BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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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: AB 32 Implementation: Greenhouse Gases	Docket 07-OIIP-01

REQUEST FOR REHEARING/RECONSIDERATION OF THE LOS ANGELES DEPARTMENT OF WATER AND POWER ON FINAL OPINION ON GREENHOUSE GAS REGULATORY STRATEGIES

November 21, 2008

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REQUEST FOR REHEARING/RECONSIDERATION OF THE LOS ANGELES DEPARTMENT OF WATER AND POWER ON FINAL OPINION ON GREENHOUSE GAS REGULATORY STRATEGIES

In accordance with Article 16 of the Rules of Practice and Procedure of the Public Utilities Commission ("CPUC" or "Commission") of the State of California, the Los Angeles Department of Water and Power ("LADWP") hereby seeks reconsideration and requests rehearing of the FINAL OPINION ON GREENHOUSE GAS REGULATORY STRATEGIES (Issued October 22, 2008) ("CPUC Decision"), in CPUC Rulemaking R.06-04-009 ("Rulemaking"). In accordance with Cal. Code Regs. tit. 20, § 1720.4, the LADWP seeks reconsideration of the FINAL OPINION ON GREENHOUSE GAS REGULATORY STRATEGIES in California Energy Commission ("CEC") Docket # 07-OIIP-1 (adoption order filed October 28, 2008). We shall refer to the CPUC and CEC collectively as the "joint agencies." We shall refer to the decisions jointly as the "Final Opinions."[1]

INTRODUCTION

The LADWP remains committed to partnering with the State to achieve the goals of AB 32 to reach 1990 greenhouse gas ("GHG") emission levels by 2020. As stated throughout the joint agencies' proceedings, we believe that the best approach to fulfilling this commitment is through quantifiable direct emission reductions. We support the use of the 33% Renewable Portfolio Standard ("RPS") and Energy Efficiency ("EE") as mechanisms for the electricity sector to meet its AB 32 goals, with a regional multi-sector cap-and-trade program providing a secondary compliance tool if entities do not meet their mandates.

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[1] The two decisions are identical in substance, but diverge in pagination. Citations to the Final Opinions will cite to the CPUC Decision.

The LADWP has repeatedly expressed concerns regarding recommendations outlined in the Interim Decision, adopted March 13, 2008, and in the Proposed Decision. While LADWP reserves the right to raise any and all issues that have been expressed in prior comments, we seek rehearing and reconsideration regarding a specific aspect of the Final Opinions.

LADWP has expressed concern that the joint agencies' recommendations to the Air Resources Board ("ARB") could set the foundation for an unnecessary and inappropriate wealth transfer from publicly owned utilities, including LADWP, to investor owned utilities ("IOUs"). To LADWP's disappointment, the Final Opinions recommend a complex allowance distribution methodology that does exactly that – transfer wealth from southern California municipal utilities to the IOUs. Specifically, the joint agencies propose:

> 1) auctions of allowances should be phased in for the electricity sector, beginning with 20% of allowances in 2012 and reaching 100% in 2016.
>
> 2) in the period prior to 2016, allowances that are not auctioned should be distributed on a fuel-differentiated output basis to deliverers of electricity from emitting generation resources (including unspecified sources).
>
> 3) Allowances that are to be auctioned should be distributed to retail providers, with a requirement that they then sell the allowances through a centralized auction undertaken by ARB or its agent. The allowance distributions to retail providers should be made on the basis of historical emissions in 2012, transitioning by 2020 to an allocation based 100% on sales, with allowances being allocated to sales from both emitting and non-emitting sources without distinction.[2]

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[2] CPUC Decision at 214.

