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Decision 97-09-117 September 24, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.	ORIGINAL R.94-04-031 (Filed April 20, 1994)
Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.	I.94-04-032 (Filed April 20, 1994)

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INTERIM OPINION: BOARD START-UP PROCEDURES

I. Summary

By Decision (D.) 97-02-014, the Commission established two advisory boards: the Low Income Governing Board (LIGB) and the California Board for Energy Efficiency (CBEE), formerly Energy Efficiency Independent Board (EEIB), to make recommendations about low-income assistance and energy efficiency programs in the restructured electric industry. That decision, and subsequent decisions and assigned Administrative Law Judge (ALJ) rulings, set forth the tasks and milestones required to implement the transition from current utility administration of these programs to the new, independent administrative structure. Today's decision addresses the initial round of start-up filings made by the CBEE and LIGB, collectively referred to as "the Boards," pursuant to Commission direction. We focus today only on those start-up issues that require immediate attention. We will address other start-up issues by subsequent Commission order.

In general, we are very pleased with the progress made by both Boards and appreciate the hard work and diligence shown by Board members, utilities, and other participants to date. We are encouraged to see that no major barriers have arisen to accomplishing the transition to independent administration of low-income and energy efficiency programs. This decision reaffirms the important role of the Advisory Boards, while more precisely detailing the roles of the Boards and how they are to function.

Specifically, we set deadlines of October 1, 1998 and January 1, 1999 for completion of the transition to the new energy efficiency and low-income program administrators, respectively. The utilities are authorized to continue as administrators of these programs in the interim. We reject the recommendation to appoint state agencies as interim administrators, as proposed by several parties. However, we may revisit this approach should the transition not be completed by our specified deadlines. We also reiterate our expectation that some programs and activities may transition earlier to the new administrators.

For 1998 energy efficiency programs, the utilities are directed to replace the existing Advice Letter process with a joint utility/CBEE planning process recommended by CBEE. Consistent with the Assigned Commissioner's Ruling dated August 1, 1997, the utilities, including Southern California Gas Company (SoCal), shall file applications for 1998 program plans on October 1, 1997. These plans should include proposed revisions to demand-side management (DSM) rules, program designs and shareholder incentives. The utilities are also directed to include descriptions of their plans to coordinate customer information services regarding energy efficiency with their plans to educate customers about their energy choices.

Regarding the 1998 program costs associated with pre-1998 commitments, we defer cost recovery or ratemaking decisions until we have the opportunity to coordinate this issue with developments in other phases of the electric restructuring proceeding. In the meantime, we direct the utilities to propose accounting mechanisms to track the costs of pre-1998 commitments until we are able to develop a consistent approach. We adopt CBEE's proposals to reasonably limit the level of these commitments during the transition to a new administrative structure.

Today's decision authorizes funding augmentations for Board start-up costs, consistent with CBEE's and LIGB's proposed 1997 budgets. For their start-up activities, including the development of a Request for Proposals for the new administrators, CBEE and LIGB are authorized a total of $905,300 and $839,000, respectively. These amounts represent a very small percentage of annual program funding. Funding is provided by the utilities as an advance from expected 1998 funds from the public goods surcharge. Any unused amounts will be available for 1998. We also direct our Energy Division to conduct annual financial and administrative audits of operations for both Boards, for the years 1997, 1998, and 1999.

In response to comments on CBEE's transition plan, we direct CBEE to define the role and activities of the new administrators consistent with the general functions described in D.97-02-014. We emphasize that project development and agreements with customers should be left to private companies. We also direct CBEE to obtain qualified

analytic support services to review program effectiveness, rather than delegate that function to the new administrator.

On the issue of legal structure for the Boards, we note that, pending further resolution of important tax issues, it is premature to issue a final decision regarding the correct approach for administering funds authorized for CBEE and LIGB activities. Consistent with the approach recently taken for the California High Cost Fund and California Teleconnect Fund (Resolution T-16071, dated August 1, 1997), we adopt an interim plan for moving forward.

Specifically, we direct the Boards to revise their proposed bylaws and other legal documents consistent with today's order, and file those documents together with proposed trust agreements as compliance filings for our review. The Boards are also directed to initiate steps to request a presubmission conference with the Internal Revenue Service (IRS) to address any concerns the IRS may have regarding the use of a trust, and to explain why the chosen structure is appropriate under state law to carry out the Commission's purposes. Following a presubmission conference with the IRS, the CBEE and LIGB shall provide the Commission with a status report plus further recommendations regarding the issue of legal structure and tax-exempt status.

In the meantime, we extend the current arrangements for payments and contract signing set forth in D.97-05-041 until we issue final approval of a legal structure. The utilities shall continue to make payments from the accounts set up to record and track the Boards' start-up funds, and we have already designated a utility for each of the Boards so that the utility can execute contracts.

On an interim basis, we adopt the Fair Political Practices Commission (FPPC) standard Conflict of Interest Code, 2 Cal. Code of Regulations § 18730, for both LIGB and CBEE. For purposes of applying these rules, the term "designated employees" is defined as including all Board members. The disclosure categories include any investment or business position in, or income from, any of the following: 1) an electric utility corporation, gas utility corporation, or energy service company, or parent or subsidiary thereof, or any entity which regularly supplies energy to these entities; and 2) an entity seeking to provide any product or service related to the Board's function or

that has plans to come before the Board or its program administrator seeking funds that this Board administers or oversees. As described in this decision, the conflict-of-interest rules adopted today may be revisited in light of the revisions to the Commission's Conflict of Interest Code and Statement of Incompatibility, or other circumstances that warrant modification of these interim rules.

Today's decision also addresses the Boards' request to modify our per diem and expense reimbursement rules. In recognition that the use of subcommittees may be the most efficient approach to accomplishing Board tasks, we extend the per diem provisions of D.97-04-044 to Board member attendance at subcommittee meetings that are noticed in accordance with the requirements of the Bagley-Keene Open Meeting Act (Bagley-Keene). These provisions are extended until December 31, 1998. However, we deny the Boards' request to permit per diem for Board member attendance at Advisory Committee meetings. As discussed in this decision, we consider Board member attendance at such meetings to be preparation work, for which we continue to deny per diem compensation.

We direct the Boards to make other modifications to their start-up filings. CBEE is directed to delete indemnification provisions that would commit representation through the office of the California Attorney General. Both Boards are directed to reflect in their bylaws our expectation that the selection and screening of the persons to fill vacancies on the Boards are our decisions to make.

We also address several issues relating to the Bagley-Keene, Gov't Code § 11120-11132. First, we clarify that if there is a deliberation or action by any Board subcommittee composed of three or more persons, then the meeting of this subcommittee must be noticed in the manner required by Bagley-Keene. However, a subcommittee composed of less than three is not subject to this requirement, and thus, it is permitted to gather and exchange information, as well as develop reports which include recommendations, in a nonpublic setting.

Second, we determine that Bagley-Keene applies to the meeting of the Technical Advisory Committee if it is constituted as an advisory committee to the CBEE within the meaning of the Government Code § 11121.8.

Third, we find that the closed session provision of Bagley-Keene (Gov't Code § 11126) does not apply to consideration of the appointment, employment, or dismissal of any consultants, staff or administrator who are hired as independent contractors. However, if the Boards were to hire "employees," then the provision would apply.

Fourth, we determine that Government Code § 11123(b) allows teleconferencing when necessary to assemble a quorum. However, we strongly encourage the Boards to attempt to have all participating members in one place for any meeting, and to use teleconferencing only as a last resort. We do prohibit the Boards from teleconferencing if there is no quorum physically present. We also note that the authority for teleconferencing will be short-lived because Government Code § 11123(b) currently is effective only until January 1, 1998.

Fifth, we direct the Boards to modify language in their proposed bylaws to eliminate proxy voting and the possibility that a vote on a particular issue could occur when a quorum is not present.

Sixth, we direct the Boards to spell out in their bylaws all the opportunities for recognizing public members during their Board meetings, and to make as many opportunities available as possible consistent with their obligation to conduct business in an orderly fashion. Finally, we note that Bagley-Keene does not mandate a specific method or means for public inspection or distribution of documents (e.g., hard copy or electronically). However, we encourage the Boards to take advantage of several options suggested by commenting parties, and note that fees for copies of public records can be charged if the costs become exhorbitant.

Today's decision also adopts the consensus recommendations of the California Energy Commission (CEC), Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (SCE) regarding funding transfer issues for renewables energy sources and research, development and demonstration (RD&D). By separate order we will address the remaining nonconsensus issue, namely, which utilities are responsible for payment of the $75 million renewables payment to the CEC, identified in Public Utilities (PU) Code § 381(c)(3) and (d). We will also address by separate order SCE's June 3, 1997 Petition

for Modification of D.97-04-044 and Clarification of Commission RD&D Balancing Account Policy.

In light of the issues addressed in today's decision, we recognize that the assigned ALJ may need to consider whether revisions to the current procedural schedule are required. We direct the assigned ALJ to hold a further implementation workshop to address scheduling and procedural issues, as soon as practicable. In the meantime, the Boards should continue working towards the procedural milestones established to date by the assigned ALJ and assigned Commissioner rulings.

II. Background

Since the issuance of D.97-02-014, there have been numerous filings made in compliance with the procedural roadmap outlined in that decision and in the assigned ALJ's implementation rulings. We briefly describe the filings made to date.

On June 5, 1997, pursuant to D.97-02-014 Ordering Paragraph 7, PG&E, SCE, SDG&E, and SoCal filed 1996 authorized funding levels for gas DSM and for gas and electric low-income rate assistance programs, by program category. This filing identified the funding amounts to be transferred to the new energy efficiency and low-income program administrators for these programs. On June 9, 1997, SCE, PG&E, and SDG&E filed a description of current utility programs and staffing to identify relevant assets and program commitments. Comments on these filings were solicited by ALJ Ruling dated June 18, 1997.

On July 18, 1997, the LIGB and CBEE filed their interim reports on start-up procedures for Commission review and approval, pursuant to D.97-02-014 and the milestone schedule established by assigned ALJ Ruling.[1] The CBEE supplemented its filing on July 30, 1997. The reports included proposed bylaws and other Board start-up documents, proposed 1997 budgets, recommended timelines and milestones for the transition to the new administrators, proposals for funding current utility commitments

[1] See ALJ's Ruling Modifying Milestones For Implementation of D.97-02-014, May 28, 1997.

during the transition, and requests for clarification concerning legal structure and the application of Bagley-Keene. Comments were filed by PG&E, SDG&E, SCE, SoCal, CEC, California Department of General Services (DGS), Energy Pacific, National Association of Energy Service Companies (NAESCO), Office of Ratepayer Advocates (ORA), Sierra Club, the Residential Energy Services Companies' United Effort and SESCO, Inc. (RESCUE/SESCO).

On August 22, 1997, CBEE filed its Response to ALJ Request for Clarification and Comment on CBEE Start-Up Filing and Transition Report (CBEE Response).

On August 28, 1997, LIGB filed a response to the comments of RESCUE/SESCO. On August 29, 1997, LIGB filed its Response to the ALJ's Request for Clarification on LIGB Projected Transition Dates (LIGB Response).

On July 30, 1997, the CEC, PG&E, SCE, and SDG&E filed a Joint Statement Listing Agreements on Public Purpose Program Funding Transfer Issues on Renewables and Research, Development and Demonstration (RD&D), pursuant to ALJ Ruling dated June 18, 1997 (Joint Statement).

III. Issues

The filings submitted to date raise several issues that require Commission action. Both Boards advise the Commission that the new administrative structure for energy efficiency and low-income programs will not be operational by January 1, 1998. They request formal Commission action to extend the current utility administrative structure, pursuant to Ordering Paragraph 9 of D.97-02-014. The CBEE also presents recommendations for Commission direction to the utilities on program administration during 1998, along with recommendations for commitments from pre-1998 programs. The Boards present projected 1997 budgets and request Commission approval of increases to the start-up funds authorized in D.97-04-044. They present proposed bylaws and other start-up documents for Commission approval, including conflict of interest, per diem, and expense reimbursement rules. In addition, the CBEE requests Commission approval of a legal structure for the Board and requests authorization to

execute contracts or hire staff. The CBEE also seeks further Commission clarification concerning the application of Bagley-Keene to Board activities.

IV. Extension of Utility Program Administration

The CBEE filing includes specific milestones and estimates for the time required to both retain new independent administrators and deliver energy efficiency services to the market. These estimates reflect the need to follow and apply state procurement rules in the competitive procurement process to be used in selecting the new administrators. The CBEE now projects that a new administrators could be in place some time between October 1, 1998 and December 15, 1998. The CBEE recommends that the Commission authorize utilities to continue administering energy efficiency programs on an interim basis until at least September 30, 1998.

The LIGB presents preliminary estimates of the activities necessary to develop a request for proposal (RFP) and to select the program administrators under state procurement rules. LIGB projects that the procurement process may take a minimum of seven months. Accordingly, the LIGB recommends that the Commission extend the current structure for operation of the utility programs until December 31, 1998. In its August 29, 1997 Response, LIGB projects a schedule that leads to a transition effective between April and August of 1999.

In its comments, DGS argues that it is premature to conclude that utilities should serve as interim program administrators for all energy efficiency activity pending competitive selection of permanent program administrators in 1998. DGS recommends that the CBEE review opportunities for interim administration of programs by DGS, particularly where new programs are to be implemented or where there is evidence of utility reluctance to maintain aggressive program implementation. Sierra Club also argues that utilities should not become the interim administrators by default and recommends that the CBEE invite for its consideration applications for interim program administration from the DGS and the CEC.

RESCUE/SESCO argue that continuing the current system of utility administration, as contemplated by the LIGB and CBEE, has major disadvantages. In

RESCUE/SESCO's view, this approach is fraught with inherent conflicts of interest and would undermine the development of a competitive market. RESCUE/SESCO also argue that continuing utility administration of programs has the undesirable effect of continuing the cost of shareholder incentives, will prevent integrated statewide programs and will require the continuation of extensive regulatory oversight. RESCUE/SESCO recommend that the Commission order the LIGB and CBEE to use qualified state agencies to administer the programs during the transition while a full competitive bidding procedure is developed and implemented.

SDG&E, SCE, and PG&E support continued use of utilities as interim program administrators. They encourage the Commission to extend the interim period until the end of 1998. In their view, a fixed period of one year will ensure a seamless transition by allowing for some overlap in the hand-off between interim utility administration and the new administrators.

Energy Pacific also supports the CBEE recommendation that incumbent utilities be utilized as interim program administrators in 1998. However, Energy Pacific is concerned that utilities might attempt to hinder private energy efficiency service providers from doing business in their service territories during 1998, and proposes new interim guidelines that it believes would support rapid industry privatization.

We have carefully reviewed the Boards' filings and parties' comments with the policy directives of D.97-02-014 in mind. In that decision, we articulated the following expectations for the transfer of energy efficiency programs to the new administrator:

> "Our goal is that most if not all of these steps will be completed by January 1, 1998. However, we recognize that a full transition to this new administrative structure may not be completed by that date. Accordingly, energy efficiency programs will continue under the stewardship of utilities during the transition. The Board will ensure that adequate surcharge funds are retained by the utilities in order to continue energy efficiency services and programs while the new structure is becoming operational. Existing shareholder incentive mechanisms will continue to apply to prior program years and to the demand-side management programs under utility administration during this transition."
> (D.97-02-014, p. 36.)

We reiterated these expectations, and those for low-income assistance programs, in the following Conclusions of Law:

> "Most of the steps required to establish the administrative structure for energy efficiency described in this decision should be completed by January 1, 1998. The steps required to establish the administrative structure for low-income programs should be completed by January 1, 1999." (D.97-02-014, Conclusion of Law 12.)

> "The respective boards for energy efficiency and low income assistance programs should determine the pace and schedule for the transference of functions, funding assets and program commitments from utilities to the new administrators and phase-down of utility programs, as appropriate. During this transition, utilities should retain their stewardship of demand-side management programs funded in prior years and continue to implement the adopted measurement and evaluation protocols. During this transition, the existing shareholder incentive mechanisms should continue to apply to utility DSM programs...." (D.97-02-014, Conclusion of Law 6.)

In Ordering Paragraph 9, we directed the Boards to report on the status of the development of a new administrative structure by mid-1997. We further stated that, should the Boards report that additional time is needed, "the Commission will act to formally extend the *current structure* for a fixed period of time." (Emphasis added.)

During our implementation workshop on March 11, 1997, it became clear that further Commission guidance would be needed regarding conflict of interest rules, indemnification, open meetings, the application of state procurement rules, start-up funding, per diem allowances, and expense reimbursement rules. These issues were addressed in D.97-04-044 issued on April 11, 1997. Further clarifications were requested by the Boards in late April concerning the applicability of state procurement rules to the Boards' acquisition of staff resources. By D.97-05-041, issued on May 7, 1997, we addressed this issue and made interim arrangements for payments and contract signing until the Boards had the legal and accounting capability to receive start-up funds.

The Boards' start-up filings recognize that implementation of our policy goals for energy efficiency and low-income assistance programs will require more time than originally anticipated. We share the disappointment expressed by parties to this

proceeding over the delays. However, we do not believe that the delays are unreasonable or unwarranted given the circumstances. Nor do we believe that having a state agency or agencies as interim administrators, as some parties propose, is a reasonable reaction to the revised timelines.

