPS") for new long-term financial commitments to base-load generation under Senate Bill ("SB") 1368, the CPUC asked: "Does it make sense to strip renewables of their GHG emissions attributes if RECs are sold when making the 'go, no-go' decision of whether an LSE can enter into a long-term financial commitment with that facility?" D.07-01-039 at 123 (January 25, 2007). The CPUC's answer was "no." *Ibid*. The CPUC reasoned that stripping renewables of their GHG emissions attributes if RECs were sold could have a perverse result: "It could discourage long-term commitments with renewable generators that have zero, low or even negative net GHG emission profiles in favor of resources with higher emissions rate." *Ibid* at 24. Moreover, the CPUC found that the RECs are sold to entities that desire to meet their renewable portfolio standard ("RPS") obligation to procure a minimum amount of renewable resources. That obligation is separate from the obligation to conform to the SB 1368 requirement that new long-term financial commitments must be

consistent with the EPS. Thus, the CPUC concluded that “the emissions of a renewable facility will not change if or when it sells RECs under a future regulatory REC market.” *Ibid* at 127.

The CPUC specifically stated in D.07-01-039 that its determination as reached in that decision “in no way guarantees” a similar result in implementing AB 32. *Ibid* at 137. However, the same result should be reached here for the same reasoning that was presented in D.07-01-039. First, stripping the low GHG emission attributes from renewables for which RECs have been sold could discourage long-term commitments with renewable generators. Second, the sale of RECs enables entities to meet an RPS obligation which is entirely separate from the obligation to meet AB 32 GHG regulatory requirements. *See* D.07-01-039 at 124.

**QUESTION NO. 24:**

***Compare and contrast the impact of a deliverer/first-seller and a load-based approach on the voluntary renewables market.***

**SCPPA RESPONSE:**

As explained in the Scoping Memo, the load-based approach would permit the CPUC to “continue to utilize our policy levers for renewables....” Scoping Memo at 9. Under the first-seller approach, “it would be much more difficult to integrate... renewables policies into our overall point of strategy.” *Ibid*.

However, there is a danger that the Commission may adopt reporting protocols that would discourage the development of renewable resources, hence, a voluntary renewables market. The staffs of the CPUC and CEC propose to effectively prohibit retail providers such as the SCPPA members from contracting with existing renewable resources to replace higher emitting resources. Proposed Reporting Protocols at 11. This would reduce the liquidity of the market for existing renewable resources. Retail providers that are subject to the reporting

protocols would be precluded from participating in that market. Given California's strong commitment to fostering the development of renewable resources, reducing the liquidity of the market for renewable resources would be a perverse result.

**QUESTION NO. 25:**

*Would one approach (deliverer/first-seller or load-based) have an advantage over the other in producing the greatest amount of emissions reductions through modifications (e.g., retrofitting, efficiency improvements, etc.) to existing power plants? Why?*

**SCPPA RESPONSE:**

Both the first-seller approach and the load-based approach should tend to produce a greater amount of emissions reductions through modifications of existing power plants. However, adoption of the load-based approach may result in more cost effective decisions being made about how to achieve GHG reductions. Under the load-based approach, retail providers would be the point of regulation. The retail providers would be in a position to evaluate the most cost effective means of reducing GHG emissions. To the extent to which they, like SCPPA members, have renewables programs, energy efficiency programs, and generation facilities, the retail providers are in a position to evaluate how to best allocate funds to attain GHG reduction goals. For example, an investment of a given amount in energy efficiency may yield more GHG emission reductions than the investment of an equivalent amount in modifications of existing power plants. A generator that would be a point of regulation under the first-seller approach would not be as well situated to make judgments about the most cost-effective means of achieving GHG reductions.

**E. Reporting, Tracking, and Verification (Questions 26 through 31).**

**QUESTION NO. 26:**

*What would be the data and administrative requirements of the deliverer/first-seller approach?*

**RESPONSE:**

The data and administrative requirements that would be imposed upon intrastate first-sellers, i.e., generators, under the first-seller approach would most likely not be much greater than the mandatory reporting requirements that CARB is currently considering under AB 32. Cal. Health and Safety Code §38530. However, the data and administrative requirements that would be imposed upon first sellers that deliver electricity to a first POD in California would be daunting. In order to accurately impose responsibility for GHG emissions on a deliverer to a first California POD, there would need to be accurate identification of the GHG attributes associated with the delivered electricity. NERC E-tags are not adequate for that purpose. At minimum, the source or sources of the delivered electricity would need to be known.

Currently, after a transaction is completed, the NERC E-tag for the transaction will identify a source as well as all marketers in the path from the source to the sink. However, the E-tag identification of a source may be insufficient for identifying the actual source of the electricity that is delivered to a first California POD. The source may be a balancing authority. Even when the source is an identified unit, if the transaction involves a unit contingent sale, the electricity may have been generated from units different from the unit that is identified as a source. Under unit contingent sales, the transaction would be contingent only upon the identified unit running. It would not be necessary that the specified unit actually provide the electricity delivered under the unit contingent sales arrangement.

