BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies.	Rulemaking 06-04-009 (Filed April 13, 2006)

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of: Order Instituting Informational Proceeding on a Greenhouse Gas Emissions Cap	Docket 07-OIIP-01

REPLY COMMENTS OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION ON THE TYPE AND POINT OF REGULATION ISSUES

December 17, 2007

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REPLY COMMENTS OF THE
CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION
ON THE TYPE AND POINT OF REGULATION ISSUES

In accordance with the Rules of Practice and Procedure of the Public Utilities Commission ("CPUC") of the State of California, the California Municipal Utilities Association ("CMUA") hereby files these Reply Comments to various parties' responses to questions posed in the *Administrative Law Judges' Ruling Requesting Comments on Type and Point of Regulation Issues* ("ALJ Ruling") issued November 9, 2007, in the R.06-04-009. CMUA also files these Reply Comments with the California Energy Commission ("CEC") in Docket 07-OIIP-01. In these Comments, the CPUC and CEC will collectively be called the "Joint Agencies" and the California Air Resources Board will be called the "Board."

The Board's authority is expressly limited to implementing regulations concerning "statewide greenhouse gas emissions" as that term is specifically defined in Assembly Bill 32 ("AB 32").[1] Unless otherwise stated, any use by CMUA of the phrase "greenhouse gas emissions" refers only to "statewide greenhouse gas emissions."

I. THE RETAIL PROVIDER IS THE PROPER POINT OF REGULATION

CMUA advocates that retail providers should be the point of regulation since those entities are best situated to achieve the ultimate AB 32 goal, i.e., the maximum technologically feasible and cost-effective reductions of statewide greenhouse gas emissions. In regard to this position, CMUA supports the comments of the Los Angeles Department of Water & Power,[2] the Northern California Power Agency,[3] the Southern California Public Power Authority,[4] and the Sacramento Municipal Utility District.[5]

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[1] CAL. HEALTH & SAFETY CODE § 38505(m).

[2] "A load-based approach to the point of regulation provides greater consistency with other California initiatives for energy efficiency, renewables, and solar. It also helps to preserve reliability, by limiting regulatory compliance to California retail providers, entities that have a vested interest in their retail customers (i.e. as opposed to non-generator marketers under a first seller)." *LADWP Comments* at 3.

[3] "NCPA generally favors a point of regulation that provides the greatest amount of flexibility for the entity with the reduction obligation to effect the necessary reductions." *NCPA Comments* at 3.

[4] "Accordingly, SCPPA supports a GHG emissions reduction program in which regulated retail providers would be the points of regulation in the electric sector." *SCPPA Comments* at 39.

[5] "The retail service provider would be in the best position to balance the level of energy efficiency, renewable energy or other low carbon strategies needed to meet its GHG goals." *SMUD Comments* at 13.

II. THE LANGUAGE OF AB 32 DEFINES AND LIMITS THE BOARD'S AUTHORITY

A. CARB's regulations may not proscribe or penalize the sale of power from high emission resources by retail providers.

CMUA supports SDG&E's comments to the extent they recognize that "contract shuffling," as presented by the Joint Agencies, is a legal fiction that penalizes certain lawful actions taken by retail providers.[6] CMUA also supports SDG&E's call for the use of a tracking system that will accurately identify source-sink relationships rather than relying upon default emission assumptions for specified resources that the Joint Agencies *know* are incorrect.[7] Always uniform in its advocacy for accuracy and consistency in emission reporting, CMUA has supported the development of improved tracking mechanisms from its earliest filings in rulemakings for SB 1368 and AB 32.

NRDC states that "the Commissions [should] design the regulations for the electric sector to minimize and discourage contract shuffling."[8] Actually, CMUA agrees with the words in this quote but not with its implications since NRDC holds to an overly broad definition of "contract shuffling." CMUA believes that "contract shuffling" must be specifically defined in strict conformance with AB 32 since a violation by a retail provider would be a crime.[9] Many parties, however, have taken a broad and unlawful position that "contract shuffling" includes transactions in which a retail provider both: (1) *actually* sells power to another party from high emission resources that is *actually* delivered to that party; and (2) *actually* purchases power from low emission resources that is *actually* delivered to and consumed by the retail provider's customers.[10]

SDG&E is substantially correct in stating that "contract shuffling" results when: (1) "contracted-for power is not actually produced" and "higher emitting resources [are] substituted by the seller" to serve the retail provider's load within California; or when contracted-for power "is produced but sold to another entity, with higher emitting resources substituted by the seller" to serve the retail provider's load within California.[11] CMUA agrees with SDG&E's position in stating that "[c]ontracting for and using lower emitting power should not be prohibited in a California-only

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[6] *SDG&E Comments* at 5.

