BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Approval of its 2009- 2011 Energy Efficiency Program Plans And Associated Public Goods Charge (PGC) And Procurement Funding Requests.	Application 08-07-021 (Filed July 21, 2008)
And Related Matters.	Application 08-07-022 Application 08-07-023 Application 08-07-031 (Filed July 21, 2008)

RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES AND THE UTILITY REFORM NETWORK TO PETITION FOR MODIFICATION OF DECISION 09-09-047

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I. INTRODUCTION

Pursuant to Rule 16.4(f) of the Commission's Rules of Practice and Procedure, the Division of Ratepayer Advocates (DRA) and The Utility Reform Network (TURN) submit this response to Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SoCalGas), and San Diego Gas & Electric Company's (SDG&E) Petition for Modification of Decision (D.) 09-09-047 (PFM),[1] in which the Utilities request numerous changes to D.09-09-047. DRA and TURN oppose some of the PFM's requested changes, support others, and in some cases, recommend that the Commission direct the Utilities to continue working with the staff of the Commission's Energy Division to resolve the issues raised in the PFM. The bulk of this response reflects DRA's and TURN's opposition to the Utilities' request to dramatically revise the process of updating and freezing *ex ante* values.

II. DISCUSSION

A. The Commission Should Reject the Utilities' Invitation To Abandon The Principle Of Using The "Best Available Information" As The Basis For Frozen Ex Ante Values, And Instead Clarify That While The IOUs Are To Be Consulted, They Do Not Wield Veto Power.

1. Overview and Summary

In D.09-09-047, the Commission adopted an important principle regarding the "freeze" of *ex ante* values used for purposes of planning and reporting accomplishments for 2010-2012. While agreeing that such values should ultimately be "frozen," the Commission rejected the Utilities' position that the frozen values should reflect the values included in the July 2009 filings. Instead, it

[1] DRA and TURN's Response refers jointly to SCE, PG&E, SoCalGas and SDG&E as "Utilities" or "Joint IOUs."

adopted the position that the "frozen values must be based upon the best available information" and, to that end, laid out a process that would "better ensure that the maximum amount of updates is captured before the freeze takes effect."[2]

A few paragraphs later, in acknowledging the need to identify and address errors that may be identified in frozen *ex ante* measure values, the Commission directed the Energy Division "in consultation with the utilities, [to] develop a process by which new measures can be added to the frozen measure datasets and mutually agreed errors in the frozen values can be corrected."[3]

The PFM indicates that the Utilities have interpreted the reference to "mutually agreed errors" and other more general references to a collaborative process with Energy Division staff as allowing the Utilities' to wield veto power over any proposed corrections in frozen values and, more broadly, changes in the way *ex ante* values are determined. If Energy Division seeks a correction that the Utilities either do not agree with or simply do not like, they could withhold agreement and stymie further progress. This would put Energy Division in an untenable position: the staff could identify updates which the utilities oppose resulting in no "mutual agreement", then be criticized by the Utilities as being a barrier to progress; or they can accede to the Utilities' positions even if Energy Division believes those positions to be wrong or inadequate, if such accession is the only way to achieve "mutual agreement." The PFM indicates that Energy Division has chosen the former path. TURN and DRA urge the Commission to affirm that this approach is more consistent with the Commission's goals for its 2010-2012 energy efficiency efforts, even if it has meant slower-than-expected progress toward achieving the "freeze" of *ex ante* values.

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[2] D.09-09-047, pp. 42-43.

[3] *Id.*, at 44.

To the extent D.09-09-047 contains any potential "ambiguity around *ex ante* assumptions,"[4] it is created by the unexplained reference to "mutually agreed errors in the frozen values" and other language the Utilities would interpret as requiring their consent before any changes are made. In other places it affirms that Energy Division is to take the lead in the process of updating *ex ante* values (for example, "provide the utilities with further detail and clarifications on the proper application of DEER so that the utilities are able to correct these problems"[5]). Rather than adopt the relief sought in the PFM and, as a result, jeopardize the principle that the frozen values must be based upon the best available information, the Commission should remove the reference to "mutually agreed errors" and otherwise confirm that the Utilities have input into, but not control over, the process of establishing *ex ante* assumptions.[6]