In our view, this approach would significantly divert the resources of the Boards, Commission staff and interested parties away from the implementation activities necessary to competitively procure our new independent administrators, pursuant to D.97-05-041. Interagency contracts for the interim administrators would need to be developed by the Commission with input from the Boards and interested parties during the same time when issues related to Board legal structure, policy rules, and RFPs for the competitive procurement of administrators also need to be addressed. Moreover, the selection of a state agency or agencies to administer programs in the interim could be confusing to energy service providers and customers alike. They would be dealing with potentially three different entities over a two-year period: the utilities for the remainder of 1997, the new "interim" administrators for some part of 1998 and finally the permanent administrators selected by competitive bid. In sum, we are unwilling to divert resources and attention at this time from our goal of procuring administrators competitively, as envisioned by D.97-05-041.

At the same time, we are unwilling to create an open-ended transition period. The Boards should continue to work aggressively towards completing the transition, particularly since we have addressed the issues that caused initial Board start-up delays. We expect the new administrator for energy efficiency programs to be fully in place and operating October 1, 1998. For low-income assistance programs, we set a deadline of January 1, 1999, for completion of the transition to a new administrator. We believe that these deadlines represent reasonable expectations, given the range of timelines presented by the Boards.[3] At the same time, they reflect our commitment to

[3] For example, in its July 30, 1997 filing (p. 23), CBEE indicates that the administrators could be selected by mid-April, and contracts signed by the end of May, 1998. LIGB presents a range of

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the changes envisioned in D.97-02-014 by establishing a fixed period of time for continuing the current administrative structure.

The LIGB appears to be moving more slowly than the CBEE for various reasons, such as fewer Board members, a longer time horizon, and less industry pressure. While these are valid issues, we do not believe the low-income program transition should take substantially longer than the energy efficiency program transition. We are setting a more ambitious goal for the transition than suggested by LIGB. Our interest is to move to the new administrative structure as soon as feasible, consistent with good program design and the legal process requirements. Fifteen months should be sufficient to accommodate all of these interests, especially since the Board has made a good start already. In order to meet this goal, the LIGB should acquire the necessary resources through Commission staff or short-term hires as soon as possible. In its timetable filed August 29, 1997, the Board delineated the components of the schedule necessary to have independent administration in place. We note that the guidelines we established in D.97-05-041 allow for a quicker process for obtaining needed resources than assumed by the Board, and that the RFP timeline may be able to be accelerated if sufficient resources are available. The LIGB should also inform the Commission of any other actions required to meet this goal.

By April 1, 1998, the CBEE should submit an updated status report on the transition process. The LIGB should submit its report no later than September 1, 1998. Should it appear that the completion of the transition will not be met by our established deadlines, we will reconsider parties' proposals of having state agencies as interim administrators. We may also explore the possibilities of using the services of firms through the relevant Master Service Agreements, or take other actions as appropriate.

We expect that some programs and activities may transition earlier than others to the new administrators. As we stated in D.97-02-014, Conclusion of Law 6, "[t]he

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between May 1 and August 1, 1999 for the transition date. (See LIGB's August 29, 1997 Response, p. 2.)

respective boards for energy efficiency and low-income assistance programs should determine the pace and schedule for the transference of functions, funding, assets, and program commitments from utilities to the new administrators and phase-down of utility programs, as appropriate." We reiterate our intention that the Boards manage this transference process, consistent with our policies and DSM rules.[3]

As to RESCUE/SESCO's concerns that the utilities will phase down programs prematurely, we also reiterate our directive that "[d]uring this transition, utilities should retain their stewardship of demand-side management programs funded in prior years and continue to implement the adopted measurement and evaluation protocols." (D.97-02-014, Conclusion of Law 6.) We expect the utilities to take this stewardship very seriously. In order to provide the Boards with information needed to monitor the transition, the utilities are directed to prepare monthly reports comparing authorized funding for energy efficiency and low-income programs with actual commitments and expenditures. These reports should be submitted to the Commission, with a copy to the Boards on the first of the month, beginning November 1, 1997, through the transition period defined above. We will consider Board recommendations on how best to address unreasonable gaps in services, should they arise during the transition.

This reporting requirement will apply to gas programs, including those currently administered by SoCal. Under D.97-02-014, as clarified by D.97-04-044, SoCal has the option of continuing to operate its own energy efficiency and low-income programs until a gas surcharge is in place. However, we reiterate our expectation that SoCal will work with the Boards and selected administrators to coordinate the planning and delivery of services. Although we temporarily deferred imposing a gas surcharge on customers of jurisdictional gas utilities, we stated our intent in D.97-06-108 not to delay such a charge indefinitely (Ordering Paragraph 1(e)). Therefore, we believe it is

[3] We note that the Boards will propose modifications to these rules, which are intended to shape the RFPs for new administrators, in upcoming filings. The most recent version of our DSM rules is appended to D.97-08-057.

important that SoCal also participate in the process of providing the Boards with information that will be needed to ensure a smooth transition to the new administrative structure.

V. Commission Direction To Utilities During 1998

In its July 18, 1997 Transition Report (Part 1), the CBEE presents six basic options that it considered for directing utility energy efficiency activities during 1998. Options 1 through 5 range from continuing the status quo in terms of policy rules, programs, and approval processes, to modifying some or all of the above in varying degrees. Option 6 would terminate all aspects of the current utility administrative structure as of December 31, 1997, with the use of carryover funds from pre-1998 programs to cover costs of pre-1998 commitments. In its July 30, 1997 supplemental report, the CBEE presents its recommendations.

In order to meet the Commission's stated objectives, CBEE believes that it is necessary to modify each of the three elements of the existing administrative structure for 1998 activities: the approval process, the program design, and the policy rules that govern program implementation. More specifically, CBEE recommends that the current Advice Letter process be replaced with an application process, which would include joint utility/CBEE planning. The application process would become the forum for considering modifications to current energy efficiency programs and for considering new programs that explicitly support market transformation and privatization goals. CBEE also believes that the current policy rules, including shareholder earnings mechanisms, should be modified to be consistent with the Commission's energy efficiency objectives and to reduce regulatory cost. Specifically, CBEE recommends that the Commission:[4]

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[4] We note that LIGB does not request a joint planning process for 1998 since it has not recommended any design changes to current utility programs for next year. (See LIGB's August 29, 1997 Response.) The current Advice Letter process shall continue to apply to low-income assistance programs.

1. authorize the utilities to use energy efficiency surcharge funds in 1998.

2. direct the utilities to work with the CBEE as they continue their current program planning process. The utilities should be directed to file an application on October 1, 1997, which describes their plans and expectations for 1998 operations.

3. review and approve the plans proposed by the utilities for 1998 after it has considered recommendations provided by the CBEE.

4. encourage the utilities to develop new programs which attempt to respond to the Commission's goal of market transformation and creation of a self-sustaining energy efficiency services industry. At a minimum, the CBEE expects proposals related to:

   a) the development of a standard performance contracting program that seeks to reduce specific market barriers, and

   b) the development of new market transformation initiatives and program designs that seek to build sustainable increases in the demand for energy efficiency services and products.

5. direct the utilities to obtain periodic input from the CBEE, and the CBEE's Technical Advisory Committee, as they prepare their application for using surcharge funds during 1998.

6. advise the utilities that it may no longer be necessary to seek input from energy efficiency stakeholders through the respective Program Advisory Committees, as long as the utilities utilize the modified process for approval and modification of authorized utility plans during the 1998 program year.

7. encourage the utilities to propose modifications to the current incentive mechanisms as they redesign their 1998 programs which are consistent with the new administrator performance mechanism described in D.97-02-014.

SoCal does not believe that there is any benefit to the Commission, CBEE, the utility, or the ratepayers from changing from the traditional advice letter process to a new application process for approval of SoCal's 1998 gas energy efficiency programs. SoCal argues that all of CBEE's and the Commission's goals regarding market changes can be met through the current process while preventing the delays and disruptions that SoCal believes are likely to occur if it is drawn into the application process with the

electric utilities. SoCal argues that its situation is significantly different from that of SCE, PG&E, and SDG&E because 1) 1998 funding for DSM and beyond has been authorized by the recent Performance Based Ratemaking (PBR) decision, D.97-02-014, and not from surcharge funds, 2) the estimated level of pre-1998 commitments represent less than 2% of the total for the four utilities, and 3) SoCal's DSM earnings are small relative to the electric utilities, i.e., less than $2 million for the 1997 Annual Earnings Assessment Proceeding. SoCal urges the Commission to allow SoCal to retain its October 1 advice letter process and maintain the current fund allocation processes and commitment timelines for SoCal's 1998 programs.

SDG&E supports the joint planning/application process, and recommends that the Commission endorse implementation of substantial (as opposed to small, pilot) market transformation efforts by the utilities in 1998, including standard performance contracting programs designed to reduce specific market barriers. In addition, SDG&E supports the development of new incentive mechanisms on a consistent basis for all utilities. NAESCO also encourages Commission endorsement of standard performance contracting and recommends that the Commission dedicate a substantial amount of 1998 funding to implement this program. NAESCO believes that the Commission should direct utilities to work through the Technical Advisory Committee process for design of the standard performance contract, subject to Board and Commission review and approval.

PG&E is generally supportive of the joint planning process, but recommends against significantly modifying existing DSM rules or shareholder incentives for 1998 program implementation, noting the difficulty of the task in such a limited timeframe. Any such modifications should be limited, in PG&E's view, to new market transformation programs; existing rules and incentive mechanisms should continue for all existing programs. PG&E is concerned that any broader effort to modify existing rules or incentives would become unduly complicated, could compromise the effectiveness of current programs, and would divert needed resources away from the transition process.

We share PG&E's concerns. We anticipate that making changes to the existing DSM rules and shareholder incentives could be a complicated and controversial task, as we have discovered in our own proceedings to develop and refine these rules. CBEE's proposal provides for only three months after the utility applications are filed (October 1, 1997) and the start of the 1998 program year. Even allowing for an expedited schedule, it is unclear that there is enough time to consider the proposals and parties' comments in time to provide meaningful guidance to the utilities for their stewardship until October 1, 1998. This timing problem could be exacerbated if the proposals require evidentiary hearings. If so, modifying existing rules and incentives could significantly detract from CBEE's ability to complete the enormous and challenging task of designing and implementing the new independent administration of energy efficiency programs, with a focus on transforming markets, within the timeframe discussed above.

The purpose of the joint planning process is laudable: to start the transition toward a more competitive cost-effective energy efficiency marketplace and move toward programs with market transformation characteristics. Also, the process is intended, appropriately, to deal with 1998-specific issues such as changes to utility incentives in a surcharge environment. We support these ideas and will offer parties the opportunity to develop modifications to current rules in a consensus-building fashion, and in a manner that permits resolution of the issues by the end of 1997. Pursuant to the Assigned Commissioner's Ruling dated August 1, 1997 (ACR), the joint CBEE/utility planning process is underway and applications will be filed on October 1, 1997. We hope the process will result in near or full consensus regarding modifications to existing rules, program designs and shareholder incentives, so that we can consider implementing the changes as filed or with revisions for the interim administrative period. We emphasize that such proposals should be developed with the transition deadlines established by this decision in mind.

Our goal is to have a draft decision on the Commission's agenda of December 16, 1997 so that the 1998 rules, program designs, and shareholder incentive mechanisms can be determined by the end of 1997. To meet that schedule, we will shorten the time

to file protests or responses to the applications from the 30 days allowed under Rule 44.1 of the Commission's Rules of Practice and Procedure. Any party may file responses or protests by October 17, 1997. The CBEE may also file a response to the applications by October 17, 1997. We recognize that any disputes over material facts, or any major disputes in general, may delay a decision to after January 1, 1998, with the resultant potential of delays or gaps in provision of services. Therefore, we strongly encourage the applications to be as consensus-based as possible.

As proposed by the CBEE, and reiterated in the ACR, the CBEE and utilities should solicit input from the public and CBEE's Technical Advisory Committee in advance of filing the October 1 applications. Input should be solicited on all aspects of program development, including standard performance contract design. Energy Pacific's concerns about the utilities' 1998 program activities should be explored further in this process.[5] As stated in the ACR, the CBEE and interested parties' responses or protests to the October 1 applications should include recommendations on what the Commission should do if some or all of the applications are incongruous with today's determinations.

As CBEE's recommended, the 1998 funding issues surrounding saturation survey, load metering, market assessment and other research data collection activities should be addressed as part of the joint planning process with the utilities. (CBEE July 30, 1997 report, p. 52.) Because CEC will have an opportunity to participate along with other parties, we do not believe that a parallel joint planning process among CEC, CBEE and the utilities is warranted, as CEC proposes. CBEE plans to file its recommendations on future funding levels for these activities by October 1, 1997, and the CEC and other interested parties will have an opportunity to comment, as provided for by the ACR.

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[5] In view of this process, it may no longer be necessary for the utilities to seek input from energy efficiency stakeholders through the respective Program Advisory Committees.

We deny SoCal's request to be exempt from the joint planning application process. Based on CBEE's report, and the comments, we anticipate that the program plans for 1998 will contain modifications to policy rules and program designs for which an Advice Letter is an inappropriate vehicle. We note that SoCal has proposed modifications to shareholder incentive mechanisms and other rules (e.g., measurement protocols and funding flexibility rules) in the Annual Earnings Assessment Proceeding (AEAP), Application (A.) 97-05-026.) We direct SoCal to remove these proposals from the AEAP and include them in its October 1 application. It is more appropriate to consider such rule changes in the context of a coordinated review, with Board input.

VI. Direction to Utilities Regarding Pre-1998 Commitments

The CBEE July 30, 1997 report presents a detailed discussion of the "commitment problem." Briefly, the problem represents the fact that utility programs often have a mismatch between customer commitment dates for program participation and actual participation (e.g., equipment installation, building completion, etc.) The mismatch crosses program years, particularly for certain programs such as new construction and contracts associated with the Commission-approved DSM bidding pilot programs.

Commitments from prior year DSM programs are usually funded from funds authorized for the program year in which the costs are recorded. For example, if the utility commits to a project in 1997 and it is completed in 1998, the costs of honoring that commitment would be recorded and collected in 1998 from funds authorized for 1998. By definition, "authorized funds" include any and all carryover funds (i.e., funds authorized and recovered in a previous year, but not spent).

However, beginning in 1998, the situation will change. The Commission will no longer authorize utility DSM program funding in general rate cases for each program year. Moreover, pursuant to Assembly Bill (AB) 1890, an electric rate freeze is in effect. In view of these developments, the CBEE identifies options for funding pre-1998 commitments as follows:

- authorize the utilities to fund such obligations from unspent DSM funds which exist at the end of 1997 (e.g., carryover funds, including project- and program-specific encumbrances);

- authorize utilities to use appropriate revenues from pre-1998 DSM programs (e.g., loan repayments, penalties, rebate returns) to reduce net commitments;

- authorize the utilities to use energy efficiency surcharge funds, and direct CBEE to adjust its plans accordingly;

- expect the utilities to cover these costs through revenues collected under the terms and conditions of revenues and cost recovery beginning January 1, 1998;

- consider creating new balancing accounts during the rate freeze period (1998-2001); or

- a combination of the above options.

CBEE recommends that the initial sources of funding for program commitments made through December 31, 1997 should be funds in current DSM accounts that are unspent as of January 1, 1998. CBEE also recommends a process for estimating the magnitude of the shortfall, which would require that utilities file additional information with their October 1, 1997 program plans, including updates of the commitment data in the June 9, 1997 filings, expected size, timing, and causes of shortfalls, if any, and potential assets or expected revenues that could help offset any shortfall during 1998. The CBEE would then review this information and make recommendations to the Commission on the use of surcharge funds to cover some or all of the remaining shortfall. CBEE defines "shortfall" as the remaining funds needed for commitments after DSM funding accounts are exhausted.

In addition, the CBEE recommends that 1997 funding levels be limited to 100% of authorized levels, in order to minimize the potential for shortfalls in the future. Current Commission policy allows utilities discretion to increase funding beyond authorized levels in specified program areas by a set amount (e.g., 130% of authorized funding levels for certain types of energy efficiency programs). In addition, the CBEE makes specific recommendations regarding the amount of time the utility has to pay commitments from signed contracts. The purpose of these recommendations is to

reduce the magnitude of any potential shortfall of funds in 1998 by setting specific end dates for both program activity and subsequent payment for these contracts made during the operation of 1997 programs.

RESCUE/SESCO object to CBEE's recommendation that unspent DSM funds authorized for 1997 be used to meet future obligations for pre-1998 utility programs. RESCUE/SESCO are concerned that this would encourage utilities to reduce future financial exposure by reducing the potential for energy conservation (e.g., by reducing their 1997 resource programs), and thereby avoid reduced sales and lost revenues. Instead, RESCUE/SESCO recommend that any unused carryovers be turned over to the CBEE for use in future program years for energy efficiency programs. RESCUE/SESCO contend that there are other potential sources of funding for pre-1998 commitments, since the Commission has already determined that funding for DSM shareholder incentives will not come from surcharge funds. (See D.97-02-014, Conclusion of Law 7.)

PG&E supports the CBEE's recommended use of surcharge funds for shortfalls that cannot be made up through carryover funding. However, PG&E takes exception to the program funding limits and pay out deadlines that CBEE recommends. PG&E argues that it would be unfair to customers, energy service providers, and utilities to impose such limitations at this late date. PG&E also argues that it is impossible to accurately forecast the day on which expenditures attain the 100% target in order to schedule a program closure. Finally, PG&E contends that the CBEE's recommended contract payout end dates are incompatible with already established end dates for the 1997 programs.

