LARGE PUBLIC POWER COUNCIL

March 21, 2025

Ms. Liane Randolph, Chair
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Large Public Power Council Comments in Response to Information Solicitation to Inform Implementation of California Climate-Disclosure Legislation

Dear Chair Randolph,

On December 16, 2024, the California Air Resources Board (CARB) issued an *Information Solicitation to Inform Implementation of California Climate-Disclosure Legislation: Senate Bills 253 and 261, as amended by SB 219.* (Information Solicitation). The Large Public Power Council (LPPC) appreciates the opportunity to provide the comments below to inform the implementation of the legislation.

LPPC is an association consisting of 29 of the largest, non-federal public power systems in the nation. Together, our members serve 30.5 million American consumers across 22 states and Puerto Rico. As not-for-profit utilities owned by and accountable to the communities we serve, our members offer some of the cleanest, most reliable, most affordable energy in the United States. Many LPPC members are setting nation-leading goals to decarbonize their electric generation portfolios and adopting new and innovative technologies, fuels, and investments in beneficial electrification and grid modernization. LPPC also supports strong governmental action at both the federal and state levels to expand available generation technology options, support advanced grid capabilities, and enhance end-user services. Continued federal and state investments in research, development, and demonstration of the full range of technologies are needed to achieve clean energy goals.

Across the nation, our members provide the backbone of the energy infrastructure for the U.S. economy and are facing unprecedented growth in demand for electricity while simultaneously leading an energy transformation that is making significant progress to reduce greenhouse gas (GHG) emissions in our sector. As CARB works to develop these rules, it is vital that the rules are practical, useful, and informative, and that they recognize the inherent difficulty of obtaining certain material climate-related information that is both accurate and timely.

With these policy and energy perspectives in the forefront, LPPC is submitting the following responses to key elements of CARB's Information Solicitation on climate disclosure matters.

APPLICABILITY OF REPORTING REQUIREMENTS

This opening section of LPPC comments requests that CARB provide clarification on two important threshold matters regarding the applicability of the California climate-disclosure requirements. First and foremost, LPPC urges CARB to expressly confirm that government-owned electric and water utilities are not "reporting entities" or "covered entities" that are subject to those reporting requirements. As discussed below, this interpretation is based on the plain reading of the statute as set forth in California Health and Safety Code § 38532(b)(2) and § 38533(a)(4). Second, CARB should provide clarifications on what constitutes "doing business in California" for purposes of the California climate-disclosure requirements. These clarifications are necessary to exclude those entities that do not directly generate GHG emissions within the state if public power systems and other government-owned entities are found to be subject to these reporting requirements.

1. **Neither government entities nor their subdivisions (*e.g.*, political subdivisions of a state) should qualify as a "business entity" under SB 253 or SB 261, regardless of whether they generate revenue.**

Senate Bill (SB) 253 (stats. 2023) established the Climate Corporate Data Accountability Act, which directs CARB to develop regulations that require every "reporting entity" to annually report its Scope 1, Scope 2, and Scope 3 emissions. Under this Act, a "reporting entity" is defined as "a partnership, corporation, limited liability company, or other business entity."[1] A similar approach is taken with SB 261 (stats. 2023), which defines "covered entity" as "a corporation, partnership, limited liability company, or other business entity."[2]

[1] Cal. Health & Safety Code § 38532(b)(2) (defining "reporting entity" to include "a partnership, corporation, limited liability company, or other business entity formed under the laws of this state, the laws of any other state of the United States or the District of Columbia, or under an act of the Congress of the United States with total annual revenues in excess of one billion dollars ($1,000,000,000) and that does business in California. Applicability shall be determined based on the reporting entity's revenue for the prior fiscal year").

[2] Cal. Health & Safety Code § 38533(a)(4) (defining "covered entity" "covered entity" to include "a corporation, partnership, limited liability company, or other business entity formed under the laws of the state, the laws of any

Importantly, both definitions confirm that the reporting requirements under SB 253 or SB 261 do not apply to any governmental entity, such as public power systems, given that the terms "partnership," "corporation," and "limited liability company" do not refer to public agencies. This interpretation is supported by how the term "business entity" is defined and used in other California statutes. For example, Health and Safety Code section 25179(c) defines a "business entity" as "any private organization or enterprise operated for profit, including, but not limited to, a proprietorship, partnership, firm, business, trust, joint venture, syndicate, corporation, or association." Further, the term "business entity" is commonly defined in other California statutes (outside the Health and Safety Code) to include only privately-owned, for-profit entities.[3] Public entities, including utilities owned by municipalities or other government entities, do not operate for profit and are instead structured to serve the public interest. Therefore, under this commonly understood definition, governmental entities are not "business entities."

