

Mailed 12/22/98

Decision 98-12-066 December 17, 1998

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.

Rulemaking 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.

Investigation 94-04-032
(Filed April 20, 1994)

**Opinion Qualifying Facility Restructuring
Reasonableness Letter Proposal**

1. Summary

This decision addresses the Qualifying Facility Restructuring Reasonableness Letter (QFRRL) proposal made by six parties to this proceeding, and two proposals made by seven Joint Parties in comments on the draft decision. We adopt a proposal of the Joint Parties for a restructuring Advice Letter process, with modifications, to address certain QF contract modification proposals in the instances when the restructuring Advice Letter has the support of the Office of Ratepayer Advocates.

2. Procedural Background

Decision (D.) 96-12-088 (the Roadmap 2 Decision) requested interested parties to file proposals to establish a generic method to review contract modifications, possibly including standard measures of reasonableness, and possibly involving an expedited process. (D.96-12-088, *slip op.* at Ordering

Paragraph 3.) The Roadmap 2 Decision also stated that the process established to review contract modifications should respect the principles outlined in D. 95-12-063, as modified by D.96-01-009, the Commission's Preferred Policy Decision in this docket.

Since the issuance of D.96-12-088, the parties have filed proposals, the Commission has conducted a workshop, the Energy Division has issued a workshop report, and Assigned Commissioner Neepor held two all-party meetings to discuss these issues. In their proposals, at the workshop, and at the all-party meetings, numerous parties have raised a variety of issues.

On February 6, 1998, Assigned Commissioner Neepor and Administrative Law Judge (ALJ) Econome issued a ruling setting forth at least four issues which are appropriate for the Commission to address now in order to further facilitate qualifying facility (QF) contract restructuring or modification and Commission review thereof. The ruling also established a briefing schedule on these issues.

The ruling described the first issue to be briefed as follows:

"Six parties have agreed on a new QFRRL process, which they propose the Commission adopt. A copy of that process is attached to this ruling as Attachment A. Please comment on whether the Commission should adopt the QFRRL Process set forth in Attachment A." (February 6, 1998 Ruling at p. 3.)

The following parties filed comments or replies pursuant to the February 6 ruling: California Integrated Waste Management Board; Enron Capital and Trade Resources (Enron); Independent Energy Producers Association and California Cogeneration Council (IEP/CCC); NRG Energy, Inc. (NRG Energy); Office of Ratepayer Advocates (ORA); Joint Comments of Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company (Joint Utility Commenters); Southern California Gas Company (SoCalGas); and Watson Generation Company (Watson). All commenting parties

either agree that the Commission should adopt the QFRRL proposal, or do not object to this proposal. The California Integrated Waste Management Board proposes that the Commission adopt the QFRRL proposal initially for up to two years.

On June 10, 1998, various parties filed a motion proposing the adoption of a settlement agreement on QF contract restructuring and modification issues. On June 18, 1998, the Assigned Commissioner and ALJ issued a ruling noting that the settlement is not an "all-party" settlement, but recognizing that, based on the record to date, all commenting parties agree that the Commission should adopt the QFRRL proposal. The ruling requested that at the same time the parties file comments to the motion for settlement approval, they comment on whether the Commission should separately consider the QFRRL proposal from the rest of the issues in the case, or whether the Commission should decide all the QF contract restructuring issues encompassed by the proposed settlement at the same time.

The following parties filed comments to the proposed settlement: the Joint Utility Commenters, IEP/CCC, NRG Energy, and Enron (jointly); ORA; SoCalGas, The Utility Reform Network; and Watson. No party objected to the Commission adopting the QFRRL proposal. Moreover, all commenting parties support the Commission addressing the QFRRL issue separately if such bifurcation will expedite approval of the QFRRL proposal.

Because the remaining issues proposed by the settlement are more complex, this decision only addresses whether the Commission should adopt the QFRRL proposal in order to expedite the resolution of this issue, and whether the Commission should adopt other related processes proposed by the Joint Parties in comments on the draft decision.

3. Overview of the QFRRL Proposal

The QFRRL proposal is attached to this decision as Attachment A. This section provides a brief overview of this proposal, but does not attempt to describe all sections and nuances of the proposal.

The QFRRL proposal provides that the utility, at its discretion, may submit all voluntarily negotiated QF power purchase agreement restructurings (contract restructurings) to ORA for a contract restructuring reasonableness letter (QFRRL). ORA has the discretion to review the agreement to determine whether it is reasonable. If ORA chooses to review the agreement, it should endeavor to issue a tentative QFRRL within 45 days after receiving the required information from the utility.

ORA's issuance of the tentative QFRRL will be noticed on the Commission's Daily Calendar. This notice will also schedule a comment conference on the QFRRL. At the comment conference, parties may inquire about the nonconfidential portions¹ of the utility's submission to ORA and express their concerns about the proposed restructuring. Parties having objections then submit written objections to both the utility, the QF, and ORA. The utility and QF then have an opportunity to respond to ORA concerning the objections.

If, in response to the comment conference and objections, ORA modifies the QFRRL, the utility and QF are served with the modified QFRRL and have a further opportunity to respond thereto. If no comments are received, the

¹ The QFRRL proposal also states that upon agreement of the utility and QF, representatives of other ratepayer advocate organizations may obtain access to confidential information if they sign an appropriate confidentiality agreement.

modified QFRRL becomes final. If ORA receives comments, it may withdraw, finalize, or further modify the QFRRL.

The QFRRL proposal contains sections addressing the minimum amount of information that the utility's QFRRL submission to ORA should include. It also contains sections addressing confidential information and the minimum amount of information ORA's QFRRL should include.

The QFRRL proposal states that after ORA issues the QFRRL, the utility should submit (1) the general terms of the restructuring; (2) the QFRRL; and (3) all information provided to ORA during the QFRRL process in the next Energy Cost Adjustment Clause (ECAC) application² or successor reasonableness application, or in a separate application. The utility retains the burden of proof in establishing that timely third party objections (made during the process leading to the issuance of the QFRRL) do not establish grounds for the Commission's rejection of the proposed restructuring. Except for the issues for which the utility retains the burden of proof, the restructuring shall be presumed to be reasonable and shall be approved by the Commission. ORA and other parties who did not submit timely objections in accordance with the QFRRL process shall have the burden of proof in rebutting this presumption. To meet this burden, they must show that the information submitted by the utility in support of the QFRRL was materially inaccurate or misleading, based upon information known, or which should have been known, to the utility at the time the information was submitted.

