

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

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

BEFORE THE CALIFORNIA ENERGY COMMISSION

In The Matter Of,)
) Docket 07-OIIP-01
AB 32 Implementation – Greenhouse Gas)
Emissions.)
_____)

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**SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) RESPONSE TO THE
REQUEST FOR REHEARING/RECONSIDERATION OF THE LOS ANGELES
DEPARTMENT OF WATER AND POWER**

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**SOUTHERN CALIFORNIA EDISON COMPANY’S (U 338-E) RESPONSE TO THE REQUEST
FOR REHEARING/RECONSIDERATION OF THE LOS ANGELES DEPARTMENT OF
WATER AND POWER**

TABLE OF CONTENTS

<u>Section</u>	<u>Title</u>	<u>Page</u>
I.	INTRODUCTION AND BACKGROUND	1
II.	THE FINAL OPINION’S RECOMMENDATIONS DO NOT RESULT IN AN UNLAWFUL GIFT OF PUBLIC MONEY	4
III.	THE FINAL OPINION’S RECOMMENDATIONS DO NOT VIOLATE LADWP’S RIGHT OF “HOME RULE”	6

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REQUEST FOR REHEARING/RECONSIDERATION OF THE LOS ANGELES
DEPARTMENT OF WATER AND POWER**

Pursuant to Rule 16.1 of the California Public Utilities Commission’s (“CPUC”) Rules of Practice and Procedure, Southern California Edison Company (“SCE”) respectfully submits this response to the Los Angeles Department of Water and Power’s (“LADWP”) request for rehearing and reconsideration of the CPUC’s and California Energy Commission’s (“CEC”) Final Opinion on Greenhouse Gas Regulatory Strategies, CPUC Decision (“D.”) 08-10-037 and CEC-100-2008-007-F (the “Final Opinion”).

I.

INTRODUCTION AND BACKGROUND

The Final Opinion includes the CPUC’s and CEC’s recommendations to the California Air Resources Board (“CARB”) on how greenhouse gas (“GHG”) emission allowances should

be distributed to the electricity sector in a multi-sector cap-and-trade program.¹ The CPUC and CEC recommend that auctioning of allowances be phased in for the electricity sector, beginning with 20% of allowances in 2012 and increasing 20% per year so that 100% of allowances are auctioned in 2016.² The Final Opinion further recommends that the allowances that are not auctioned be distributed to electricity deliverers using a fuel-differentiated, output-based allocation with distributions limited to deliveries from emitting resources, including unspecified resources.³ With respect to the allowances that are to be auctioned, the CPUC and CEC recommend that CARB distribute such allowances to retail providers of electricity, on behalf of their customers, with a requirement that the retail providers then sell the allowances through a centralized auction.⁴ The Final Opinion recommends that the allowance allocation to retail providers be based on historical emissions in 2012, transitioning to a 100% sales basis by 2020.⁵

LADWP asserts that the Final Opinion’s recommendations to CARB would result in an inappropriate wealth transfer from LADWP and other publicly-owned utilities (“POUs”) to the investor-owned utilities (“IOUs”) that would constitute an unlawful gift of public money.⁶ This argument is without merit. The only support LADWP offers for its contention that the recommended methodology would result in a purported \$3 billion wealth transfer by 2020 and \$1.1 billion per year thereafter is a citation to its own comments on the CPUC’s and CEC’s proposed decision which introduced new modeling results that neither the parties nor the CPUC and CEC had an opportunity to evaluate.⁷ SCE agrees with LADWP that more detailed modeling on the impacts of various methods of allowance allocation is needed before CARB makes a decision as to how allowances should be allocated to the electricity sector. However, there is no basis in the record for LADWP’s assertions regarding alleged wealth transfers from

¹ Final Opinion at 13-16, 204-216. Citations are to the page numbers in CPUC D.08-10-037.

² *Id.* at 15, 214.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 15-16, 214.

⁶ LADWP Request at 2-3, 12-14.

⁷ *Id.* at 3.