Despite reassurances that the joint agencies intend to minimize costs to consumers and treat all market participants equitably and fairly, the Final Opinions fall fatally short of meeting those objectives. With regard to the distribution of allowances or allowance value, the Final Opinions – in the absence of economic modeling to support the allowance distribution formula – recommend a methodology that, at $100/ton, risks a **permanent $3 billion wealth transfer by 2020 and $1.1 billion per year thereafter that is entirely exclusive of investments in direct emission reductions and solely the result of a flawed cap-and-trade design**.[3] The Final Opinions' allowance distribution is unsupported by the CPUC's own staff options paper that acknowledges wealth transfers will be greater with a sales based distribution of allowances.[4] It is the CPUC's and CEC's duty to come up with a better design than what is proposed here. If the recommendation is not changed and is adopted wholesale by the ARB, the LADWP will have no choice but to raise every available legal argument in opposition to this manifestly illegal program.

The approach proposed in the Final Opinions unfairly and unlawfully rewards utilities with legacy nuclear and hydro resources at the expense of utilities that have legacy coal. This is poor public policy, ignores earlier federal mandates that required investment in coal fired plants, and sets up an inappropriate model for a regional or federal cap-and-trade program. These inequitable impacts are imposed on publicly owned utilities, not for failing to achieve emission reductions associated with implementation of AB 32, but as a result of geographic limitations and historical differences in resource investments that have nothing to do with emissions. The additional costs to publicly owned utilities from this cap-and-trade proposal would be in

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[3] *See* Oct. 2, 2008 comments of the LADWP on the Proposed Decision in this proceeding, at 5-7.
[4] Joint CPUC and CEC Staff Paper on Options for Allocation of GHG Allowances in the Electricity Sector, at 27 (Apr. 16, 2008).

addition to the significant costs of implementing direct emission reductions through renewables and energy efficiency. Fuller use of renewables and energy efficiency are both key strategies that the LADWP has consistently supported throughout this proceeding..

The Final Opinions correctly describe the theory behind cap-and-trade, "Electricity deliverers would have the option of reducing their own GHG emissions or purchasing allowances from others who have made emission cuts beyond their obligations." [emphasis added].[5] The CPUC's own staff acknowledged in the Staff Options Paper that legacy investments in nuclear and hydro do not represent emission cuts beyond AB 32 obligations. They should never be considered in any GHG emissions allowance distribution formula since allocating allowance value to those investments does not provide any additional opportunities or incentives for reducing emissions to achieve the AB 32 goals. To the extent nuclear and hydro provide regulated entities with zero-emitting generation, they create GHG value by eliminating the need to surrender allowances. However, to further issue allowances based on sales or output from these resources equates to unjustified and unlawful compensation at the expense of the publicly owned utilities that have real compliance burdens and emission reduction obligations.

The CPUC and CEC ignore this rational approach, and instead, assert that their longer-term priorities should be "to provide strong incentives for increased reliance on all low- and non-emitting resources, including legacy generation."[6] This justification is neither credible nor supportable, especially given the fact that legacy nuclear and hydro resources are fully committed and unlikely to become available to others in the foreseeable future. Any additional "incentives" in the form of allowance shortfalls are

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[5] CPUC Decision at 9.
[6] *Id.* at 213.

just an excessive penalty. The Legislature's intent when it passed AB 32 was to reduce GHG emissions, not to "true up" rates between IOUs and POUs or to rely on a cap-and-trade program to redistribute billions of dollars through an auction process. Throughout this proceeding, the LADWP has expressed its concern about the over-emphasis on a market-based system to reduce emissions and the implications for California's electric grid reliability and the ratepayers that are expected to fund this untested and convoluted experiment.

In summary, the LADWP seeks rehearing on the legal, factual and equitable grounds set forth herein, including: (1) the allowance recommendation creates a tax that violated Proposition 13; (2) the auction structure violates home rule; (3) the transfer of funds implicates other California Constitution provisions; and (4) there is insufficient support in the record to support the conclusions reached by the joint agencies with respect to the cap and trade recommendation.

LEGAL ISSUES

The joint agencies devote less than three pages to the legal issues raised regarding the joint agencies' choice of allocation method and the redistribution of money that results. The recommendations that result in this redistribution are legally infirm and the scant analysis provided in the Final Opinions is insufficient to support the joint agencies' recommendations.