NERC E-tags are intended to facilitate maintaining the reliability of the bulk transmission system. They are neither designed nor intended to be a GHG emissions tracking device. Thus, if the first-seller approach were to be adopted, either a new tracking device would need to be developed, or NERC E-tags would need to be substantially redesigned.

**QUESTION NO. 27:**

*How would the deliverer/first-seller approach relate to the Public Utilities Commission/Energy Commission Staff reporting protocol proposal, i.e., would the deliverer/first-seller approach require modifications to the Staff reporting proposal, or could it serve as an interim reporting protocol? If modifications are required, what exactly would they be?*

**SCPPA RESPONSE:**

The staffs' Proposed Reporting Protocol is neither designed nor intended to meet the data requirements of the first-seller approach. The staffs' Proposed Reporting Protocol would establish reporting requirements for retail providers, not for first sellers.

AB 32 requires the CARB to adopt mandatory greenhouse gas emissions reporting regulations by January 1, 2008. Cal. Health and Safety Code §38530. The regulations must "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." *Ibid*, §38530(b)(2). This reporting requirement explicitly "applies to all *retail sellers* of electricity, including load-serving entities... and local publicly owned electric utilities...." *Ibid*.

The staffs' Proposed Reporting Protocol is intended to satisfy the requirements of §38530 that apply to retail sellers. Proposed Reporting Protocol at 1. Insofar as AB 32 specifically

requires CARB to develop mandatory reporting regulations that will apply to retail sellers of electricity, those regulations as mandated by state law will be developed regardless of whether the load-based approach or the first-seller approach is adopted. Insofar as the Proposed Reporting Protocol would be applicable to retail sellers of electricity in accordance with AB 32, the Proposed Reporting Protocol may be useful for purposes of implementing the load-based approach to GHG emissions regulation, but it would be inapplicable to implementing first-seller approach.

If the first-seller approach were to be recommended by the CPUC and CEC and ultimately adopted by CARB, it would be necessary to have a separate set of reporting protocols for first sellers such as significantly modified E-tags. The first-seller reporting protocols would be additional to and would not replace the reporting protocols that would apply to retail sellers under AB 32 insofar as the retail seller protocols are required by state law regardless of whether a first-seller approach or load-based approach to GHG regulation is ultimately adopted.

**QUESTION NO. 28:**

*If a deliverer/first-seller approach is adopted, what would be the pros and cons of requiring reporting both from deliverers/first sellers and retail providers, in order to provide ARB with multiple control data sets for comparison?*

**SCPPA RESPONSE:**

As explained in the Response to Question No. 27, if a first-seller approach were adopted, it would be necessary to have two sets of reporting protocols, one that would apply to first-sellers and another that applies to retail sellers. AB 32 requires CARB to adopt mandatory greenhouse gas emissions reporting requirements for retail sellers. Cal. Health and Safety Code

§38530(b)(2). Unless that state law imposing mandatory reporting requirements upon retail sellers is repealed, those reporting requirements must be imposed.

**QUESTION NO. 29:**

*Compare and contrast the ability of a deliverer/first-seller and a load-based system to create confidence for investors and confidence for environmental advocates about tracking and compliance.*

**SCPPA RESPONSE:**

If a first-seller approach were adopted with reliance upon NERC E-tags as currently constituted, investors and environmental advocates would be likely to have little confidence in the tracking of emissions and compliance by first-sellers that deliver to California PODs. A substantial reformation of NERC E-tags or the creation of an entirely new tracking system would be necessary to instill confidence in investors and environmental advocates.

There would likely be a high degree of confidence in reporting and tracking under the load-based approach insofar as the retail sellers that would be subject to the reporting and tracking requirements would be directly under the jurisdiction of CARB as well as other state agencies such as the CPUC, the CEC, and local authorities.

**QUESTION NO. 30:**

*Who/what governs access to the purchasing/selling entity data on the NERC E-tags?  
What would a state agency need to do to obtain access to E-tag data?*

**SCPPA RESPONSE:**

The WECC governs access to the purchasing/selling entity data on NERC E-tags. Information on the E-tags is confidential. See SCPPA Response to Question No. 4. It is unclear that state agencies would be able to gain access to E-tags. Even if they were able to gain access,

state agency reliance on confidential information would be unlikely to foster public confidence that regulatory objectives were being achieved or achieved properly.

**QUESTION NO. 31:**

*What role would the CAISO play, if any, in the implementation and administration of a deliverer/first-seller program? What role would other control area operators or balancing authorities play?*

**SCPPA RESPONSE:**

SCPPA does not envision the CAISO or any other control area operator or balancing authority implementing or administering a first-seller program. The mission of such entities is maintaining grid reliability, not implementing state environmental programs.

**F. GHG Emissions Allowance Allocations Issues (Questions 32 through 34).**

**QUESTION NO. 32:**

*Would implementation of a deliverer/first-seller approach necessitate auctioning of GHG emissions allowances? Why or why not?*

**SCPPA RESPONSE:**

Implementation of a deliverer/first-seller approach absolutely would not necessitate auctioning of GHG emissions allowances in all instances. The MAC was completely clear that the decision about the appropriate point of regulation was independent of the decision about how to allocate allowances. Although the MAC advocated “transitioning to a full auction over time” for all sectors, the MAC said that “several factors weigh in favor of distributing some allowances for free at the outset of the program....” Recommendations at 55.