² In D.97-10-057, the Commission eliminated the ECAC mechanism as of January 1, 1998. The ECAC mechanism was in effect extended to March 31, 1998 by D. 97-12-131.

The QFRRL proposal states that in addressing the reasonableness of the proposed restructuring, the Commission may either issue reasonableness findings specific to the restructuring or issue general reasonableness of operations findings for the entire ECAC proceeding.

4. Parties' Positions

All parties either supported or did not object to the Commission adopting the QFRRL proposal.³ ORA and IEP/CCC joined in the arguments of the Joint Utility Commenters. These joint comments state that obtaining final Commission approval of QF restructurings is a lengthy process, which creates uncertainty and increases risk. Because of this process, QFs are reluctant to enter into discussions with utilities about additional restructurings.

The joint comments explain that currently, the utilities have several options in seeking review of a QF contract restructuring: (1) obtain an ORA "reasonableness assessment letter," which is an opinion letter from ORA that the proposed restructuring terms are reasonable; (2) submit a formal application for Commission approval of the restructuring; or (3) seek approval of the restructuring as part of the utility's overall reasonableness review.

The joint comments state that the QFRRL proposal would preserve these current options while adding a new option for certain contract restructurings. The comments explain that the QFRRL proposal will afford parties an optional expedited procedure to approve bilaterally negotiated contract modifications, while preserving the right of any interested party to comment on the proposed

³ The parties state that the support of ORA, the utilities, and IEP for the QFRRL proposal is conditioned upon the Commission adopting the proposal as written. If the Commission modifies the proposal, these parties reserve the right to withdraw their support.

restructuring during the QFRRL process. The final QFRRL, which is issued after interested parties receive notice and an opportunity to comment on the proposed restructuring, will cause the restructuring to be presumed reasonable and approved in a reasonableness proceeding or separate application without further Commission review. Parties who fail to submit timely objections to the proposed restructuring will have the burden of proof in rebutting this presumption. The joint comments argue that the QFRRL proposal expedites the process for obtaining Commission approval, and thereby minimizes the risk and uncertainty associated with sometimes protracted reasonableness proceedings.

The California Integrated Waste Management Board suggests that the Commission approve the QFRRL proposal for up to two years, in order to determine both how well it works and whether the QFs who have not been part of the negotiations which led to the drafting of the QFRRL proposal would use it.

5. Discussion

We commend the parties for their cooperation in developing and agreeing to the QFRRL proposal. Because the parties believe that this process will encourage restructurings with readily quantifiable and demonstrable benefits and costs, the ALJ proposed to adopt on an interim basis the QFRRL proposal as set forth in Appendix A, as more fully discussed below, subject to the following modifications and clarifications. The ALJ made these modifications and clarifications largely to address Commission process, i.e., how the Commission will process certain requests for approval, and what proposals might be binding on the Commission without further review. These issues go to the heart of the Commission's decisionmaking authority, and to some extent, cannot be compromised by the parties without ensuring that the process conforms with the Commission's legal duties and obligations. We will include the major part of this discussion here in order to provide a context for our discussion below, where

we address comments to the draft decision, the proposals of the Joint Parties, and our adopted modifications to one of the proposals of the Joint Parties.

5.1. *Commission Approval Process and Presumption of Reasonableness*

The QFRRL proposal makes a substantive change to Commission policy in that, under certain circumstances where no party has timely objected to the contract restructuring, and ORA has issued a QFRRL, the Commission would approve in a reasonableness proceeding a QF contract restructuring based on ORA's QFRRL without further review.

Public utility regulation in general is factually intensive. Regulation also involves consideration of many policies, some of which may compete with each other at least some of the time, and application of the governing law. The Commission's role is to determine facts, weigh policy objectives, ensure conformity with the law, and reach a reasonable outcome.

Notwithstanding the parties' agreement or lack of objection to an issue, the Commission has the independent duty to ensure that its decisions are consistent with the record, the law, and in the public interest. The California Supreme Court's discussion of the extensive functions delegated to the Railroad Commission (the predecessor to this Commission) with respect to highway common carriers applies to general descriptions of this Commission's authority.

"Created by the Constitution in 1911, the commission was designed to protect the people of the state from the consequences of destructive competition and monopoly in the public service industries. Although it has been termed a 'quasi-judicial' tribunal in some of its functions, its powers and duties go beyond those exercised by the judicial arm of government. A court is a passive forum for adjusting disputes, and has no power either to investigate facts or to initiate proceedings. Litigants themselves largely determine the scope of the inquiry and the data upon which the judicial judgment is based.

"The powers and functions of the Railroad Commission are vastly different in character. It is an active instrument of government charged with the duty of supervising and regulating public utility services and rates." (*Cal. etc. Transport Co. v. Railroad Com.*, 30 Cal.2d 184, 188 (1947).

The Commission has recognized that the unanimous recommendation of parties to the proceeding is often (though not always) a reliable guidepost to reasonable outcomes. However, even in "all-party" settlements presented to the Commission, the Commission exercises its independent judgment in determining whether all affected interests are represented in the proceeding and the record and the law are consistent with the settlement. (See D.92-12-019, 46 CPUC2d 538.)⁴

Thus the utility applicant still must meet its burden of proof in persuading the Commission that the proposed restructuring is reasonable. Therefore the Commission should not be bound, under the specific circumstances specified in the QFRRL proposal, to issue a decision in conformance with the parties'

⁴ D.92-12-019 is a leading decision on all-party settlements. In that decision, the Commission said that we would be "prepared to adopt a settlement that meets sponsorship and content criteria" pertaining to "both the identity and capacity of the sponsoring parties and the terms of their recommendation. As a precondition to our approval" of a proposed all-party settlement, we said that we would expect the record to support the following findings:

- "a. [that] all active parties to the instant proceeding" join in the sponsorship;
- "b. that the sponsoring parties are fairly reflective of the affected interests;
- "c. that no term of the settlement contravenes statutory provisions or prior Commission decisions;
- "d. that the settlement conveys ...sufficient information to permit us to discharge our future regulatory obligations with respect to the parties and their interests." (46 CPUC2d at 550-551, footnote omitted.)

agreement without further review. The Commission, after considering the full record, must still exercise its independent judgment in approving the contract restructuring. Therefore, we would only adopt the QFRRL as so modified.