A. The California Constitution

1. The Final Opinion's Recommendations, if Adopted, Will Violate Article XIIIA (Proposition 13)

The joint agencies cannot simply assert charges for allowances are a fee, not a tax, and thereby make it so. Moreover, the ultimate determination of whether such charges are a fee or a tax is not governed solely by the use of the funds that are generated. Thus, LADWP disagrees with the assertion that "[s]o long as any revenue generated from an allowance allocation option is used to further the purposes and goals

of AB32 and not deposited in the state's General Fund for non-AB32 uses, and is in reasonable relationship to the adverse effects caused by the corresponding emission of GHGs, there is no levying of a tax."[7]

The Final Opinions recognize that the auctions will yield revenues in excess of programmatic costs; the joint agencies devote pages 225-229 of the CPUC Decision to disposition of such excess. Under the recommended approach in the Final Opinions, at least some amounts paid for allowances are therefore taxes, not regulatory fees.[8] Article XIIIA of the California Constitution provides that "any changes in State taxes enacted for the purpose of increasing revenues ... must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the legislature ..." AB 32 was not passed by such a vote.

Court cases have distinguished "regulatory fees" from taxes and have upheld regulatory fees in several contexts. Regardless of the context, however, the courts have consistently held that regulatory fees can be imposed only to defray costs reasonably incurred by the state in administering the regulation.[9] It is exactly this exception to Proposition 13 that Speaker Nuñez, the author of AB 32, intended to establish in his letter submitted to the Assembly Daily Journal on the day AB 32 was adopted by the Assembly:

> AB 32 authorizes the California Air Resources Board to adopt a schedule of fees for the direct cost of administering the reporting and emission reduction and compliance programs established pursuant to the bill's provisions. It is

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[7] *Id.* at 236. This conclusion ignores the principle, pointed out by LADWP in its June 2, 2008, filing, that regulatory fees cannot exceed the State's own costs in administering the regulatory program. LADWP Comments, at 25-26 (June 2, 2008).

[9] *See, e.g.*, Sinclair Paint Co. v. State Bd. of Equalization, 15 Cal. 4th 866, 881 (Cal. 1997) ("[I]t is undisputed . . . that the state must use the funds it collects under section 105310 *exclusively* for mitigating the adverse effects of lead poisoning of children, and not for general revenue purposes." (emphasis in original)); Cal. Ass'n of Prof'l Scientists v. Dept. of Fish & Game, 79 Cal. App. 4th 935, 946 (Cal. Ct. App. 2000) ("Thus, the fees were not revenue raising in that they did not generate income which surpassed the cost of the services provided.").

> my intent that any funds [provided by these fees] be used solely for the direct costs incurred in administering this division."[10]

Clearly, the intent of this letter was to bolster the argument that charges payable pursuant to the fee schedule fall within the "regulatory fee" exception to Proposition 13.[11] Had the Speaker believed that AB 32 included other revenue generating provisions, such as an auction, he would have tried to craft his letter to cover those too.

Whether wealth transfers are paid directly to the state or to private parties, the transfers are state-mandated revenue exactions that are subject to the constraints of Proposition 13.[12] In either case, they will far exceed the limited recovery of the state's own costs that is allowed by the regulatory fee exception to Proposition 13. If the state wishes to raise revenues, whether for the general fund or to pay subsidies to ratepayers or to subsidize low GHG interests, it must do that through taxes that are adopted with the two-thirds vote required under Proposition 13. The regulatory fee exception does not extend to revenue measures to fund anything other than the state's own cost of administering AB 32. The joint agencies' reliance on *Sinclair Paint Co. v. State Bd. of Equalization* for the proposition that fees may be used for broader purposes is misplaced. The *Sinclair Paint* decision does not allow for unlimited application of fees, and makes clear that the agencies would have the burden to show that "charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or

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[10] Letter from Fabian Nuñez, Speaker of the Assembly, Cal. State Assembly to Mr. E. Dotson Wilson, Chief Clerk of the Assembly, Cal. State Assembly ASSEMBLY DAILY JOURNAL, Aug, 31, 2006, at 7646, *available at* http://www. assembly.ca.gov/clerk/billslegislature/srchframe. htm.