One of the difficulties in developing the best approach for addressing pre-1998 commitments is the lack of accurate information on the magnitude of these commitments. The utilities filed rough estimates on June 9, 1997, which indicate that the magnitude could be as great as $80 million-$90 million over the next eight years. However, as the CBEE and ORA point out, these estimates are subject to considerable uncertainty. Moreover, these estimates have not been verified by the CBEE or reviewed in detail by other parties.

Another difficulty is the fact that the Commission is still considering a wide range of cost recovery and rate making issues associated with electric industry restructuring. Our evaluation of the options identified by the CBEE should not be undertaken in isolation. As RESCUE/SESCO point out, a similar issue relating to the cost recovery and ratemaking treatment for utility DSM shareholder incentives has been raised, but not yet resolved. In both instances, rate recovery cannot occur in the traditional manner because of changes to the electric utility industry, including the electric rate freeze established by AB 1890.

In view of these uncertainties, we believe that the most prudent approach is to track the 1998 costs associated with pre-1998 commitments, and determine the cost recovery and ratemaking treatment at a later date. In the meantime, we will monitor developments in other phases of this electric industry restructuring proceeding, so that we may develop a consistent approach. In their October 1, 1997 applications, the utilities should propose a tracking mechanism to serve this purpose. Unspent 1997 funds should continue to be accounted for in existing DSM balancing accounts, or in new accounts established for this purpose as part of the tariff streamlining phase of this proceeding.

At the same time, we agree with CBEE's proposals to reasonably limit the level of these commitments during the transition to a new administrative structure. We do not find PG&E's argument that it cannot accurately determine the 100% authorization level very persuasive. The utilities have had to accurately determine the point at which they would reach the 130% level for several years. We will approve the CBEE's recommendation on this limit. This limit should apply to any gas or electric expenditures made in 1997 and to any financial commitments made during the 1997 operation of 1997 energy efficiency programs.

With regard to end dates for contract pay outs, we note that D.97-02-014 anticipates that the Boards will need to manage the pace and schedule for the transference of functions, assets, and program commitments from utilities to the new administrators. (See Conclusion of Law 6.) Managing the level of pre-1998 commitments (and even 1998 commitments) by recommending modifications to current

pay out dates is a logical extension of that responsibility. At the same time, we are concerned that some of the contract pay out dates recommended by the CBEE may not allow utilities to complete the inspection and verification process currently required. (See PG&E's August 11, 1997 comments, p. 3.) We will adopt the CBEE's recommended pay out dates with the understanding that the CBEE, after further conferring with utilities on this aspect of their proposal, may propose modifications to these dates. If CBEE recommends any further modifications to the contract pay out dates for 1997 programs, it shall notify the Commission by filing a statement with the Commission's Docket Office no later than December 1, 1997. Copies should be served on the Special Public Purpose service list in this proceeding.

Even though gas programs are not funded by a surcharge at this time, D.97-02-014 limited authorized funding for 1998 gas programs to 1996 levels. Therefore, we see merit in CBEE's recommendation to limit the potential shortfall associated with 1997 gas programs. (See CBEE's August 22 Response, p. 2.) We will apply the funding authorization limits and contract pay out dates to both gas and electric programs, including those currently operated by SoCal.

The ACR directed the utilities to include in their October 1, 1997 application information on any expected shortfall in funds to cover commitments from pre-1998 program commitments. (See ACR, p. 3.) By October 15, 1997, as a supplement to their October 1, 1997 applications, the utilities should:

- Propose a cost-accounting process that will work in concert with the cost-accounting process for transferring surcharge funds to accounts designated for CBEE activities in 1998, with no commingling of surcharge funds with non-energy efficiency activities unless approved by the Commission.

- Identify the size, timing and causes of pre-1998 commitments and identify the assets or expected revenues that could help offset those commitments during 1998. SDG&E, SCE, and PG&E should update the data in their June 9 filings.

- Present updated estimates of carryover funds, by program category.

- Propose an accounting mechanism to track the 1998 costs associated with pre-1998 program commitments.

The ACR requires the October 1, 1997 applications to be filed at the Commission's Docket Office and served on the Special Public Purpose service list in this proceeding. The supplemental filings should be similarly filed and served. Parties will have ten days from the date of filing to respond to the supplemental information. These requirements supersede the filing and response time provisions of our Rules of Practice and Procedure.

As recommended by the CBEE, we also direct each utility to modify the scope and content of its Annual DSM Report to include a separate section (identified as Pre-1998 Program Commitments). In addition, the utilities should work with the CBEE to ensure reporting consistency and continuity between the utility June 9 filings, the October 1 applications and supplemental filing, and the April DSM reports.

VII. Approval of 1997 Budgets

In D.97-04-044, the Commission authorized $250,000 for each Board to meet necessary expenses during and beyond the pre-budget period. The CBEE projects 1997 expenses (from April through December) of $622,600 (low estimate) to $905,300 (high estimate). As of July 29, 1997, the CBEE has spent $101,972 of its initial authorization. The LIGB projects 1997 expenditures of $512,000 (low estimate) to $839,000 (high estimate). As of July 29, 1997, the LIGB has spent approximately $46,000.[6]

CBEE requests a budget augmentation of $655,300 to cover expenses associated with the high range of estimates. LIGB requests an initial increase of $250,000, but anticipates that additional augmentation will be needed before the end of 1997. LIGB plans to submit a final proposed budget for the year on or before September 19, 1997, with more precise budgets.

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[6] See the August 8, 1997 Response of the LIGB and CBEE to ALJ Gottstein's July 28, 1997 Ruling Requesting Further Information (Response).

We have reviewed the submitted budgets and supplemental explanations prepared in response to the assigned ALJ's July 28, 1997 ruling. We believe that the request for increased funding is reasonable, based on current projections. We note that none of the commenting parties object to these estimates or the Boards' requests for supplemental 1997 funding. The energy efficiency and low-income assistance programs are funded at $278 million and $179 million per year, respectively.[7] Even the high range of estimates presented to date by the Boards represents a very small percentage of those program funds. We will authorize the high range of estimates for both Boards, with the expectation that these funding allowances will not be fully expended in 1997 and unused amounts will be available for 1998. This will permit both Boards to proceed during the rest of 1997 without the need to submit a request for additional funding authorization for 1997 activities. The utilities shall provide these additional funds in the same funding proportion we adopted in D.97-04-044, as follows:

	LIGB	CBEE
Pacific Gas and Electric	$235,600	$262,120
Southern California Edison	235,600	262,120
San Diego Gas & Electric	117,800	131,060
Total:	$ 589,000	$655,300

Consistent with our determinations in D.97-04-044 and D.97-05-041, these start-up funds are considered an advance from the utilities from expected 1998 funds from the public goods surcharge, and such advances shall accrue interest at the commercial paper (prime, three months) rate. As a practical matter, it is simpler for one utility to pay all the bills for a Board until the Boards can establish their own accounts. To date, PG&E has paid bills for the CBEE and SCE has paid bills for the LIGB. We will continue this practice. Accordingly, SCE and SDG&E are authorized to transfer their CBEE

[7] For energy efficiency funding levels, see PU Code § 381(c)(1); The amount for low-income assistance programs was taken from utility filings made June 5, 1997 in this proceeding, in response to D.97-02-014, Ordering Paragraph 7.

funding allocations to PG&E, and PG&E and SDG&E are authorized to transfer their LIGB funding allocations to SCE.[8]

In D.97-04-044, we noted that the Board's operations would be subject to audit at the Commission's discretion. (D.97-04-044, mimeo, p. 10.) Given the size of Board operations, as evidenced by the transition reports and start-up budgets, we will direct our Energy Division to conduct annual financial and administrative audits of operations for both Boards. Audit results on 1997 operations shall be reported to us no later than July 1, 1998. Audit results for 1998 and 1999 shall be reported by July 1, 1999 and July 1, 2000, respectively. We will determine the need for audits beyond 1999 at a later date. The Energy Division may hire consultants to perform these audits if the audits cannot be performed by Commission staff and shall use surcharge funds for this purpose. The Energy Division shall report the audit results to the Commission with recommendations.

VIII. Role of Administrators

Chapter II of the CBEE Transition Report describes alternative approaches to organizing the administration of energy efficiency services and markets. In presenting these alternatives, the CBEE describes the role of the administrators in the new restructured environment, as follows (emphasis added):

> "Similar to the programs currently administered by the utilities, the Board intends to create an administrative structure *that will provide a variety of energy efficiency services to customers* of the major investor-owned utilities. (CBEE Report, p. 12.)
>
> "...Independent Administrators who will then design and *deploy energy efficiency programs and services.*" (CBEE Report, p. 16.)
>
> "...and have this administrator design programs, hire qualified staff, *and finally market and deliver the programs.*" (CBEE Report, p. 16.)

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[8] As PG&E notes in its August 4, 1997 comments, the LIGB needs to modify a statement in its Board Member Reimbursement Guidelines and Procedures to recognize that SCE, and not PG&E, will make first payments to the Board.

"...administrators must begin to develop new programs *and hire staff to deliver them.*" (CBEE Report, p. 20.)

"...the Board expects that some or all of these functions may continue to reside with the new administrators:

- develop program designs and hire the necessary staff and financial resources to support the planning process;
- manage and control the funds necessary to support approved programs;
- oversee the implementation of programs and make periodic adjustments to designs or program implementation procedures as warranted;
- provide periodic reports on the results of program operations using agreed upon indicators of program activity or success as specified by the Board;
- *recruit and contract with private firms to install energy efficient equipment or provide specific energy management services."*
- *employ staff to recruit trade allies and/or market the programs;*
- *employ staff to deliver engineering skills, technical support or quality control services to the market place;*
- *develop advertising/trade shows to increase public awareness;*
- *evaluate the effectiveness of energy efficiency programs."* (CBEE Report, pp. 14-15.)

Sierra Club objects to the role of administrators envisioned by the statements noted above in italics. In its view, the functions and services provided by administrators should be limited to facilitation of program planning with input from the industry and customers, management of surcharge funds, and reporting. Sierra Club argues that the provision of information, services, and products must be left to the marketplace. The administrator may obtain these services through contracts but, in

Sierra Club's view, should not attempt to duplicate these legitimate business activities by hiring its own staff. Sierra Club also believes it is important that the administrator have no control or authority over program evaluation, especially if the administrator qualifies for performance incentive payments.

RESCUE/SESCO articulate similar concerns. Energy Pacific is also concerned that some of the duties assigned to the administrators go beyond the functions intended by the Commission. SDG&E argues that the promotion of private industry development requires a different role of program administrator than the utility's role today. In particular, SDG&E recommends that the project development and agreements with customers should be left to private companies. Each of these parties take the position that delivering customer energy solutions should be assigned to private energy efficiency service providers.

In D.97-02-014, we articulated our goal of establishing an administrative structure that will facilitate the self-sufficiency of energy efficiency services in the marketplace. In particular, we stated:

> "Today, we reaffirm our commitment to ratepayer funding for energy efficiency as a transitional step towards the development of a fully competitive market in energy efficiency services. In our view, the mission of market transformation is to ultimately privatize the provision of cost-effective energy efficiency services so that customers seek and obtain these services in the private, competitive market." (D.97-02-014, mimeo, p. 2.)

> "This will require a two-prong approach. First, we need to promote a vibrant energy efficiency services private industry that can stand on its own. This will require programs that encourage direct interaction and negotiation between private energy efficiency service providers and customers, building lasting relationships that will extend into the future. Second, we need to promote effective programs that will simultaneously transform the "upstream" market (e.g., manufacturers and retailers) so that energy efficient products and services are available and advertised by private vendors and builders." (Ibid., p. 21.)

To this end, we established CBEE to develop and recommend to this Commission contracts for the administration of market transformation programs.

Keeping the objectives articulated above in mind, we delineated the expected functions of energy efficiency program administrator, as follows:

"1. Assists the Board in selecting various projects.

"2. Pays monies to and verifies program milestones/performance indicators.

"3. Manages any Standard Offers.

"4. Collects the funds and manages the bank account.

"5. Provides administrative support to EEB [Energy Efficiency Board].

"6. Will not deliver energy efficiency solutions." (D.97-02-014, mimeo., p. 35.)

Although the CBEE did not request Commission action on the issues discussed in Chapter II, we believe that direction is needed, particularly in light of the comments. There is room for interpretation of CBEE's description. For example, are references to the administrative structure intended to refer to the administrator's role, the Board's role, or the entire framework of Board, administrator and program implementers? However, we do share the concerns expressed by the Sierra Club, RESCUE/SESCO, Energy Pacific, and SDG&E that the CBEE's vision of administrative functions could be seen as inconsistent with our policy directions. In its Response, CBEE argues against strict limitations of functions that may be served by the administrators and states that it plans to continue to solicit input on the issue of administrative structure and provide a more definitive list of functions for the administrators in the context of the RFP. (Response, pp. 11-12.)

Further clarification is required so that CBEE and all interested parties work to develop an RFP that is consistent with our intent. So that there is no misinterpretation of that intent, we direct CBEE to define the role and activities of the new administrators consistent with the general functions described in D.97-02-014.[9] In particular, project

[9] However, we do not intend that these general functions be exhaustive of the list of activities provided by the administrator, but simply that any activities should be consistent with this list. Moreover, we will have a further opportunity to review CBEE's description of administrator functions when CBEE prepares the RFP for our consideration.

development and agreements with customers should be left to private companies.[19] Furthermore, the CBEE should obtain qualified analytic support services to review program effectiveness, as recommended by the Sierra Club.

We believe that Article 2.1 of CBEE's bylaws should be modified to more directly acknowledge the two-pronged approach to market transformation described above. The fourth sentence should be amended to read:

> "The purpose of the Board is to serve in an advisory capacity to the CPUC, in which the Board will make recommendations to the Commission concerning the independent administration of energy efficiency programs designed to transform the market by privatizing the provision of cost-effective energy efficiency services by (a) promoting a vibrant self-sufficient energy efficiency industry through programs that encourage direct interactions and negotiation between private energy efficiency providers and customers, and (b) promoting the "upstream" market (e.g., manufacturers and retailers) so that energy efficient products and services are available and advertised by private vendors and builders."

At the same time, we emphasize that there are other functions articulated by CBEE associated with the new administrative structure that we believe are more properly performed by program implementers. Such functions include providing customers with meaningful information on energy efficiency investments and reducing barriers to investments in energy efficient technologies. CBEE and the administrator(s) should ensure these functions are effectuated through the marketplace as part of the efforts to create a sustainable and competitive energy services market.

IX. Legal Structure of Boards

In D.97-04-044, we directed the Boards to "take all steps necessary to establish bank accounts or trusts to receive and disburse funds, including the immediate

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[19] We intend that the selection of these private companies, who will be the providers of energy efficiency services to the end users, will be accomplished by the administrators through a fair and open process. Since the selection process in this particular instance really involves the distribution of energy efficiency funds, and not the procurement of consultants, the selection process for these providers is not subject to the State Procurement Rules.

establishment of accounts to receive the start-up funds." (mimeo, p. 10.) To accomplish this, the CBEE proposes establishing one of two legal structures, an Advisory Board with its funds held in trust by a bank, or a Public Benefit Corporation. The CBEE and LIGB request Commission guidance to determine what legal structure for holding surcharge funds will ensure that the funds are tax-exempt for federal income tax purposes.

By Resolution T-16071, issued on August 1, 1997, the Commission recognized that pending further resolution of important tax issues including further assurance by the IRS, it is premature to issue a final decision regarding the correct approach for administering funds authorized for the California High Cost Fund B (CHCF-B) and the California Teleconnect Fund (CTF). Resolution T-16071 adopted an interim plan for moving forward, which postponed a final determination regarding legal structure pending the CHCF-B and CTF Interim Committee's presubmission conference with the IRS and further recommendation to the Commission. We will apply the same interim plan for LIGB and CBEE.

Consistent with the procedures established by Resolution T-16071, LIGB and CBEE are directed *not* to establish bank accounts and trust funds, and *not* to organize themselves as Public Benefit Corporations at this time. LIGB and CBEE should revise their proposed bylaws and other legal documents consistent with today's order, and file those documents together with proposed trust agreements as compliance filings for our review. These compliance filings are due no later than 20 days from the effective date of today's order. They should be filed at the Commission's Docket Office and served on the Special Public Purpose service list in this proceeding. Comments on the filings are due no later than 10 days thereafter.

To facilitate review of the Board's compliance filings, the documents should contain markings that clearly indicate all language changes to the documents presented in the Boards' July 18 start-up filings. The Boards should also prepare a table of cross-references between the language modifications or clarifications required by today's order and the location of specific language complying with those requirements in the compliance documents. The Commission may inform the Boards of the results of

its review by letter from the Executive Director, or by Commission decision or resolution, as deemed appropriate.

CBEE and LIGB are also directed to initiate steps to request a presubmission conference with the IRS to address any concerns the IRS may have regarding the use of a trust, and to explain why the chosen structure is appropriate under state law to carry out the Commission's purposes. Following a presubmission conference with the IRS, the CBEE and LIGB shall provide the Commission with a status report plus further recommendations, as appropriate, regarding the issue of legal structure and tax-exempt status. The report and recommendations shall be filed in this proceeding and served on the Special Public Purpose service list. The first report should be filed no later than January 1, 1998 (and every three months thereafter until no longer needed).

In addition to the other modifications to Board start-up documents that we require by today's decision, the Boards' by-laws should be clarified to explicitly state that:

1) the Boards act in a purely advisory capacity and have no decision making authority over policy or program issues.

2) the Commission has sole authority over the regulated utilities involved in the programs.

3) the Board members are at all times subject to the direction, control, and approval of the Commission while in the performance of their duties and in actions taken by the Boards.