LADWP and other POU's to the IOU's. In fact, far from receiving a wealth transfer from the POU's, SCE customers are projected to pay higher rates as a result of the State's Assembly Bill ("AB") 32 GHG reduction program and the Final Opinion's recommended methodology for allocating allowances. Although there are limitations in the E3 modeling, that modeling suggests that the recommended allocation methodology would result in an increase in rates for SCE customers.⁸

As discussed below, LADWP has not established that the Final Opinion's recommendations would result in a gift of public funds in violation of the California Constitution. The CPUC and CEC considered and properly rejected this flawed argument in the Final Opinion and it should be denied again here.

SCE does not dispute that imposition of a statewide emission reduction program will cause some entities substantial economic harm. Other entities will not be affected or will be positively affected. In order to most effectively achieve the State's AB 32 goals, SCE has consistently advocated that allowance allocation efforts should be based on mitigating the economic harm caused by the implementation of AB 32.⁹ Allowances should be allocated to those entities that experience economic harm due to the implementation of GHG regulation.

Overall, SCE believes that the CPUC's and CEC's recommended approach to allowance allocation would do a reasonable job of mitigating the economic harm of the State's GHG reduction program by allocating allowances to electricity deliverers on a fuel-differentiated basis and initially distributing allowances to retail providers based on historical emissions. SCE is concerned, however, with the Final Opinion's recommended rapid transition to 100% auctioning of allowances and the impact of such a quick transition on entities, like LADWP, that will suffer economic harm from implementation of AB 32. Given the long life of generating assets and the

⁸ Final Opinion at 214-215.

⁹ *See, e.g.*, Comments of Southern California Edison Company (U 338-E) on Administrative Law Judges' Ruling Updating Proceeding and Requesting Comments on Emission Allowance Policies and Other Issues at 2-5 (filed June 2, 2008); Reply Comments of Southern California Edison Company (U 338-E) on Administrative Law Judges' Ruling Updating Proceeding and Requesting Comments on Emission Allowance Policies and Other Issues at 12-15 (filed June 16, 2008).

amount of time likely needed to develop and perfect low-emission generating technologies and emission removal systems, five years is not sufficient time for entities to transition to low-emission resources.

The electricity sector is a capital-intensive industry where the timeframe for investment decisions is evaluated in decades, not just a few years. The average life of a fossil fuel generation plant exceeds thirty years. Long-term purchase power agreements are typically signed for intervals of between five and twenty years. It takes at least five years just to permit and plan new high-capacity transmission lines that can access new renewable resources. Thus, it is unreasonable to expect that entities will be able to make significant changes in their generation profiles within five years. Such a rapid transition to 100% auction will cause undue economic harm to all California entities and consumers. Therefore, SCE believes that if there is to be a transition to auctioning of allowances, there should be a more gradual transition to 100% auction. Furthermore, any transition to an auction should be tied to the development of technology that will allow for the reduction of GHG without an undue financial burden on consumers. This more gradual transition to full auctioning of allowances may remedy many of LADWP's concerns regarding the effect of GHG regulation on its customers.

Finally, the CPUC and CEC should again reject LADWP's assertion that the auction structure recommended in the Final Opinion violates LADWP's right of "home rule." As the CPUC and CEC previously held, LADWP has not established that there is conflict between the recommended auction structure and its municipal affairs. Nor has LADWP met the other elements required to show its constitutional home rule powers are violated.

II.

THE FINAL OPINION'S RECOMMENDATIONS DO NOT RESULT IN AN UNLAWFUL GIFT OF PUBLIC MONEY

LADWP asserts that the Final Opinion's recommendations on allowance allocation would result in wealth transfers from LADWP and other POU's to the IOUs and that these alleged wealth transfers are an unlawful gift of public money in violation of Article XVI, Section

6 of the California Constitution.¹⁰ As discussed above, there is no basis in the record for LADWP's contentions regarding purported wealth transfers from POUs to IOUs. LADWP's argument should be rejected on that ground alone.

Furthermore, LADWP made this same argument in prior comments to the CPUC and CEC.¹¹ Indeed, the discussions of this issue in LADWP's comments on the CPUC's and CEC's proposed decision and LADWP's request for rehearing and reconsideration are nearly identical. The CPUC and CEC rejected LADWP's contention that the recommended allowance allocation methodology was a gift of public money in the Final Opinion, reasoning that "LADWP fail[ed] to show how a requirement to purchase an allowance constitutes a gift."¹² LADWP's request for rehearing and reconsideration offers nothing new that would support changing this conclusion.