[7] *SDG&E Comments* at 5.

[8] *NRDC Comments* at 9.

[9] A violation of AB 32 may result in criminal penalties including imprisonment. *See* HEALTH & SAFETY CODE §§ 38550, 42400. For example, see the Board staff's suggested regulations §§ 95111(b)(3)(F), (N)-(R) whereby a retail provider's failure to submit information on its "contract shuffling" would constitute a punishable violation.

[10] *See e.g., NRDC Comments* at 9.

[11] *SDG&E Comments* at 5. CMUA agrees with SDG&E's basic statement but notes that certain lawful situations may occur when the power actually delivered is not from the specified resource, e.g., substitute power being used for firming renewable resources.

provider. That is precisely the reason that the point of regulation must be at the retail service provider level. Not balancing the requirements of AB 32 with the need to keep rates under control would only serve to undermine public confidence in the regulations and in AB 32 itself.

In its opening comments, CMUA described the existing statutory law that *authorizes and requires* each POU's local governing body to implement and enforce a renewables portfolio standard[15] as well as establish targets for all potentially feasible and achievable cost-effective electricity efficiency savings.[16] The authority to set standards for these activities is granted in statute to the local governing bodies for the POUs and the CPUC for load serving entities (i.e., investor owned utilities, et al.). The Board, on the other hand, is granted general authority to adopt emission reduction measures "in furtherance of achieving the statewide greenhouse gas emissions limit" beginning in 2012.[17] There is no doubt that increasing energy efficiency and renewable resource procurements are key actions for some retail providers to reduce emissions. These tools, however, may have different applications in different service territories. Additional renewables may be more cost effective for one retail provider while additional energy efficiency may be more cost effective for another retail provider. For the POUs, only the local governing bodies can make those decisions. In no way should AB 32 be interpreted to preempt, override, or repeal the existing authority granted to the local governing bodies and the CPUC to set standards for energy efficiency and renewable resource procurement.

In stating their belief that the Board has authority to set statewide targets for retail providers, the commenters did not engage in discussion of the existing laws already granting this authority to the POU's local governing bodies. Yet, if the Board were to consider adopting energy efficiency and renewable energy targets, it would have to confront these laws head on. The only way for the parties' "recommendations" to take effect would be for the general grants of authority in AB 32 to repeal the existing specific grants of authority in Public Utilities Code sections 387 and 9615. The courts would hardly condone this interpretation, and the Joint Agencies should likewise reject those comments.

In *California Medical Board vs. Superior Court* ("*Medical Board*"),[18] the court elaborated on the rules for statutory construction when two statutes deal with the same subject matter. In *Medical Board*, the court sought and applied an approach comporting with settled principles of statutory

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[15] CAL. PUB. UTIL. CODE § 387.

[16] CAL. PUB. UTIL. CODE § 9615.

[17] *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 38560, 38562.

[18] 88 Cal. App. 4th 1001 (2001).

construction.[19] In direct contravention to these principles, the various commenters suggest an interpretation whereby AB 32 impliedly repeals Public Utilities Code sections 387 and 9615.

For the courts, the "fundamental task of statutory construction is to "ascertain the intent of the lawmakers so as to effectuate the purpose of the law."[20] The courts "begin by examining the language of the statute."[21] The actual "statutory language . . . is the best indicator of legislative intent" and reliance "on the statutes' plain language is "the most powerful safeguard for the courts' adherence to their constitutional role of construing, rather than writing, statutes . . . ."'"[22] Here, sections 387 and 9615 could hardly be more clearly stated, i.e., the authority for establishing targets is solely within the purview of the local governing bodies.