4) the circumstances under which the Boards seek Commission review and approval before moving forward with their duties shall include:

   - determination and naming of Board membership;

   - approval of Board filings (charters, bylaws including Board member reimbursement guidelines and conflict of interest rules, trust agreements, etc.) and amendments thereto as required by the Commission;

   - approval of Board operating budgets;

   - approval of all guidelines, including proposed modifications to DSM rules, that delineate the scope of energy efficiency or low-income

assistance activities that will be eligible for funding, that define allocation and accounting principles, including applicable cost-effectiveness criteria, that specify how administrative performance shall be monitored and evaluated, or that establish rules governing affiliate roles, potential conflicts of interest, market power abuse and self-dealing;

- approval of the RFPs for program administration; and
- approval of the contracts with selected program administrators.

In addition, the Boards should modify § 4.1 of their proposed bylaws to read as follows (additions underlined):

> 4.1 Duties. The Board shall have the following duties and responsibilities. <u>While performing these duties and responsibilities, the Board members are at all times subject to the direction, control, and approval of the CPUC. The CPUC has all policy and program decisionmaking authority. The Board shall act in an advisory capacity to the CPUC.</u>

Section 8.1 of the CBEE's bylaws should also be modified to read as follows (additions underlined):

> 8.1 <u>The Board shall have the power to carry out its duties and responsibilities as specified in § 4.1 of these bylaws.</u> The Board shall not have the authority to direct utility distribution companies to act or refrain from acting. Such authority shall remain solely with the CPUC.

These clarifications are needed to ensure the relationship between the Boards and the Commission is fully explained. However, the role of the Boards is not substantively changed from previous decisions. We continue to intend to rely on the Boards' expertise and detailed evaluations of relevant matters in making decisions on low-income and energy efficiency topics. We created these Boards to enhance our ability to make good decisions in these areas. We have already benefited from Board advice on transition matters and look forward to Board recommendations regarding programs, policies, administration, and monitoring of future energy efficiency and low-income programs over the next several years.

X. Authorization to Contract and Hire Staff

In its start-up filing, CBEE requests explicit authorization to execute contracts or hire staff. In view of the fact that certain legal issues such as legal structure will remain unresolved for some additional time, we cannot provide the requested authorization today. As we noted in D.97-05-041, the Boards may not have the legal authority to sign contracts for staff resources or make payments related to start-up activities until these legal issues are resolved. Accordingly, we extend the current arrangements for payments and contract signing set forth in D.97-05-041 until we issue final approval of a legal structure.

Specifically, the utilities shall continue to make payments from the accounts set up to record and track the Boards' start-up funds, up to the start-up funding levels set forth in D.97-04-044 and augmented by today's decision. If a contract needs to be executed for a Board, the Board shall use the designated utility to execute the contract with the provider of the assistance. The Board will select the provider, and the designated utility that signs the contract will not have any specific right to veto the selection. (See D.97-05-041, mimeo., pp. 5-6.)

In its filing, the CBEE speaks about the ability to hire permanent staff other than the support services authorized by D.97-05-041. (CBEE's July 18, 1997 Filing, p.6.) The CBEE appropriately raises this issue in the context of the legal structure. Whether the advisory Boards will be able to hire permanent staff indeed will depend on the legal structure that this Commission determines for the Boards.

There are also issues as to how such permanent staff of advisory Boards to the Commission would be hired. Affecting this determination is the Commission's consideration of a recent decision of the California Supreme Court in Professional Engineering v. Department of Transportation (1997) 15 Cal.4th 543, which held that Caltrans, a state agency, was constitutionally prohibited from contracting out certain work. The applicability of this decision to the permanent employees of an advisory Board will depend on its legal structure.

In today's decision, we will not make any final determination of how these permanent employees will be obtained. We will make such a determination when we have resolved the legal structure for these Boards.

However, in light of the above, we will modify D.97-05-041, p. 4 (slip op.), which contains language that permits the Boards to hire "for the long term." The ability to hire "for the long term" might be interpreted to mean authorization to hire permanent employees. We do not intend this result. Thus, we will delete the words "or for a long term" from page 4 of D.97-05-041.

Further, we continue to require that the Boards look first to the Commission staff to provide the administrative, technical and legal services that they immediately and urgently need to complete the start-up phase, and to meet the deadlines set forth in AB 1890. If such assistance cannot be adequately provided by Commission staff, or the Commission staff lacks the expertise, then the Boards are permitted to look outside the Commission in the manner described in D.97-05-041.[11] Such services should be procured on a short-term and temporary basis. We reiterate that there should be coordination with the Commission staff on this matter. Specifically for legal services, the Boards should confer with the Commission's General Counsel to establish a process for determining when the use of outside legal counsel is appropriate.

XI. Conflict of Interest

In D.97-04-044, we instructed the Boards to develop conflict of interest rules as part of their start-up filings, subject to our approval. In developing these rules, we instructed the Boards to use the Political Reform Act (Government Code §§ 81000-91014) as a model. In D.97-02-014, we required that Board members cannot be

[11] We note that the processes that the Boards have utilized thus far in their procurement of immediate and interim administrative, technical and legal support have been consistent with the mandates we set forth in D.97-05-041.

employed by any entity that plans to bid for an administrative function[12] and noted a potential conflict-of-interest or self-dealing concern from having associations with entities that may receive funds from the independent administrators.[13] However, we provided that the Boards may choose to propose different disclosure rules for consideration, and should submit specific rules for the exclusion or recusal from specific matters before the Boards.

LIGB states that the Political Reform Act requires state and local government agencies to adopt and promulgate Conflict of Interest Codes. LIGB incorporates into its bylaws 2 Cal. Code of Regulations § 18730, which contains the terms of a standard Conflict of Interest Code as adopted by the Fair Political Practices Commission (FPPC). The Board requests that we adopt these provisions in conjunction with its proposed statement of "designated employees" and "disclosure categories." Specifically, LIGB proposes that for purposes of interpreting 2 Cal. Code of Regulations § 18730, "designated employees" shall include all members of the LIGB Board. As its "disclosure categories," LIGB proposes that "designated employees" of the LIGB shall disclose:

A. Any investment or business position in, or income from, any of the following:

1. An electric utility corporation, gas utility corporation, or energy service company ("ESCO");

2. A parent or subsidiary of an entity described in subsection (A)(1); or

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[12] By "administrative function," we refer specifically to the functions and activities performed by the independent administrator(s), and not to functions and activities of recipients of implementation funds.

[13] In D.97-02-014, we specifically excluded utility and energy service company representatives from serving on the CBEE, but make such a requirement for the LIGB. In D.97-01-044, we selected LIGB members and required that potential conflicts should be mitigated upfront by a written pledge not to bid for Board-awarded projects, specifically interpreted as bidding to be an administrator of low-income programs.

3. Any entity which regularly supplies energy to an entity described in subsection (A)(1).

B. Any investment or business position in, or income from, any of the following:

1. An entity seeking to provide any product or service related to the Board's function or that has plans to come before the Board or its Program Administrator seeking funds that this Board administers or oversees; or

2. A parent or a subsidiary of an entity described in subsection(B)(1).

CBEE has developed its own set of conflict of interest rules for consideration, which it indicates are modeled on the Political Reform Act, but modified in certain respects. CBEE states that its proposed conflict of interest rules would apply to both public and institutional members of the Board, except to the extent described in § IV.B. of its rules (Annual Disclosure Statements) for institutional members already filing disclosure statements satisfying the requirements of its proposed rules.

RESCUE/SESCO encourage the Commission to adopt the standard Conflict of Interest Code as proposed by LIGB, and apply these rules also to CBEE's Board members. RESCUE/SESCO offer several criticisms of the rules developed by CBEE, contending that the rules result in certain unacceptable exceptions and gaps in the conflict of interest prohibitions which should apply to a Board administering such a substantial program fund.

In reviewing LIGB's and CBEE's proposed rules, we are mindful of the concerns raised by RESCUE/SESCO, as well as our desire to maintain consistency between the rules applicable to the Boards. There are merits to adopting the FPPC standard Conflicts of Interest Code; however, we do not wish to immediately dismiss the potential merits of modifications such as those proposed by CBEE.

In deciding what rules to adopt, we take particular note of the fact that this Commission's Conflict of Interest Code and Statement of Incompatible Activities are currently under active review and must be updated by February 28, 1998, as mandated

by Senate Bill (SB) 595. We believe that the final rules to be adopted for the Boards should be considered in light of these revisions. For this reason, the conflict of interest rules we adopt today for LIGB and CBEE are interim rules. On an interim basis, we adopt the FPPC standard Conflict of Interest Code, 2 Cal. Code of Regulations § 18730, for both LIGB and CBEE. For purposes of applying these rules, LIGB and CBEE should define "designated employees" as including all members of their respective Boards. We further adopt the "disclosure categories" as proposed by LIGB as applying to both Boards. We note that § 18730 (b)(7) provides that statements of economic interests shall be made on forms prescribed by the FPPC and supplied by the agency. We direct each Board to designate a representative from among its members, or an individual who shall act on behalf of its members, to be responsible for obtaining the necessary reporting and disclosure forms from the Commission's filing officer. The filing officer may be contacted through the Commission's Executive Director's Office.

Finally, we will remain open to considering revisions of these interim rules in light of our revisions to the Commission's Conflict of Interest Code and Statement of Incompatibility. Furthermore, to the extent we may find other circumstances warrant modification of these interim rules, we may revisit the rules adopted today. We caution, however, that we are disinclined to consider proposed modifications which suggest a lessening of the conflict of interest rules we adopt today.

XII. Filling Board Vacancies

In their comments to both Boards' filings, RESCUE/SESCO criticize the Boards for permitting themselves to select, screen or recommend candidates to fill vacancies on the Board. We agree that the selection and screening of the persons to fill vacancies on the Boards are to be our decisions. The Boards are not prohibited from providing this Commission with the names of possible qualified candidates for our consideration. However, we intend to solicit recommendations for eligible candidates from other sources as vacancies develop. Accordingly, §§ 3.2 and 3.6 of the LIGB's Proposed Bylaws and Article 3.6 of the CBEE's Proposed Bylaws should be modified, as recommended by CBEE in its Response. (Response, p. 5.)

XIII. Per Diem and Expense Reimbursement Policy

In D.97-04-044, we established a per diem for Board members of $300 for each day of meetings ($200 if the meeting lasts for less than approximately two hours). In establishing this level of per diem we purposely did not set levels so high as to substitute for all comparable employment, noting that Board membership "should be considered a public service." (mimeo, p. 10.) We also explicitly rejected proposals to provide per diem for preparation work.

CBEE and LIGB were directed to submit expense reimbursement rules using the Commission's Interim Advisory Committee Standard of Expense Reimbursement (Resolution F-621 dated November 9, 1988) as their guidelines. Consistent with those standards, we noted that employees of state governmental agencies and utilities would not receive per diem. We permitted other government employees (including those from academic institutions) to receive a per diem if appropriate arrangements were made with their employees. We encouraged members with funding available to support Board activities to use such funding to defray their expenses, as appropriate. (D.97-05-041, mimeo, p. 11.)

CBEE requests that the Commission modify D.97-04-044 to provide, for prospective application, that eligible Board members receive per diem for any Board subcommittee meeting scheduled and announced at a full Board meeting and for participation by a Board member at an advisory committee meeting. LIGB's proposed reimbursement rules include similar per diem provisions for Board member attendance at "official" Board subcommittee and advisory committee meetings.

CBEE also requests that reasonable reimbursable expenses for Board members include expenses incurred for 1) traveling to meetings of the Board, subcommittees of the Board and advisory committees, 2) working lunches during Board meetings and 3) overnight accommodations in San Francisco at a level consistent with reasonable rates in that city. CBEE applies its reimbursement rules to Board members as well as "individuals or entities providing support services to the Board." (CBEE July 18, 1997 filing, Attachment A-4, p. 3.)

Resolution F-621 states that reimbursement is permissible for attendance at scheduled meetings of the Advisory Committee (the term "Committee" is analogous to the various advisory entities, committees and boards that are now referred to collectively as "Boards"), Commission-ordered workshops, or formal hearings directly related to the Advisory Committee's duties. Neither Resolution F-621 or D.97-04-044 expressly permit per diem reimbursement for Board member attendance at subcommittee meetings or meetings of advisory committees, as this term is used by the Commission in this proceeding. Specifically, the advisory committees established by D.97-04-044 refer to availability of expertise to the Boards through input from a broader community, such as utilities and private energy service companies. (See D.97-04-044, mimeo, pp. 33, 68.) At the same time, Resolution F-621 permits the Commission to make discretionary exceptions to the Advisory Committee Standard of Expense Reimbursement on a case by case basis. (Resolution F-621, Finding 3.)

In considering this issue, we must keep in mind our general policy of not creating a per diem policy that turns "public service" into "regular employment" for Board members. At the same time, we recognize that the many overlapping tasks facing the Boards, particularly over the next year, requires a considerable commitment of time by Board members. The use of subcommittees may be the most efficient approach to accomplishing these tasks given the time frame we establish in today's order. In recognition of these circumstances, and for a limited period only, we will extend the per diem provisions of D.97-04-044 to Board attendance at subcommittee meetings that are noticed in accordance with the requirements of the Bagley-Keene. We believe that per diem for Board-related work should only be given when those activities are open to the public. Only in this way can interested parties and the Commission be fully aware of what Board work is undertaken at those meetings.

We will extend these per diem provisions to Board subcommittee meetings until December 31, 1998, unless extended by further Commission order. We note that per diem expenditures will be subject to the Energy Division audit discussed above.

We do not, however, believe that Board members should receive a per diem when they elect to attend advisory committee meetings. We note that advisory

committees are composed of a separate group of individuals selected on the basis of their expertise. They report directly to the Board at full Board meetings on technical or programmatic issues. In our view, a well-functioning advisory committee should be able to clearly present information or recommendations developed at advisory committee meetings to the full Board without the need for Board members to attend advisory committee meetings. Similarly, we believe that a well-functioning Board should be able to provide clear direction to its advisory committees at full Board meetings without the need to also attend advisory committee meetings. Nonetheless, some Board members may desire to attend those meetings on an occasion in order to, for example, to prepare for upcoming Board meetings where advisory committee recommendations will be considered. We have no objection to that practice; however, we consider such attendance to be preparation work, for which we continue to deny per diem compensation.

In sum, until December 31, 1998, our per diem allowances will also apply to Board member attendance at Board subcommittee meetings that are public and noticed in accordance with the requirements of Bagley-Keene. Per diem will not be allowed for Board attendance at advisory committee meetings.

In terms of what should be included under "reasonable expenses," the proposed reimbursement rules allow reimbursement for actual expenses related to travel, meals, parking, and other incidentals up to the limits currently in effect and applicable to Commission staff on official duty. Those limits include up to $37.00 for meals during each 24-hour period and up to $79.00 plus tax for lodging per night except that in state-designated high-cost areas, including San Francisco, the limit shall be $110.00 plus tax per night (or, for each, the current government reimbursement rate). Private automobile use will be reimbursed at a rate of up to 24 cents per mile or the current government reimbursement rate. Airfare will be reimbursed up to the lowest available airfare with reference to the amount of notice given for the meeting being attended. Board members will be reimbursed for reasonable miscellaneous expenses including cab fare, parking and bridge tolls.

Both Boards also specify that each item of travel expense claimed in the amount of $5.00 or more must be substantiated by a receipt, except for meals. Board members may not be reimbursed for meal or lodging expenses incurred within 50 miles of their headquarters or for lodging expenses incurred within 50 miles of their primary residence. Finally, Board members may be reimbursed for all reasonable costs necessarily incurred by them related to the operation of the Board, including photocopying, FAXing, telephone calls, supplies, and "support services." [11]

The provision noted above for lodging limits in high-cost areas is included in the LIGB's reimbursement rules, and addresses CBEE's concerns about the higher cost of hotels in San Francisco. CBEE should add that provision to its reimbursement rules. Consistent with our determinations regarding per diem, we will allow the proposed reimbursement rules, as modified herein, to apply to Board meetings and Board subcommittee meetings. Accordingly, the first sentence of the proposed rules (under "Reasonable Expenses") should be modified to read as follows:

> "Reasonable expenses of Board members related to attendance and participation in Board activities will be reimbursed as described in this section. Until December 31, 1998, unless extended by further Commission order, the provisions of this section shall also apply to expenses of Board members related to attendance and participation in Board subcommittee meetings that are public and noticed in accordance with the provisions of the Bagley-Keene Open Meeting Act."

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[11] In its Response, CBEE addresses the ALJ's query as to what is referred to by "support services" as follows: "In response, the Board wishes to clarify that the Board's per diem and expense rules apply only to Board members and any 'support services' (i.e., photocopying, supplies) directly incurred by Board members. Expenses incurred and reimbursed for outside support services under contracts negotiated, signed and approved by the Board are governed by those contracts." (Response, p. 2.) Based on this clarification, the use of the term "support services" in the last paragraph under "Reasonable Expenses" is redundant because that paragraph specifically identifies supplies and photocopying. Both CBEE and LIGB should delete the reference to "support services" from that paragraph. CBEE should also delete the sentence beginning with "Support services incurred by Board members..." under its "Interim Reimbursement Rules (first paragraph), since the term "support services" is ambiguous.

With regard to working lunches during Board meetings, the Boards should handle these within the per diem limits described above by charging each member a prorated portion of the cost of providing the working lunch. Those Board members whose lunches are not covered by either per diem or expense reimbursements may have their prorated share of the working lunch paid for by the Board.

