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MAIL DATE
12/3/99

Decision 99-12-024 December 2, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas & Electric Company for a Permit to Construct an Electric Substation, the Nortech Substation, and Associated Power Lines, Known as the North San Jose Capacity Project.	Application 98-06-001 (Filed June 1, 1998)

ORDER DENYING REHEARING OF DECISION 99-08-023

I. SUMMARY

In this Application, PG&E sought authority to construct a substation and related transmission facilities in the North San Jose area. The substation is needed to meet anticipated customer-driven peak electrical load growth by the summer of 2000 and to prevent potential outages. The Application was filed pursuant to the Commission's General Order (GO) 131-D, which requires an applicant to provide notice to the public of its proposed project. The record indicates that PG&E published a notice of its proposed project in local newspapers, posted the notice along the proposed transmission line routes, and notified local public agencies and all property owners within 300 feet of the proposed location. No formal protests or comments were filed in response to the Application. (Decision (D.) 99-08-023, page 3.)

PG&E also submitted its Proponent's Environmental Assessment (PEA), as required by Rule 17.1 of the Commission's Rules of Practice and Procedure after the consultation with the Commission's Energy Division (ED), as required by the California Environmental Quality Act (CEQA). After reviewing the initial Application, the ED environmental review staff identified deficiencies in the PEA that PG&E subsequently corrected. The ED released an Initial Study and

Draft Mitigated Negative Declaration (MND) for public comment on September 16, 1998, with comments due on October 16, 1998. Of the Applicants for Rehearing, only Sony filed comments. Those comments expressed concern regarding aesthetics, Electro-Magnetic Frequency (EMF) and property values. (D.99-08-023, page 7.) During the comment period, a Prehearing Conference was held at the Sony installation in San Jose, for the purpose of providing an opportunity for the public to submit comments and concerns regarding the proposed project. The only party commenting was Sony, essentially reiterating its written comments, and there were no requests for an evidentiary hearing. (D.99-08-023, page 4.) The transcript of the Prehearing Conference indicates that, except for Sony, none of the Applicants filed Notices of Appearance.

GO 131-D requires an applicant for a Permit to Construct (PTC) to include a description of the applicant's plans to take steps to reduce EMF resulting from the project. PG&E did not include this information in its initial application, but provided it in a supplement to its application filed on April 29, 1999. Both the Draft and Final MNDs provided discussions for informational purposes of EMF exposure with respect to the proposed project, pending the results of further study and research being conducted jointly by the California Department of Health Services and the Commission on the potential health impacts of EMF. (D.99-08-023, page 5.)

II. DISCUSSION

A. Standing of the Applicants

The following parties filed Applications for Rehearing of D.99-08-023: Montague LLC (Montague), Legacy Partners Commercial, Inc. (Legacy), Spieker Properties, Inc. (Spieker), CarrAmerica Realty Corporation and Sony Electronics, Inc.(Car-Sony) and The Redevelopment Agency of the City of San Jose and the City of San Jose (San Jose). Except for Sony, none of the

Applicants for Rehearing appeared as parties at the Prehearing Conference. (Prehearing Conference Transcript (PHC-T), page A.) Nor did they file protests to the Application. In fact, they took no action at all during the course of the proceeding, but now insist that the decision is erroneous and should be reheard. Section 1731(b) of the Public Utilities Code provides as follows:

> "(b) After any order or decision has been made by the Commission, any party to the action or proceeding or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing..."

We have rejected similar attempts by non-parties to file applications for rehearing. In Application of Wild Goose Storage, Inc. for a Certificate of Public Convenience and Necessity (1997), D.97-10-070, 1997 Cal. PUC LEXIS 975, the Commission found that Roseville Land Development Land Association lacked standing to file an application for rehearing because, although the company had participated in the environmental review of the project, it had never made an appearance as a party. We denied the application for rehearing, quoting Section 1731, and noting that the company had had the opportunity to intervene as a party on a timely basis, but had not done so. Similarly, in Application of AT&T Communications of California to Increase Rates (1988), D.88-08-066, 29 Cal P.U.C. 2d 177, we rejected an application for rehearing by Extelcom as improper because Extelcom was not a party to the action and lacked the financial interest in AT&T required by Section 1731(b). The Commission reiterated that only those persons or entities described in Section 1731(b) may file rehearing. See also Lang v. Railroad Commission (1935) 2 Cal. 2d 557, where the Supreme Court held that intervenors were parties and as such could petition for a rehearing. Further, the Courts have held that a party may not lay in wait until a project has been approved and then obtain evidentiary hearings when it could have requested hearings during the regular approval process but failed to do so. Corona-Norco Unified School