5.2. Burden of Proof as Between Parties

The QFRRL proposal also is a substantive change in Commission policy on the issue of burden of proof. Under the QFRRL proposal, after ORA signs the final QFRRL, the burden of proof shifts from the utility on all issues that were not raised earlier in the process. Parties who do not submit timely objections to the contract restructuring during the period prior to the issuance of the QFRRL have the burden of proof in rebutting the presumption of reasonableness by showing the information submitted by the utility in support of the QFRRL was materially inaccurate or misleading based upon information known, or which should have been known, to the utility at the time the information was submitted. The utility retains the burden of proof for issues that are timely identified during the period preceding ORA's issuance of the QFRRL.

The parties sponsoring the QFRRL proposal argue that this shift in the burden of proof is advantageous to the utility, the QF, and ratepayer by allowing any opposition to a proposed restructuring to be identified expeditiously, and "by creating a climate in which the utilities will assume greater willingness to consummate restructurings with QFs without subjecting the transaction to the condition precedent of prior Commission approval." (March 25, 1998 Comments of Joint Utility Commenters at p. 5.) They also argue that delays reduce the amount of ratepayer savings that can be captured through restructuring and may inhibit the desire of some parties to enter into negotiations at all.

Given that interested parties have notice and an opportunity to object to a proposed restructuring prior to the utility filing an application under

the QFRRL proposal, we agree that it would be reasonable to allow shifting the burden of proof as among parties to the proceeding. However, as noted above, the Commission cannot delegate its decisionmaking authority to the parties, and still must exercise its independent judgment based on the record in determining whether to approve a contract restructuring.

5.3. Confidentiality

The QFRRL proposal contains a section on confidentiality that differs from Commission policy in formal proceedings. It also provides that the utility, not the Commission, determine what information should be kept confidential and that information would then be confidential for five years after submittal.

The California Public Records Act (Government Code § 6250 et seq.) provides that "the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Government Code § 6250.) Although the Commission sometimes designates documents as confidential and to be kept under seal in appropriate circumstances (see, e.g., General Order 66-C and Public Utilities Code § 583), it is Commission policy that a party seeking confidential treatment in a formal Commission proceeding has the burden of proof in justifying its request. (See, e.g., Resolution ALJ-164.)

We therefore clarify that Section 2 of the QFRRL proposal, which is entitled "Confidential Information," would have applied to the parties' use of such information during the process leading up to the final QFRRL, except as modified by further order or ruling of the Commission or an appropriate ALJ. Once a utility presents the restructured contract for Commission approval under Section 7 of the QFRRL proposal, either by application or in a reasonableness

review or otherwise, it must make an appropriate motion pursuant to Resolution ALJ-164, or a superseding provision, requesting that the information be kept confidential.

5.4. *Notice to Objectors*

If we were to have adopted the QFRRL process we would have had to modify it to conform to basic due process requirements, i.e., notice and opportunity to be heard. Under the QFRRL proposal, if any person objects to the tentative QFRRL by written comments, these comments are served on ORA, the utility and the QF. The utility and QF then have the opportunity to respond to the objections to ORA, and are only required to serve their objections on ORA. We would have modified Part 2e of the QFRRL proposal to require that the utility and QF also serve their response to the objections on the objecting party, as well as ORA.

Similarly, under the QFRRL proposal, if ORA modifies the tentative QFRRL, it must serve the QF and utility with a copy of the modified QFRRL, and the QF and utility have an opportunity to respond thereto (see Section 2g). We would have modified this portion of the proposal to require that any ORA modification of the QFRRL should also be served on any person who filed written objections to the tentative QFRRL that led to the comment conference. We believe these two changes would have better served the interests of due process for all participants.

5.5. *Contract Restructurings Between a Utility and Its Affiliates*

The QFRRL process, by design, places most of the review of the proposed contract restructuring in an informal workshop setting before the utility formally files the request for approval with the Commission. As a practical reality of the decisionmaking process, a proposed contract restructuring which receives a QFRRL and which is unopposed will be subject to less scrutiny

than a proposed restructuring which does not receive a QFRRL, or one that is controverted. Because, in most circumstances, the principal parties to the contract restructuring and review (the utility, the QF and ORA) negotiate at arms length, we would have been comfortable in adopting the QFRRL process, as modified and clarified by this decision. However, in instances where the QF is an affiliate of the utility, the possibility exists that the contract negotiations might not be at arms length. We therefore believe that the QFRRL process is not always appropriate for reviewing contract restructurings involving a utility and its QF affiliate. We would have seriously considered the comments made by Watson regarding procedural safeguards that could have been adopted in lieu of a wholesale ban on review of affiliate restructurings via the QFRRL process.

6. Comments on the Draft Decision

On October 16, 1998, the following parties filed comments on the September 2, 1998 draft decision of ALJ Econome: ORA; Watson; SoCalGas; and the Joint Parties consisting of Southern California Edison Company; Pacific Gas and Electric Company; San Diego Gas and Electric Company; IEP/CCC; Enron and NRG Energy, Inc. (Joint Parties). Although all parties supported the original QFRRL process, no party supported the ALJ's draft decision's modifications to the QFRRL proposal.

ORA believes the modifications in the draft decision "will not promote the goal of expedited review of QF contract modifications and restructurings." Watson objects to provisions which would have limited the QFRRL to contract restructurings not involving a utility and one of its QF affiliates, and argues that adequate procedural safeguards can be adopted instead of a total ban on such filings. SoCalGas objects to provisions in the draft decision which limit its access to confidential information during the QFRRL procedure. The Joint Parties argues for adoption of the QFRRL as proposed by all parties.