Finally, we note that CBEE applies its reimbursement rules to Board members as well as "individuals or entities providing support services to the Board." (CBEE July 18, 1997 filing, Attachment A-4, p. 3.) All references to support services should be deleted. These reimbursement rules apply to Board members only, with one exception. As CBEE explains in its Response, the interim payment procedures described under "Payment of Per Diem and Reasonable Expense" are the same for both reimbursement of Board member per diem and expenses and for expenses incurred by consulting and support services pursuant to contracts negotiated, signed and approved by the Board. CBEE's proposed language clarifications for that section are approved.

XIV. Indemnification

In D.97-04-044 (mimeo., p. 7.), the Commission stated its intention that members of the LIGB and CBEE be treated as uncompensated servants of the state: "The State will accordingly indemnify them as it indemnifies its compensated employees and will provide them representation for their acts done within the course and scope of the services they perform for the Boards, as provided in Government Code §§ 825-825.6 and §§ 995-996.6." The CBEE's start-up documents adds the provision that ". . . the State will provide legal representation to such persons through the office of the California Attorney General, and will indemnify such persons for any losses incurred by reason of any act or failure to act occurring within the scope of the services they perform for the Board." (See CBEE proposed Bylaws, Article 3, § 3.7.) The LIGB does not add this language.

We direct the CBEE to delete the above-referenced sentence that commits representation through the office of the California Attorney General. This statement goes beyond the indemnification provisions of D.97-04-044. Indemnification does not

automatically mean that representation in any individual case will be provided by the Attorney General's Office. That will depend on factors such as available staffing and expertise.

XV. Affiliate Transaction Rules

As we stated in D.97-02-014 (mimeo, p. 31), the Boards should file proposed rules that address the circumstances, if any, under which affiliates of selected administrators, utility or otherwise, may bid for contracts associated with program implementation. The CBEE plans to seek input from market participants on affiliate guidelines and rules as part of the process of developing the overall set of policy rules for energy efficiency. The CBEE also expects to develop more specific contractual provisions relating to affiliate transactions as it gets closer to selecting independent administrators. The LIGB proposes to include in its September 19, 1997 filing a schedule for the submittals regarding the role of affiliates.

Rather than having the Boards develop affiliate rules in this proceeding, ORA recommends that the terms and conditions of affiliate transactions between a utility and its affiliates be developed in the affiliate transactions proceeding (Rulemaking (R.) 97-04-011/Investigation (I.) 97-04-012). RESCUE/SESCO ask that comments from parties reviewing affiliate transactions in that docket be requested and encouraged.

We note that the issues to be addressed with regard to affiliate transactions in this proceeding are broader than those being considered in R.97-04-011/I.97-04-012, since here we address the circumstances, if any, under which affiliates of non-utility (as well as utility) administrators may bid for contracts associated with program implementation. We are unwilling to expand the scope of that proceeding to accommodate these non-utility issues. Moreover, as noted in the ALJ's ruling addressing this issue, the schedule for R.97-04-011/I.97-04-012 would have required that the Boards file their recommendations by June 2, 1997, which was not feasible. (See ALJ Ruling dated May 28, 1997.) We therefore support the ALJ's ruling that affiliate rules applicable to programs and funding administered by the Boards be developed in this proceeding, until further notice. We will carefully coordinate our consideration of

utility-related issues with developments in our affiliate transaction proceeding. To facilitate this coordination, the Boards should also serve copies of their proposed affiliate transaction rules on the service list in R.97-04-011/I.97-04-012. We will solicit comments on the Boards' filings from parties to that proceeding, as well as this one, as RESCUE/SESCO suggest.

XVI. Coordination of Customer Information Services

The CBEE recommends that the Commission direct the utilities to include in their October 1, 1997 applications for 1998 programs:

> "descriptions of their plans to coordinate customer information services regarding energy efficiency with their plans to educate customers about their choices for energy (i.e, the Commission's Customer Education Plan.) The utility's message content should conform to the Commission's changed goals for energy efficiency, per Finding of Fact #1 in D.97-02-014." (CBEE July 30, 1997 Report, p. 47.)

ORA supports this recommendation, and suggests that the utilities should also coordinate their plans with the CEP adopted on August 1, 1997 by D.97-08-064. ORA also recommends that the utilities, in their October 1, 1997 filings, address issues associated with consumer protection as part of the overall education process.

NAESCO urges the Commission to place responsibility for development of a customer education program with the CBEE (with input from the Technical Advisory Committee) subject to review and approval by the Commission. In NAESCO's view, it would be inappropriate to give utilities the unilateral responsibility to educate customers regarding new choices related to energy efficiency programs.

We believe that the joint planning process proposed by CBEE, and clarified in today's order, addresses the need to solicit balanced input into an educational program for energy efficiency. As described above, the CBEE and utilities are directed to solicit input from the public and the Technical Advisory Committee in advance of the October 1, 1997 filings, and all parties will also have an opportunity to comment. We direct the utilities to include in their October 1 applications the information noted above.

XVII. Issues Relating to the Bagley-Keene Open Meeting Act

The LIGB and CBEE, are subject to Bagley-Keene as "advisory boards" under Government Code § 11121.8. These Boards have been assigned the responsibilities and tasks to make recommendations to this Commission concerning our implementation of the low-income and energy efficiency programs, mandated by PU Code §§ 381-383. These Boards function in an advisory role, and there has been no delegation to these Boards of any of our authority over these public purpose programs. In performing these responsibilities and tasks as "advisory bodies" on issues of much concern to the public, the Commission has mandated that the boards conduct their meetings in public, in accordance with the Bagley-Keene. (D.97-04-044, p. 7.)

The July 18 filings of the LIGB and CBEE raise several issues concerning Bagley-Keene. Among these issues are: (1) Can a subcommittee composed of "less than a quorum" of an advisory board conduct a nonpublic meeting to gather and exchange information, and develop reports for the advisory board's consideration? (2) is a technical advisory committee of an advisory board subject to Bagley-Keene? (3) can an advisory board conduct a closed meeting to consider the selection, hiring, retention, or approval of any consultant, staff, or administrator? (4) when is teleconferencing permitted by Bagley-Keene? (5) should an advisory board member be permitted to vote by proxy and how many votes are required for the approval of a board action? (6) what does Bagley-Keene require for public participation at the meetings of the Boards? and (7) how must the public records of an advisory group be provided for public inspection or distribution?

A. "Less Than A Quorum" Rule

In its July 18, 1997 filing, the CBEE raises the question whether subcommittees composed of one to four Board members (which is less than a quorum) are permitted to gather and exchange information, and develop reports outside the Board's public meeting. (CBEE's July 18, 1997 Filing, pp. 9-10.) Such information and reports would be presented to the Board during a public meeting.

A meeting of a subcommittee composed of less than a quorum may meet to gather and exchange information outside of a publically noticed meeting only if the subcommittee is composed of less than three members. This is because a subcommittee of three or more constitutes a "state body" under Government Code § 11121.8. This statutory provision makes an advisory subcommittee a "state body" if it is created by formal action of a state body (in this case, the CBEE) and consists of three or more persons. Thus, the advisory subcommittee is subject to the requirements of Bagley-Keene.

This interpretation of the "less than a quorum" rule is consistent with the interpretation of the California Attorney General found in 68 Ops.Cal.Atty.Gen 34, 40 (February 15, 1985). In this opinion, the California Attorney General concluded that a "state body," which was composed of eleven members and which was subject to Bagley-Keene, could not interview candidates for the position of executive director in closed session, but "could appoint an advisory committee of or to the commission consisting of less than three individuals to screen potential candidates."

Further, we address the issue as to whether three or more Board members can "get together" outside Board meetings to purely gather information for presentation to the CBEE during the public meetings. "Purely gathering information" is permissible so long as no deliberation takes place. The courts have broadly defined "deliberation" to include "not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision." (Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal.App.2d 41, 47-48; see also, Rowen v. Santa Clara Unified School Dist. (1981) 121 Cal.App.3d 231, 234; Stockton Newspaper, Inc. v. Redevelopment Agency (1985) 171 Cal.App.3d 95, 102.) Based on this case law, if subcommittees meet to form recommendations, their acts will constitute deliberation. However, the task of merely gathering information for CBEE's action, which does not include any screening or discussion of such information, does not constitute deliberation within this broad definition. Further, the "transmission of informational materials" which involves "no interaction or communication between or

among individual Board members . . ." does not constitute deliberation. (Frazer v. Dixon Unified School Dist. (1993) 18 Cal.App.4th 781, 797.)

Thus, if there is deliberation or action by any subcommittee composed of three or more persons, then the meeting of this subcommittee must be noticed in the manner required by Bagley-Keene. However, a subcommittee composed of fewer than three is not subject to this requirement, and thus, it is permitted to gather and exchange information, as well as develop reports which include recommendations, in a nonpublic setting.[15]

B. Technical Advisory Committees

In its July 18 filing, CBEE requested a Commission determination as to applicability of the Bagley-Keene to the meetings of this Board's Technical Advisory Committee. (CBEE's July 18, 1997 Filing, p. 10.) We believe the act applies to the meeting of the Technical Advisory Committee.

In D.97-02-014, p. 32 (slip op.), we instructed this board to appoint a Technical Advisory Committee. CBEE has complied with these instructions. We also stated that "we expect participation in advisory committee activities to be as open as possible, and public participation should be encouraged." (Id.)

"State bodies" are subject to the requirements of the Bagley-Keene. An advisory committee such as the Technical Advisory Committee is a state body under Government Code Section 11121.8, which states:

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[15] In their comments to CBEE's July 18, 1997 Filing, p.6, RESCUE/SESCO are asking us to prohibit any two-person subcommittee from meeting in private with utilities and other interested parties. RESCUE/SESCO do not provide any concrete facts as to why these meetings should be prohibited except to say that they should be conducted under public scrutiny. Bagley-Keene does not require that meetings involving two-person subcommittees be publicly noticed. Without more facts, we do not intend to speculate on what might be occurring. We hope that the purpose of these interactions between any two-person subcommittee and the utilities and any other interested parties has been to gather and exchange information. Until we are provided with sufficient facts to raise a serious concern, we will not prohibit such interactions.

> "[A] 'state body' means any advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multi-member advisory board of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons." (Gov. Code § 11121.8.)

The creation of the Technical Advisory Committee was formally mandated by a "state body," namely the Commission, and the CBEE, another "state body," acting on this mandate, formally established the Technical Advisory Committee and has approved 36 individuals for membership. (See D.97-02-014, p. 32; CBEE's July 18, 1997 Filing, p. 14.) Thus, the Technical Advisory Committee was created by formal action of two "state bodies," and it consists of three or more persons. Consequently, by state law, the Technical Advisory Committee is a "state body" which must comply with the requirements of the Bagley-Keene Open Meeting Act. Further, this is consistent with our goal that the activities of this advisory committee "be as open as possible."[16]

C. Closed Meetings for Obtaining Consultants, Staff, or Administrators

The CBEE has asked this Commission what the applicability is of the closed session provision of Bagley-Keene to the selection, hiring, retention, or approval of "any consultant, staff, or administrator." (CBEE's July 18, 1997 Filing, p. 10.) Government Code § 11126(a) permits "state bodies," such as the CBEE, to hold "closed sessions during a regular or special meeting to consider the appointment, employment, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public meeting. . . ." (Gov't Code § 11126(a).) This provision is applicable to "employees" and not "independent contractors." (See Rowen v. Santa Clara Unified School Dist. (1981)

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[16] We note that interested persons from the industry and the public may at any time choose to form a voluntary association related to energy efficiency matters. If such a group were to form it may wish to seek formal recognition from the Commission as a working group.

121 Cal.App.3d 231, 235.)[17] The statute uses the word "employees," and not "independent contractors,"and an independent contractor is not an employee. (S.G. Borello & Sons v. Department of Industrial Relations (1989) 48 Cal.3d 341, 349; Societa per Azioni de Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446, 457-458, cert. den. 459 U.S. 90; Germann v. Workers' Comp. Appeals Bd. (1981) 123 Cal.App.3d 776, 783.) Further, since the Legislature "presumptively" knew the distinction between "employees" and "independent contractors," but did not include the latter in the language of the statute, it is assumed that "independent contractors" are excluded. (Id.)

Thus, whether § 11126(a) applies to the selection, hiring, retention, or approval of "any consultant, staff, or administrator" of the CBEE depends on whether such a person is a "employee" or "independent contractor." The test of whether a worker is an independent contractor or an employee is the "right of control" over the work done, as to the result, details of, and means by which the work is accomplished. (Societa per Azioni de Navigazione Italia v. City of Los Angeles, supra, 31 Cal.3d at 516.) If the employer retains the right of control, the worker is an employee; if the *worker* retains the means, he is an independent contractor. (Masson v. New Yorker Magazine, Inc. (N.D. Cal. 1993) 832 F.Supp. 1350, 1373.) Factors in determining the nature of the work relationship also include the employer's or employee's right to terminate services, without incurring liability; who supplies the instrumentalities, tools, and place of work; a distinct occupation or business on the part of the person performing the service; the nature of the occupation; the length of time required to render the service; the method of payment; and the parties' belief as to the relationship created. (Germann v. Workers' Comp. Appeals Bd, supra, 123 Cal.App.3d 776 at 783; see also Lab. Code § 3357 ["Any person rendering service for another, other than as an independent contractor . . . is presumed to be an employee."])

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[17] Although in Rowen, the California Supreme Court was addressing the applicability of the closed sessions provisions of the Brown Act and not the Bagley-Keene Open Meeting Act, the language of both sections is virtually identical. Thus, the California Supreme Court's holding in Rowen would apply in the instant situation.

In terms of the administrative, technical and legal consultants that the CBEE has procured, they appear to be "independent contractors" rather than "employees." These consultants seem to have "control" over the work, including the details and the means by which the work is to be performed. They have been retained on an interim and limited term basis for a special project, namely the start-up operations. The consultants have their own offices.

With respect to the program administrators, e.g., the Independent Administrator, the Commission has mandated that these persons will be procured through a process consistent with the State Procurement Rules. (D.97-05-041, p. 3.) In obtaining program administrators through this process, they will likely be consultants who will be controlling their "own work" on a specified project for a defined period of time, and thus, be working as "independent contractors."

In sum, the closed sessions provision of Bagley-Keene does not apply to "any consultants, staff, or administrator" who are hired as "independent contractors." If the CBEE were to hire "employees," then the provision would apply.

D. Teleconferencing

Both the CBEE and the LIGB provide for attendance by teleconferencing. (See Operating Rules of CBEE, p. 1, Article 5.3 of CBEE's Proposed Bylaws, and § 5.8 of LIGB's Proposed Bylaws.) For example, in its Operating Rules, CBEE states the following:

> "Attendance in person by Board members at scheduled meetings is encouraged. If personal attendance is not possible, attendance can be by teleconference as long as the portion of the teleconferenced meeting that is required to be open to the public is audible to the public at the location specified in the notice of the meeting and at least one member of the Board is physically present at the location specified in the notice of the meeting. All votes taken during a teleconferenced meeting will be by roll call."

Government Code § 11123 permits teleconferencing. Subdivision (b) of this statute states:

> "(1) Nothing in this article shall be construed to prohibit a state body from holding an open or closed meeting by teleconferencing if the

convening at one location of a quorum of the state body is difficult or impossible, subject to all of the following:

"(A) The teleconferencing meeting shall comply with all requirements of this article applicable to other meetings.

"(B) The portion of the teleconferenced meeting that is required to be open to the public shall be audible to the public at the location specified in the notice of the meeting.

"(C) Each teleconference location shall be identified in the notice of the meeting and shall be accessible to the public.

"(D) All votes taken during a teleconferenced meeting shall be by rollcall.

"(E) The portion of the teleconferenced meeting that is closed to the public may not include the consideration of any agenda item being heard pursuant to Section 11125.5 of the Government Code.

"(F) At least one member of the state body shall be physically present at the location specified in the notice of the meeting.

"(2) For purposes of this subdivision, 'teleconference' means a conference of individuals in different locations, connected by electronic means, through either audio or video, or both.

"(3) This subdivision shall not be operative and shall have no effect on and after January 1, 1998." (Gov't Code § 11123 (b)(1) through (b)(3).)

An issue has arisen as to whether teleconferencing would be permitted even if there is a quorum assembled in one location. As noted above, the Proposed Bylaws of both CBEE and LIGB and CBEE's Operating Rules would allow for this possibility.

Government Code § 11123 does not prohibit teleconferencing when there is a quorum present. The language in the statute does not say "only if there is no quorum."

Further, we do not believe that the Legislature, in enacting Government Code § 11123, intended such a result. Clearly, the Legislature was specifically concerned with the situation when a quorum would be "difficult or impossible" at one location, and not when a quorum was present. It is a well settled rule of statutory construction that:

> " ' "[s]tatutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers – one that is practical rather than technical, and that will lead to a wise policy rather than to mischief or absurdity." ' " (People v. Aston (1985) 39 Cal.3d 481, 492.)

Thus, we will not read into Government Code § 11123 more restrictively than intended.

Moreover, we do not wish to inhibit the maximum possible participation of Board members, who have been appointed because of their expertise in low-income and energy efficiency programs. We do not see how the general goals of Bagley-Keene to have the public observe and participate are being thwarted if we permit attendance by teleconferencing where a quorum is present in one location. We will require that the Boards comply with all provisions of Government Code § 11123(b)(1)(A)-(F) if there is any teleconferencing during a meeting. The Boards should incorporate these specific requirements in their Proposed Bylaws and Operating Rules (if applicable).