On the other hand, if the Commission agrees with the Joint IOUs' implicit position that the goal of achieving "mutual agreement" regarding errors and other update matters trumps the goals of using the best available information and capturing the maximum amount of updates before the freeze takes affect, it will need to initiate a process to obtain a more balanced view of what has happened to date between the Joint IOUs and Energy Division.[7] To date, the discussions regarding how to freeze energy savings values have only involved Energy Division and the Utilities, at least so far as TURN and DRA are aware. Not surprisingly, the PFM only tells the Utilities' side of the story. Unless and until

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[4] PFM, p. 3.

[5] D.09-09-047, p. 43.

[6] In D.10-04-029, the Commission adopted a dispute resolution process for major disputes arising out of EM&V work. Should the utilities believe that any difference they might have with Energy Division regarding the "frozen" values rises to the level of a major dispute, they can avail themselves of that process.

[7] It will also have to devote time and resources to developing, implementing and refereeing a process that might achieve such "mutual agreement" without effectively giving the utilities veto power over the outcome.

the Commission (and other interested parties, such as TURN and DRA) have a full accounting from Energy Division of the process to date as viewed by the staff, there is an insufficient basis to act on the Utilities' request.

2. Background and Context for the PFM

In D.09-09-047, the Commission agreed with PG&E and SCE that "measure *ex ante* values established for use in planning and reporting accomplishments for 2010-2012 should be frozen," but in the next sentence rejected the Utilities' proposal to freeze these values based on the E3 calculators submitted with the July 2, 2009 versions of the utility applications. Instead, the Commission agreed with TURN that "frozen values must be based upon the best available information at the time the 2010-2012 activity is starting and that delaying the start of the freeze until early 2010 is a reasonable approach to better ensure that the maximum amount of updates is captured before the freeze takes effect."[8]

The adopted outcome on this issue was different than the approach set forth in the Proposed Decision, which would have frozen DEER values at the levels in the compliance filing to the decision, with the further recognition

> "It is therefore essential that the utilities work with Energy Division to correct the persistent and pervasive errors that have been identified in their filings to date."[9]

In response to comments on the Proposed Decision, the Commission modified the "freeze" such that it would not lock in the values from the July 2009 applications, but rather would capture the "maximum amount of updates." After reiterating that "the Utilities have not always properly utilized current DEER measure values and assumptions in their submitted cost-effectiveness calculations," D.09-09-047

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[8] D.09-09-047, pp. 42-43.

[9] Proposed Decision issued August 25, 2009, p. 37.

stated the Commission's expectations of Energy Division: provide the Utilities with further detail and clarifications on the proper application of DEER; complete its review and approval of non-DEER measure *ex ante* estimates; and implement a review and approval process "that balances the need for measure review with the utilities need to rapidly implement the portfolios approved by this Decision."[10] The Commission concluded with the recognition that there will be new measures for which *ex ante* estimates must be developed, and errors may be identified in frozen measure *ex ante* values.

> Energy Division, in consultation with the utilities, should develop a process by which new measures values can be added to the frozen measure datasets and mutually agreed errors in the frozen values can be corrected.[11]

The associated Conclusion of Law (26) and Ordering Paragraph (48) both reaffirmed the commitment to using "the best available information at the time the 2010-2012 activity is starting." Neither included the "mutually agreed errors" language found in the text.

3. The Joint IOUs' Petition for Modification

The PFM discussion of this issue first notes that the Commission adopted the freeze of *ex ante* values based on the best available information, then notes that these assumptions have not yet been frozen. The PFM claims that ED agrees with the IOUs that "the process is currently at a stalemate and that direction from the Commission is needed to move forward."[12] The Joint IOUs state:

> "Since the requirements of the Decision have not been met, the Joint IOUs request that the Commission amend the Decision language to specify more clearly which data sets and processes should be used to

[10] D.09-09-047, p. 43.

[11] *Id.* (emphasis added).

[12] PFM, p. 3.