[11] *See Sinclair Paint*, 15 Cal. 4th at 875-81.

[12] For purposes of Proposition 13, there is no difference between wealth transfer revenues collected directly by the state and state-mandated wealth transfers paid directly to private parties. "[T]he Legislature cannot do indirectly what it is prohibited from doing directly." Howard Jarvis Taxpayers' Ass'n v. Fresno Metro. Projects Auth., 40 Cal. App. 4th 1359, 1375 (Cal. Ct. App. 1995).

benefits from the regulatory activity"[13] in order to constitute a fee. Based on the recommendations of the Final Opinions, the joint agencies could not meet this burden.

2. The Final Opinion's Recommendations, if Adopted, Will Violate Article XI, Section 5(a) (Home Rule)

As a department of the City of Los Angeles, which is a charter city, the LADWP is entitled under the state Constitution to "make and enforce all ordinances and regulations in respect to municipal affairs."[14] The operations and financial affairs of a charter city's municipally owned utility have long been recognized as "municipal affairs."[15]

The Constitution recognizes the State's right to regulate matters of "statewide concern,"[16] subject to federal preemption on matters within federal jurisdiction. But when the State does so, its actions must be "both (i) reasonably related to the resolution of that concern, and (ii) 'narrowly tailored' to limit incursion into legitimate municipal interests."[17]

An auction structure that produces wealth transfers will not satisfy either test. It is self-evident that any allocation method that diverts significant resources from the LADWP will undermine its renewable procurement program. The allocation method adopted in the Final Opinions does just that.

The LADWP's resources are not unlimited. The LADWP's rates, because they are set by elected public officials, are appropriately subject to greater scrutiny and price pressure than those of the IOUs. The LADWP can assure the joint agencies that if the LADWP is forced to make significant purchases of allowances for its operations, the

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[13] *See Sinclair Paint*, 15 Cal. 4th at 869.
[14] CAL. CONST. art. XI, § 5(a).
[15] *See* L.A. G & E Corp. v. L.A., 188 Cal. 307, 318 (Cal. 1922).
[16] Cal. Fed. Sav. & Loan Ass'n v. City of L.A., 54 Cal. 3d 1, 7 (Cal. 1991).
[17] Johnson v. Bradley, 4 Cal. 4th 389, 404 (Cal. 1992).

LADWP will not at the same time be able to pursue the ambitious renewables procurement program (including an RPS of 35 percent in 2020) that the LADWP has adopted in the exercise of its home rule powers.

It may be entirely appropriate for the state to hold the LADWP to account if its programs to reduce GHG emissions do not yield the LADWP's fair share of statewide emissions reductions. It is entirely inappropriate, and a violation of home rule, for the state to implement a wealth transfer scheme that diverts billions of dollars from LADWP's effort to achieve those reductions. Such a scheme is neither reasonably related to the resolution of the concern that LADWP and the state both share -- to reduce GHG emissions to achieve the goals of AB 32 -- nor narrowly tailored to limit incursion into LADWP's legitimate municipal interests.

3. The Final Opinion's Recommendations, if Adopted, Will Violate Article XIII, Section 19 (No Different Taxes or License Charges on Public Utilities vs. Other Entities)

The joint agencies also need to reconsider the conclusion that Article XIII, Section 19 is not violated by allowance of an allocation option that redistributes payments as recommended in the Final Opinions. The joint agencies cannot simply dismiss comments summarily or attempt to shift the burden to commenting parties to address legal shortcomings of the recommendations. The joint agencies assert that "LADWP has not shown that the requirement that deliverers of emitting power purchase some allowances at auction would establish 'license charges' as that term is used in Article XIII, Section 19."[18] Further, the joint agencies contend that they may require public utilities to pay for the "special privilege" of polluting without violating Article XIII,

[18] CPUC Decision at 236.