While we will interpret the law to allow participation by teleconferencing, we strongly encourage the CBEE and the LIGB to attempt to have all participating members in one place for every meeting, and to use teleconferencing only as a last resort. To this end, we will require the Boards to have at least a majority of members physically present in one location at all Board meetings. Thus, we are precluding the Boards from teleconferencing if there is no quorum physically present, despite what is permitted by Government Code § 11123.

We also note that the authority for teleconferencing will be short-lived because Government Code § 11123(b) is effective only until January 1, 1998. (See Gov't Code § 11123(b)(3).) Thus, the CBEE and the LIGB should also include language in

their Proposed Bylaws that teleconferencing is not permitted on or after January 1, 1998, unless the Legislature reenacts this statute.

E. Voting

Article 5.3 of the CBEE's Proposed Bylaws states: "Decisions shall be made by majority vote or supermajority vote (as provided for in the operating rules) of those voting members present or the member's representative, provided that a minimum of four votes shall be required in all circumstances." (Proposed Bylaws, CBEE's July 18, 1997 Filing, p. 7.)

In their comments, RESCUE/SESCO argue that language in Article 5.3 would permit voting by proxy and that a vote could be taken by less than a quorum. They advocate that neither be permitted.

With respect to voting by proxy, we have not and will not permit it. As discussed above, attendance must be in person (except when teleconferencing is permitted), so that the deliberation by the member will occur in public. Further, we have appointed these members as individuals, and have not contemplated that there would be a "member's representative." As we stated in D.97-04-044, p. 8 (slip op.):

> "The public members are named as individuals and may not be substituted for at meetings. Institutional members may be replaced by the institutions as may be required, however only one person can fill a slot at any time (i.e., no sharing or substitution without replacement."

Accordingly, reference to a "member's representative" should be removed because we will not permit voting by proxy. In its Response, CBEE agrees that there should be no voting proxy, except that it desires representative voting by the institutional members. We will not create an exception for institutional members.

With respect to the CBEE's voting rule in Article 5.3 of its Proposed Bylaws, we do not believe that the CBEE intends that voting will occur when there is not a quorum present. As Article 5.3 provides: "A majority of the members of the Board in office shall constitute a quorum for the transaction of business." We interpret the "transaction of business" to mean "holding a meeting," and thus, being able to "take

action." (See Gov't Code § 11122.) A quorum is required to "take action" under Bagley-Keene. (62 Ops.Cal.Atty.Gen. 698, 699-700 (November 14, 1979).)

However, the CBEE has set forth "a minimum of four votes" rule in Article 5.3, which could be read to mean that a vote on a particular issue involving less than a quorum of the board could be possible. On the other hand, this "minimum of four votes" is subject to another interpretation; that is that a measure may not pass unless it is supported by four votes. In light of the language in Article 5.3 stating that a quorum is required for the transaction of business, we believe the latter reading of the "minimum of four votes" rule is the correct one. To avoid any possibility for misunderstanding, we suggest that the CBEE modify its " a minimum of four votes" rule as follows:

> "Decisions shall be made by majority vote or supermajority vote (as provided for in the operating rules) of those voting members present, provided that no measure shall pass unless, under all circumstances, a minimum of four members vote in support of the measure."

However, we do have a concern with the following language in Article 5.3 which states:

> "A meeting at which a quorum is initially present may transact business notwithstanding the withdrawal of members, if any action taken is approved by at least a majority of the required quorum for the meeting."

Section 6.4 of the LIGB's Proposed Bylaws contains the same provision. We are concerned that this language would permit a vote with less than a quorum present. This is inconsistent with the requirement that there must be a quorum to transact business, including to take action, e.g., vote on a specific issue. When a member whose presence is required for a quorum "withdraws" from the meeting by leaving, the result is that the required quorum no longer exists, and thus, no business

can be transacted.[18] Another way to state this principle is that the number needed to transact business, including to conduct a meeting or take action, namely a quorum, is the same number that must be present for a vote.

The law does consider a vote to be valid when a member abstains from a vote, not for reasons of conflict of interest, and the abstaining member who was needed to make the quorum is present at the time of the vote. The vote is valid so long as there is a majority of votes in support of the measure. (See Dry Creek Valley Assn., Inc. v. Board of Supervisors (1977) 67 Cal.App.3d 839, which held that an abstention or nonaction is considered a vote; see also 62 Ops.Cal.Atty.Gen. 698, supra, at 700; 61 Ops.Cal.Atty.Gen. 243, 251 (May 23, 1978).)

Therefore, we will require the CBEE and LIGB to modify the language in their Proposed Bylaws (Article 5.3 for CBEE and § 6.4 for LIGB) to eliminate the possibility that a vote on a particular issue could occur when a quorum is not present. CBEE's Operating Rules will also require modification based on the above discussion.

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[18] This can also happen in another context. For example, five members of the CBEE are needed for a quorum. If the person or persons who are needed to make the quorum and that person or persons cannot vote on a particular issue because of a conflict of interest, then the Board no longer has a quorum to be able to "transact business" or "take action" on that item. " 'A member who is not entitled to vote because of a conflict of interest, for example, is not counted for purposes of establishing a quorum on a particular question. [Citations.]' " (78 Ops.Cal. Atty.Gen. 332, 341 (November 17, 1995), citing 62 Ops.Cal.Atty.Gen. 698, supra, at 700.)

It is noted that there are special rules which apply where a majority of the board is prohibited from participating due to a conflict of interest, and thus a quorum would be impossible. (See 78 Ops.Cal.Atty.Gen. 332; supra, at 335-336; see also, 62 Ops.Cal.Atty.Gen. 698, supra, at 700.) These special rules constitute the rule of necessity, and have a narrow application. They can only be used when the disqualified member is "legally required" to participate so that there can be a quorum; the disqualified member is not brought back to break a tie; and there are no other options available, e.g., postponement of the vote. (See generally, 78 Ops.Cal.Atty.Gen. 332, supra.) If more than one member is disqualified, not all the disqualified members will be allow to remain and participate. Only the number of members that is required to establish a quorum shall be allowed to participate. (Id. at 335-336.) The selection of the particular members who will be permitted to participate may be accomplished by a process of selection by lot. (Id. at 336-338.)

F. Public Participation

In their comments to CBEE's July 18, 1997 Filing, pp. 4-5 and 7-9, RESCUE/SESCO claim that the CBEE's public participation provision in Article 5.5 of its bylaws "is far too restrictive," and that the CBEE has not provided meaningful opportunity for public comment.

Article 5.5 of the CBEE's Proposed Bylaws provides:

> "The Board will provide an opportunity to members of the public to address the Board directly on each agenda item before or during the Board's discussion or consideration of the item. The Board will provide a sign-up sheet for members of the public who wish to address the Board. Copies of Board documents may be requested from the Board. The sign-up sheet will be available prior to the commencement of the public meeting and will provide space for the name of the member of the public wishing to address the Board, whom that individual represents, and the agenda item to be addressed." (See Proposed Bylaws, CBEE's July 18, 1997 Filing, pp. 7-8.)

The CBEE has provided an opportunity for public participation consistent with Bagley-Keene, which requires: "[T]he state body shall provide an opportunity for members of the public to directly address the state body on each agenda item before or during the state body's discussion or consideration of the item. . ." (Gov't Code § 11125.7(a).)

However, RESCUE/SESCO claim that requiring the public to sign up prior to the public meeting limits the opportunity for meaningful public participation. Some documents are made available only minutes before the meeting, or the agenda does not provide sufficient details to help a member of the public determine if he or she wants to make a public comment.

In its Response, CBEE argues that these are only minimum requirements and that in practice, more opportunities have been provided to the public during the meetings. We are persuaded that CBEE has provided sufficient opportunity for public comment. To emphasize this, the bylaws should spell out all the opportunities for recognizing public members during the meetings, and the Boards should continue to make as many opportunities available as possible, consistent with the Boards'

obligation to conduct business in an orderly fashion. CBEE and LIGB should modify their bylaws accordingly.

We are persuaded by CBEE's Response that it has made every effort to publicly distribute documents as soon as those documents become available. Because of the extreme time pressures on CBEE, it is understandable why documents cannot be provided well in advance.

G. Inspection and Distribution of Public Records of the Advisory Boards

In their comments to the LIGB's July 18, 1997 Filing, pp. 39-40, RESCUE/SESCO take issue with how the LIGB has handled the public's access to its public records. They recommend that the LIGB be "instructed" to (1) set up a mailing list; (2) offer all of its public documents via e-mail, pending final set up of a web site; (3) use the internet facilities which have been offered to the Board at no charge, and (4) set up a web site.

Although Bagley-Keene requires the inspection and distribution of public documents, the Act does not mandate a specific method or means for public inspection or distribution, e.g., hard copy or electronically. (Gov't Code § 11125.1.)

Accordingly, except for RESCUE/SESCO's recommendation to use free private internet facilities,[19] we do not preclude the LIGB from using any of the other means suggested by RESCUE/SESCO to provide for public inspection or distribution of its public documents. In fact, the LIGB should establish a mailing list to facilitate a systematic way for interested members of the public to request and receive any documents from a meeting that they could not attend.[20]

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[19] We will not permit the LIGB to use the free internet facilities because we do not wish to "brand" any private internet facilities as being affiliated with the Commission or its advisory boards in any fashion.

[20] If the costs become exorbitant, an advisory board could consider "charging a fee or deposit for a copy of a public record..." (Gov't Code § 11125.1(e).)

XVIII. Funding Transfer Issues on Renewables and RD&D

CEC, SDG&E, PG&E, and SCE ("the parties") have reached agreement on all but one funding transfer issue related to renewables and RD&D. Today's decision addresses the areas of agreement. By separate order we will address the remaining nonconsensus issue, namely, which utilities are responsible for payment of the $75 million renewables payment to the CEC, identified in PU Code § 381(c)(3) and (d). We will also address by separate order SCE's June 3, 1997 Petition For Modification of D.97-04-044 and Clarification of Commission RD&D Balancing Account Policy.

The parties agree that the public purpose program surcharge funds collected for RD&D programs administered by the CEC should be sent by the utilities directly to the CEC's "Public Interest Research, Development and Demonstration Program Fund" trust account established for these funds, unless otherwise directed by the Legislature or the Commission. With respect to the RD&D payments, the parties also agree that payments should be made no later than the following dates in the specified amounts, unless otherwise directed by the Legislature or the Commission:

RD&D Funds	*PG&E*	*Edison*	*SDG&E*	*Total*
		($ Millions)		
1/5/98	$5.94	$5.64	$0.78	$12.36
3/31/98	5.94	5.64	0.78	12.36
6/30/98	5.94	5.64	0.78	12.36
9/30/98	5.94	5.64	0.78	12.36
12/31/98	5.94	5.64	0.78	12.36
3/31/99	7.425	7.05	0.975	15.45
6/30/99	7.425	7.05	0.975	15.45
9/30/99	7.425	7.05	0.975	15.45
12/31/99	7.425	7.05	0.975	15.45
3/31/00	7.425	7.05	0.975	15.45
6/30/00	7.425	7.05	0.975	15.45
9/30/00	7.425	7.05	0.975	15.45
12/31/00	7.425	7.05	0.975	15.45
3/31/01	7.425	7.05	0.975	15.45
6/30/01	7.425	7.05	0.975	15.45
9/30/01	7.425	7.05	0.975	15.45
12/31/01	7.425	7.05	0.975	15.45
TOTALS:	$118.80	$112.80	$15.60	$247.20

The parties agree that the public purpose program surcharge funds collected for the renewables programs administered by the CEC should be sent by the utilities directly to the CEC's "Public Interest Renewable Resource Technologies Fund" trust account established for these funds, unless otherwise directed by the Legislature or the Commission. With regard to the renewable program payments, the parties also agree that payments should be made on or before the following dates in the specified amounts, unless otherwise directed by the Legislature or the Commission:

Renewable Funds	*PG&E*	*Edison*	*SDG&E*	*Total*
		($Millions)		
1/5/98	$9.60	$9.90	$2.40	$21.90
3/31/98	9.60	9.90	2.40	21.90
6/30/98	9.60	9.90	2.40	21.90
9/30/98	9.60	9.90	2.40	21.90
12/31/98	9.60	9.90	2.40	21.90
3/31/99	12.00	12.375	3.00	27.375
6/30/99	12.00	12.375	3.00	27.375
9/30/99	12.00	12.375	3.00	27.375
12/31/99	12.00	12.375	3.00	27.375
3/31/00	12.00	12.375	3.00	27.375
6/30/00	12.00	12.375	3.00	27.375
9/30/00	12.00	12.375	3.00	27.375
12/31/00	12.00	12.375	3.00	27.375
3/31/01	12.00	19.125	3.00	34.125
6/30/01	12.00	19.125	3.00	34.125
9/30/01	12.00	19.125	3.00	34.125
12/31/01	12.00	19.125	3.00	34.125
Subtotals:	$192.00	$225.00	$48.00	$465.00
On or before 3/31/2002				$75.00
TOTAL:				$540.00

The parties agree that if a need arises for an acceleration of the payment schedules listed above, they will work to achieve an acceptable replacement payment schedule, and reserve the right to come back to the Commission if an acceptable resolution cannot be reached. We note that no parties object to these agreements.

The agreed-upon transfer schedules appear reasonable and will be adopted. SDG&E, SCE, and PG&E should submit advice letters establishing ratemaking mechanisms to implement the transfer in accordance with the ALJ's June 18, 1997 ruling, i.e., 14 days after the effective date of today's decision.

XIX. Next Steps

In light of the issues addressed in today's decision, we recognize that the ALJ may need to consider whether revisions to the current procedural schedule are required. We direct the ALJ to hold a further implementation workshop to address scheduling and procedural issues, as soon as practicable. In the meantime, the Boards should continue working towards the procedural milestones established to date by ALJ and Commissioner rulings.

Findings of Fact

1. In D.97-02-014, the Commission directed utilities to retain their stewardship of DSM programs during the transition to a new administrative structure and to implement those programs in accordance with current DSM rules and shareholder incentives until the transition was complete.

2. Implementation of the new administrative structure for energy efficiency and low-income assistance programs, as envisioned in D.97-02-014, will require more time than originally anticipated.

3. The appointment of a state agency or agencies as interim administrators for energy efficiency and low-income assistance programs at this time would significantly divert the resources of the Boards, Commission staff and interested parties away from the implementation activities necessary to competitively procure new independent administrators.

4. Having a state agency administer energy efficiency and low-income assistance programs in the interim may be confusing to energy service providers and customers alike because they would be dealing with up to three different entities over a two-year period.

5. Establishing a fixed period for continuing the current administrative structure is consistent with the intent of D.97-02-014.

6. A deadline of October 1, 1998 for completion of the transition to new administration for energy efficiency programs is within the range of timelines presented by the CBEE.

7. A deadline of January 1, 1999 for completion of the transition to new administration for low-income assistance programs is not within the range of timelines presented by the LIGB, but should be achievable with current and enhanced resources.

8. Even though SoCal currently continues to operate its own energy efficiency and low-income programs, coordination in the planning and delivery of services requires that it work with the Boards and selected administrators.

9. In order to move more rapidly towards our market transformation goals during the transition to a new administrative structure, some changes to the existing DSM rules, program design and shareholder incentives may be needed.

10. Making changes to the existing DSM rules, program design and shareholder incentives for utility administration of energy efficiency programs during the transition can be considered through utility October 1, 1997 applications in time to provide meaningful guidance for utility stewardship during 1998 if hearings on disputed material facts are not needed.

11. Providing parties the opportunity to make such changes in a consensus building manner would assist in permiting resolution of issues in a timely manner.

12. Because CEC will have the opportunity to participate in the utilities' October 1 application process, a three-way planning process between CBEE, the CEC, and the utilities on research data funding issues is unwarranted.

13. The Advice Letter process is an inappropriate vehicle for considering the types of rule changes and program modifications contemplated by the utilities and CBEE for 1998 programs.

14. Beginning in 1998, funding of commitments from prior year DSM programs cannot be handled as they have been in the past because of changes in the regulatory framework for electric utilities.

15. D.97-02-026 limited funding for 1998 gas programs to 1996 levels.

16. The June 9, 1997 utility estimates of pre-1998 commitments are subject to considerable uncertainty and have not been verified by CBEE or reviewed in detail by other parties.

17. The level of pre-1998 commitments can be reasonably limited by not allowing utility expenditures and commitments in 1997 to exceed 100% of authorizations.

18. Managing the level of pre-1998 commitments by recommending modifications to current pay out dates is a logical extension of the Board functions articulated in D.97-02-014, Conclusion of Law 6.

19. The Boards' recommended contract pay out dates may not allow utilities to complete the inspection and verification process currently required.

20. The Boards' current projections of 1997 Board expenses justify an increase in start-up funding authorizations.

21. Even the high range of estimates of 1997 Board start-up expenditures represents a small percentage of surcharge funds.

22. Authorizing the high range of estimates of 1997 Board start-up expenditures will permit the Boards to proceed during the rest of 1997 without the need to submit a request for additional funding authorization for 1997 activities.

23. D.97-04-044 makes the Boards' operations subject to audit at the Commission's discretion.

24. CBEE's vision of administrative functions is not clearly consistent with the Commission's policy direction in D.97-02-014.

25. CBEE's bylaws do not specifically acknowledge the two-pronged approach to market transformation articulated in D.97-02-014.

26. Pending further assurance by the IRS, it would be premature to issue a final decision regarding the Boards' legal structure for administering funds authorized for energy efficiency and low-income assistance programs.

27. Directing the Boards to confer further with the IRS is consistent with the Commission's current approach to resolving legal structure issues for other Advisory Boards.