The MAC recommended “that California avoid windfall profits, where they would occur, by limiting the free allocation of allowances.” Recommendations at 56. Specifically: “There should be no free allocation to firms under the cap that are able to pass most of their costs on to

consumers. These include electric generators, other first sellers of electricity, oil refineries, and natural gas processors.” *Ibid*. However, at least at the outset of the program, there could be free allowances to “LSEs that are closely regulated or municipally owned” insofar as “these entities are likely to be obligated to pass a value of freely allocated allowances through to their ratepayers.” *Ibid* at 56.

The MAC explained that even under a first-seller approach, it would be acceptable to allocate allowances for free to LSEs, including POUs,<sup>3</sup> to cushion the impact on consumer prices with the benefits of the free allowances going entirely to consumers:

If allowances are allocated for free, in some cases the impact on consumer prices could be smaller than in the case of auctioning (regardless of whether the first-seller or load-based approach is adopted). Using an allowance has an opportunity cost regardless whether the allowance was purchased or given away. However, in California utility regulators are likely to prevent LSEs, whose rates they regulate, from passing allowance opportunity costs along to consumers in cases where the LSE receives allowances for free. This is likely to be particularly true of the municipal utilities, which are effectively owned by consumers. Thus, if allowances are freely allocated to LSEs and the LSEs are prevented from passing along the opportunity costs associated with the use of free allowances, the impact on consumer prices will be less than under a system that auctions allowances or one that freely allocates allowances to generators.

Recommendations at 47. SCPPA agrees entirely with MAC. Under a first-seller approach, retail providers that generate electricity in California or import electricity for delivery to first points of delivery within California would need to acquire allowances like any other intrastate generator or interstate importer. In order to cushion the impact of a GHG regulatory program on consumer

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<sup>3</sup> MAC explained that in its Recommendations the term “LSEs” includes municipal utilities, although the term “LSE” has a more restrictive definition in other contexts: “In this report LSEs include municipal utilities as well as other retailers. In some other contexts, the term ‘LSE’ has a more restrictive definition that excludes municipal utilities.” Recommendations at 41 (footnote 34.)

prices, free allowances should be allocated to those retail providers for the benefit of the consumers they serve.

To the extent to which the retail providers are encumbered by carbon-intensive electrical generation resources, those retail providers are going to be required to absorb the substantial cost of transitioning from carbon-intensive resources to low-GHG resources. The cost of that transition will have to be absorbed by the retail providers' customers. It would be unfair to require those consumers both to bear the substantial cost of transitioning away from carbon-intensive resources and to pay for allowances allocated through an auction.

Thus, if the first seller approach were to be adopted with auctioning of GHG allowances, SCPPA strongly supports the MAC suggestion that allowances should be allocated for free to retail providers to reduce the impact on the retail providers' consumers. For retail providers, there is assurance that the benefits of the free allocation allowances would be passed through to consumers and not constitute windfall profits to shareholders. "This is likely to be particularly true of the municipal utilities, which are effectively owned by consumers." Recommendations at 47.

**QUESTION NO. 33:**

*If you do not believe that an auction would be required under the deliverer/first-seller approach, explain how an emissions allocation system would work under a deliverer/first-seller approach. In doing so, answer the following:*

**SCPPA RESPONSE:**

As explained by the MAC, an auction would be appropriate for allocating allowances to first sellers to "that are able to pass most of their costs on to consumers. These include electric generators, other first sellers or electricity, oil refineries, and natural gas processors."

Recommendations at 56. However, the MAC also explained that while an auction may be the appropriate methodology for allocating allowances to first sellers that are able to pass most of the costs on to consumers, retail providers are different: “LSEs that are closely regulated or municipally owned are not included, since these entities are likely to be obligated to pass the value of freely allocated allowances on to their ratepayers.” Recommendations at 56. “This is likely to be particularly true of the municipal utilities, which are effectively owned by consumers.” Recommendations at 47. SCPPA strongly supports the MAC’s proposal that there should be an administrative or “free” allocation of allowances to consumers through the retail providers that serve them to cushion the impact on consumer bills.

***a. To whom would allocations be given?***

If the first-seller approach were adopted, allowances should be allocated to retail providers for the benefit of their consumers, with the freely allocated allowances being reduced over time as California progresses to attaining 2020 GHG reduction goals for the electric sector.

***b. If you recommend allowances be given to deliverers/first sellers, on what basis would allocations be given during any particular compliance period?***

Allowances should be given for free only to retail providers for the benefit of consumers. Some retail providers are going to have to incur a very substantial cost of reducing their reliance on carbon intensive generation of resources. As a result of geographical and historical circumstances, SCPPA and its members are encumbered by electrical generation resources that are carbon based. Currently, 76 percent of SCPPA member resources are carbon based: 47 percent coal and 29 percent gas. Renewable resources are six percent of the resource mix, nuclear is nine percent, hydro is five percent, and unassigned purchases are four percent.