The Joint Parties additionally suggest two alternative methods for accomplishing the goals of the QFRRL process, those goals being expeditious review of filings and increased certainty of outcome. The first alternative is to place the QFRRL directly onto the Commission's Agenda as a means to provide the Commission with the opportunity to review the QFRRL. The second alternative is to use a restructuring Advice Letter process modeled substantially on the rules concerning Advice Letter filings set forth in Appendix A and B to Draft General Order 96-A. The specifics of this alternative are set forth in Attachment B to this Order.

Parties had an opportunity to respond to these proposals in Reply Comments. Reply Comments were received on October 29, 1998 from the Joint Parties; ORA; and SoCal Gas. All parties continued to support the original QFRRL proposal. ORA pointed out that the Joint Parties' alternative of placing the QFRRL on the Commission's Agenda had several procedural flaws, and stated its opposition to the restructuring Advice Letter process because it did not give ORA sufficient time or opportunity to review the filings as compared to the QFRRL proposal or the current Application process. ORA would only support the restructuring Advice Letter process for restructurings which essentially constitute an all-party settlement in which no party objects to the approval of the restructuring. ORA is concerned that this process as proposed by the Joint Parties provides no guarantee that an Advice Letter filing would be dependent upon ORA's review and approval of the proposed restructuring.

7. Discussion of Comments and Reply Comments

We will not adopt the QFRRL process as modified by the draft decision. The comments on the draft decision make it clear that the modifications do not represent an improvement on the current process, from the perspective of those who would be most affected. Nor will we adopt the QFRRL process as

originally proposed. The draft decision pointed out a variety of insurmountable barriers to that approach, including issues of Commission responsibility, and we would have only considered adopting some version of the QFRRL process that met these concerns. We will consider the proposals of the Joint Parties. This provides us with the option of adopting these proposals (intact or as modified) or adopting no new process.

The first alternative suggestion of the Joint Parties is to directly place the QFRRL on the Commission's Agenda. This proposal is vague in its details. It is not clear who would place the item on the Agenda, what level of review it receive, or what procedural rules would apply. It is possible for a Commissioner (generally an Assigned Commissioner or Coordinating Commissioner) to place an item on the Commission Agenda for full Commission consideration. However, this usually occurs within a broader framework, such as with the Commission's SB 960 rules for a Rulemaking, or as a proposed Order Instituting Rulemaking. In such cases, the procedural rules are clear, and due process is preserved. No such process was proposed by the Joint Parties. We will not attempt to construct such a process here.

The second alternative suggestion of the Joint Parties is to use a restructuring Advice Letter process, which is similar to parts of the Draft General Order 96-A revisions to the current Advice Letter process. The details of these process are set forth in Attachment B. Unlike the first suggested alternative, this second alternative would use an existing Commission process (subject to possible modification when the general order revisions are finalized). The restructuring Advice Letter process would meet due process requirements of notice and opportunity to comment, and would not require a whole new set of rules.

There is value in this approach in concept. We anticipate that the restructuring Advice Letter process should provide more expeditious resolution

of matters than our current Application process. To the extent that filings are not contested, the process would also provide at least as much, if not more, certainty of outcome as the Application process. Taken together, these considerations address two of the major concerns of parties and may lead to more filings and an increased likelihood of increased benefits to ratepayers.

ORA has a valid concern that restructuring Advice Letter filings as proposed do not provide ORA with sufficient time for review. In the QFRRL process, ORA would have had at least 45 days (and potentially much more if necessary) to review a proposed letter. In the current Application process, ORA has 30 days to protest, and further opportunities to make its case (as determined by the ALJ). With a restructuring Advice Letter, ORA (and any other party) would have only 20 days to protest and, generally, no further opportunities to participate.

As a general principle, Advice Letters should be used for matters that are less controversial than Applications. Advice Letters have usually been allowed only for tariff implementation filings and certain other more ministerial matters. While the use of Advice Letters has expanded to some degree in recent years, we are loathe to approve a wholesale shift of an entire category of matters - QF restructuring cases - to the less formal Advice Letter process. Nothing in this case has convinced us that these matters, which have often been very complex, controversial and litigious, should now categorically be considered as simple or ministerial.

However, we are mindful of the spirit in which the QFRRL proposal was made, and that it gained the support of all parties (with some proposed modifications). We appreciate their efforts, and support the ultimate goal of increasing ratepayer, utility and industry benefits. Therefore, we will approve the use of the restructuring Advice Letter process for those filings that have the

greatest likelihood of being non-controversial or approved as submitted (or nearly as submitted). These would be those filings which garner the upfront support of ORA, along with the QF and the sponsoring utility.

Historically, ORA (or its predecessors) has been the party most likely to protest a QF restructuring filing - as would be expected due to the often large impact these deals have on ratepayers. In instances where ORA does not protest, the Commission in most instances approves the proposal. Therefore, an ORA-approved filing seems a reasonable candidate for a streamlined process. We will require that a statement of support or neutrality from ORA be attached to any restructuring Advice Letter filing. We will not limit the use of the restructuring Advice Letter in any other way, such as by dollar size or by type of QF (including affiliates of utilities).

ORA must be given sufficient opportunity to review the filing in order to ensure the efficacy of the process. We will not mandate any particular timeframe for ORA to review proposed restructuring Advice Letters before they are filed, as this is a matter to be worked out between the parties. We note that utilities have the option at any time to file an Application instead of a restructuring Advice Letter for any reason, including a reluctance to wait for ORA to send a statement of support or neutrality.

While an ORA statement must be included with the restructuring Advice Letter, any other party may file a protest to the Advice Letter in the proper timeframe. We believe the procedural safeguards set forth in Attachment B, as modified by the following discussion, will ensure fairness in addressing the protests. Energy Division will review such protests (and any responses), and prepare a Resolution for the Commission pursuant to Section 9 or Attachment B. However, we modify Section 9 so that Energy Division, at its discretion, may advise the utility that the matter is too complex and should be filed as an

Application. Energy Division may also advise the utility to file an Application even if there are no protests, should the Division determine that there are complexities to the filing that the Division does not believe it is in the best position to resolve. The Energy Division should discuss any such recommendation with the Coordinating Commissioner for QF matters before advising the utility to file an Application.