District v. City of Corona (1993) 17 Cal. App. 4th 985, 998 and Coalition for Student Action v. City of Fullerton (1984) 153 Cal. App. 3d 1194, 1198. Of the Applicants, only Sony has standing to file an Application for Rehearing.[1]

B. Notice of the Application

With the exception of San Jose, all the Applicants allege that the Decision is in error because they had no notice of the proceeding, in violation of the Commission's GO 131-D, and therefore did not participate in the proceeding. However, the record indicates otherwise. GO 131-D, Section XI. 9(A.)(b.), requires that notice of the filing of an application be given to all property owners within 300 feet within the right-of-way as determined by the most recent local assessor's parcel roll available. According to PG&E's Response to the Applications for Rehearing (Response), it mailed eight copies of the Application to Spieker at two different addresses, 10 copies to CarrAmerica at two different addresses and 1 copy to Sony. Legacy did not exist as an entity until the fall of 1998, but seven copies were mailed to its predecessor, Lincoln Properties, or to subsidiaries of Lincoln Properties, all at Lincoln's (now Legacy's) address. (Response, page 7.) In addition, PG&E states in its Response to the Application of Montague for Rehearing at page 1, that Montague was sent a copy of the Notice of Application on June 15, 1998. Further, as PG&E points out in its Response, at page 8, its representatives met face-to-face with CarrAmerica, Sony, Spieker and Lockheed Martin (Loral Aerospace) during the time the Application was pending. Further, the Prehearing Conference was held in Sony's own building. Applicants' argument that they had no notice of the proceeding is without merit.

Applicants further argue that they were not served with a copy of PG&E's Supplement to the Application. Rule 2.3 of the Commission's Rules of

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[1] Although only Sony has standing to file an application for rehearing, we will review and dispose of all issues of legal error raised in the applications for rehearing.

Practice and Procedure provides that service of this sort of filing must be provided to "each person whose name is on the official service list." Because none of the Applicants appeared as parties, they were not on the service list, and therefore were not entitled to receive a copy of the Supplement. Further, the Supplement was filed at the order of the Assigned Administrative Law Judge (ALJ). Such filings during the course of Commission proceedings are routinely sent only to parties of record. PG&E has complied with all the service of process requirements incumbent on it by this Commission and by state law. The arguments of Applicants are therefore without merit.

Finally, on the subject of notice, Sony argues that the Commission did not comply with its own Rule 17.1(f)(1) of the Rules of Practice and Procedure and with Public Resources Code Section 21092. Section 21092 gives to the Commission several alternative methods of notifying parties of the Notice of Preparation of a Negative Declaration, one of which is newspaper publication. Section 3 of the NMD indicates that the required notice was published in the San Jose Mercury News from September 24 through October 1, 1998. In addition, the Environmental Science Associates, the Commission's consultant in this matter, mailed to all Applicants a copy of the required notice on September 16, 1998. (Response of PG&E, page 8.) The Commission complied with all relevant notice requirements of its own Rules and with those of CEQA and the argument is without merit.

C. Position of the Parties

Besides the notice issues discussed above, Sony and the other Applicants' arguments have two common themes. The first is that the decision is in error because PG&E failed to consider sufficient alternatives to the location of the project and that the project is inconsistent with the Rincon de los Esteros

Master Landscape Plan. (Rincon Plan.) In both instances, the record in the proceeding demonstrates that the Applicants are incorrect.

First, as PG&E points out in its Response to the Applications, beginning at page 9, the company consulted extensively with San Jose and Sony to select a substation site and a power line alignment that would minimize the impacts both to the environment and to adjacent property owners, as required by GO 131-D. In fact, San Jose recommended the Zanker Road alignment adopted in D.99-08-023. (Response of PG&E, page 9.) The record indicates that PG&E first began discussions with San Jose in 1996, when the need for a new electric substation was first identified. Twenty-four sites were initially considered, then reduced to seventeen because of redevelopment plans by the City. Section IV of PG&E's Application and Sections 15 and 19 of PG&E's PEA outline the company's method for considering alternate sites for the project, which were approved by the Commission at page 7 of D.99-08-023. In fact, PG&E did not file its Application until agreement with San Jose on the proposed location of the project. (Response of PG&E, page 12.) PG&E has clearly met its obligation to consult with local government entities as required by GO 131-D.