Reliance by SCPPA members on coal resources, primarily the Intermountain Power Project in Utah and the San Juan Project in New Mexico, is a legacy of the 1970s. In 1978, Congress adopted the Powerplant and Industrial Fuel Use Act (“PIFUA”). This Act prohibited development of new gas-fired baseload resources. The national policy was to encourage the use of coal, a domestic resource. When confronted by the need to add capacity and the unavailability of hydroelectric options in the region, SCPPA and its members resorted to coal-fired facilities located in nearby western states, consistent with PIFUA and national policy. The addition of the coal-based resources was driven by a combination of legal, geographical, and economic circumstances. The global warming consequences of such resources were not understood at the time.

The shift from carbon-based generation to non-carbon resources is going to take time and is going to be costly. The SCPPA members have already spent nearly \$800 million from 1997 through 2006 on public benefits programs, with the highest percentage (34 percent or \$262 million) being spent on energy efficiency. The cost of new and expanded end-use efficiency programs is going to be even more substantial in the future.

In addition to vigorously pursuing energy efficiency and demand reduction measures, the SCPPA members are aggressively adding renewable resources. SCPPA is currently procuring roughly 500 MW of wind energy, 200 MW of geothermal energy, 100 MW of solar-thermal energy, and 30 MW of biomass-based energy. The cost is projected to be approximately \$267 million per year. SCPPA is also investigating an integrated solar thermal system to displace coal use at San Juan Project in New Mexico. Individual SCPPA members are pursuing their own renewable projects apart from SCPPA.

Consistent with the SCPPA members' commitment to adding renewable resources, SCPPA is also undertaking substantial transmission projects in order to bring renewable energy to load centers in southern California. The Greenpath North Transmission Project, a 1,200 MW transmission line from the Imperial Valley to Los Angeles, is being designed to import geothermal energy. The Southern Transmission System upgrade would add 480 MW of capacity from Utah to Los Angeles to import wind energy. The Greenpath transmission line is projected to cost more than \$335 million plus financing costs. The Southern Transmission System upgrade is projected to cost \$90 million plus financing costs.

It would be punitive to require SCPPA and its members to bear *both* the massive cost of shifting from their historical reliance carboniferous resources *and* the cost of acquiring allowances through an auction. Assuming an annual cost of \$25 CO<sub>2</sub>/ton, SCPPA members would have to expend nearly \$600 million annually to buy emission allowances. The cost of emission allowances would increase electricity rates and consumer bills substantially. The allowance-driven rate increases would be *additional* to the rate increases that will be needed to pay for new and expanded energy efficiency programs, new low carbon and non-carboniferous resources, and associated transmission capacity that will be needed for the SCPPA members to meet GHG reduction goals.

The consequence of requiring the SCPPA communities to spend hundreds of millions of dollars for auctioned allowances would result in a wealth transfer from the SCPPA communities to others in the state. Under the program envisioned by the MAC, the money spent for allowances would be reallocated without regard to who contributed the money. The MAC proposes that auction proceeds be directed to activities such as promoting end-use efficiency, increasing assistance to low-income customers, and reducing state taxes. Recommendations at

56-57. Using auction proceeds for these purposes would result in a wealth transfer to others, including a potential cross-subsidization of retail providers that are less reliant on carboniferous resources. Many of these are low-rate utilities that, due to their geographical location, have had historical access to low-cost state and federal hydropower resources that were and are unavailable to SCPPA members.

A wealth transfer from the communities that are most challenged to phase out their reliance on carbon-based resources to those that are less challenged would be unfair, inequitable, and unnecessarily punitive. Imposing the cost of auctioned allowances on top of the cost of GHG reduction measures could produce rate shock that would undermine public acceptance of GHG reduction goals regardless of how wholeheartedly SCPPA and its members embrace achievement of those goals.

***c. How would the state of California know how many allowances were needed by importers?***

Importers that are not retail providers should obtain allowances through participation in an auction as explained by the MAC. Free allowances should be administratively allocated only for the benefit of consumers through the retail providers that serve them.

***d. How would marketers be treated?***

Marketers are not retail providers. They fall within the category of first-sellers “that are able to pass most of their costs on to consumers” along with “electric generators, other first-sellers of electricity, oil refineries, and natural gas processors.” Recommendations at 56. Thus, in accordance with the MAC’s Recommendations, marketers should not be eligible for free allowances.

***e. How would electricity service providers be treated?***

Electricity service providers (“ESPs”) are retail providers and “LSEs” as the term is used by MAC. “LSEs include not just the investor-owned utilities that the PUC regulates, but also municipal utilities, co-ops, and other entities that serve customer electricity load.”

Recommendations at 41. Thus, ESPs should be permitted to obtain free allowances to the extent to which they experienced historical emissions. To the extent to which they obtained electricity solely through wholesale purchases, they should not be eligible for free allowances.

***f. Would zero-carbon generators also receive allowances?***

Zero-carbon generators do not have emissions, by definition. Thus, they do not have emissions that they would need to cover with allowances.

***g. What would be the likelihood of windfall profits under such a system?***

To the extent to which allowances would be allocated for free only to retail providers for the benefit of consumers as proposed by the MAC, there would not be windfall profits.

***h. How could such a system prevent windfall profits?***

See the Response to Question No. 33.g.