> measure energy savings from the IOUs' respective programs. Further, consistent with the Decision, ex ante values and the approach for customized projects should be frozen immediately."[13]

The PFM describes how this relief would materialize with regard to three specific categories: Database for Energy Efficient Resources (DEER); non-DEER deemed workpapers (including new non-DEER measures); and non-DEER customized projects.

[13] *Id.*, at 3-4.

4. The Commission Should Modify D.09-09-047 to Make Clear That While The Utilities Are To Play An Important Role In The Process of Freezing *Ex Ante* Values, The Utilities Do Not Hold Express or Implied Veto Power, And The Process Can Go Forward Even Where The Utilities Withhold Consent.

In D.09-09-047, the Commission decided to freeze *ex ante* values, but with the important caveat that the freeze would reflect "the best available information." Updating the *ex ante* values to reflect such "best available information" or identifying and correcting errors in the frozen values both have the potential to work against the interests of the Utilities with regard to at least some of the programs proposed for 2010-2012, so long as the Utilities have an interest in maximizing the reported energy savings in order to make their programs appear successful. This means the Utilities have a conflict of interest when it comes to participating in the process of freezing *ex ante* values in a manner consistent with D.09-09-047: To the extent that any such update or correction of errors in frozen values is perceived to work against their interests, the Utilities have an incentive to obstruct the process.

The PFM demonstrates that this is not just a theoretical problem. The Utilities proclaim the process with Energy Division to be at a "stalemate" and cite their unilateral declaration that some of the Energy Division-proposed changes are beyond what the Commission intended[14] as an example of that process breakdown. But such a "stalemate" between the Commissions's staff and the Utilities can only exist because the Utilities perceive themselves to have the ability to prevent the process from going forward simply by withholding their consent or cooperation.

[14] As is further discussed below, the Utilities' contention that only changes consistent with DEER 2.05 are permitted is not supported by the language of D.09-09-047.

The Commission should resolve this problem by modifying D.09-09-047 to remove the "mutually agreed" qualifier to the "errors in the frozen values." Thus the sentences at the top of page 43 of D.09-09-047 would read:

> We recognize that errors may be identified in frozen measure *ex ante* values. Energy Division, in consultation with the utilities, should develop a process by which new measures values can be added to the frozen measure datasets and ~~mutually agreed~~ errors in the frozen values can be corrected.[15]

Under this approach, Energy Division would be expected to consult with the Utilities about errors in frozen values, but would not be hamstrung in its ability to move forward to correct such errors even if they fail to achieve "mutual agreement" with the Utilities. TURN and DRA surmise that with this change Energy Division could announce the results of its efforts to date to freeze *ex ante* values and identify and correct any errors in those frozen values. If the Utilities have objections to the Energy Division results and deem those objections worthy of pursuing further review at the Commission, they could pursue the dispute resolution process identified in D.10-10-029.[16]

Failure to make such modifications would permit the Utilities to now achieve in substantial part an outcome explicitly rejected in D.09-09-047. Prior to that decision the Utilities had asked that the *ex ante* values be frozen at the levels reflected in the third version of their applications (as submitted in July 2009). The Commission specifically rejected that approach in favor of the updates based on

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[15] D.09-09-047, p. 43.

[16] In D.10-04-029, the Commission adopted a dispute resolution process that would cover five specified types of disputes. D.10-04-029, p. 33-34; *see also* Ordering Paragraph 9. TURN and DRA believe that disputes over the process for freezing *ex ante* values and identifying errors in frozen values fall into the category labeled "Disputes over results of EM&V studies or reports…." Should the Commission disagree with this interpretation or believe it would be prudent to create a separate sixth category tailored matters, it could add such a category in its decision on this petition.

"the best available information at the time the 2010-2012 activity is starting."[17] If the Commission grants the relief sought in the PFM the Utilities will have effectively transformed the freeze back to the levels reflected in their July 2009 applications, except to the extent they subsequently agreed to permit updates. The Commission should not permit such an undercutting of this important element of its earlier decision.

5. If The Commission Does Not Affirm Energy Division's Ability To Reach Conclusions And Take Actions With Which The Utilities May Not Agree, It Needs To Initiate A Fuller And More Formal Review Of The Process That Led To The PFM's Filing.