Requiring LADWP to purchase allowances to cover its emitting resources under a generally applicable statewide GHG reduction program, just like all other deliverers of electricity, is not a gift of public money. Nor is there a gift of public funds simply because some obligated entities with lower emissions than LADWP may not absorb as much financial cost under the State's GHG reduction program as LADWP. Courts have found an unlawful gift of public funds in situations such as using county funds to pay independent counsel to investigate filing a civil suit on behalf of a dependent child¹³ and release of a tax lien without consideration.¹⁴ Requiring municipal utilities to comply with the State's efforts to reduce GHG is a very different situation. If LADWP's contentions were accepted, LADWP and other public entities would be effectively exempted from the State's cap-and-trade system. That is not the law and is inconsistent with AB 32's goal of reducing statewide GHG emissions. Any effort by

¹⁰ LADWP Request at 12-14.

¹¹ See Opening Comments of the Los Angeles Department of Water and Power on Proposed Decision of Commissioner Peevey: Final Opinion on Greenhouse Gas Regulatory Strategies at 16-17 (filed October 2, 2008); see also Opening Comments of the Los Angeles Department of Water and Power on Policies Regarding Emission Allowance Allocation, Flexible Compliance, Treatment of Combined Heat & Power, Non-Market-Based Emission Reduction Measures and Emission Caps, and Greenhouse Gas Modeling Results at 26 (filed June 2, 2008).

¹² Final Opinion at 237.

¹³ *San Diego County Dep't of Soc. Servs. v. Superior Court*, 134 Cal. App. 4th 761, 765-767 (2005).

¹⁴ *Community Television of S. Cal. v. County of Los Angeles*, 44 Cal. App. 3d 990, 996 (1975).

LADWP to exempt itself from application of the statewide AB 32 emission reduction program should be rejected.

In the Final Opinion, the CPUC and CEC correctly found that LADWP had not established that the recommended allowance allocation structure would result in an unlawful gift of public funds. LADWP’s argument should be rejected again here.

III.

THE FINAL OPINION’S RECOMMENDATIONS DO NOT VIOLATE LADWP’S RIGHT OF “HOME RULE”

LADWP also contends that the Final Opinion’s recommendations would violate the “home rule” provision found in Article XI, Section 5(a) of the California Constitution.¹⁵ This is not the first time that LADWP has made this argument.¹⁶ The same argument was rejected by the CPUC and CEC in an earlier decision.¹⁷ LADWP offers no new facts or law that would support a different outcome. Accordingly, the CPUC and CEC should again reject LADWP’s assertion that the auctioning of allowances would violate its right to make and enforce municipal regulations.

California has a well-established body of case law detailing the necessary steps in addressing a home rule controversy.¹⁸ First, a court must “determine whether there is a genuine conflict between a state statute and a municipal ordinance.”¹⁹ To be a genuine conflict, it must be “unresolvable short of choosing between one enactment and the other.”²⁰ Only after

¹⁵ LADWP Request at 8-9.

¹⁶ See Opening Comments of the Los Angeles Department of Water and Power on the Proposed Decision of President Peevey: Interim Opinion on Greenhouse Gas Regulatory Strategies at 11-12 (filed February 28, 2008); see also Opening Comments of the Los Angeles Department of Water and Power on Policies Regarding Emission Allowance Allocation, Flexible Compliance, Treatment of Combined Heat & Power, Non-Market-Based Emission Reduction Measures and Emission Caps, and Greenhouse Gas Modeling Results at 23-25 (filed June 2, 2008).

¹⁷ Interim Opinion on Greenhouse Gas Regulatory Strategies, CPUC D.08-03-018 at 97-98 n.32.

¹⁸ *Trader Sports, Inc. v. City of San Leandro*, 93 Cal. App. 4th 37, 46 (2001); see also *Cal. Fed. Sav. & Loan Ass’n v. City of L.A.*, 54 Cal. 3d 1, 7 (1991) (superseded on other grounds by *Cal. Fed. Sav. & Loan Ass’n v. City of L.A.*, 11 Cal. 4th 342 (1995)).