**QUESTION NO. 34:**

***If you recommend allocation of allowances to retail providers, followed by an auction to deliverers/first sellers, how would such an auction be administered? What kinds of issues would such a system raise?***

**SCPPA RESPONSE:**

Free allowances to retail providers should be allocated on the basis of the exposure of the retail provider’s consumers to economic harm. Insofar as the retail provider would use the free

allowances to offset the burden of having to buy allowances from others, the retail provider would have not have allowances left to auction to others.

If free allowances were allocated among retail providers on the basis of load, population or any similar measure that is not directly related to the need to prevent economic harm to the retail provider's consumers, some retail providers would inevitably receive allowances that were disproportionate to their need for allowances. That would expose some retail providers to cross-subsidizing others. For example, if free allowances were allocated among retail providers on the basis of load, higher-emission retail providers would most likely receive fewer allowances than they need. Low-emission retail providers would receive more than they need. The higher emission retail providers would probably be required buy auctioned allowances, which would result in a wealth transfer to recipients of the auction proceeds including the low-emission retail providers. The higher emission retail providers may also need to buy allowances directly from others including the low-emission retail providers through the cap-and-trade secondary market. That would result in a direct wealth transfer from the higher emission retail providers to the allowance sellers.

Allocating free allowances on the basis of load would not only result in inequitable wealth transfers. It would contradict the MAC's repeated statements about the importance of fostering end-use efficiency. Allocating free allowances on the basis of load would weaken the incentive of retail providers to pursue energy efficiency aggressively, insofar as any decline in load would result in a decline in carbon allowances.

**G. Relationship to Other Sectors Under AB 32 in California (Question 35).**

**QUESTION NO. 35:**

*Would GHG emissions allowances created under a deliverer/first-seller compliance regime in the electricity sector be compatible for trading with other sectors in the California economy, assuming a multi-sector cap-and-trade system? How?*

**RESPONSE:**

Allowances could be traded with other sectors, assuming a multi sector cap-and-trade system were in place. For example, under Program 1 as proposed by the MAC, the cap-and-trade program would have a scope similar to the EU ETS Program. The scope would cover medium and large GHG-emitting facilities including electric plants and energy-intensive industries such as refining and cement productions. Recommendations at 29. The allowances received by entities covered under Program 1 could be traded, regardless of whether the allowances are received for free or through an auction.

**H. Relationship to a Multi-State System Such as the Western Regional Climate Action Initiative (Questions 36 through 39).**

**QUESTION NO. 36:**

*Compare and contrast the ability of a deliverer/first-seller and a load-based approach to avoid double-counting of emissions between states.*

**RESPONSE:**

Double counting of emissions by states would not be a problem under a pure source-based program. Pure source-based programs are currently being proposed in Congress for the United States. However, neither the first-seller approach nor the load-based approach would be a pure source-based program. Although the first-seller approach would include a source-based

component for intrastate sources of emissions, the first-seller approach would require deliverers of energy at a first POD in California to be points of regulation in order to avoid “leakage.”

As discussed above, no reporting protocol or mechanism currently exists that would permit identification of the emissions associated with electricity delivered at a first California POD. Indeed, no such reporting protocol has even proposed in this proceeding beyond the general suggestion that NERC E-tags might be reformed in some way so as to be an adequate reporting and tracking mechanism for GHG emissions. Given the absence of an existing or even proposed reporting protocol for first-seller deliveries to first California PODs, it is not possible to say whether there would be double counting of emissions by states under a first-seller program.

Double counting of emissions among states need not occur under a load-based approach. Whether double counting would occur would depend on the reporting protocol adopted for a load-based regulatory scheme. Under the staffs’ Proposed Reporting Protocol, there would be double counting. The staffs have proposed a default value for unspecified purchases from the Pacific Northwest that would result in double counting of non-firm hydroelectric resources by Pacific Northwest states and California. *See* SCPPA Comment, July 2, 2007 at 6-11, R.06-04-009 (July 2, 2007); Letter from Department of Community, Trade and Economic Development, State of Washington (“Washington”), R.06-04-009 (July 10, 2007); Letter from Oregon Public Utility Commission and Oregon Department of Energy (“Oregon”), R.06-04-009 (July 10, 2007); SCPPA Reply to Washington and Oregon, R.06-04-009 (July 20, 2007).

Double counting is not an inherent defect in the load-based approach, however. It is a defect in the protocol that has been proposed by the staffs for reporting by retail providers. The double counting could be eliminated by adopting the “marginal method” for calculating the default factor for unspecified purchases from the Pacific Northwest as recommended by SCPPA

and apparently supported by Oregon and Washington or by reaching a collaborative agreement on environmental attributes of power transactions within the WECC as recommended by Washington and Oregon. *Ibid.*

**QUESTION NO. 37:**

***How should exports from California be handled under a deliverer/first-seller approach? Would the proper treatment of exports depend on whether the receiving state has a cap-and-trade system? If so, how?***

**SCPPA RESPONSE:**

Under the first-seller approach, emissions associated with generation sources located in California would be subject to California GHG regulation. Additionally, in order to prevent leakage, deliveries from out-of-state to first California PODs would be subject to California GHG regulation even if the deliveries were for wheeling through California to other states. Subjection of wholesale sales in interstate commerce to California GHG regulation could affect the wholesale price of electricity and could otherwise degrade the efficiency and liquidity of interstate wholesale market, as discussed above. SCPPA urges the Commission to take the potential consequences for the interstate wholesale electricity market into account in evaluating the merits of the first seller approach.