Section 19.[19] Finally, the joint agencies argue that it is not clear that public utilities will in fact pay differently than members of other economic sectors.[20]

Assuming *arguendo* that payments under the recommended cap and trade scheme are not taxes, they are still prohibited and discriminatory "license charges" for the emission of carbon dioxide under Article XIII, Section 19. Article XIII, Section 19 of the state Constitution provides that "no tax or license charge [other than state-assessed property taxes] may be imposed on [public utilities] which differs from that imposed on mercantile, manufacturing and other business corporations."

Under the Final Opinions, a discriminatory two-tier system will be established where electric utilities will have to purchase allowances to cover their emissions whereas other emitters that ARB will exclude from the capped sector will not have to acquire any allowances at all.[21] Moreover, even among the capped sectors, further prohibited discriminatory treatment of the electric utilities will result from the disproportionate emission reductions that ARB may impose on the electric utilities and which the Final Opinions appear to invite. To the extent the cost of the programmatic measures for the electric sector are to be paid by the sector, then those costs are fairly viewed as an additional cost of the allowances that are allocated to the sector. Other sectors not subject to a proportionate programmatic burden will accordingly be paying less than the electric sector for an equivalent license to emit.

In this discussion, it is very important to keep in mind that even if there were a reasonable basis for treating utilities differently, it would remain unconstitutional. Article

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[19] *Id.*
[20] *Id.*
[21] The details of which emitters will be in the uncapped group at this point remain uncertain. However, it appears it may at least include the HGWP, agricultural and recycling businesses.

XIII, Section 19 bars differential treatment of electrical utilities regardless of rational basis.[22]

With the sole exception of state-assessed property taxes, "no tax or license charge . . . may be imposed on [public utilities] which differs from that imposed on mercantile, manufacturing and other business corporations."[23] This provision prohibits the imposition of taxes and license charges on public utilities[24] at higher rates than mercantile, manufacturing and other comparable businesses.[25]

It now quite clearly appears that ARB would be treating electric public utilities differently than other sectors of the economy if it were to adopt the joint agencies' recommendations. The Final Opinions invite this result by recommending a combination of programmatic measures and a cap-and-trade program that will require the electric sector to contribute a substantially disproportionate proportion of statewide

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[22] Pac. Gas & Elec. v. City of Oakland, 103 Cal. App. 4th 364, 369-70 (Cal. Ct. App. 2002); City of Oceanside v. Pac. Tel. & Tel. Co., 134 Cal. App. 2d 361, 366-67 (Cal. Ct. App. 1955).
[23] CAL. CONST. art. XIII § 19.
[24] The term "public utility" encompasses all entities that have devoted their facilities to public use. Story v. Richardson, 186 Cal. 162, 167 (Cal. 1921); Indep. Energy Producers Ass'n v. State Bd. of Equalization, 125 Cal. App. 4th 425, 442-43 (Cal. Ct. App. 2004). This includes not only the investor-owned utilities but also LADWP and the other publicly-owned utilities. *See* County of Inyo v. Pub. Utils. Comm'n, 26 Cal.3d 154, 178 n.9 (Cal. 1980) (disapproving assertions that a "municipally owned utility" is not a "public utility" within the meaning of Article XIII of the Constitution). And one court has held that, for purposes of Article XIII, Section 19, the term "public utility" may also extend to independent generators that sell at wholesale, even though they are not price-regulated by the PUC. *Indep. Energy Producers Ass'n*, 125 Cal. App. 4th at 434, 445-46.
[25] *City of Oakland*, 103 Cal. App. 4th at 369-72 ("As Oakland's business tax charges PG&E a rate that differs from the rate imposed on mercantile, manufacturing and other, comparable, business corporations, the business tax imposed on PG&E is unconstitutional."); *City of Oceanside*, 134 Cal. App. 2d at 366-67 (holding that a higher tax on telephone companies than other companies violated the predecessor of § 19).

emission reductions.[26] To this the Final Opinions have no reply beyond an unsupported statement that this argument "is unconvincing."[27]

4. The Final Opinion's Recommendations, if Adopted, Will Violate Article XVI, Section 6 (No Gifts of Public Funds)

As explained earlier, the Commissions' proposed auction scheme will result in vast and ever-increasing annual transfers of wealth from the LADWP to lower-GHG retail providers. By 2020, assuming an allowance price of $100 per ton, those transfers would exceed $1.1 billion annually.