Finally, we note a few additional modifications which we make to the restructuring Advice Letter process set forth in Attachment B. We do not adopt Section 4 in Attachment B addressing confidentiality. Confidentiality issues shall be consistent with the current practice for utility Advice Letters. Furthermore, we note that Attachment B is based on the draft General Order 96-A. No later than 30 days after the Commission has adopted a final version of General Order 96-A, each participating utility which has sponsored Attachment B shall file either separately or jointly, a Petition for Modification of this decision to conform the portions of Attachment B which we adopt to the final version of General Order 96-A. We clarify that the utilities should not seek to eliminate the modifications we make to Attachment B, but should merely conform the portions of Attachment B that we adopt to the final version of General Order 96-A.

Findings of Fact

1. No party objects to the Commission adopting the QFRRL proposal which is attached as Attachment A to this decision. Although the QFRRL proposal is part of a proposed settlement involving other issues, all parties commenting on the proposed settlement support the Commission addressing the QFRRL proposal separately if such bifurcation will expedite approval of the QFRRL proposal.

2. The fact that the parties believe that the QFRRL process will encourage restructurings with readily quantifiable and demonstrable benefits and costs

persuades that the QFRRL proposal could be adopted as modified and clarified by this decision.

3. Issues concerning Commission process, i.e., how the Commission will process certain requests for approval, and what proposals might be binding on the Commission without further review, go to the heart of the Commission's decisionmaking authority and, to some extent, cannot be compromised by the parties without ensuring that the process conforms with the Commission's legal duties and obligations.

4. Notwithstanding the parties' agreement or lack of objection to an issue, the Commission has the independent duty to ensure that its decisions are consistent with the record, the law, and in the public interest.

5. Under the QFRRL proposal, interested parties have notice and opportunity to object to a proposed contract restructuring prior to the utility filing an application under the QFRRL proposal.

6. The QFRRL proposal provides that the utility, not the Commission, determines what information should be kept confidential in formal proceedings and that information would then be kept confidential for five years after submittal.

7. Although it is the general policy of the State of California that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state, the Commission sometimes designates documents as confidential and to be kept under seal in appropriate circumstances. However, it is Commission policy that a party seeking confidential treatment in a formal Commission proceeding has the burden of proof in justifying its request.

8. As a practical reality of the decisionmaking process, a proposed contract restructuring which receives a QFRRL and which is unopposed will be subject to

less scrutiny than a proposed restructuring which does not receive a QFRRL, or one that is controverted.

9. In most circumstances, the principal parties to the contract restructuring and review (the utility, the QF and ORA) negotiate at arms length. In instances where the QF is an affiliate of the utility, the possibility exists that the contract negotiations might not be at arms length.

10. We want to encourage parties who wish to restructure their contracts to do so during the electric restructuring transition period.

11. No party supported the draft decision's modifications to the QFRRL process.

12. The Joint Parties proposed two alternative processes in their comments on the draft decision. Parties were given an opportunity to comment on these proposals.

13. The Joint Parties' first proposal did not include important details about how it would work, including due process issues.

14. The Joint Parties' second proposal suggested a restructuring Advice Letter process that is consistent with Draft General Order 96-A revisions, but does not require ORA agreement or neutrality on the proposed QF contract modification before it is filed.

15. QF contract modification filings that have the support of ORA tend to be less controversial and more likely to garner ultimate Commission approval.

Conclusions of Law

1. Because the remaining issues proposed by the settlement are more complex, this decision should address only whether the Commission should adopt the QFRRL proposal in order to expedite the resolution of this one issue.

2. The QFRRL proposal, attached as Attachment A to this decision, should not be adopted.

3. The QFRRL proposal would be reasonable if it is modified to clarify that the Commission is not bound, under the specific circumstances specified in the QFRRL proposal, to issue a decision in conformance with the parties' agreement without further review. The utility applicant must still meet its burden of proof in persuading the Commission that the proposed restructuring is reasonable, and the Commission, after considering the full record, must still exercise its independent judgment in approving the contract restructuring.

4. The QFRRL proposal regarding shifting of burden of proof as among the parties to the proceeding is reasonable. However, if it were to be adopted, we would have to clarify that by adopting this provision of the QFRRL proposal, the Commission is not delegating its decisionmaking authority to the parties, and still must exercise its independent judgment in determining whether to approve a contract restructuring based on the record.

5. If it were to be adopted, Section 2 of the QFRRL proposal, which is entitled "Confidential Information," would need to be clarified to apply to the parties' use of such information during the process leading up to the final QFRRL, except as modified by further order or ruling of the Commission, or an appropriate ALJ.

6. If it were to be adopted, Part 2e of the QFRRL proposal would have to be modified to require that the utility and QF should also serve their response to the objections on the objecting party, as well as ORA. Part 2g of the QFRRL proposal would also have to be modified to require that any ORA modification of the QFRRL should also be served on any person who filed written objections to the tentative QFRRL that led to the comment conference.

7. If it were to be adopted, the QFRRL proposal would have to be modified so that the process should not be used for contract restructurings involving a utility and its QF affiliate.

8. The Joint Parties' first alternative proposal is overly vague and should not be adopted.

9. The Joint Parties' second alternative proposal as set forth in Attachment B is reasonable if it is modified to ensure that ORA, in writing, agrees or is neutral to the restructuring Advice Letter before it is filed, and if it contains the other procedural modifications discussed in Section 7.

10. Because we want to encourage parties who wish to restructure their contracts to do so during the electric restructuring transition period, this decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The restructuring Advice Letter process attached as Attachment B to this decision, shall be adopted subject to the modifications and clarifications set forth in Section 7 of this decision.

2. No later than 30 days after the Commission has adopted a final version of General Order 96-A, each participating utility which has sponsored Attachment B should file, either separately or jointly, a confirming Petition for modification of this decision to conform the portion of Attachment B which we adopt to the final version of General Order 96-A, as more specifically set forth in Section 7 of this decision.

R.94-04-031, I.94-04-032 COM/JLN/ccv

This order is effective today.

Dated December 17, 1998, at San Francisco, California.

