

BEFORE THE CALIFORNIA PUBLIC UTILITIES COMMISSION

AND

THE CALIFORNIA ENERGY COMMISSION

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)

[Also Filed at the California Energy Commission]

CEC Docket 07-OIIP-01

**REPLY COMMENTS OF POWEREX CORP. ADDRESSING THE FINAL OPINION ON
GREENHOUSE GAS REGULATORY STRATEGIES**

DOCKET	
07-OIIP-1	
DATE	<u>OCT 07 2008</u>
RECD.	<u>OCT 07 2008</u>

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Dated: October 7, 2008

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Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, Powerex provides its reply comments on the Proposed Decision (PD) on greenhouse gas (GHG) regulatory strategies under AB 32. These reply comments are limited to support for the request of Morgan Stanley Capital Group, Inc. ("Morgan Stanley") that the PD be clarified to establish that all entities, including power marketers, that deliver electricity to California from either emitting resources or unspecified sources are deliverers who will be eligible for the allocation of allowances.

In its opening comments, Morgan Stanley raised concern regarding one aspect of the PD's treatment of the allocation of allowances, specifically those references in the PD limiting the allocation of allowances to "emitting" deliverers that could be read to exclude power marketers or other deliverers of imported power from the allocation of allowances:

Curiously, the recommended decision chooses to give allowances only to “emitting” deliverers. This term is not defined in the text of the Final Opinion, but Morgan Stanley interprets its plain meaning such that no allowances will be allocated to power marketers who import power into California that was generated outside the state, even though such entities will be considered “First Deliverers” and thus will have compliance obligations. If this, in fact, is the Commissions’ intent, there is no discussion in the body of the order regarding the reasoning behind this decision. Indeed, Morgan Stanley does not believe such a choice can be justified. If allowances are to be distributed to “deliverers” then leaving out one class or type of deliverers will put that omitted group at a significant competitive disadvantage.

We would further note that by effectively eliminating importers from the pool of deliverers who are allocated allowances, the Commissions increase the chances that the “First Deliverer” approach could violate the dormant Commerce Clause.

Powerex would read the references to “emitting” deliverers in the PD as intended to distinguish between deliverers of energy with associated emissions (i.e., including First Deliverers from out-of-state unspecified sources with a GHG liability associated with their deliveries) as opposed to deliverers of energy with no associated emissions – and not as an effort to recommend allowances only for deliverers who are also emitters.

To the extent that a power marketer or any other entity delivers energy to California from an emitting resource or delivers energy from unspecified resources (which will, in turn, be assigned a default emissions factor), it is assumed that the intention of the two Commissions is to recommend that such deliverers be allocated allowances. This intention is reflected, if not quite clearly expressed, at p. 13 of the PD:

For the emission allowances distributed to electricity deliverers, the number of allowances given to individual deliverers should be determined using a fuel-differentiated, output-based allocation with distributions limited to deliveries from emitting sources.¹

¹ To make the allowance allocation recommendation quite clear, the PD should amplify its discussion at p. 13 to indicate that deliveries from unspecified sources qualify as “deliveries from emitting resources” and should incorporate related revisions to Finding of Fact Nos. 27-28 and Ordering Paragraph No. 8 as set forth in Attachment A hereto.

Nevertheless, Morgan Stanley has certainly identified an ambiguity that has been created by the PD's occasional references to "emitting" deliverers as the deliverers eligible for an allowance allocation.² The ambiguity is heightened by other references in the PD which either identify "electricity deliverers," rather than "emitting deliverers," as entities eligible for allowances or, as noted above, indicate that allowances should be allocated to deliverers of energy from emitting resources (presumably including deliverers of energy from unspecified sources).³

The simplest way to clarify the apparent ambiguity would be (i) to amplify the discussion at p. 13 to clarify that "deliveries from emitting sources" includes deliveries from unspecified sources; (ii) to strike the reference to "emitting" in the body of the discussion at pp. 207-209; and (iii) to revise Findings of Fact Nos. 27-28 and Ordering Paragraph No. 8 to reflect that the two Commissions are recommending that allowances be allocated to deliverers of energy from emitting resources, which includes deliveries of energy from unspecified sources.⁴ The deletion of the modifier "emitting" will not lead to confusion about the two Commissions' recommendation that deliveries to California of energy that has no associated emissions will not qualify for any allocation of allowances. That point is made amply clear by the PD at pp. 215-217 wherein the two Commissions express their view that the inclusion of renewables in a fuel-differentiated output-based allocation of allowances to deliverers does not appear to be warranted.