The overwhelming majority of these wealth transfers would be paid with public funds of locally-owned public utilities. The LADWP's share alone would exceed $450 million annually. And virtually all of these public funds – over $1.1 billion per year – would be paid to private entities (PG&E, SCE and SDG&E). These uses of public funds are prohibited by the state Constitution.

The Legislature has "no power . . . to make any gift . . . of any public money or thing of value to any individual, municipal or other corporation whatever."[28] The wealth transfers here would be paid by the donor public entities to the donees without consideration,[29] and are gifts, pure and simple.[30] The end result of the policies the joint agencies recommend for the distribution of allowances and auction proceeds is no

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[26] "ARB's Draft Scoping Plan would assign approximately 40% of the economy-wide responsibility for mandatory emissions reductions to the electric sector, even though electricity represents only 25% of the statewide emissions. . . . If electricity is included in the cap-and-trade program contemplated in the Draft Scoping Plan, and were to achieve the additional emissions reductions that ARB expects from the cap-and-trade program, the electricity sector could, in total, deliver as much as 55% of the required emission reductions in the State . . . ." CPUC Decision at 122. We appreciate the Commissions' comment that "the responsibility for reducing emission reductions can be separated from the recovery of the cost of the emission reductions." *Id.* However, it is not clear where the Commissions propose drawing that line of separation.

[27] CPUC Decision at 236.

[28] CAL. CONST. art. XVI § 6.

[29] CAL. CIV. CODE § 1146; Westly v. U.S. Bancorp, 114 Cal. App. 4th 577, 582 (Cal. Ct. App. 2003).

[30] The compelled transfer of billions of dollars from the donor public entities, via an allocation of allowances that have value only because of the very law compelling the purchase of them, is nothing more than a compelled gift of the public entities' funds.

different than a statute requiring the donor public entities to write a check for over a billion dollars annually to the donees. The Constitution would prohibit the Legislature from adopting such a statute. And "[t]he Legislature cannot do indirectly what it is prohibited from doing directly."[31]

This constitutional bar prohibits gifts of public money to entities not controlled by the state.[32] The IOUs obviously are not controlled by the state within the meaning of the constitutional provision. The existence of sufficient state control to allow a gift depends on (1) the manner of appointment of members of the governing board (*i.e.* most should be appointed by elected officials); (2) the degree of specificity in how the transferred funds must be spent, to assure that they are spent for the requisite purpose; and (3) annual auditing and reporting requirements.[33] The IOUs fail these tests. Their board members are elected by shareholders, not appointed by elected officials.[34] Moreover, the only proposed controls on how the IOUs spend the public money are that it be used for purposes related to AB 32 and to benefit their electrical customers, subject to PUC supervision.[35] No auditing or reporting requirements are set forth in the Final Opinions. The Final Opinions give no reason to think that the IOUs would spend the funds of the public entity to provide benefits to *the public entities'* customers.

The courts have recognized an exception to the rule against gifts of public funds in the case of expenditures that are made for a public purpose. However, the public

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[31] Howard Jarvis Taxpayers Ass'n v. Fresno Metro. Projects Auth., 40 Cal. App. 4th 1359, 1375 (Cal. Ct. App. 1995).
[32] *See, e.g.*, Cal. Family Bioethics Council v. Cal. Institute For Regenerative Med., 147 Cal. App. 4th 1319, 1353-55 (Cal. Ct. App. 2007); Cal. Ass'n of Retail Tobacconists v. State, 109 Cal. App. 4th 792, 816-17 (Cal. Ct. App. 2003).
[33] *See Cal. Family Bioethics Council*, 147 Cal. App. 4th at 1354-65; *Cal. Ass'n of Retail Tobacconists*, 109 Cal. App. 4th at 816-28.
[34] *See Howard Jarvis Taxpayers Ass'n*, 40 Cal. App. 4th at 1383-88 (holding that recipient was not sufficiently public where 11 of 13 directors were appointed by private parties not accountable to electorate); *Cal. Family Bioethics Council*, 147 Cal. App. 4th at 1355 (distinguishing Jarvis on this ground).
[35] CPUC Decision at 227-28.

