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The California Municipal Utilities Association, Northern California Power Agency, Pacific Gas & Electric Company, Sacramento Municipal Utility District, San Diego Gas and Electric Company and Southern California Edison Company.(The Parties) appreciate the work of the Air Resources Board (ARB) and staff on a thorough Proposed Regulation Order creating a 33% Renewable Electricity Standard (Proposed RES Regulation). The regulation represents many hours of staff work, not only at ARB, but in consultation with the staff of the California Public Utilities Commission, California Energy Commission and the California Independent System Operator.

Achieving a statewide 33% renewable electricity goal by 2020 is a significant undertaking. An unprecedented infrastructure build-out is required and major challenges with transmission permitting and approval, project permitting and siting delays, and the need to maintain grid reliability while integrating a significant amount of intermittent renewable resources must be considered.

The Parties have commented on the June draft rule previously filed comments on the Proposed RES Regulation and nothing in this letter is intended to alter or impair those comments. Furthermore, while The Parties in large part have expressed support for the direction taken in the June 4, 2010 Proposed RES Regulation, last-minute changes to the regulation may cause parties to modify their earlier positions and comments given the magnitude of modifications being considered today. Accordingly, the comments offered herein focus solely on the enforcement provisions of the Proposed RES Regulation, as set forth in the June 4, 2010 Proposed RES Regulation.

The Parties are concerned about the proposed enforcement mechanism, which: (1) does not take into account the relevant circumstances associated with achieving a 33% renewable goal by 2020, and (2) contains language creating the potential for hundreds of millions of dollars in penalties.

For example, the Proposed RES Regulation bases penalties on Health and Safety Code Section 42400 (referenced from Section 38580), where the basic penalty is up to $1,000 per violation, with other circumstances leading to potential penalties of up to $75,000 per violation. The Proposed RES Regulation neither proposes a cap on penalties, nor is a cap included in the underlying code sections for the potential penalties per violation set forth above. Since each MWh of shortfall may be considered a separate violation, a party short just 500 GWh (for larger regulated parties, that is less than 1% of annual retail sales) could theoretically face the potential for $500 million dollars in penalties (500,000 MWh * $1,000 = $500,000,000).

The Proposed RES Regulation then compounds these potential penalties by imposing them for each day for which the shortfall is not cured. If the shortfall was not cured in 90 days – just one calendar quarter – the basic fines could exceed $45 billion.

This outsized enforcement potential, while perhaps not likely to be exercised by ARB, creates uncertainty for each of The Parties, for the following reasons:

- Publicly-owned utilities (POUs) seeking bond financing for their renewable projects may face the burden of convincing underwriters that the potential liability from enforcement penalties does not threaten their fiscal stability in such a way as to place bond repayment in jeopardy.

- Investor-owned utilities (IOUs) could face a similar problem, both with regard to capital borrowing and investor confidence in their long-term fiscal soundness as the IOUs are forced to disclose the potential for staggering fines for non-compliance with the Proposed RES Regulation.

- Renewable developers will likely face more stringent non-performance provisions in utilities' power purchase agreements, which will shift some or all of the risk of RES penalties to sellers, and may view such provisions as deal breakers. Even if they are willing to sign these agreements, they are likely to experience financing problems similar to those of the IOUs and POUs. Furthermore, renewable developers would be expected to increase the price of the energy they generate to offset this risk.

In contrast to the penalty authority in the Proposed RES Regulation, the interim penalties proposed by the CPUC for the 20% Renewables Portfolio Standard (RPS) are capped at $25 million annually. Thus, the Proposed RES Regulation represents a new and daunting exposure compared to the State's current RPS program under the CPUC rules the IOUs have been operating under when procuring renewables.

This RES enforcement issue can be addressed by the ARB in two steps:

- By directing staff to develop effective, efficient, and flexible tools in a 15 day language change that would appropriately and fairly enforce violations to resolve the outsized nature of the enforcement uncertainty, and

- By revising section 97009 of the proposed RES regulation to indicate that ARB staff will work with parties through the 15-day process to develop enforcement language that would mitigate this penalty exposure by 1) capping the penalty amount; 2) modifying the way a violation of the regulation is defined; 3) changing the imposition of penalties from a daily basis to an annual or other basis, or 4) providing any other appropriate relief on this issue.

With such modifications, one area of significant concern to all of the aforementioned parties can effectively be addressed without adverse consequence to the ARB's RES program. We thank you for your consideration of these proposed modifications.