RICHARD A. BILAS

President

P. GREGORY CONLON

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners

ATTACHMENT A

THE SUPPORT OF ORA, THE UTILITIES, AND IEP FOR THE QFRRL PROPOSAL IS CONDITIONED UPON THE COMMISSION ACCEPTING OR ADOPTING THE PROPOSAL AS WRITTEN. IF THE COMMISSION MODIFIES THE PROPOSAL IN PART OR IN WHOLE, THE SUBMITTING PARTIES EACH RESERVE THE RIGHT TO WITHDRAW THEIR SUPPORT.

December 8, 1997

QF RESTRUCTURING REASONABLENESS LETTER (QFRRL)

1. Eligibility

All voluntarily negotiated Qualifying Facility (QF) Power Purchase Agreement buyouts, buydowns, contract renegotiations or modifications (hereafter all these items will be referred to as restructurings) may be submitted to the Office of Ratepayer Advocates or its successor (ORA) for a contract restructuring reasonableness letter (QFRRL).

2. QFRRL Procedure

- a. After the QF and the Utility have prepared a written agreement to restructure a QF contract that they have either executed or are prepared to execute, the Utility shall submit to the ORA the information required in Section 3.
- b. The ORA shall endeavor to review the required information to determine if the restructuring is reasonable. If the ORA makes such determination, then it shall issue a tentative QFRRL that includes the opinions set forth in Section 6. ORA, in its sole discretion, reserves the right to decline review of restructurings which are primarily settlements of disputes. Copies of the tentative QFRRL shall be served on both the Utility and the QF.
- c. The ORA shall endeavor to review and issue the tentative QFRRL within 45 days from the date of receiving the required information from the Utility.
- d. Upon its issuance, notice of the tentative QFRRL shall be given to the public through the Commission's calendar, which notice shall schedule a comment conference for a date not earlier than 15 days from the date of the notice. The notice shall also identify a person to contact to request non-confidential information regarding the proposed restructuring and a non-confidential copy of the tentative QFRRL. Upon agreement of the

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Utility and the QF, representatives of other ratepayer advocate organizations may obtain access to confidential information if they sign an appropriate confidentiality agreement. The notice shall also provide that at least 24 hours before the scheduled start of the conference, interested parties shall confirm in writing to the designated contact person their intent to attend the comment conference. If no parties so confirm, the comment conference will be canceled.

- e. At the comment conference, attending parties may inquire as to the non-confidential portions of the Utility's submission to the ORA and may express any concerns they may have regarding the proposed restructuring. No later than 15 days following the scheduled date of the comment conference, any party may submit written objections to the proposed restructuring by mailing such objections to the Utility with a copy to ORA and the QF. Such objections shall state in detail the factual and/or legal bases for each asserted ground of objection. The Utility and the QF shall have five days from receipt of such objections in which to submit responses to ORA.
- f. Within 25 days following the scheduled date of the comment conference, ORA will either withdraw or finalize the tentative QFRRL (which may include appropriate modifications as described in Section 2.g.), or request supplemental information from the Utility. In the latter case, ORA will either finalize or withdraw the tentative QFRRL within 10 days after submission of the supplemental information.
- g. If ORA modifies the tentative QFRRL, the Utility and the QF shall be served with a copy of the modified QFRRL, and shall have five days to comment on the modifications. If no comments are received, the modified QFRRL shall be deemed final. If the QF or the Utility provide comments on the modified QFRRL, ORA may withdraw, finalize or further modify the QFRRL within 5 days of the end of this comment period.
- h. Any of the foregoing time periods may be extended by mutual agreement of the Utility, ORA and the QF. Alternatively, the Commission's Executive Director or the Energy Division Director may for good cause shown extend any of the foregoing time periods.
- i. The general terms of the restructuring, as well as the final QFRRL, shall then be submitted in the next available ECAC application (including one covering a prior record period but which has not yet been filed) or successor reasonableness application or submitted under separate application, either individually or bundled with other restructurings.

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- j. Subject to the terms of its agreement with the QF, the Utility may elect at any time to end the QFRRL process and pursue approval of the restructuring in any appropriate CPUC regulatory proceeding or elect not to restructure the contract.

3. Required Information

The QFRRL submission to the ORA shall at a minimum include the following information subject to Rule 1, which as appropriate may be submitted as confidential as defined in Section 4 below and which shall include all relevant workpapers and other relevant documents:

- a. Identification of the QF, location of the QF's generating facility, brief description of the generating facility size, type of technology and other pertinent or unique characteristics.
- b. Ownership of the QF project and related companies, including affiliate relationships of the parties involved in the transaction, if any.
- c. A detailed description of the historical operational performance of the project, including historical production and compliance with performance and efficiency monitoring standards.
- d. A summary of the proposed contract restructuring.
- e. A summary of the ratepayer benefits.
- f. A description of any significant, pending legal or regulatory disputes between the Utility and the QF, and their resolution.
- g. An assessment of the QF's projected economic and operational viability under the existing contract.
- h. A detailed description of ratepayer benefits, shareholder incentive, and sensitivity analyses.
- i. A copy of the QF's existing contract, including any amendments.
- j. A copy of the executed or unexecuted restructured agreement for which approval is sought and copies of all related agreements between the QF and the Utility.

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4. Confidential Information

Information relating to the restructuring may be submitted as confidential information in accordance with the terms of Public Utilities Code Section 583 and General Order 66-C, in which case the confidential information shall not be open to public inspection for a period of five (5) years after submittal. Upon a showing of good cause, the confidentiality period may be extended by the Commission. The Utility shall clearly mark as confidential all information submitted to ORA or in the ECAC (or successor) application for which it requests confidential handling.

In the event confidential information is made available to ratepayer advocacy third parties pursuant to an appropriate confidentiality agreement, the contracting parties will prepare such agreement. Commission staff members need not sign confidentiality agreements but shall be subject to Public Utilities Code §583 and General Order 66-C and a protective order if necessary.

5. Commission Jurisdiction Over QFs

Participation by a QF in the QFRRL process does not in any way constitute acquiescence by the QF to the regulatory jurisdiction of the Commission.