Although, CMUA sees no ambiguity in sections 387 and 9615, the discussion below describes the courts' analysis when the statutory language may have some ambiguity. In that case, a court "may also look to the canons of statutory construction to guide [its] quest for legislative intent" which includes "the duty to harmonize statutes on the same subject if possible, the presumption against implied repeals, and the rule that a specific statute prevails over a general one."[23] These canons of statutory construction, however, do not trump the plain language and are "merely aids to ascertaining probable legislative intent."[24] These canons are "tools to assist in interpretation, not the formula that always determines it" and a court "must be careful lest invocation of a canon cause it to lose sight of its objective to ascertain the Legislature's intent."[25]

The key point stated in *Medical Board* is that "whether the canon invoked is that the specific statute prevails over the general or that the latest statutory expression prevails, such canons share the requirement that the enforcement of one duly enacted statute at the expense of another on the same subject only applies when the two statutes cannot be reconciled."[26] The courts will seek to "harmonize statutes on the same subject, giving effect to all parts of all statutes if possible" because they "will find

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[19] *California Medical Board*, 88 Cal. App. 4th at 1005-1006. *See also Pacific Lumber Company v. State Water Resources Control Board*, 37 Cal. 4th 921 (2006); *City of Los Angeles v. County of Kern*, 2006 U.S. Dist. LEXIS 81417 (2006).

[20] *Id.* at 1012, *quoting People v. Cruz*, 13 Cal. 4th 764, 774-775 (1996).

[21] *Id.*

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

[23] *California Medical Board*, 88 Cal. App. 4th at 1012, *quoting Droeger v. Friedman, Sloan & Ross*, 54 Cal. 3d 26, 50 (1991); *Garcia v. McCutchen*, 16 Cal. 4th 469, 476, 478 (1997).

[24] *California Medical Board*, 88 Cal. App. 4th at 1012.

[25] *Id.* at 1012, *quoting Droeger*, 54 Cal. 3d at 50; *California Correctional Peace Officers Assn. v. Department of Corrections*, 72 Cal. App. 4th 1331, 1348 (1999).

[26] *California Medical Board*, 88 Cal. App. 4th at 1014, *quoting Garcia*, 16 Cal. 4th at 478.

an implied repeal only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.""[27]

The statutory acts discussed above are not so repugnant and inconsistent that there is no possibility of concurrent operation. The language and broad scope of AB 32 suggests that it leaves standing existing authority to the POU's local governing bodies and the CPUC. The more specific statutes *expressly* grant regulatory authority to the local governing bodies for establishing energy efficiency and renewable energy standards. On the other hand, the more general statute, AB 32, grants authority to develop emission reduction measures. If the Board determines that the statutes deal with similar subject matter, one possible harmonizing interpretation would entail the Board's recognition of energy efficiency and renewable energy procurement as viable means to reduce GHG emissions, but leaving the setting of actual targets to the local governing bodies. The Board, then, would be authorized to incorporate reporting and verification methodologies to give retail provider's appropriate recognition of emission reductions through these means.

III. NATIONAL GHG PROGRAMS

IEP observes, and CMUA agrees, that "[t]here is no federal program [and w]hether there will be one, or what form it will actually take, is a matter of speculation."[28] Therefore, if the Joint Agencies and the Board proceed with developing a California-only program, it should be designed to easily integrate into the prospective federal program. Meanwhile, CMUA believes that the only sensible policy is for retail providers to be the point of regulation since they have the most control over resource planning, procurement, and acquisition.

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[27] *California Medical Board*, 88 Cal. App. 4th at 1012, *quoting Garcia v. McCutchen*, 16 Cal. 4th at 476, 477; *Droeger*, 54 Cal. 3d at 52.

[28] *IEP Comments* at 13.

CERTIFICATE OF SERVICE

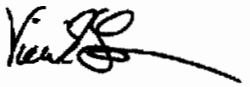
I hereby certify that I have this day served a copy of the attached:

REPLY COMMENTS OF THE
CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION
ON THE TYPE AND POINT OF REGULATION ISSUES

on all known parties to R.06-04-009 by transmitting an e-mail message with the document attached to each party named in the official service list. I served a copy of the document on those without e-mail addresses by mailing the document by first-class mail addressed as follows:

See attached service list

Executed this 17th day of December 2007, at Sacramento, California.



Vicki Ferguson

Service List R.06-04-009, updated XX, 2007

CALIFORNIA PUBLIC UTILITIES COMMISSION
Service Lists

Proceeding: R0604009 - CPUC - PG&E, SDG&E,
Filer: CPUC - PG&E, SDG&E, SOCALGAS, EDISON
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