¹⁹ *Cobb v. O’Connell*, 134 Cal. App. 4th 91, 96 (2005).

²⁰ *Cal. Fed. Sav. & Loan Ass’n*, 54 Cal. 3d at 16-17.

determining that a genuine conflict exists can a court look to the next step: whether “the local legislation impact[s] a municipal or statewide concern.”²¹ If it impacts a statewide concern, then courts apply the test cited by LADWP: the State’s actions must be “both (i) reasonably related to the resolution of that concern, and (ii) ‘narrowly tailored’ to limit incursion into legitimate municipal interests.”²²

LADWP claims that an allowance auction would divert resources and thus undermine the renewable procurement program implemented by LADWP in the exercise of its home rule powers.²³ In the Interim Opinion on Greenhouse Gas Regulatory Strategies, the CPUC and CEC rejected this same argument from LADWP, noting that they were “not convinced that a conflict exists between the use of auctions under AB 32 and LADWP’s home-rule authority to operate its municipal utility.”²⁴ The CPUC and CEC concluded that there was no genuine conflict between the competing claims of the municipal and State governments: “LADWP has not shown that any purported conflict is unresolvable short of choosing between one enactment and the other.”²⁵

LADWP still has not made a showing that there is a genuine conflict between an AB 32 allowance auction and LADWP’s renewable procurement program. LADWP simply reasserts the same statements that were rejected by the CPUC and CEC in prior pleadings. Therefore, the CPUC and CEC should reject LADWP’s contention that the Final Opinion’s recommendations violate the home rule provision of the California Constitution.

Additionally, even if a genuine conflict did exist between an allowance auction under an AB 32 cap-and-trade program and LADWP’s renewable procurement program, LADWP has not shown that its home rule rights would be violated by the recommended auction structure.

LADWP concedes that the State may regulate matters of statewide concern.²⁶ The reduction of

²¹ *Cobb*, 134 Cal. App. 4th at 96; *Trader Sports*, 93 Cal. App. 4th at 46.

²² *Johnson v. Bradley*, 4 Cal. 4th 389, 404 (1992); *Cobb*, 134 Cal. App. 4th at 96; *Trader Sports*, 93 Cal. App. 4th at 46.

²³ LADWP Request at 8-9.

²⁴ D.08-03-018 at 97 n.32.

²⁵ *Id.* at 98 n.32.

²⁶ LADWP Request at 8.

GHG emissions to mitigate the risk of global climate change clearly meets this test. Yet LADWP asserts, without further explanation, that the recommended cap-and-trade auction is not reasonably related to the resolution of a statewide concern nor narrowly tailored to the resolution of that concern.²⁷ LADWP's assertions are without merit.

The recommended cap-and-trade program and auction structure are designed to create GHG reductions across the electricity sector, which is reasonably related to reducing GHG emissions – a statewide concern. Moreover, the recommended cap-and-trade program is narrowly tailored to limit incursion into LADWP's municipal affairs. LADWP is not forced to purchase allowances, which LADWP characterizes as a “wealth transfer.” The cap-and-trade program gives LADWP the flexibility to reduce its GHG emissions through its renewable program or other efforts or to purchase allowances. Thus, under a cap-and-trade program, there is less incursion into the city's legitimate municipal interests than there would be through direct regulations that mandated the actions LADWP must take to reduce emissions.

Because LADWP has not shown that the Final Opinion's recommendations violate any portion of the test for evaluating home rule controversies, the CPUC and CEC should reject LADWP's contention that their recommendations violate the home rule provision of the State Constitution.

²⁷ *Id.*

Respectfully submitted,

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Dated: December 8, 2008

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) RESPONSE TO THE REQUEST FOR REHEARING/RECONSIDERATION OF THE LOS ANGELES DEPARTMENT OF WATER AND POWER on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

Transmitting the copies via e-mail to all parties who have provided an e-mail address.
First class mail will be used if electronic service cannot be effectuated.

Executed this **8th day of December 2008**, at Rosemead, California.

/s/ Raquel Ippoliti
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[TOP OF PAGE](#)
[BACK TO INDEX OF SERVICE LISTS](#)