Sony urges that the company should consider undergrounding as an alternative. However, it was determined that there was no room under Zanker Road for this alternative because of existing sewer pipes. (Response of PG&E, page 13.) Sony also requested that the lines be moved away from its property, but this proved impossible because it would require the removal of more trees, would conflict with new roads proposed at the location, and would require the removal of 28 town houses along the alternate route.

While GO 131-D, § IX.B.1.c., mandates that PG&E must consider alternatives, neither the Order nor CEQA require consideration of all possible alternatives. The number of alternatives to be studied is subject to reasonable

limits given the time and resources available. Residents Ad Hoc Stadium Committee v. Board of Trustees (1979) 89 Cal. App. 3d 274, 286. The discussion of project impacts must consider a reasonable range of alternatives to the project or the project location that offer substantial environmental advantages and may be feasibly accomplished in a successful manner. Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal. 3d 553, 566. PG&E considered all feasible alternatives to the Zanker Road alignment, and included a reasonable range of alternatives in its Application.

The mere suggestion by the Applicants that PG&E may have failed to consider the median of Zanker Road as an alternative alignment, even if true, cannot justify rehearing now. Indeed, routing the power line in the median of Zanker Road was one of the first alignments considered. It was eliminated because the City's Public Works Department repeatedly and emphatically advised PG&E that it would not permit any construction within 25 feet of the sewage pipes. Since the Public Works Department has consistently opposed any construction within 25 feet of these pipes, it would be impossible to construct PG&E's power line in the Zanker Road median. (Response of PG&E, page 14.)

GO 131-D requires PG&E to consult with local government agencies on alternative substation sites and power line routes. (GO 131-D, §§ IX.B.1.d; XIV.B and IX.B.1.c.) In this case, PG&E and San Jose exhaustively considered alternative routes to the Zanker Road alignment. The Zanker Road alignment was selected as the preferred alternative only after the City staff recommended this route. Neither CEQA nor GO 131-D require PG&E to consider remote and speculative alternatives, especially in the face of repeated statements by the staff of the City of San Jose that such an alternative is infeasible. Foundation for San Francisco's Architectural Heritage v. City & County of San Francisco (1980) 106 Cal. App. 3d 893, 910.

Applicants' next argument is that the Decision is in violation of CEQA because the facility is inconsistent with the Rincon de los Esteros Master Landscape Plan (Rincon Plan). The Plan was prepared in 1993 to guide landscaping and transportation improvements in a broad area of northern San Jose extending from the Guadalupe River on the west to Coyote Creek on the east. According to the plan, the first phase was a master tree program. However, the Plan was never implemented or followed. While the Plan calls for landscaping of a "[c]onsistent street tree planting, in a single species regularly spaced at 40 feet on center, along the length of Zanker Road (one row on the sides and in the median)" the existing landscaping includes more than a dozen different tree species. None of the seven blocks covered by PG&E's project are in fact landscaped in a manner consistent with the Rincon Plan. Only two blocks (between the Montague Expressway and River Oaks) are planted with a "single species" of tree along the sides of the street. However, while these two blocks are landscaped with the "statuesque poplars" lauded by the Applicants, poplar trees are not recommended by the Rincon Plan for Primary Street and Highway Trees such as along Zanker Road. Moreover, poplar trees are expressly disapproved in the Rincon Plan as not acceptable to the San Jose Department of Public Works. In addition, the redwood trees also lauded by the Applicants are not included in the Rincoln Plan at all and, when planted with poplars, cannot form a consistent "single species" of tree in direct conflict with the Rincon Plan. The Plan, for all of its laudable intentions, was never implemented or followed, and there is no cohesive landscaping theme along Zanker Road. (Response of PG&E, page 19.)