The potential for the GHG regulatory program to degrade the efficiency and liquidity of the interstate wholesale market could be reduced or eliminated under a comprehensive national program for source-based regulation of GHG emissions. An interstate compact or interstate agreements may also achieve the similar result. However, given that the western market covers multiple states, it appears that an effective multi-state compact could be difficult to achieve.

**QUESTION NO. 38:**

*If some states in the region adopt a source-based system (or a load-based system which also regulates exports), how would the State of California verify the true source of imports in order to avoid double-regulation of power imported from other capped states?*

**SCPPA RESPONSE:**

If some states in the Western region adopted a source-based GHG regulatory system and California adopted the first-seller approach, there could be double-regulation of power imported from the other states. The states with source-based GHG regulatory systems in place would regulate GHG emissions from generation located in the states. The emissions would be regulated a second time upon the delivery of electricity to first California PODs. The result would be the same if other states in the region adopted a load-based system which also regulated exports. No reporting or tracking mechanism currently exists which would permit California to identify whether the emissions associated with electricity delivered from out-of-state had already been regulated.

If there were a federal source-based regulatory scheme, the problem of double-regulation of GHG emissions associated with interstate sales of electricity could be eliminated.

**QUESTION NO. 39:**

*How would a deliverer/first-seller approach function relative to an Oregon load-based system (as currently proposed by Oregon)?*

**SCPPA RESPONSE:**

SCPPA is unfamiliar with any programs that are being contemplated by Oregon. However, if Oregon were to adopt a load-based system which regulated exports, adoption of the

first-seller approach in California would result in double regulation of electricity exported from Oregon to California. That would negatively affect the interstate wholesale market.

**I. Interaction with Potential Federal Regulation (Questions 40 through 42).**

**QUESTION NO. 40:**

*How easily could a deliverer/first-seller approach scale or link to multi-state, national, or international programs?*

**SCPPA RESPONSE:**

Insofar as regulation of intrastate emissions under the first-seller approach constitutes source-based regulation, that component of a California first-seller program would be likely to be compatible with a multi-state, national, or international source-based programs. However, the imposition of GHG regulation on deliverers of electricity to first California PODs would not be compatible with multi-state, national, or international source-based programs. The imposition of California GHG regulations on electricity that is delivered to first California PODs from other jurisdictions that impose source-based regulation on GHG emissions could result in double-regulation of GHG emissions. Accordingly, if multi-state, national, or international source-based programs source-based programs were implemented, California would need to terminate its first-seller regulation of deliveries at first California PODs.

**QUESTION NO. 41:**

*Would one approach (deliverer/first-seller or load-based) be easier to transition into a potential federal GHG regulatory system? If one would be superior in this respect, explain why and what assumptions you are making about the likely federal framework.*

**SCPPA RESPONSE:**

Both the first-seller approach and the load-based approach would require modifications to transition to a federal GHG regulatory system. If the federal program were source-based, the

regulation of deliveries of electricity to first California PODs under the first-seller approach would need to be terminated, as discussed in the Response to Question No. 40.

Adjustments would also be necessary if California adopted a load-based program if there were a source-based federal program. To the extent to which retail providers take service from either specified or unspecified out-of-state resources, the emissions associated with those resources should no longer be regulated under the California load-based program. The emissions would be regulated elsewhere on a source basis. Likewise, generation that is not owned and operated by retail providers would become points of regulation upon transition to a federal source-based regulatory program. As a result, the associated emissions should not be regulated under the California load-based program. The only generation left for regulation under the California load-based program would be the retail provider's generation.

**QUESTION NO. 42:**

*What are the merits of the deliverer/first-seller proposal as a model for other governments' efforts, particularly at the national level?*

**SCPPA RESPONSE:**

Both the first-seller approach and the load-based approach are designed to prevent leakage in accordance with AB 32. If there were a comprehensive source-based federal program, there would no longer be a need to for a feature to account for leakage to other states. Thus, the leakage containment features of the programs would be irrelevant for a federal program.

**J. Questions for Legal Briefing (Questions 43 through 53).**

**1. Federal Power Act (Questions 43 through 47).**

**QUESTION NO. 43:**

*Would the Federal Power Act preempt adoption of the deliverer/first-seller approach?*

*Why or why not? Does it make any difference that the federal government has not issued any regulations in this specific area?*

**SCPPA RESPONSE:**

If California were to adopt the first-seller approach, California's program may be subject to challenge on federal preemption grounds. Under the first-seller approach, deliveries of electricity from out-of-state sources to first California PODs would be points of regulation. Subjecting deliveries of electricity at first California PODs to California GHG regulatory requirements may affect wholesale electricity prices otherwise affect the efficiency and liquidity of the interstate wholesale electricity market. The FERC has exclusive jurisdiction over electricity transmission and wholesale sales of electricity in interstate commerce under the Federal Power Act. *Nantahala P&L Co., et al., v. Thornburgh*, 476 US 953 (1988). Accordingly, the MAC cautioned: "Another potential legal challenge has to do with Federal Power Act. Some have suggested that this Act may render subsidy 'first seller' obligations unenforceable by the state with respect to wholesale transactions." Recommendations at 45.