The Joint IOUs' PFM only tells one side of the story. Not surprisingly, the Utilities' version of the events suggests that the fault for the "stalemate" of the update and freeze process lies entirely with Energy Division. Since the process only involved the Utilities and Energy Division, and Energy Division's role as a non-party limits its opportunities to publicly weigh in on these subjects, getting the full story will require devoting substantial additional time and effort to these matters. The effort to sift through competing versions of what happened between Energy Division and the Utilities seems likely to distract from the more important and time-sensitive tasks associated with getting the *ex ante* values updated consistent with using the best available information and then frozen, as called for in D.09-09-047.

As just one example, consider the PFM's contention that Energy Division failed to freeze *ex ante* values within the timeline set forth in the ALJ's November 18, 2009 ruling, even though the Utilities "submitted all required non-DEER measure workpapers in advance of the March 31, 2010 deadline."[18] The deadline

[17] D.09-09-047, pp. 42-43; see also Conclusion of Law 26.

[18] PFM, p. 5.

came from the Energy Division discussion of the process for submission and review of the non-DEER workpapers. A key element of that process was to "provide ED with adequate time for review of submitted workpapers."[19] Energy Division went on to state that it intended to issue final acceptance of the workpapers by March 31, 2010.[20] Clearly Energy Division's ability to achieve its March 31, 2010 deadline depended heavily on the Utilities' submission of the workpapers sufficiently before that deadline such that the staff would have adequate time to review the submissions and, if necessary, obtain further information from the Utilities. Thus, if the Utilities' submitted any substantial portion of the workpapers on or just before March 31, 2010, it would seem patently unfair to pin the blame on Energy Division for the failure to meet the stated deadline. Yet that is precisely what the PFM does:

> Energy Division did not freeze these ex ante values within the timeline set forth by the [ALJ Ruling]…[21]

On this one point, finding out when the Utilities actually provided the workpapers to Energy Division will help assess the Joint IOUs' PFM's claim. More generally, assessing the reasonableness of the PFM's characterization of the events that have transpired since D.09-09-047 issued will require creating an opportunity for Energy Division to present its side of the story, for TURN, DRA and other interested parties to weigh in, and for the Commission to identify and resolve numerous factual disputes. **I**

TURN and DRA urge the Commission to sidestep any need to more fully develop the record by adopting the approach described in the preceding section: eliminate the reference to achieving "mutual agreement" between Energy Division and the Utilities, and otherwise confirm that Energy Division is to consult with the

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[19] November 18, 2009 Ruling, Attachment, p. 3.

[20] *Id.*, p. 4.

[21] PFM, p. 5.

Utilities and then to act as the staff sees fit using its best judgment. Otherwise, the Commission is likely to find itself mired in a protracted version of "he said, she said" in order to determine the accuracy of the Utilities contentions in the PFM.

6. The Joint IOUs' PFM Fails To Demonstrate The Reasonableness Of The Requested Modifications.

a) Database for Energy Efficient Resources (DEER)

According to the Joint IOUs' PFM,

> The Commission has already specified that the IOUs should use DEER 2008 version 2.05, dated December 16, 2008, for the 2010-2012 cycle.[22]

The Decision actually clarified that its references to DEER 2008 values were shorthand for "the complete set of data denoted as 2008 DEER version 2008.2.05, dated December 16, 2008, as currently posted at the DEER website."[23] But this clarification must be read in the context of the Commission's earlier statement in favor of ensuring that "the maximum amount of updates is captured before the freeze takes effect." Where such updates are available, use of DEER 2008 version 2.05 would fail to capture those updates. TURN and DRA submit that the clarification of what is meant when the term "DEER 2008" appears in the decision only matters where such DEER 2008 is the "best available information" because there have been no further updates.

The Utilities explain their interpretation of the decision as permitting correction of errors in DEER, but only when the Utilities mutually agree with the staff's assessment that such errors exist and the proposed correction of that error.[24] The PFM describes Energy Division as proposing modification of version 2.05 of

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[22] PFM, p. 4, citing D.09-09-047, p. 43.