6. ORA Opinions

The QFRRL issued by ORA shall at a minimum state the following:

- a. The restructured contract and all payments to be made under the restructured contract are reasonable.
- b. The Utility should be authorized to recover in non-bypassable rates, to the same extent as any other cost associated with a QF is recoverable, all payments under the restructured contract, subject only to the Utility's prudent administration of the restructured agreement.

The tentative QFRRL is non-binding and may not be used in any other regulatory proceeding including, but not limited to, as evidence of the reasonableness or unreasonableness of any restructuring. The final QFRRL shall be binding on the ORA and its successors, absent a showing as described in Section 7.b. below.

Following the issuance of a tentative or final QFRRL, the Utility shall cooperate with ORA in providing prompt responses to data requests regarding the restructured contract for which a tentative or final QFRRL has been issued. However, following issuance of a final QFRRL, such data requests shall be limited to those that ORA believes in good faith are required to make a showing of the type described in Section 7.b below.

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7. Commission's Approval Following the Issuance of a Final QFRRL

a. Application

The Utility shall submit general terms of the restructuring, as well as the final QFRRL, in the next available ECAC application (including one covering a prior record period but which has not yet been filed) or successor reasonableness application or under separate application, either individually or bundled with other restructurings. Unless the restructuring was previously submitted in an ECAC application (or successor reasonableness application), the restructuring may be submitted in a separate individual or bundled application if such application is filed within twelve months of the issuance of the QFRRL.

The Utility shall include in its submission to the Commission all information provided to ORA during the QFRRL process and a copy of all written objections received within the time period specified in Section 2 above from third parties, which objections shall become part of the record.

b. Commission Consideration of the Restructuring and Presumption of Reasonableness

The Utility shall retain the burden of proof in establishing that timely third party objections submitted under the provisions of Section 2 above do not establish grounds for disapproving the proposed restructuring. Except for issues as to which the Utility retains the burden of proof under the preceding sentence, since public notice of the tentative QFRRL has been provided and consideration has been given to the comments, if any, received at and following the comment conference, the restructuring shall be presumed to be reasonable and shall be approved by the Commission. ORA and other parties who did not submit timely objections in accordance with Section 2 shall have the burden of proof in rebutting this presumption by showing that the information submitted by the Utility in support of the QFRRL was materially inaccurate or misleading, based upon information known, or which should have been known, to the Utility at the time the information was submitted.

In addressing the reasonableness of the proposed restructuring, the Commission may either 1) issue reasonableness findings specific to the restructuring if submitted in ECAC or its successor, or submitted in a separate application either individually or bundled with other restructurings as appropriate or 2) issue general reasonableness of operations findings for the entire ECAC proceeding or its successor.

End of Attachment A

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Revised Exhibit A

**RESTRUCTURING ADVICE LETTER FILING ("RALF") PROCEDURE
FOR REVIEW OF QF CONTRACT RESTRUCTURINGS**

1. The utility will submit a restructuring advice letter to the Commission's Energy Division which will contain the essential information necessary to establish the reasonableness of the proposed voluntarily negotiated QF restructuring. Each such filing, and all protests, responses and replies concerning the filing, shall indicate a postal address and (where appropriate) a FAX number or e-mail address at which the advice letter filer, protestant or respondent, agrees to receive subsequent documents and notices relevant to the advice letter. Each such filing will be reported in the Daily Calendar.

2. Service of the restructuring advice letter shall be as follows:

On or before the date a restructuring advice letter is submitted for filing, and unless otherwise directed by Commission order, the utility shall serve the restructuring advice letter (1) on the Consumer Services Division and the Office of Ratepayer Advocates (service on these parties may be made by Internet); and (2) on the utility's restructuring advice letter service list and any other third parties as specified by the Energy Division, other Commission order, or statute.

The utility's restructuring advice letter service list shall include the postal and e-mail address, as appropriate, of persons on the list.

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The utility shall include on the requested list any person that requests such inclusion and may periodically confirm the desire of any currently listed person to remain on the list.

After the filing of a restructuring advice letter, and pending its disposition, the utility shall promptly provide a copy of the advice letter to anyone so requesting. Such provision shall be without charge to anyone who is a current customer for utility services from the utility, or to anyone receiving the advice letter by Internet.

3. The restructuring advice letter shall contain the following categories of information, including all relevant work papers and other relevant supporting documents:

- a. Identification of the QF, location of the QF's generating facility, brief description of the generating facility size, type of technology and other pertinent or unique characteristics.
- b. Ownership of the QF project and related companies, including affiliate relationships of the parties involved in the transaction, if any.
- c. A detailed description of the historical operational performance of the project, including historical production and compliance with performance and efficiency monitoring standards.
- d. A summary of the proposed contract restructuring.
- e. A summary of the ratepayer benefits.
- f. A description of any significant, pending legal or regulatory disputes between the Utility and the QF, and their resolution or status.

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- g. An assessment of the QF's projected economic and operational viability under the existing contract.
- h. A detailed description of ratepayer benefits, shareholder incentive, and sensitivity analyses.
- i. A copy of the QF's existing contract, including any amendments.
- j. A copy of the executed or unexecuted restructured agreement for which approval is sought and copies of all related agreements between the QF and the Utility.

4. The publicly available version of the restructuring advice letter may be redacted to delete the following types of confidential information, which redaction would be approved in advance by the Commission in its orders authorizing the use of the advice letter process:

- a. The schedule of any restructuring payments to be made to the QF, including the total amount thereof.
- b. The Utility's non-public projection of replacement energy and capacity costs.
- c. The Utility's projection of future production by and payments to the QF under the existing contract.
- d. Non-public financial and operating data provided on a confidential basis by the QF to the Utility.
- e. The Utility's assessment of the QF's financial and operating viability under the existing contract.
- f. The Utility's analysis of ratepayer savings under expected, best case and worst case scenarios (except that the projected range of savings under each scenario shall not itself be deemed confidential).
- g. Portions of restructuring agreements that are deemed to be confidential by the parties and which, if made public, would place the Utility and/or the QF at a competitive disadvantage.

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- h. Other information which constitutes a protectable trade secret of a party or which, if publicly disclosed, would place the Utility or the QF at a competitive disadvantage.