In a related matter, CARB seeks input on whether "business entity" should be interpreted to include "federal and state government entities" if those governmental entities generate revenue. As noted above, section 25179(c) of the California Health and Safety Code defines a "business entity" as "any *private* organization or enterprise *operated for profit*, including, but not limited to, a proprietorship, partnership, firm, business, trust, joint venture, syndicate, corporation, or association" (emphasis added). Government entities and their subdivisions (*e.g.*, a political subdivision of a state) are <u>not</u> private organizations that are "operated for profit" (even if they generate revenue) and, therefore, do not meet such California Health and Safety Code definition of a business entity. Consequently, CARB should not include government entities and their subdivisions within the scope of SB 253 and SB 261.

Also, government entities and their subdivisions have an existence based in sovereignty, providing for the public welfare, or similar bases—not a business existence. Each such entity is not a "business entity" based upon the plain meaning of that term. Therefore, for this additional reason, CARB should not include government entities and their subdivisions within the scope of SB 253 and SB 261.

For these reasons, LPPC urges CARB to confirm that "business entity," as used in SB 253 and SB 261, does not include governmental entities, such as publicly owned electric and water utilities, for purposes of the climate disclosure reporting requirements under SB 253 and SB 261.

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other state of the United States or the District of Columbia, or under an act of the Congress of the United States with total annual revenues in excess of five hundred million United States dollars ($500,000,000) and that does business in California. Applicability shall be determined based on the business entity's revenue for the prior fiscal year").

[3] *See*, e.g., Revenue and Tax Code § 18621.10(b)(2); Government Code § 5975(c); Corporations Code § 5063.5; Civil Code § 1799(b); Government Code § 82005.

Furthermore, the exclusion of public power should not create any significant data gaps. In the case of electric utilities, CARB can use the existing GHG emissions reporting already provided by electric utilities to the extent such data is needed under the climate disclosure program.

2. **<u>CARB should not adopt the interpretation of "doing business in California" found in the Revenue and Tax Code section 23101.</u>**

CARB seeks input on how to define the phrase "does business in California" in SB 253 and SB 261. This includes considering whether to adopt the interpretation from the Revenue and Tax Code section 23101. CARB should not adopt this interpretation, because it is overly broad and could lead to entities being subject to the reporting requirements even if they do not actually conduct business or generate GHG emissions in the State.

Under Revenue and Tax Code section 23101, an entity is considered "doing business in California" if it is "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit," such as a certain monetary level of payroll paid in California or real property and tangible personal property owned in California. Although these factors align with the Revenue and Tax Code's purpose, they do not directly relate to whether the entity generates significant emissions within California. For instance, an electric utility with all its operations outside California might still have remote employees or maintain an incidental presence in the state through an office or corporate apartment. Despite these activities not affecting the entity's GHG emissions in California, they could trigger the emissions reporting requirements if CARB adopts the interpretation of "doing business" found in the Revenue and Tax Code section 23101.

Furthermore, it seems inconsistent with legislative intent to consider an entity with no substantial physical presence in California as "do[ing] business in California." In a letter published in the Senate Daily Journal on January 30, 2024, the lead sponsors of SB 253 and 261 clarified that the legislative intent was not to include participation in the Western Energy Imbalance Market or the Extended Day Ahead Market within the meaning of "doing business in California." The letter further states that the bills are not meant to apply to business entities "whose only activity within California consists of wholesale electricity transactions that occur in interstate commerce." This specific clarification of legislative intent, along with its implication that the GHG emissions reporting obligations should not be overly broad, should be adhered to.

CARB should instead offer more precise and targeted guidance. Given its clear regulatory authority over in-state emissions sources, CARB should align the implementation of SB 253 and SB 261 with its jurisdiction over entities that directly emit within California. As part of defining "doing business in California" for the purposes of implementing SB 253 and 261, CARB should take the following steps:

- **Clarify the Language**: Define "does business in California" to apply specifically to business entities with physical operations or activities within the State that directly produce GHG emissions in the State and exclude those operational connections that have no or incidental impacts on GHG emissions.

- **De Minimis Exemption**: Establish a de minimis exemption for business entities not primarily based in California and that have fewer than 1% of their employees residing in California as their primary residence.

Furthermore, there is a risk that smaller business entities might relocate out of the State of California to avoid reporting requirements, which could lead to a decrease in State tax revenue—a potential unintended consequence of the reporting obligations. Additionally, business entities with limited ties to the State, such as those only paying payroll or property taxes, may be more inclined to refrain from hiring employees in California or maintaining property there, further reducing the State's tax revenue. GHG emissions from employees working remotely or offsite typically do not significantly impact the overall emissions of an organization.

Other California State laws, such as the California Consumer Privacy Act (CCPA), establish specific thresholds outside of the Revenue and Tax Code. For instance, the CCPA imposes extraterritorial obligations when a business derives 50 percent or more of its annual revenue from California consumers. Similarly, CARB should define "does business in California" in a narrow manner as requested above.