If California adopted the load-based approach, California may also face preemption challenges, but the grounds for such a challenge are not as patently obvious as they are for the first-seller approach.

**QUESTION NO. 44:**

*For purposes of your legal analysis of the previous question, would your opinion differ if the deliverer/first-seller were the reporting entity only and not also the point of regulation?*

*Why or why not?*

**SCPPA RESPONSE:**

If deliverers of electricity to first California PODs were required to make reports about their deliveries but were not points of regulation, the degree of interference in the interstate wholesale electricity market would be less than under the first seller approach. However, if the first-seller approach were modified so as to eliminate subsection of deliveries of first California PODs to GHG regulation, the modified first-seller approach would fail to meet the AB 32 requirement to minimize leakage.

**QUESTION NO. 45:**

*Could the deliverer/first-seller approach be designed or implemented in a way that would avoid or lessen problems under the Federal Power Act? If so, how?*

**SCPPA RESPONSE:**

The first-seller approach could be designed to lessen problems under the Federal Power Act if the approach were limited to regulating intrastate California generation of electricity without regulating deliveries of electricity from out-of-state sources to first California PODs. However, such a modified first-seller approach would fail to address leakage as required by AB 32.

**QUESTION NO. 46:**

*Compare Federal Power Act issues under a deliverer/first-seller approach and a load-based approach.*

**SCPPA RESPONSE:**

The first-seller approach would directly affect the wholesale electric market. Particularly, wholesale prices would be affected. The load-based approach would not directly affect the wholesale electric market, although there may be more subtle effects. Particularly, wholesale prices would not be directly affected. *See* SCE Comment at 17.

**QUESTION NO. 47:**

*If you conclude that Federal Power Act preemption would be a problem, could FERC action (e.g., approval of a CAISO tariff rule) ameliorate this problem? If so, what specifically could FERC do?*

**SCPPA RESPONSE:**

To the extent to which there is federal legislation establishing a national GHG regulatory program that requires the FERC to participate in implementing the program, it would be reasonable to expect that the FERC would take action consistent with the federal statutory requirements.

It is unclear that the FERC would have any statutory basis for adopting rules and regulations that to implement a single state's GHG regulatory program.

**2. Dormant Commerce Clause (Questions 48 through 51).**

**QUESTION NO. 48:**

*Does the deliverer/first-seller approach raise problems under the dormant Commerce Clause?*

**SCPPA RESPONSE:**

The first-seller approach could raise problems under the dormant Commerce Clause. The Commerce Clause provides: "Congress shall have Power... to regulate Commerce with foreign Nations and among the several States." US Constitution, Article I, Section 8. The negative

implication or “dormant” aspect of the Commerce Clause is that individual states do not have the power to regulate or impede the flow of interstate commerce.

A fundamental feature of the first-seller approach is to regulate GHG emissions from generation resources both within and outside of California. Deliveries of electricity to first California PODs would be established as points of regulation under the first-seller approach in order to obtain reductions in GHG emissions from out-of-state resources just as the imposition of GHG regulation on intrastate generation is intended to obtain GHG emission reductions from in-state resources.

Supporters of the first-seller approach would undoubtedly argue that the approach is not facially discriminatory between in-state resources and out-of-state resources. However, there would still be a dormant Commerce Clause issue insofar as the first-seller approach is intended to have and would have an impact on an out-of-state generation. In *Pike v. Bruce Church*, 397 US 137 (1970) the Supreme Court established a test that weighs the local benefits of a measure that affects interstate commerce against the burdens on interstate commerce to determine if the State regulation violates the dormant Commerce Clause. The burdens of a regulatory scheme of interstate commerce must be “clearly excessive” in relation to local benefits in order for a regulation to be struck down under the *Pike* doctrine.

In a clear effort to establish California’s interest in reducing GHG emissions, the Legislature found in AB 32:

(a) Global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California. The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in displacement of thousands of coastal businesses and residences, damage to marine ecosystems and the

natural environment, and an increase in the incidences of infectious diseases, asthma, and other human health-related problems.

Cal. Health and Safety Code §38501(a). The Legislature's findings may be sufficient to support California's standing to challenge a federal agency in federal court. *See Massachusetts, et al. v. Environmental Protection Agency, et al.*, 127 S.Ct. 1438 (2007). However, it is unclear whether a reviewing court would find that the cited interest is sufficient to support a clear and intended burden on out-of-state generation.

**QUESTION NO. 49:**

*Could the deliverer/first-seller approach be designed or implemented in a way that would avoid or lessen problems under the dormant Commerce Clause? If so, how?*

**SCPPA RESPONSE:**

The first-seller approach could be modified to lessen problems under the dormant Commerce Clause just as it could be modified to lessen preemption problems. Specifically, the first-seller approach could be modified to eliminate regulation of deliveries of first California PODs. However, as observed above, the first-seller approach would then fail to address leakage contrary to the Legislative intent expressed in AB 32.