5. The restructuring advice letter shall only take effect upon Commission approval.

6. Any person may protest or respond to a restructuring advice letter as follows:

Within 20 days after the date that the advice letter is reported in the Daily Calendar, the protest or response shall be submitted to the Energy Division and served on the same day on the utility filing the restructuring advice letter. After filing a protest, and pending disposition of the restructuring advice letter, the protestant shall promptly provide a copy of the protest to anyone so requesting.

A restructuring advice letter may be protested on one or more of the following grounds:

- a. The utility did not properly serve or give notice of the restructuring advice letter;
- b. The relief requested in the restructuring advice letter would violate statute or Commission order;
- c. The restructuring advice letter contains material errors, or does not follow the Commission's approved methodology, if any.

In addition, a restructuring advice letter may be protested on the grounds that the proposed restructuring is unjust, unreasonable, or

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discriminatory, provided, however, that a restructuring advice letter is not subject to protest on these grounds where such protest would require relitigating a prior order of the Commission.

The utility filing the restructuring advice letter shall reply to each protest and may reply to any response. Any such reply shall be submitted to the Energy Division not later than five business days after the last day to serve a protest or response, and shall be served on the same day on the person making the protest or response. If there are multiple protests or responses to a restructuring advice letter, the utility's reply may be to all such protests and responses.

The Energy Division may consider a late-filed protest or response. If the Energy Division considers a late-filed protest or response, it shall notify the utility filing the restructuring advice letter, and the utility shall have five business days from the date of issuance of the notice within which to reply to the late-filed protest or response.

7. The utility filing the restructuring advice letter may make minor revisions or corrections to the filing at any time before the effective date by filing and serving a supplement or substitute sheet. The utility shall withdraw the advice letter without prejudice in order to make major revisions. Supplements, substitute sheets, and withdrawals shall be filed

and served in the same manner and on the same persons as was the original advice letter.

Minor revisions do not automatically extend the protest period. The Energy Division on its own motion or at the request of any person, may issue a notice extending the protest period. Any protest during the extended period shall be confined to the substance of the revision.

8. A supplement to a restructuring advice letter may be used to make minor revisions. The following revisions are examples of what commonly, but not necessarily, qualify as minor: a modification in response to a protest; a language clarification; or a later effective date. The supplement shall bear the same identifying number as the original advice letter but shall have a letter suffix "A" for the first supplement, "B" for the second supplement, etc.

9. Upon completion of the protest, response and reply period, the Energy Division will have 40 days within which to review the proposed restructuring to determine whether the information provided under paragraph 2 above and in response to any protest establishes that the proposed restructuring is reasonable under the Commission's standards and should be approved. When such review has been completed, and within such 40-day period, the Energy Division will prepare and submit to the Commission for consideration at the Commission's next public meeting which is at least 10 days thereafter a proposed resolution either approving or

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rejecting the restructuring advice letter. (To facilitate this process, the utility may submit a proposed form of resolution as part of the advice letter package.) A proposed resolution approving the restructuring advice letter shall make at least the following finding:

- (a) That the restructuring is reasonable;
- (b) That all payments to be made pursuant to the restructuring shall be recovered by the utility through its Annual Transition Cost Proceeding or other mechanism authorized by the Commission, subject only to the utility's prudent administration of the restructuring agreement.

The Commission may then adopt the proposed resolution or modify it in whole or in part. After the Commission has acted on the resolution, its action will be reported in the Daily Calendar and the resolution will be served on the utility filing the restructuring advice letter, the affected QF and on any person filing a protest or response to the restructuring advice letter.

10. Pursuant to Public Utilities Code Sections 1731 to 1736 and Rules 85 to 86.7 of the Commission's Rules of Practice and Procedure, the utility filing the restructuring advice letter, the affected QF, or any person filing a protest to the restructuring advice letter may apply for rehearing of a resolution approving or rejecting the restructuring advice letter pursuant to paragraph 9 above. The application for rehearing shall set forth specifically the grounds on which the applicant considers the resolution to be unlawful.

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Other than the affected QF, a person filing a response does not have standing to apply for rehearing.

The application for rehearing shall be submitted to the Commission's Docket Office, which will assign a docket number to the application, and with the Energy Division. If the applicant is the utility filing the restructuring advice letter, it shall serve all persons filing protests or responses to the restructuring advice letter. If the applicant is the affected QF or a person filing a protest, the applicant shall serve the utility and all other persons filing protests or responses to the restructuring advice letter.

11. If the Commission's final resolution does not approve the proposed restructuring in its entirety, then the terms of the agreement between the utility and the QF will determine whether or not the restructuring effort will terminate or whether the proposed restructuring will be resubmitted for consideration through a formal application process. Also, subject to its agreement with the QF, the utility will have the right to withdraw a restructuring advice letter without prejudice at any time prior to Commission action on the draft resolution prepared by the Energy Division, or to pursue a formal application process in lieu of the advice letter procedure.

12. Nothing in the restructuring advice letter filing procedure shall preclude the utility from electing not to use the advice letter process.

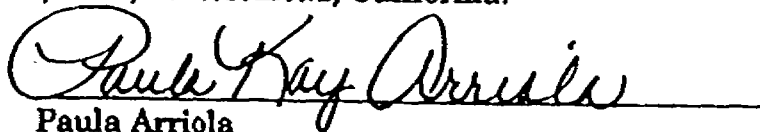
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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of NOTICE OF FILING OF REVISED EXHIBIT "A" TO JOINT COMMENTS ON THE DRAFT DECISION OF ALJ JANET L. ECONOME on all parties identified on the attached service list. Service was effected by means indicated below:

- ☒ Placing the copies in properly addressed sealed envelopes and depositing such envelopes in the United States mail with first-class postage prepaid (Via First Class Mail);
- ☐ Placing the copies in sealed envelopes and causing such envelopes to be delivered by hand to the offices of each addressee (Via Courier);
- ☐ Transmitting the copies via facsimile, modem, or other electronic means (Via Electronic Means).

Executed on November 20, 1998, at Rosemead, California.



Paula Arriola
PROJECT ANALYST
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770

End of Attachment B