[23] D.09-09-047, p. 43.

DEER 2008, and the Utilities' agreement to a limited subset of what they deem "corrections." "However, the Utilities did not agree to implement any proposed updates that constituted methodological changes, such as introducing a new approach to calculating interactive effects."[25]

Because these issues have arisen from a process that involved only the Utilities and Energy Division, and because the PFM presents only the Utilities' version of the events that transpired, the Commission lacks sufficient information to assess the distinction between the "corrections" the Utilities have deemed acceptable and "updates" for which they have withheld any mutual agreement and, in their view, successfully derailed. But on the face of D.09-09-047, any such distinction should make no difference in the treatment, given the Decision's explicit reference to incorporating "the maximum amount of updates" before implementing the freeze.

In sum, on the DEER-related measures, the Utilities are asking the Commission to reverse the outcome adopted in D.09-09-047 based on nothing other than their successful filibuster of Energy Division's efforts to develop and implement updates and to identify and correct errors. The Utility position that the Commission rejected in D.09-09-047 sought to use the data reflected in their July 2009 applications. The Utility-proposed changes would abandon this commitment to the "maximum amount of updates" in favor of the DEER 2008 data as the default, with a limited number of corrections that they have deemed acceptable. Adopting such an outcome would effectively put the Utilities in charge of deciding which *ex ante* values will be used for the planning and reporting of accomplishments from their energy efficiency programs.

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[24] PFM, pp. 4-5.

[25] *Id.*

b) Non-DEER Deemed[26] Workpapers

The PFM contends that the Commission assigned a particular urgency to the Energy Division's review process for workpapers associated with non-DEER measure *ex ante* estimates, quoting a directive to the staff calling for a balance the need for measure review with the need to rapidly implement the Commission-approved portfolios.[27] The Utilities omitted the preceding sentence:

> It is therefore essential that the utilities work with Energy Division in its review and approval of their non-DEER measures *ex ante* values so that this activity can be completed as soon as possible.[28]

The fact that for the most part only the Utilities and Energy Division have been privy to what has transpired regarding the *ex ante* values update and freeze efforts since

D.09-09-047 issued makes it difficult to evaluate the Utilities' assertions in the PFM. However, the Utilities' implication that they have in no way contributed to the delay because they "submitted all required non-DEER measure workpapers in advance of the March 31, 2010 deadline" cannot be assessed without further information regarding what the "further Energy Division direction" was that followed the November 2009 ALJ Ruling, and when precisely the Utilities submitted the workpapers. If the Utilities delivered most or all of the workpaper material on or shortly before that deadline, it would be unrealistic to expect Energy Division to complete its review of that material before the deadline.

The Utilities criticize Energy Division for not freezing the *ex ante* values by the March 31, 2010 target date, and having instead "rejected or required major

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[26] TURN and DRA are not clear on why the utilities have inserted the word "deemed" into their title for Non-DEER Workpapers. Before the Commission adopts this term, it needs to have the Utilities explain what precisely they have in mind as being "deemed" about the Non-DEER measures or the associated workpapers.

[27] PFM, p. 5.

[28] D.09-09-047, p. 43.

changes to all reviewed workpapers three months after the Joint IOUs request for clarification."[29] The Commission cannot assess the accuracy or relevance of this assertion without further information regarding the "request for clarification," the Energy Division's actual response to the reviewed workpapers and, to the extent the staff actually rejected or required major changes, the basis for such rejection or requirement of changes.

Finally, the relief sought in the PFM on this point is inappropriate. Freezing the *ex ante* values based on whatever was included in the Utilities' non-DEER workpapers so long as those workpapers ended up in the Energy Division's in-box by March 31, 2010 (with a few updates to reflect the limited corrections to values for DEER measures that the utilities deem acceptable) simply eviscerates the process of any meaningful role for Energy Division. The Commission made clear in D.09-09-047 that it had serious concerns about the quality of the data the Utilities were submitting in their cost-effectiveness calculations, even as it agreed to freeze those values for the 2010-2012 program cycle once the updates were complete.[30] The PFM would have the Commission abandon those concerns and permit the Utilities to use whatever values they submitted, so long as they were submitted by March 31, 2010. The Commission needs to firmly reject such an approach.

c) New Non-DEER Deemed Workpapers

The Joint IOUs' PFM specifically calls out the treatment of new measures that are not included in current DEER datasets.[31] According to the Utilities, while the November 2009 ALJ Ruling gives Energy Division a 15-day review period in

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[29] PFM, pp. 5-6.