<u>RECOMMENDATIONS FOR IMPROVING THE CLIMATE-DISCLOSURE RULES</u>

As discussed above, CARB should confirm that the reporting requirements under SB 253 and SB 261 do not apply to public power utilities such as those that are members of LPPC. In the event that public power utilities and other government-owned utilities are found to be subject to these reporting requirements (which is clearly inappropriate for the reasons noted above), LPPC offers the comments below on how to ensure that the rules are not unduly burdensome.

1. **<u>CARB should not consider business entities that sell energy or other goods and services into California through markets, like the CAISO energy imbalance market or extended day ahead market, to be "do[ing] business in California."</u>**

CARB seeks input on whether "entities that sell energy, or other goods and services, into California through a separate market, like the energy imbalance market or extended day market" should be covered by SB 253 and 261. The brief answer is that the sale of energy or other goods and services (*e.g.*, transmission, reserves, or other energy-related products) into California through a separate market should not subject a business entity to SB 253 and SB 261.

Subjecting business entities to the requirements of SB 253 and SB 261 solely because they sell energy or other energy-related products into California through the CAISO or other markets, including any markets currently in development or to be developed in the future (such as with regard to a Regional Organization initiated by the West-wide Governance Pathways Initiative that is currently being considered) will result in unintended, negative consequences for the state. At a minimum, subjecting these suppliers to SB 253 and SB 261 will increase the already high cost of energy in the state. At worst, it could result in Californians experiencing more unreliability in their energy supply if out-of-state business entities decide to leave those markets rather than become subject to SB 253 and 261.

California cannot afford to disincentivize business entities from providing energy and other energy-related products into the state. Thus, CARB should not include business entities that provide energy and other energy-related products into California through the CAISO or other markets within the scope of SB 253 and SB 261.

Even if business entities that participate in these markets decide to continue to sell energy and other energy-related products into California if they become subject to SB 253 and SB 261, they might seek to recover through these markets the associated compliance costs, which could increase the cost of the energy and other energy-related products being imported into California. This could ultimately impact California consumers through increased energy costs.

Additionally, bilateral sales of energy or other energy-related products that occur in interstate commerce should not constitute "do[ing] business in California" for similar reasons. Such transactions constitute another type of wholesale electricity transactions, and the letter (published in the Senate Daily Journal on January 30, 2024) discussed in an earlier section above stated that SB253 and SB 261 are "not intended to include a business entity whose only activity within California consists of wholesale electricity transactions that occur in interstate commerce."

Also, neither renewable energy certificate (REC) sales nor carbon credit sales should constitute "do[ing] business in California." Such transactions mitigate GHG emissions and, therefore, should be encouraged and not be discouraged in any way.

2. **CARB should establish the filing date for reporting Scope 1 and Scope 2 emissions in the fourth quarter after the end of the business entity's fiscal year. This adjustment is needed to provide sufficient time to prepare accurate and verifiable emissions data, thereby reducing the risk of errors, fines, and/or penalties.**

Public power utilities generally require two to three quarters after the end of their fiscal years to gather, finalize, and verify their emissions inventories with a third-party auditor. Typically, the final raw data sets for most public power utilities are not available until the second or third quarter after the end of their fiscal years. Consequently, additional time is necessary after the completion of data collection to conduct the required calculations, secure verification from the EPA and other relevant agencies, and obtain third-party data assurance.

Annual emissions reports must be submitted to EPA by March 31. To meet this deadline, necessary information must be collected, reviewed, and compiled, which is challenging. Additionally, the annual emissions data is not officially confirmed by the EPA until it is made publicly available in October.

3. **CARB should permit reporting entities to report Scope 3 emissions categories based on the materiality and relevance of the emissions category to their operations.**

CARB requests input on whether it should standardize certain elements of Scopes 1, 2, or 3 emissions reporting and, if so, which specific aspects to focus on. Given that Scope 3 emissions data inherently involve uncertainties due to the complex interconnections within modern supply chains, comprehensive reporting of all Scope 3 emissions by reporting entities could lead to inaccurate and misleading information. CARB should give guidance on defining the boundaries for reporting Scope 3 emissions data to ensure accuracy, clarity, and effectiveness. This guidance should be provided upfront before CARB requires compliance with any requirements for reporting Scope 3 emissions.

CARB should also cap the liability for reporting entities due to the inherent inconsistencies in Scope 3 emissions data. A safe harbor provision should be established to shield reporting entities from penalties for any unintentional errors in Scope 3 emissions disclosures made in good faith and with a reasonable basis. This provision could be reassessed during the rule review scheduled for 2030.