Whether or not the Plans are consistent is not an appropriate concern in any event. In measuring the environmental impact of a project, the Commission must measure the proposed project's impacts against the "physical conditions which exist in the area," not against a hypothetical plan which might or might not

be implemented. (CEQA Guidelines, § 15360.) In Environmental Planning and Information Council v. County of El Dorado ("EPIC") (1982) 131 Cal. App. 3d 350, the court held that petitioners erred in demanding that the County compare the new (proposed) General Plan with the old (adopted) General Plan. The EPIC court stated, at page 354, "CEQA nowhere calls for evaluation of the impacts of a proposed project on an existing general plan; it concerns itself with the impact of the project on the environment, defined as the existing physical conditions in the affected area."

In this case, PG&E consulted with and worked with San Jose for more than a year before submitting its Application. During that period, the City developed a specific plan to mitigate the visual impacts of the power line along Zanker Road. The City asked PG&E to commit to the new Zanker Road Landscaping Plan (Zanker Plan) and to contribute $500,000 to implementation of that plan. PG&E relied on the representations of the City. Ultimately, the Commission too relied on these representations.

The Applicants claim that the Zanker Plan is inadequate to fully mitigate the impacts of the proposed power line along Zanker Road. According to the Applicants, short "orchard type trees" proposed in the Zanker Plan "will clearly not hide the proposed power line poles...." (Application of Sony, page 9.)

It is true that some of the orchard trees proposed in the City's Zanker Plan are 30 feet tall, but the existing poplar trees are only 30 to 40 tall. Moreover, not all of the trees proposed in the Zanker Plan are the 30-foot orchard type tree. The Zanker Plan also calls for Chanticleer Pear, Red Spire Pear and Pyrimidal European Hornbeam, all of which grow to heights of up to 40 feet. At each pole location, the Zanker Plan calls for a cluster of "tall, upright trees." These are proposed to be columnar-style, Arnold Tulip Trees, growing to a height of 45 feet. Also, in the median of Zanker Road, the Zanker Plan calls for Eucalyptus and

Fremont Cottonwood, which reach heights of 60 to 70 feet tall. (Response of PG&E, page 21.)

It is not true, as the Applicants assert, that the City's Zanker Plan will disrupt the existing cohesive theme of the Rincon Plan by planting trees on only one side of the street. First, as described above, the Rincon Plan was never realized, so it is difficult to claim that a coherent theme currently exists. Second, the Zanker Plan calls for the massing of these trees in multiple rows, sometimes three or four rows deep. Third, the Zanker Plan calls for planting trees on both sides of the street as well as the median. PG&E has not limited the planting to only one side of the street. By implementing the Zanker Plan, the City will include the best elements of the existing landscaping and the best elements of the Rincon Plan—and combine them with 2,300 additional trees to finally achieve the cohesive theme it seeks.

The fact that the Zanker Plan has not been formally adopted by the City of San Jose does not render it inadequate under CEQA. A Mitigated Negative Declaration is appropriate where, although the initial study has identified potentially significant effects on the environment, revisions in the project agreed to by the applicant before the proposed Declaration is released for public comment would mitigate the effects to a less than significant level or there is no substantial evidence in the record taken as a whole that the project as revised would have a significant impact on the environment. (Public Resources Code, § 21064.5.) In this case, the initial study identified a potentially significant effect which could be mitigated with landscaping. As set forth in the MND, PG&E agreed to contribute $500,000 toward implementation of the Zanker Plan as mitigation of these potential impacts. The MND, including the proposed landscaping mitigation, was circulated. The Applicants, especially San Jose had an opportunity to comment. They did not.

In Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of California (1988) 47 Cal.3d 376, 422 the court held that, although proposed mitigation measures were subject to "reasonable criticism," they should be upheld where the administrative record as a whole contained substantial evidence supporting the view that the measures would mitigate the impacts in question. In this case, the Zanker Plan was prepared at the request of the City by State-licensed landscape architects expressly to mitigate the visual impact of the proposed power lines along Zanker Road. The City gave its preliminary approval of the Zanker Plan, and PG&E has committed to providing the necessary funding to implement the plan. It must be remembered that mitigate does not mean eliminate. It means to soften or to make less severe. Although implementation of the City's Zanker Plan will not eliminate all views of the proposed power lines, there is sufficient evidence that the proposed landscaping mitigation will reduce the impact of the lines to a less than significant level.