[30] D.09-09-047, p. 43 ["As discussed in this decision (e.g., Sections 4.2 and 4.5), the Utilities have not always properly utilized current DEER measure values and assumptions in their submitted cost-effectiveness calculations."]

[31] PFM, pp. 6-7.

which to provide comments, to date Energy Division has provided no response to any of the workpapers submitted since March 31, 2010.

The Utilities' reference to a 15-day review period from the ALJ Ruling is unclear, at best. The ruling includes several different 15-day periods applicable to Energy Division's responses to utility submissions. For "new" non-DEER measures, there is a 15-day period for Energy Division to respond to comments on its proposal for a draft uniform measure workpaper template.[32] Energy Division is to complete its "preliminary review" of utility-submitted workpapers (limited to determining whether minimum data requirements are met) within 15 days of workpaper submission.[33] But there is no 15-day period tied to Energy Division's final review of such submissions.

Simply saying that the Joint IOUs have submitted workpapers pursuant to this process but "have not received a response from the Energy Division,"[34] does not provide the Commission with sufficient information to assess (much less grant) the Utilities' claim for relief. More information is needed, including when the utility request came in, the nature of that request, and the material provided in support of that request (both in terms of quantity and quality of the material).

Even if one assumes that the Utilities' contentions on these points are complete and accurate, the proposed relief would be inappropriate. The Utilities ask the Commission to freeze the values at whatever was the level set forth in their workpapers submitted after March 31, 2010, so long as they were submitted before the Commission acts on the current petition, without regard to the quality of the underlying data. And going forward, Energy Division would have 15 days to perform the entire review (rather than the preliminary assessment).

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[32] November 18, 2009 ALJ Ruling, Attachment p. 4.

[33] *Id.*, p. 6.

[34] PFM, pp. 6-7.

> If the Energy Division does not provide any comments within 15 days, the *ex ante* values as set forth in the workpapers will be frozen, pending any changes that the IOUs agree to revise.[35]

It's hard to imagine an approach that would give the IOUs a stronger incentive to make Energy Division's review impossible to perform within a 15-day period, since the Utilities proposed values would be frozen by default (except to the extent the Utilities themselves see fit to revise those values). It's also hard to conceive of an approach that would be less consistent with the Commission's past and ongoing recognition of the importance of a robust EM&V process to ensure that the underlying programs warrant the level of ratepayer investment being made.

d) Non-DEER Customized Projects

Unable to request that the Commission freeze *ex ante* values associated with customized projects, the Joint IOUs' PFM asks the Commission "to freeze the approach to calculating [*ex ante* values for] customized projects for the 2010-2012 program cycle."[36] After listing the Utilities' allegations regarding Energy Division's purportedly greatly expanded data requirements related to customized projects, the petition goes on to propose (in a five-page, single-spaced attachment) the "approach" that the Utilities request the Commission to both adopt and then immediately freeze for the duration of the 2010-2012 program cycle. The only support for this purported change is a single, self-serving sentence:

> This approach to customized projects strikes an appropriate balance between the Energy Division's oversight role and the Commission's intent to reduce the regulatory administrative burden on the Joint IOUs and ensure a predictable process.[37]

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[35] PFM, p. 7.

[36] PFM, pp. 7-8 [emphasis in original].

[37] PFM, p. 10.

Energy Division may have a different view of the data requirements it seeks to apply to these custom programs and likely does not agree that it has requested analysis "that the Joint IOUs may not be legally able to perform," or that its proposed guidance is "vague [and] incompatible with existing reporting mechanisms."[38] If the Commission considers granting the relief sought by Utilities on this point, it should first engage in a process that will permit consideration of Energy Division's input and experience with the process.

B. The Commission Should Not Grant the Request to Modify Benchmarking Requirements in the Absence of a More Complete Record.