4. **Reporting should be direct to CARB, and CARB should allow reporting entities to choose any protocols and standards that satisfy the SEC final GHG reporting rules.**

CARB seeks input on some additional key points. First, it wants feedback on whether the state should mandate direct reporting to CARB or outsource this task to an organization specializing in emissions and/or climate reporting. Reporting should be direct to CARB, because the information is confidential, and various issues could result from outsourcing this task to a third-party organization. For example, one major concern is that the third-party organization could cease its functions, thereby potentially leading to a loss of control of the collected information.

Second, CARB is asking for suggestions on whether specific aspects of Scopes 1, 2, or 3 emissions reporting should be standardized, given the current requirement for reporting entities to align their GHG emissions measurement and reporting with the World Resources Institute/World Business Council for Sustainable Development Greenhouse Gas Protocol (Protocol). CARB should not mandate exclusive use of the Protocol or any other private entity's protocol but rather allow reporting entities to choose any protocols and standards that satisfy the final GHG reporting rules issued by the Securities and Exchange Commission (SEC).[4] If CARB were to mandate a particular private entity's protocol, this would delegate regulation to the private entity. CARB should not use such an approach for several reasons, including the fact that the private entity may change the protocol in a manner that is at odds with SB 253 or SB 261, California rules regarding other legislation, etc. CARB should instead honor the use by voluntary reporters of existing respected protocols or standards. Otherwise, CARB would be punishing such early adopters by forcing them to change from their use of such existing respected protocols or standards.

5. **<u>CARB should offer flexibility in the reporting requirements outlined in SB 261.</u>**

In relation to SB 261, CARB is soliciting feedback on three key aspects:

- **Timeframe for Reporting Completion**: Determining an appropriate timeframe to ensure that all reporting, including necessary assurance reviews, is completed.

- **Reporting Period Flexibility**: Deciding whether to mandate a standardized reporting year or permit reporting within a two-year window.

- **TCFD Recommendations**: Addressing a series of questions related to the Final Report Recommendations of the Task Force on Climate-related Financial Disclosure (TCFD).

Reporting entities presently face the challenge of complying with varied reporting requirements from multiple jurisdictions and government agencies, each having distinct deadlines. CARB should retain flexibility when setting the submission date for the biennial report.

To ensure the most accurate data while maintaining cost efficiency, the biennial report on climate-related financial risks and disclosure of adaptation and mitigation efforts should be submitted in the fourth quarter of an unstandardized reporting year. This timing allows for all data to be finalized, verified, and accurate.

CARB should refrain from standardizing the reporting year, instead allowing reporting entities to submit reports at any point within a two-year period. This flexibility would provide reporting

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[4] *See* 89 Fed. Reg. 21,735 (Mar. 28, 2024).

entities with sufficient time to conduct a comprehensive materiality risk assessment and prepare detailed disclosures regarding their risk mitigation and adaptation strategies.

6. **Miscellaneous**

CARB should waive the assurance requirement (both as to reasonable assurance level and limited assurance level) for data that has already been verified through compliance with other frameworks and programs. This would substantially reduce compliance costs.

The timeline outlined in the legislation seemingly does not provide sufficient time for CARB to craft a robust rule that is both effective and aligned with legislative intent. Therefore, CARB should request legislative approval to extend the rulemaking period beyond the summer (which would need to be accompanied with an extension regarding the timeline for compliance by reporting entities with SB 253 and SB 261).

Conclusion

LPPC urges CARB to determine that "business entity" (as used in SB 253 and SB 261) does not include government entities and their subdivisions (*e.g.*, a political subdivision of a state). Furthermore, LPPC recommends that CARB establish a clear and concise definition of "does business in California" for SB 253 and SB 261, rather than relying on existing tax codes that were not designed for this purpose. Moreover, LPPC urges CARB to determine that the sale of energy or other goods and services (*e.g.*, transmission, reserves, or other energy-related products) into California through a separate market, like the CAISO energy imbalance market or extended day market, does not subject a business entity to SB 253 and SB 261.

Additionally, reporting should be direct to CARB and CARB should offer flexibility (1) in permitting reporting entities to report Scope 3 emissions categories based on the materiality and relevance of the emissions categories to their operations, (2) in allowing reporting entities to choose any protocols and standards that satisfy the SEC final GHG reporting rules, and (3) in the SB261 reporting requirements.

Finally, CARB should waive the assurance requirement for data that has already been verified through compliance with other frameworks and programs and CARB should seek legislative approval to extend the rulemaking timeline (as the current schedule is seemingly insufficient to develop robust and appropriate rules that align with the legislation's intent and address the complexities of reporting emissions data).

LPPC values the chance to offer feedback and presents the above recommendations to assist CARB in crafting a robust rule that ensures reporting is informative, accurate, concise and not overly burdensome.

Respectfully Submitted,
/s/ Thomas Falcone

Thomas Falcone
President