The Applicants claim that implementation of the Zanker Plan prepared by the City is infeasible. The Applicants further claim that the proposed contribution by PG&E may not be sufficient to implement the Zanker Plan on the east side of Zanker Road, that the City does not have funding to develop construction documents or meet other costs associated with administering those documents, and that, by depending on the City to implement the Zanker Plan, PG&E is failing to actually mitigate the potential impacts of the project.

At the City's request, PG&E committed to cooperate with the implementation of the plan. At the City's request, PG&E agreed to contribute $500,000 toward implementation of the plan because that is what was requested. When the City asked for additional funds for construction documents, PG&E agreed to that request. Finally, pursuant to CEQA, the Commission will establish a mitigation monitoring program that may make changes as necessary to ensure

that PG&E makes all reasonable efforts to ensure that the proposed mitigation can be achieved.

Throughout this multi-year process, PG&E worked with the staff of the City to develop a landscaping mitigation plan. Throughout this process, PG&E first agreed to pay the costs for initial implementation of the landscaping plan, and then agreed to pay additional costs for bid documents. PG&E also agreed to the City's demands that it retain control of the landscaping plan and its implementation. The Applicants now claim that City lacks the capacity to implement the Zanker Plan. The argument is without merit. First, as part of this project, PG&E is compensating the affected property owners along Zanker Road for any loss of mature landscaping along their frontage. Second, as part of this compensation, PG&E is purchasing additional landscape easement rights from these property owners and transferring those rights to the City in order to fully implement the Zanker Plan. Third, in addition to the contribution of $500,000 for implementation of the Zanker Plan, PG&E has agreed to pay the costs to prepare construction drawings and bid documents. Fourth, in addition to its financial contribution to the City, the MND requires PG&E to assist the City with timely and efficient implementation of the plan. (MND, page 22.) Fifth, PG&E has already offered to continue to work with the City to implement the landscaping mitigation.

Now the City claims that this contribution is "substantially below the 1998 estimate of the cost [by the RDA's consultant] to implement the proposed landscaping for the east side of Zanker road. (San Jose Application, Ex. B, Affidavit of John Weis, page 2.) First, PG&E has never denied reasonable requests of the RDA for additional money to implement the plan. Second, when PG&E requested the referenced 1998 cost estimate, the RDA consultant stated that she had never been asked to prepare one. PG&E asked a landscape architect to

develop a preliminary cost estimate to replace trees removed to construct the new power line. That estimate suggests that the cost to plant all the 929 replacement trees called for in the Zanker Plan on those properties where the trees will be removed (with associated irrigation, etc.) would be $527,000. (Response of PG&E, page 26.)

D. Requests for Oral Argument

On October 15, 1999, Legacy filed a request for oral argument in this matter. As pointed out above, Legacy is not a proper party with standing to make such a request. Such requests are governed by the Commission's Rule of Practice and Procedure 86. Rule 86.3 requires that a request for oral argument be set forth in the application for rehearing. Legacy did not meet this requirement. Further, Rule 86.3, which establishes the criteria for granting a request for oral argument, requires a showing of "legal issues of exceptional controversy, complexity, or public importance and those which raise "questions of first impression that are likely to have significant precedential impact."

Applicants assert that the review and documentation supporting the project reflects no analysis or mitigation of the environmental aspects of sinking steel poles in contaminated soil, a matter of "public importance and exceptional controversy." (Petition of Legacy for Oral Argument, page 4.) However, a review of the MND reveals that it does address this issue and provides for mitigation. If contamination is suspected, testing is required and workers must follow a health and safety plan provided in advance in accordance with OSHA, 29 C.F.R., Section 1910.20. Further mitigation measures are provided at pages 17 and 18 of the NMD.

Legacy further argues that oral argument should be held to address the issue of whether PG&E's Supplement to the Application should have been served on all adjacent landowners. This issue has already been addressed above,

and, in any event, does not constitute a legal issue with sufficient controversy and public interest to justify oral argument as advanced by Applicant.

Spieker also made a timely request for oral argument in its Application. However, as pointed out above, Spieker was not a proper party to this proceeding and has no standing to apply for rehearing. Not does the Applicant raise issues to justify oral argument as outlined above.