² See PD at 207 and 209; also Findings of Fact Nos. 27-28 and Ordering Paragraph No. 8.

³ For example, at p. 13 of the PD, it states that "[b]eginning in 2012, 20% of the emission allowances allocated to the electricity sector should be auctioned, with 80% distributed administratively for free to electricity deliverers."

⁴ Attachment A sets forth recommended revisions to Finding of Fact Nos. 27 and 28 and Ordering Paragraph No. 8.

Respectfully submitted this 7th day of October, 2008 at San Francisco, California.

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ATTACHMENT A

RECOMMENDED TEXTUAL REVISIONS/PROPOSED FINDINGS OF FACT/REVISED ORDERING PARAGRAPH

(1) **PD Text at p. 13:**

For the emission allowances distributed to electricity deliverers, the number of allowances given to individual deliverers should be determined using a fuel-differentiated, output-based allocation with distributions limited to deliveries from emitting sources.

Should be revised as follows:

For the emission allowances distributed to electricity deliverers, the number of allowances given to individual deliverers should be determined using a fuel-differentiated, output-based allocation with distributions limited to deliveries from emitting sources **including deliverers from out-of-state unspecified sources with a GHG liability associated with their deliveries.**

(2) **Finding of Fact No. 27:**

A fuel-differentiated output-based allocation approach with distributions limited to emitting deliverers would provide all deliverers with allowances roughly in proportion to the amount they need and would reduce the potential for allowance rents.

Should be revised as follows:

A fuel-differentiated output-based allocation approach with distributions limited to deliverers of energy from emitting sources **(including deliverers from out-of-state unspecified sources with a GHG liability associated with their deliveries)** would provide all deliverers with allowances roughly in proportion to the amount they need and would reduce the potential for allowance rents.

(3) **Finding of Fact No. 28:**

A fuel-differentiated output-based allocation approach with distributions limited to emitting deliverers would avoid undue economic harm to California electricity consumers who are currently locked into a certain degree of dependence on coal.

Should be revised as follows:

A fuel-differentiated output-based allocation approach with distributions limited to deliverers of energy from emitting sources **(including deliverers from out-of-state unspecified sources with a GHG liability associated with their deliveries)** would avoid undue economic harm to California electricity consumers who are currently locked into a certain degree of dependence on coal.

(4) **Ordering Paragraph No. 8:**

We recommend that for the portion of allowances distributed to deliverers, ARB distribute the allowances using a fuel-differentiated output-based approach with distributions limited to emitting deliverers, as described in this decision.

Should be revised as follows:

We recommend that for the portion of allowances distributed to deliverers, ARB distribute the allowances using a fuel-differentiated output-based approach with distributions limited to deliverers from emitting sources **(including deliverers from out-of-state unspecified sources with a GHG liability associated with their deliveries)**, as described in this decision.

CERTIFICATE OF SERVICE

I, Lisa Vieland, certify that I have on this 7th day of September 2008 caused a copy of the foregoing

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OPINION ON GREENHOUSE GAS REGULATORY STRATEGIES**

to be served on all known parties to R.06-04-009 listed on the most recently updated service list available on the California Public Utilities Commission website, via email to those listed with email and via U.S. mail to those without email service. I also caused courtesy copies to be hand-delivered as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of September 2008 at San Francisco, California.

/s/ Lisa Vieland
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PUC/X103825.v1

October 7, 2008

VIA E-MAIL AND OVERNIGHT DELIVERY

California Energy Commission
Docket Office, MS-4
1516 Ninth Street
Sacramento, CA 95814-5504

**Re: Docket No. 07-OIIP-01; Reply Comments of Powerex Corp.
Addressing the Final Opinion on Greenhouse Gas Regulatory
Strategies**

Dear Sir or Madam:

Attached please find an original copy of the Reply Comments of Powerex Corp. Addressing the Final Opinion on Greenhouse Gas Regulatory Strategies to be filed in the above-referenced docket. Simultaneously with this mailing, an electronic copy of the above-referenced reply comments was e-mailed to the Energy Commission's Docket Unit.

Should you have any question with regard to the referenced filing, please contact the undersigned.

Very truly yours,

GOODIN, MACBRIDE,
SQUERI, DAY & LAMPREY, LLP

By */s/ James D. Squeri*
James D. Squeri

cc: Karen Griffin (kgriffin@energy.state.ca.us)