**QUESTION NO. 50:**

*Are issues under the dormant Commerce Clause more or less serious under a deliverer/first-seller approach compared with a load-based approach? Explain.*

**SCPPA RESPONSE:**

Although the load-based approach may present dormant Commerce Clause issues, those issues are not as facially obvious as they are under the first-seller approach.

**QUESTION NO. 51:**

*The Market Advisory Committee report suggests that the value of GHG emission allowances “can be used to fund innovative emission reduction technologies and to focus pollution-reduction efforts in low-income and minority communities” or “can be utilized to provide transition assistance for workers and industries subject to strong market pressures from competitors operating in jurisdictions that lack similar caps on greenhouse gas emissions” (Market Advisory Committee report, at iv - v) or “should be directed to investments in end-use efficiency improvements” (Id., at 54). Would these uses raise problems under the dormant Commerce Clause? Would these problems be more or less serious under a deliverer/first-seller approach compared with a load-based approach?*

**SCPPA RESPONSE:**

The MAC suggests multiple uses for the revenues that California would receive by charging regulated entities for GHG allowances under the first-seller approach:

- “In-state investments in low-emissions technologies.” Recommendations at 9.
- “Investments in California communities that bear disproportionate environmental and public health burdens.” Recommendations at 9.
- “A portion of the allowance value created under a cap-and-trade program... should be directed to investments in end-use efficiency improvements.” Recommendations at 54.
- “A portion of the allowance value created under a cap-and-trade program should be used to keep the net cost of electricity to consumers from rising too far in the early stages of the program.” Recommendations at 54.
- “Promote investment in low-GHG technologies and fuels (including energy efficiency) by providing incentives to firms and consumers.” Recommendations at 56.
- “Promote end-use efficiency among residential, commercial, and industrial customers.” Recommendations at 56.

- “Increase assistance to low income consumers.” Recommendations at 56.
- “Finance reductions of GHG and criteria pollutants in communities that bear disproportionate environmental and public health burdens.” Recommendations at 57.
- “Finance reductions in state taxes.” Recommendations at 57.
- “[Tax] rebate checks, perhaps on a per-capita basis.” Recommendations at 57.
- “Transition assistance aimed at mitigating the impact a pollution cap might have on workers or firms that are subject to strong market pressures from competitors located in uncapped jurisdictions.” Recommendations at 57.

Some of these uses for the money that would be derived from California selling allowances to regulated entities are, in their face, aimed at protecting California businesses from competition from other states for neutralizing the advantages of out-of-state companies. For example, the MAC recommends that some portion of the value derived from selling allowances be used to “provide transition assistance aimed at mitigating the impact a pollution cap might have on workers or firms that are subject to strong market pressures from competitors located in uncapped jurisdictions.” Use of allowance value to subsidize California entities in competition with businesses in un-capped jurisdictions raised dormant Commerce Clause issues. *See West Lynn Creamery, Inc. v. Healy*, 512 US 186, 194 (1994).

### 3. Authority to Auction (Question 52).

#### QUESTION NO. 52:

*Does ARB have the authority, under AB 32 or any other statute, to auction allowances to emit greenhouse gases? Explain.*

#### SCPPA RESPONSE:

AB 32 does not contain a provision authorizing CARB to auction allowances. SCPPA is unaware of any other statute that would confer such authority on CARB.

4. **Other Legal Issues (Question 53).**

**QUESTION NO. 53:**

*Are there any other legal issues that the Public Utilities Commission and the Energy Commission should consider in deciding whether to investigate the deliverer/first-seller approach further? Explain.*

**SCPPA RESPONSE:**

The first-seller approach would apply California GHG regulations to out-of-state sources by making deliveries to California first PODs a point of regulation. There may be preemption issues beyond those presented by the Federal Power Act. To the extent to which the Commissions and CARB opt to regulate the electricity sector through the load-based approach, preemption as well as Commerce Clause issues would be clearly reduced if not eliminated insofar as the points of regulation would be California entities that are clearly within California jurisdiction.

**III. CONCLUSION**

SCPPA respectfully requests that the Commissions take into account the points raised by SCPPA herein as it deliberates the merits of the “first-seller” approach. Regardless of whether “first-sellers” or retail providers are ultimately determined to the appropriate point of regulation, SCPPA urges the Commissions to recommend to CARB that allowances should be made available to retail providers administratively and that those allowances should be allocated

predominantly if not entirely on the basis of historical emissions, at least at the outset of the regulatory program.

Respectfully submitted,

*/s/ Norman A. Pedersen*

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Dated: August 6, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the **SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY COMMENT ON MARKET ADVISORY COMMITTEE REPORT** on the service list for CPUC Docket No. R.06-04-009 and CEC Docket No. 07-OIIP-01 by serving a copy to each party by electronic mail and/or by mailing a properly addressed copy by first-class mail with postage prepaid.

Executed on August 6, 2007, at Los Angeles, California.

*/s/ Sylvia Cantos*

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Sylvia Cantos

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