purpose must be a purpose of the donor public entity, here the LADWP and other publicly-owned utilities.[36] The purpose of the LADWP is to be a vertically integrated utility that provides reliable, safe power at reasonable rates. That purpose is in no way served by gifts from the LADWP to other utilities (whether publicly or privately owned) that operate hundreds of miles from the LADWP's service area and serve none of the LADWP's customers. In fact, these gifts significantly undermine the purpose of the LADWP.

In the Final Opinions the joint agencies have failed to address these arguments. Once again, the joint agencies provide only a general conclusion in response to the concerns raised by DWR: "LADWP fails to show how a requirement to purchase an allowance constitutes a gift."[37] This is insufficient to survive judicial scrutiny in light of the arguments set forth above.

B. Modeling Deficiencies

The joint agencies do not have adequate information or analysis to make a specific recommendation to the Air Resources Board on allowance allocations. The E3 modeling, in its current stage of development, does not allow for analysis of a fuel-differentiated allocation with a weighted factor (2 for coal, 1 for natural gas) as described in the Staff Options Paper. Nonetheless, this is the very option that the CPUC and CEC have endorsed in their Final Opinions for the portion of allowances that are not auctioned.[38]

As stated in the Final Opinions: "Because of current modeling limitations, the fuel-differentiated option has not been modeled in this proceeding." Remarkably, that

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[36] Golden Gate Bridge and Highway Dist. v Luehring, 4 Cal. App. 3d 204, 208-09 (Cal. Ct. App. 1970) (citing Mallon v. City of Long Beach, 44 Cal.2d 199, 210 (Cal. 1955); City of Oakland v. Garrison, 194 Cal. 298, 304 (Cal. 1924)).
[37] CPUC Decision at 237.
[38] *Id.* at 15, 198-99.

did not deter the joint agencies from recommending that method of allocation to ARB for allowances that are not auctioned. Given the joint agencies' inability to model the effects of this choice, it is impossible for the joint agencies to assert that this choice satisfies the agencies' selection criteria. As set forth in section 5.1, these criteria are minimization of costs to consumers, equitable and fair treatment of market participants, align incentives with the emissions reduction goals of AB32, support a well-functioning cap-and-trade market, and administrative simplicity. In the absence of empirical data the joint agencies cannot show that distribution of allowances to retailers using a fuel-differentiated output-based approach satisfies any of the criteria. The joint agencies certainly have not demonstrated that such an approach is demonstrably superior to other alternatives.

CONCLUSION

The Final Opinions provide important recommendations to the California Air Resources Board regarding the implementation of AB32 for the electricity generation sector that need to be reconsidered in light of the fundamental inequities and legal infirmities that would result from adoption of the recommendations. LADWP urges the joint agencies to rehear and reconsider the approach of the Final Opinions to further the purposes of AB32. In particular, the joint agencies need to reconsider the recommended allocation scheme that would result in a significant wealth transfer, and seek to avoid the potential legal challenges associated with that approach.

Dated: November 21, 2008 Respectfully submitted,

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CERTIFICATE OF SERVICE

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

REQUEST FOR REHEARING OF THE
LOS ANGELES DEPARTMENT OF WATER AND POWER
ON FINAL OPINION ON GREENHOUSE GAS REGULATORY STRATEGIES

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, updated November 20, 2008. See attached 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.

I also caused courtesy copies to be delivered as follows:

VIA OVERNIGHT MAIL
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Executed this 21st day of November 2008, at Los Angeles, California.

/s/ LEILANI JOHNSON KOWAL

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