E. Supplements to the Applications

The City of San Jose has requested permission to file a Supplement to its Application on the grounds that it has discovered new evidence on the feasibility of undergrounding the transmission lines using dielectric cable. First, as pointed out above, San Jose did not become a party to this proceeding and has no standing to make such a filing. Second, the record in this proceeding indicates that, from the inception of the project, San Jose has been adamantly opposed to any undergrounding of the project at this location because of the presence of sewer and other pipes. (Opposition of PG&E to Petition for Oral Argument and Response to Supplement, page 6.) Third, there is no provision in the Public Utilities Code, nor in the Commission's Rules of Practice and Procedure for the filing of Supplements to Applications for Rehearing following the Response by the Applicant. The argument is therefore without merit.

III. CONCLUSION

No legal or factual errors have been alleged and rehearing should therefore be denied.

IT IS THEREFORE ORDERED that:

1. Rehearing of Decision 99-08-023 is denied.

2. This proceeding is closed.

This order is effective today.

Dated December 2, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
JOEL Z. HYATT
CARL W. WOOD
Commissioners

Certified as a True Copy
of the Original

ASST. EXECUTIVE DIRECTOR, PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA

PROOF OF SERVICE BY MAIL

I, L. Escandor, declare:

I am over the age of 18 years, not a party to this proceeding, and am employed by the California Public Utilities Commission at 505 Van Ness Avenue, San Francisco, California.

On 12/3/99, I deposited in the mail at San Francisco, California, a copy of:

AL 99-12-024
(DECISION NUMBER OR TYPE OF HEARING)

12/2/99
(DATE OF HEARING)

A 98-06-001
(APPLICATION/CASE/OII/OIR NUMBER)

in a sealed envelope, with postage prepaid, addressed to the last know address of each of the addressees in the attached list.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 12/3/99, at San Francisco, California.

Yrd *

*Signature
9/92

EX-5

A.98-06-001

12/2/99

DECISION: 99-12-024

MAIL DATE: 12/3/99

Copy of **"ORDER DENYING REHEARING OF DECISION 99-08-023"** mailed to the following.

SEE ATTACHED LIST FOR APPEARANCES, STATE SERVICE

Count **13**

11/30/99
lpd

********** SERVICE LIST **********

Last updated on 29-NOV-1999 by: LPD
A9806001 LIST

********** APPEARANCES **********

James D. Squeri
Attorney At Law
GOODIN MACBRIDE SQUERI RITCHIE & DAY LLP
505 SANSOME STREET, STE 900
SAN FRANCISCO CA 94111
(415) 392-7900
jsqueri@gmssr.com
For: Legacy Partners Commercial, Inc.

Katherine Harasz
SUITE 1100
50 WEST SAN FERNANDO STREET
SAN JOSE CA 95113
(408) 277-5690
For: Redevelopment Agency of the City of San Jose

Charles R. Lewis Iv
Attorney At Law
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442
SAN FRANCISCO CA 94120

Terry P Bredek, Sr
SONY ELECTRONICS INC
3300 ZANKER ROAD
SAN JOSE CA 95134

Katherine Hardt-Mason
ANDREW L. FABER
TEN ALMADEN BOULEVARD, 11TH FLOOR
SAN JOSE CA 95113-2233
(408) 286-5800
For: CARRAMERICA REALTY CORPORATION AND SONY ELECTRONICS INC.

Kenneth J. Weatherwax
Associate Engineer
SIERRA ENERGY & RISK ASSESSMENT, INC.
ONE SIERRAGATE PLAZA STE 225A
ROSEVILLE CA 95678
(916) 782-5421

********** STATE SERVICE **********

Judith Ikle
Energy Division
AREA 4-A
505 VAN NESS AVE
SAN FRANCISCO CA 94102
(415) 703-1486
jci@cpuc.ca.gov

Steven A. Weissman
Attorney At Law
JEFFER, MANGLES, BUTLER & MARMARO
1 SANSOME STREET, 12TH FLOOR
SAN FRANCISCO CA 94104
(415) 989-9639
saw@jmbm.com

Barbara Ortega
Executive Division
RM. 500
320 WEST 4TH STREET SUITE 500
LOS ANGELES CA 90013
(213) 576-7070
bho@cpuc.ca.gov

********** INFORMATION ONLY **********

Virginia Becchin
1046 WRIGHT AVE., UNIT I
MOUNTAIN VIEW CA 94043