28. The Boards may not have the legal authority to sign contracts for staff resources or make any payments related to start-up activities until a number of legal issues are resolved, including their legal structure.

29. The issue of whether Advisory Boards will be able to hire permanent staff will depend on the legal structure that the Commission determines for the Boards.

30. LIGB proposes adoption of the FPPC standard Conflict of Interest Code, 2 Cal. Code of Regulations § 18730.

31. CBEE developed its own modified conflicts of interest code for Commission consideration.

32. SB 595 mandates that the Commission shall modify its own Conflict of Interest Code and Statement of Incompatible Activities by February 28, 1998, in a manner consistent with applicable law.

33. Revisions to the Commission's own Conflict of Interest rules or other circumstances may warrant modification of the interim conflict of interest rules we adopt today for LIGB and CBEE.

34. The Commission is responsible for the selection and screening of persons to serve on Advisory Committees, such as the CBEE and LIGB, including Board vacancies.

35. The use of Board subcommittees may be the most efficient approach to accomplishing the Boards' tasks, given the timeframe established in today's order.

36. The Commission and interested parties can be made fully aware of what Board work is undertaken in subcommittee meetings only if they are open to the public and noticed in accordance with the requirements of Bagley-Keene.

37. Advisory Committees appointed by the Boards are composed of a separate group of individuals selected on the basis of their expertise; they report directly to the Board at full Board meetings on technical or programmatic issues.

38. Well-functioning Boards and Advisory Committees should be able to exchange information without Board members attending Advisory Committee meetings. Attendance at those meetings by a Board member is more properly considered "preparation work" than Board work.

39. Per diem for a Board member's preparation work was denied by the Commission in D.97-04-044.

40. The per diem and expense reimbursement policies adopted by the Commission in D.97-04-044 apply only to Board members, with the exception that the portion of the rules governing payment of invoices also applies to expenses incurred by consulting and support services pursuant to contracts negotiated, signed, and approved by the Board.

41. The use of the term "support services" in reference to supplies and photocopying expenses incurred by Board members is ambiguous and should be deleted from the expense reimbursement rules.

42. The travel reimbursement limits currently in effect and applicable to Commission staff on official duty provide for a higher limit for designated high-cost areas, including San Francisco.

43. Reimbursement for working lunches during Board meetings or subcommittee meetings can be handled within the per diem limits applicable to Commission staff by charging each member a prorated share of the cost.

44. CBEE's proposed indemnification language includes a sentence that commits representation through the office of the California Attorney General, which goes beyond the indemnification provisions of D.97-04-044. Representation by the California Attorney General in any individual case will depend on such factors such as available staffing and expertise.

45. The issues to be addressed with regard to affiliate transactions in this proceeding are broader than those being considered in R.97-04-011/I.97-04-012, since

they include issues related to non-utility affiliate transactions in the case of non-utility program administrators.

46. The schedule for R.97-04-011/I.97-04-012 would have required that the Boards file their recommendations by June 2, 1997, which was not feasible.

47. A Board subcommittee of three or more constitutes a "state body" under Government Code § 11121.8.

48. A state body may meet in closed session purely to gather information for Board action, as long as no deliberation takes place. Deliberation includes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision. Deliberation includes the formation of recommendations for Board consideration.

49. CBEE has complied with instructions in D.97-02-014 to appoint a Technical Advisory Committee and to have the meetings of this advisory committee be as open as possible.

50. The closed session provision of Bagley-Keene applies to employees, but does not apply to any consultants, staff or administrators who are hired as independent contractors.

51. The administrative, technical, and legal consultants that CBEE has procured 1) have control over the work, including the details and the means by which the work is to be performed, 2) have been retained on an interim and limited term basis for a special project, namely the start-up operations, and 3) have their own offices.

52. The program administrators will be procured through the state procurement process and will control their own work on a specified project for a defined period of time.

53. The Legislature in enacting Government Code § 11123(b) was specifically concerned with the situation when a quorum would be "difficult or impossible" to assemble at one location, and not when a quorum was present.

54. Government Code § 11123(b) does not permit attendance by teleconferencing on or after January 1, 1998.

55. Allowing Board members to vote by proxy or by a member's representative is inconsistent with the Commission's directives in D.97-04-044.

56. It is reasonable to interpret CBEE's "a minimum of four votes" rule to mean that a measure may not pass unless it is supported by four votes.

57. Although Bagley-Keene requires the inspection and distribution of public documents, the Act does not mandate a specific method or means for public inspection or distribution.

58. CEC, SDG&E, PG&E, and SCE have reached agreement on all but one funding transfer issue related to renewables and RD&D, including the funding transfer schedule and amounts.

Conclusions of Law

1. The new administrator for energy efficiency programs should be in place and operating October 1, 1998.

2. The transition to a new administrator for low-income assistance programs should be completed by January 1, 1999.

3. Consistent with our direction in D.97-02-014 and our DSM rules, the Boards should recommend the pace and schedule for the transference of functions, funding assets and program commitments from utilities to the new administrators and phase-down of utility programs, as appropriate.

4. PG&E, SCE, SDG&E, and SoCal should not phase down programs prematurely as the Boards implement their transition plans. The Boards should monitor the transition and make recommendations to the Commission on how to address unreasonable gaps in services, should they arise during the transition.

5. Since it is the Commission's goal to have a gas surcharge for public purpose programs in the future, at which time SoCal's programs will also transfer to the new administrative structure, it is reasonable to require that SoCal provide the Boards with information needed to monitor the level of program activity.

6. PG&E, SCE, SDG&E, and SoCal, as part of a joint planning process with CBEE, should file applications on October 1, 1997 on DSM program plans pursuant to the

Assigned Commissioner's Ruling dated August 1, 1997. The filing of these applications should replace the existing Advice Letter process. The procedural schedule for addressing the October 1 applications and CBEE recommendations should be determined by the assigned ALJ, in consultation with the Assigned Commissioner. SoCal should remove proposals to modify shareholder incentives and to change other aspects of our rules from A.97-05-026 and include them in its October 1, 1997 application.

7. The October 1, 1997 applications may include proposed modifications to DSM rules, energy efficiency program designs, and shareholder incentives. These modifications should be designed to respond to the Commission's goal of market transformation and creation of a self-sustaining energy efficiency services industry. Such proposals should be developed with the transition deadlines established by this decision in mind.

8. The 1998 funding issues surrounding saturation survey, load metering, market assessment, and other research data collection activities should be addressed as part of the joint planning process and October 1, 1997 applications.

9. It is reasonable to track the 1998 costs associated with pre-1998 commitments at this time, and determine the cost recovery treatment at a later date.

10. Unspent 1997 funds should continue to be accounted for in existing DSM balancing accounts, or in new accounts established for this purpose as part of the tariff streamlining phase of this proceeding.

11. It is reasonable to limit the level of pre-1998 commitments by limiting 1997 expenditures and commitments to 100% of authorized levels for both gas and electric energy efficiency programs. This limit should apply to any gas or electric expenditures made in 1997 and to any financial commitments made during the 1997 operation of 1997 energy efficiency programs, including those incurred by SoCal.

12. CBEE recommended contract pay out dates should be approved for gas and electric programs, including those currently operated by SoCal, subject to modification after CBEE has conferred further with the utilities on the issue of inspection and verification.

13. In their October 1, 1997 applications, PG&E, SDG&E, SCE, and SoCal should:

- Propose a cost-accounting process that will work in concert with the cost-accounting process for transferring surcharge funds to accounts designated for CBEE activities in 1998, with no commingling of surcharge funds with non-energy efficiency activities unless approved by the Commission;

- Identify the size, timing, and causes of pre-1998 commitments and identify the assets or expected revenues that could help fund or offset those commitment levels during 1998. SDG&E, SCE, and PG&E should update the data in the June 9 filings.

- Present updated estimates of carryover funds, by program category; and

- Propose an accounting mechanism to track the 1998 costs associated with pre-1998 program commitments.

14. PG&E, SDG&E, SCE, and SoCal should modify the scope and content of their Annual DSM Report to include a separate section identified as pre-1998 program commitments. The utilities should work with CBEE to ensure reporting consistency and continuity between the utility June 9 filings, the October 1 applications and supplemental filing and April DSM reports.

15. It is reasonable to authorize the high range of estimates of 1997 start up costs for both Boards, with the expectation that these funding allowances will not be fully expended in 1997 and unused amounts will be available for 1998.

16. PG&E, SDG&E, and SCE should provide additional start-up funding to the Boards in the following amounts:

	LIGB	CBEE
Pacific Gas and Electric	$235,600	$262,120
Southern California Edison	235,600	262,120
San Diego Gas & Electric	117,800	131,060
Total:	$589,000	$,655,300

17. Consistent with our determinations in D.97-04-044 and D.97-05-041, these funds should be considered an advance from the utilities from expected 1998 funds from the

public goods surcharge, and such advances shall accrue interest at the commercial paper (prime, three months) rate.

18. PG&E and SCE should pay all bills for CBEE and LIGB, respectively. SCE and SDG&E should transfer their CBEE funding allocations to PG&E, and PG&E, and SDG&E should transfer their LIGB funding allocations to SCE.

19. It is reasonable to conduct an audit of the Boards' 1997, 1998, and 1999 operations, and determine the need for audits beyond 1999 at a later date.

20. CBEE should define the role and specific activities of the energy efficiency program administrator consistent with those general functions described in D.97-02-014, namely that the administrator:

- Assists the Board in selecting various projects;
- Pays monies to and verifies program milestones/performance indicators;
- Manages any Standard Offers;
- Collects the funds and manages the bank account;
- Provides administrative support to CBEE; and
- Will not deliver energy solutions.

21. Under the new administrative structure, project development and agreements with customers should be left to private companies, consistent with our policy direction in D.97-02-014. CBEE should obtain qualified analytic support services to review program effectiveness, rather than delegate that function to the program administrators.

22. The fourth sentence of Article 2.1 of CBEE's bylaws should be amended to more clearly reflect the two-pronged approach to market transformation articulated in D.97-02-014.

23. The Boards' bylaws should be clarified to explicitly state the advisory nature of their activities and the circumstances under which the Boards seek Commission review and approval before moving forward with their duties.

24. LIGB and CBEE should not organize themselves as Public Benefit Corporations or establish bank accounts and trust funds until important tax issues have been resolved.

25. LIGB and CBEE should revise their proposed bylaws and other start-up documents consistent with today's order, and file those documents together with proposed trust agreements as compliance filings for Commission review.

26. LIGB and CBEE should initiate steps to request a presubmission conference with the IRS to address any concerns the IRS may have regarding legal structure. Following the conference, CBEE and LIGB should provide the Commission with a status report plus further recommendations, as appropriate, regarding the issue of legal structure and tax-exempt status.

27. The utilities should continue to make payments from the accounts set up to record and track the Boards' start-up funds, up to the start-up funding levels approved in D.97-04-044 and augmented by today's decision. Pursuant to D.97-05-041, if a contract needs to be executed, the Board should select the provider, and the designated utility who signs the contract should not have any specific right to veto the selection. The utility should be responsible for making payments to the provider.

28. The language on page 4 of D.97-05-041 should be modified so that it cannot be interpreted to mean Board authorization to hire permanent employees.

29. The Boards should confer with Commission general counsel to establish a process for determining when the use of outside counsel is appropriate.

30. On an interim basis, LIGB and CBEE should comply with the FPPC standard Conflict of Interest Code, 2 Cal. Code of Regulations § 18730.

31. For purposes of applying 2 Cal. Code of Regulations § 18730, LIGB and CBEE should define "designated employees" to include all members of their respective Boards. LIGB and CBEE should use the "disclosure categories" proposed by LIGB and enumerated in this decision.

32. The conflict of interest rules we adopt today should apply to LIGB and CBEE until such time as they are either affirmed as final rules or modified by Commission order.

33. Sections 3.2 and 3.6 of the LIGB's proposed bylaws and Article 3.6 of the CBEE's proposed bylaws should be modified to clarify that the Commission shall make all screening and selection decisions regarding filling Board vacancies. The Boards should

be allowed to provide the Commission with the names of possible candidates for consideration.

34. The per diem provisions adopted in D.97-04-044 for Board meetings should be extended to Board subcommittee meetings that comply with Bagley-Keene until December 31, 1998, unless extended by further Commission order.

35. Reimbursement issues related to high cost areas and working lunches can be reasonably addressed within the per diem limits applicable to Commission staff on official duty, as described in this decision. The Boards should pay the prorated share of a working lunch for members whose lunches are not covered by either per diem or expense reimbursements.

36. The Boards' per diem and expense reimbursement rules should apply only to Board members, except as provided for by this decision.

37. CBEE's proposed indemnification language should be modified by deleting the language that commits to representation through the office of the California Attorney General.

38. The affiliate rules applicable to programs and funding administered by the Boards should be developed in this proceeding, until further notice.

39. The utilities should include in their October 1, 1997 program planning applications descriptions of their plans to coordinate customer information services regarding energy efficiency with their plans to educate customers about their choices for energy.

40. If there is deliberation or action by any Board subcommittee composed of three or more persons, then the meeting of this subcommittee should be public and noticed in the manner required by Bagley-Keene.

41. Bagley-Keene applies to the meetings of the Technical Advisory Committee.

42. A Board or advisory subcommittee composed of less than three should be permitted to gather and exchange information, as well as develop reports which include recommendations, in a nonpublic setting.

43. The closed session provision of Bagley-Keene does not apply to the selection, hiring, retention or approval of CBEE's administrative, technical, and legal consultants, because these consultants are independent contractors rather than employees.

44. The general goals of Bagley-Keene to have the public observe and participate are not thwarted if attendance by teleconferencing is permitted when a quorum is present in one location.

45. The Boards should be prohibited from teleconferencing if there is no quorum in one location, despite what is permitted by Government Code § 11123.

46. Government Code § 11123 does not prohibit teleconferencing where there is a quorum present.

47. Voting by proxy should not be permitted.

48. A quorum is required to "take action" under Bagley-Keene.

49. The number needed to transact business, including to conduct a meeting or take action, namely a quorum, is the same number that must be present for a vote.

50. The Boards should modify their bylaws to describe all the opportunities for public comment. The Boards should make as many opportunities for public comment available as possible, consistent with the Boards' obligation to conduct business in an orderly fashion.

51. LIGB and CBEE should establish a mailing list to facilitate a systematic way by which interested members of the public can request and receive any documents from a meeting that they could not attend. If the costs become exorbitant, the Boards may charge a fee or deposit for a copy of a public record, pursuant to Government Code § 11125.1(c).

52. Public purpose program surcharge funds collected for RD&D programs administered by the CEC should be sent by the utilities directly to the CEC's "Public Interest Research, Development and Demonstration Program Fund" trust account established for these funds, unless otherwise directed by the Legislature or the Commission. RD&D payments should be made on or before the following dates in the specified amounts, unless otherwise directed by the Legislature or the Commission:

RD&D Funds	*PG&E*	*Edison* ($ Millions)	*SDG&E*	*Total*
1/5/98	$5.94	$5.64	$0.78	$12.36
3/31/98	5.94	5.64	0.78	12.36
6/30/98	5.94	5.64	0.78	12.36
9/30/98	5.94	5.64	0.78	12.36
12/31/98	5.94	5.64	0.78	12.36
3/31/99	7.425	7.05	0.975	15.45
6/30/99	7.425	7.05	0.975	15.45
9/30/99	7.425	7.05	0.975	15.45
12/31/99	7.425	7.05	0.975	15.45
3/31/00	7.425	7.05	0.975	15.45
6/30/00	7.425	7.05	0.975	15.45
9/30/00	7.425	7.05	0.975	15.45
12/31/00	7.425	7.05	0.975	15.45
3/31/01	7.425	7.05	0.975	15.45
6/30/01	7.425	7.05	0.975	15.45
9/30/01	7.425	7.05	0.975	15.45
12/31/01	7.425	7.05	0.975	15.45
TOTALS:	$118.80	$112.80	$15.60	$247.20

53. The public purpose program surcharge funds collected for the renewables programs administered by the CEC should be sent by the utilities directly to the CEC's "Public Interest Renewable Resource Technologies Fund" trust account established for these funds, unless otherwise directed by the Legislature or the Commission. Payments should be made on or before the following dates in the specified amounts, unless otherwise directed by the Legislature or the Commission:

Renewable Funds	*PG&E*	*Edison* ($Millions)	*SDG&E*	*Total*
1/5/98	$9.60	$9.90	$2.40	$21.90
3/31/98	9.60	9.90	2.40	21.90
6/30/98	9.60	9.90	2.40	21.90
9/30/98	9.60	9.90	2.40	21.90
12/31/98	9.60	9.90	2.40	21.90
3/31/99	12.00	12.375	3.00	27.375
6/30/99	12.00	12.375	3.00	27.375
9/30/99	12.00	12.375	3.00	27.375
12/31/99	12.00	12.375	3.00	27.375
3/31/00	12.00	12.375	3.00	27.375
6/30/00	12.00	12.375	3.00	27.375
9/30/00	12.00	12.375	3.00	27.375
12/31/00	12.00	12.375	3.00	27.375
3/31/01	12.00	19.125	3.00	34.125
6/30/01	12.00	19.125	3.00	34.125
9/30/01	12.00	19.125	3.00	34.125
12/31/01	12.00	19.125	3.00	34.125
Subtotals:	$192.00	$225.00	$48.00	$465.00
On or before 3/31/2002				$75.00
TOTAL:				$540.00

54. If a need arises for an acceleration of the payment schedules listed in the Joint Statement, CEC, SDG&E, PG&E, and SCE should work to achieve an acceptable replacement payment schedule. They should come back to the Commission if an acceptable resolution cannot be reached.

55. In light of the issues addressed in today's decision, the assigned ALJ should consider whether revisions to the current procedural schedule are required.

56. In order to move expeditiously in implementing our policy goals, this order should be effective today.

INTERIM ORDER

IT IS ORDERED that:

1. The California Board for Energy Efficiency (CBEE) and the Low-Income Governing Board (LIGB), collectively referred to as "the Boards," shall recommend to the Commission the schedule for the transfer of functions, funding, assets, and program commitments from utilities to the new administrators and the phase-out of utility programs, as appropriate. The Boards shall manage this transfer consistent with our current policies and demand-side management (DSM) rules, or any modifications thereof made in this proceeding.

2. Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) shall continue as interim administrators of energy efficiency and low-income assistance programs until October 1, 1998 and January 1, 1999, respectively, and are authorized to use public purpose surcharge funds for this purpose. Some programs or activities currently administered by PG&E, SCE, and SDG&E may transition earlier to the new administrators, depending upon the transfer schedule recommended by the Boards and adopted by the Commission.

3. CBEE and LIGB shall each submit an updated status report on the transition to new administrators by April 1, 1998 and September 1, 1998, respectively. The reports

shall be filed at the Commission's Docket Office and served on the Special Public Purpose service list in this proceeding.

4. PG&E, SCE, SDG&E, and Southern California Gas Company (SoCal) shall prepare monthly reports comparing authorized funding for energy efficiency and low-income assistance programs with actual commitments and expenditures. These reports shall be filed at the Commission's Docket Office and served on the Special Public Purpose service list in this proceeding on the first of the month, beginning November 1, 1997, until the new administrators are in place. Copies shall be submitted to the Boards.

5. PG&E, SCE, SDG&E, and SoCal, as part of a joint planning process with CBEE, shall file applications on October 1, 1997 on DSM program plans pursuant to the Assigned Commissioner's Ruling dated August 1, 1997 and as described in this decision. The procedural schedule for addressing the October 1 applications and CBEE recommendations shall be determined by the assigned Administrative Law Judge (ALJ), in consultation with the Assigned Commissioner. The filing of these applications shall replace the existing Advice Letter process for energy efficiency programs. The existing Advice Letter process shall continue to apply to low-income assistance programs.

6. SoCal shall remove proposals to modify shareholder incentive mechanisms and other rules (e.g., measurement protocols and funding flexibility rules) from the Annual Earnings Assessment Proceeding (AEAP), Application 97-05-026 and include them in the October 1, 1997 application for 1998 program plans, as described in this decision.

7. Existing DSM rules, including shareholder incentive mechanisms shall apply to utility DSM programs and activities during 1998 unless modified by Commission order.

8. As described in this decision, 1997 DSM program expenditures and commitments for PG&E, SCE, SDG&E, and SoCal shall be limited to 100% of authorized levels. This limit shall apply to any gas or electric expenditures made in 1997 and to any financial commitments made during the 1997 operation of 1997 energy efficiency programs.

9. The following contract pay out end dates are approved, subject to modification after CBEE has conferred further with the utilities on the issue of inspection and

verification. These dates shall apply to both gas and electric energy efficiency programs, including those currently operated by SoCal.

- For 1997 New Construction programs, December 31, 1998.
- For 1997 Energy Management Services programs, December 31, 1997.
- For 1997 Energy Efficiency Incentive programs, not pertaining to contracts associated with Commission-approved DSM pilot bidding programs, July 1, 1998.
- For all other activities funded from DSM accounts, December 31, 1997.

10. If CBEE recommends further modifications to the contract pay out end dates adopted by this decision, it shall notify the Commission by filing a statement with the Commission's Docket Office no later than December 1, 1997. Copies shall be served on the Special Purpose Service list in this proceeding.

11. By October 15, 1997, as a supplement to their October 1, 1997 applications, PG&E, SDG&E, SCE, and SoCal shall:

- Propose a cost-accounting process that will work in concert with the cost-accounting process for transferring surcharge funds to accounts designated for CBEE activities in 1998, with no commingling of surcharge funds with non-energy efficiency activities unless approved by the Commission;
- Identify the size, timing, and causes of pre-1998 commitments and identify the assets or expected revenues that could help fund or offset those commitment levels during 1998. PG&E, SDG&E, and SCE shall update the data in their June 9 filings;
- Present updated estimates of carryover funds, by program category; and
- Propose an accounting mechanism to track the 1998 costs associated with pre-1998 program commitments.

These supplemental filings shall be filed at the Commission's Docket Office and served on the Special Public Purpose service list in this proceeding. Parties shall have ten days from the date of filing to file comments on the supplemental information.

12. PG&E, SDG&E, SCE, and SoCal shall modify the scope and content of their Annual DSM Reports to include a separate section identified as pre-1998 program commitments. The utilities shall work with CBEE to ensure reporting consistency and continuity between the utility June 9 filings, the October 1 filings (and supplement) and April DSM reports.

13. Additional start-up funds for each Board shall be provided by PG&E, SCE, and SDG&E in the following amounts:

	LIGB	CBEE
Pacific Gas and Electric	$235,600	$262,120
Southern California Edison	235,600	262,120
San Diego Gas & Electric	117,800	131,060
Total:	$589,000	$655,300

14. PG&E and SCE shall pay all bills for CBEE and LIGB, respectively. SCE and SDG&E shall transfer their CBEE funding allocations to PG&E, and PG&E and SDG&E shall transfer their LIGB funding allocations to SCE.

15. The Energy Division shall conduct financial and administrative audits of 1997, 1998, and 1999 operations for both Boards. The Energy Division may hire consultants to perform these audits if the audits cannot be performed by Commission staff and shall use energy efficiency and low-income assistance surcharge funds for this purpose. The Energy Division shall report audit results for 1997 and make recommendations to the Commission no later than July 1, 1998. Audit results and recommendations for 1998 and 1999 shall be reported by July 1, 1999 and July 1, 2000, respectively.

16. CBEE shall amend the fourth sentence of Article 2.1 of its proposed bylaws to read:

> "The purpose of the Board is to serve in an advisory capacity to the CPUC, in which the Board make recommendations to the Commission concerning the independent administration of energy efficiency programs designed to transform the market by privatizing the provision of cost-effective energy services by (a) promoting a vibrant self-sufficient energy efficiency industry through programs that encourage direct interactions and negotiations between private energy efficiency providers

and customers, and (b) promoting the 'upstream' market (e.g., manufacturers and retailers) so that energy efficient products and services are available and advertised by private vendors and builders."

17. CBEE shall define the role and expected activities of the administrators consistent with the description of general functions articulated in D.97-02-014, as clarified by this decision. Specifically, the energy efficiency program administrator or administrators shall perform the following general functions:

- Assist the Board in selecting various projects;
- Pay monies to and verify program milestones/performance indicators;
- Manage any Standard Offers;
- Collect the funds and manage the bank account;
- Provide administrative support to CBEE; and
- Refrain from delivering energy solutions.

Under the new administrative structure, project development and agreements with customers shall be left to private companies. CBEE shall obtain qualified analytic support services to review program effectiveness, rather than delegate that function to the program administrators.

18. In addition to other modifications to Board start-up documents required by today's decision, the Boards' bylaws shall be clarified to explicitly state the following:

a. the Boards act in a purely advisory capacity and have no decision making authority over policy or program issues.

b. the Commission has sole authority over the regulated utilities involved in the programs.

c. the Board members are at all times subject to the direction, control, and approval of the Commission while performing their duties and actions taken by the Boards.

d. the circumstances under which the Boards seek Commission review and approval before moving forward with their duties shall include:

(1) determination and naming of Board membership;

(2) approval of Board filings (charters, bylaws, including Board member reimbursement guidelines and conflict of

interest rules, trust agreements, etc.) and amendments thereto as required by the Commission;

(3) approval of Board operating budgets;

(4) approval of all guidelines, including proposed modifications to DSM rules, that delineate the scope of energy efficiency or low-income assistance activities that will be eligible for funding, that define allocation and accounting principles, including applicable cost-effectiveness criteria, that specify how administrative performance shall be monitored and evaluated, and that establish rules governing affiliate roles, potential conflicts of interest, market power abuse and self-dealing;

(5) approval of the RFPs for program administration; and

(6) approval of the contracts with selected program administrators.

19. The Boards shall modify Section 4.1 of their proposed bylaws to read as follows (additions underlined):

> 4.1 Duties. The Board shall have the following duties and responsibilities. <u>While performing these duties and responsibilities, the Board members are at all times subject to the direction, control and approval of the CPUC. The CPUC has all policy and program decisionmaking authority. The Board shall act in an advisory capacity to the CPUC.</u>

20. CBEE shall modify Section 8.1 of its bylaws to read as follows (additions underlined):

> 8.1 <u>The Board shall have the power to carry out its duties and responsibilities as specified in Section 4.1 of these bylaws.</u> The Board shall not have the authority to direct utility distribution companies to act or refrain from acting. Such authority shall remain solely with the CPUC.

21. LIGB and CBEE shall revise their proposed bylaws and other start-up documents consistent with today's order, and file those documents together with proposed trust agreements as compliance filings for Commission review. These

compliance filings shall be filed at the Commission Docket Office and served on the Special Public Purpose service list in this proceeding no later than twenty days from the effective date of today's order. Parties may file comments on the compliance filings no later than ten days thereafter.

22. The Boards' compliance filings shall contain markings that clearly indicate all language changes to the documents presented in the Boards' July 18, 1997 start-up filings. The Boards shall prepare a table of cross-references between the language modifications or clarifications required by today's decision and the location of specific language complying with those requirements in the compliance documents. The Commission shall inform the Boards of the results of its review by a letter from Executive Director, or by Commission decision or resolution, as deemed appropriate by the assigned Commissioner in consultation with the assigned ALJ.

23. As described in this decision, LIGB and CBEE shall initiate steps to request a presubmission conference with the Internal Revenue Service (IRS) to address any concerns the IRS may have regarding the use of a trusts or other chosen legal structure, and to explain why the chosen structure is appropriate under state law to carry out the Commission's purpose. Following a presubmission conference with the IRS, the CBEE, and LIGB shall provide the Commission with a status report and further recommendations, as appropriate, regarding the issue of legal structure and tax-exempt status. The report and recommendations shall be filed in this proceeding and served on the Special Public Purpose service list. The first report shall be filed no later than January 1, 1998, and every three months thereafter until no longer needed.

24. The utilities shall continue to make payments from the accounts set up to record and track the Boards' start-up funds, up to the start-up funding levels approved in D.97-04-044 and augmented by today's decision. Pursuant to D.97-05-041, if a contract needs to be executed, the Board shall select the provider, and the designated utility who signs the contract shall not have any specific right to veto the selection. The utility shall be responsible for making payments to the provider.

25. D.97-05-041 shall be modified by deleting the words "or for a long term" from the first full paragraph of Section 4. Procedures for Obtaining Staff Resources (mimeo., p. 4.)

26. On an interim basis, LIGB and CBEE shall comply with the Fair Political Practices Commission standard Conflict of Interest Code, 2 Cal. Code of Regulations § 18730. For purposes of applying 2 Cal. Code of Regulations § 18730, LIGB and CBEE shall define "designated employees" to include all members of their respective Boards. LIGB and CBEE shall use the disclosure categories proposed by LIGB and enumerated in this decision. The conflict of interest rules we adopt today shall apply to LIGB and CBEE until such time as they are either affirmed as final rules or modified by Commission order. Each Board shall designate a representative who will be responsible for obtaining the necessary reporting and disclosure forms from the Commission's filing officer.

27. LIGB shall modify Section 3.6 and CBEE shall modify Articles 3.2, 3.3, and 3.6 of its bylaws as follows:

a. Section 3.6 (LIGB) and Article 3.2 (CBEE) shall be modified to read:

> "The CPUC shall appoint all Board members, who shall be chosen from nominees submitted by the Board and by interested members of the general public. The Board shall publish notice seeking nominees to the Board in the CPUC daily calendar at least thirty (30) days prior to September 1, 1999 for Board terms beginning January 1, 2000, and shall publish comparable written notice in the CPUC Daily Calendar seeking nominees for all other Board positions which shall become available."

b. Article 3.3 (CBEE) shall be modified to add the clause "solicited in accordance with Article 3.2" after the phrase "New Board member nominations."

c. Article 3.6 (CBEE) shall be modified to read as follows:

> "If a Public Seat is vacated, the Board shall solicit nominations of candidates to fill such vacancy in accordance with the provisions of Article 3.2, and shall forward such nominations,

including the Board's own recommendations, to the CPUC for approval."

28. The per diem provisions adopted in D.97-04-044 for Board meetings shall be extended to Board subcommittee meetings that comply with the Bagley-Keene Open Meeting Act (Bagley-Keene) until December 31, 1998, unless extended by further Commission order. Per diem shall not be extended to Board member attendance at Advisory Committee meetings.

29. The Boards' proposed reimbursement rules for expenses shall be modified as follows:

a. The first sentence of the proposed rules (under "Reasonable Expenses"), which reads: "Reasonable expenses of all Board members related to attendance and participation in Board activities will be reimbursed" shall be replaced with the following:

"Reasonable expenses of Board members related to attendance and participation in Board activities will be reimbursed as described in this section. Until December 31, 1998, unless extended by Commission order, the provisions of this section shall also apply to expenses of Board members related to attendance and participation in Board subcommittee meetings that are public and noticed in accordance with the provisions of the Bagley-Keene Open Meeting Act."

b. CBEE shall include the higher reimbursement limit of $110.00 plus tax for lodging per night for state-designated high cost areas, including San Francisco.

c. CBEE and LIGB shall delete references to "support services" incurred by Board members.

d. CBEE and LIGB shall clarify that the procedures for invoice payment are the same for both reimbursement of Board member per diem and expenses and for expenses incurred by consulting and support services pursuant to contracts negotiated, signed and approved by the Board.

30. CBEE shall delete the second sentence of Article 3, Section 3.7 of its proposed bylaws, that reads: "Accordingly the State will provide legal representation to such

persons through the office of the California Attorney General, and will indemnify such persons for any losses incurred by reason of any act or failure to act occurring within the scope of the services they perform for the Board."

31. The affiliate rules applicable to programs and funding administered by the Boards shall be developed in this proceeding, until further notice. To facilitate coordination with developments in Rulemaking (R.) 97-04-011/Investigation (I.) 97-04-012, the Boards shall serve copies of their proposed affiliate transaction rules on the service list in that proceeding, and the assigned Administrative Law Judge shall solicit comments on those filings from parties to R.97-04-011/I.97-04-012.

32. In their October 1, 1997 applications, PG&E, SCE, SDG&E, and SoCal shall include descriptions of their plans to coordinate customer information services regarding energy efficiency with their plans to educate customers about their choices for energy, i.e., the Commission's Customer Education Plan. The utility's message content shall conform to the Commission's changed goals for energy efficiency, as stated in Finding of Fact 1 in D.97-02-014.

33. CBEE and LIGB shall modify their bylaws and other start-up documents to conform with the requirements of the Bagley-Keene, as described in Section 17 of this decision.

34. The Boards comply with all provisions set forth in Government Code § 11123(b)(1)(A)-(F) if there is any teleconferencing during a meeting. The Boards should incorporate these specific requirements in their Proposed Bylaws and Operating Rules (if applicable).

35. The Boards shall be prohibited from teleconferencing if there is no quorum present in one location, despite what is permitted by Government Code § 11123.

36. Both the CBEE and the LIGB shall state in their Proposed Bylaws and Operating Rules (as applicable) that attendance by teleconferencing is not permitted on or after January 1, 1998, unless the Legislature reenacts the provisions of Government Code § 11123(b).

37. The CBEE shall modify its " a minimum of four votes" rule as follows:

> "Decisions shall be made by majority vote or supermajority vote (as provided for in the operating rules) of those voting members present, provided that no measure shall pass unless, under all circumstances, a minimum of four members vote in support of the measure."

38. The following language in Article 5.3 of the CBEE's Proposed Bylaws and Section 6.4 of the LIGB's Proposed Bylaws shall be deleted:

> "A meeting at which a quorum is initially present may transact business notwithstanding the withdrawal of members, if any action taken is approved by at least a majority of the required quorum for the meeting."

39. The CBEE shall modify its Operating Rules to eliminate the possibility that a vote could occur when there is less a quorum present.

40. CBEE shall remove the language "or the member's representative" from Article 5.3 of its proposed bylaws and any other references to voting by proxy, including for Institutional Members.

41. CBEE and LIGB shall modify their bylaws to describe all the opportunities for public comment, and make such opportunities available consistent with their obligation to conduct business in an orderly fashion.

42. As soon as practicable, LIGB and CBEE shall establish a mailing list to facilitate a systematic way by which interested members of the public can request and receive any documents from a meeting that they could not attend. If the costs become exorbitant, the Boards may charge a fee or deposit for a copy of a public record, pursuant to Government Code § 11125.1(e).

43. No later than 14 days from the effective date of this decision, SDG&E, SCE, and PG&E shall submit advice letters establishing ratemaking mechanisms to implement the transfer of funds for Renewables and Research, Development and Demonstration, as set forth in this decision.

44. The assigned ALJ shall hold a further implementation workshop to address scheduling and procedural issues, as soon as practicable. In the meantime, the Boards shall continue working towards the procedural milestones established by assigned ALJ and Assigned Commissioner rulings.

This order is effective today.

Dated September 24, 1997, at San Francisco, California.

JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

Commissioner P. Gregory Conlon, being necessarily absent, did not participate.