The PFM observes that D.09-09-047 "provided multiple directives to …benchmark commercial, local government and new construction facilities."[39] DRA and TURN understand that the process of implementing benchmarking has been complicated by the interaction between the requirements of D.09-09-047 and Assembly Bills (AB) 1103 and 531. However, the PFM fails to demonstrate that each of the PFM's requested changes are necessary or the best solution to the problems with implementing benchmarking as envisioned by D.09-09-047.

The Utilities' request that the Commission adopt a phased approach to benchmarking that targets larger buildings first appears reasonable.[40] On the other hand, the request to modify D.09-09-047 to "exclusively promote the ESPM [Energy Star Portfolio Manager] tool for benchmarking"[41] is not adequately supported by the PFM. The Utilities claim that AB 1103 provides for the exclusive use of ESPM, and that ESPM is "the only tool" that provides a

[38] PFM, p. 8.

[39] PFM, p. 10.

[40] PFM, p. 13.

[41] PFM, p. 12.

consistent, well-defined process. The PFM does not attempt to explain why Energy Division staff nevertheless supports use of other benchmarking tools in addition to ESPM. For example, ESPM is a tool that benchmarks the operation of a building, but there are other benchmarking tools are being developed with the potential to benchmark the assets within a building. Perhaps other benchmarking tools would address shortcomings of ESPM, such as its inability to benchmark portions of a building,[42] or ESPM's requirement that customers must activate a secure ESPM account. DRA and TURN cannot support a request to require ESPM as the exclusive benchmarking tool in the absence of more information about other benchmarking tools and a more comprehensive review of exclusive use of the ESPM.

Rather than granting the relief requested in the PFM on these and other benchmarking issues in the absence of an adequate record that more fully explores the concerns the Utilities raise, the Commission should direct the Utilities to continue working with the Energy Division staff to resolve ongoing benchmarking issues. As one example, Energy Division could hold a workshop to consider best practices for achieving the Commission's benchmarking goals in light of the current legislative landscape and concurrent responsibilities of the California Energy Commission for benchmarking.

To the extent that Commission is inclined to grant the relief requested in the PFM, such as relieving the Utilities of the obligation to meet their numerical benchmarking targets, it should ensure that the Utilities' budgets are adjusted downward to reflect their decreased responsibility.

[42] PFM, p. 14.

C. The Commission Should Deny the Utilities' Request to Modify The Direction Related To The Co-Branding Of The New 2010-2012 Marketing Education & Outreach Statewide Brand.

D.09-09-047 directed the Utilities to use the newly created Statewide Marketing brand, "alone or in a co-branded capacity across all energy efficiency marketing efforts for all programs."[43] The Utilities claim to "fully support the use of the new brand"[44] while at the same time requesting broad discretion to decide when to use it. The Utilities argue that they seek such broad discretion in deciding when to use "Engage 360" to "facilitate customer understanding and minimize confusion in the marketplace regarding who a given communication is from."[45]

The Utilities seek "flexibility to approve any co-branded material prior to its publication"[46] as well as "the opportunity to approve the use of their brand in any co-branding material prior to its publication." The Utilities request that in the event that a utility does not approve co-branded material, "only the utility logo should be used." They seek blanket exemptions from the requirement for programs not funded by energy efficiency funds; campaigns and collateral that include both energy efficiency and non-energy efficiency programs, and energy efficiency local and third party programs, and advertising funded by Utilities' shareholder funding and used at the discretion of the Utilities.

The Commission should reject the Utilities' request for unfettered unilateral discretion to determine when to use the Engage 360 brand, as it would be inconsistent with the Commission's intent that the new brand be used "alone or in a co-branded capacity across all energy efficiency marketing efforts for all

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[43] D.09-09-047, p.

[44] PFM, p. 17.

[45] *Id.*

[46] *Id.*

programs."[47] The new statewide brand, Engage 360, promotes the goals of the "California Energy Efficiency Strategic Plan which recognized the need to provide Californians with clear and relevant options on how to save energy, reduce greenhouse gas emissions, and support clean energy solutions."[48] Allowing the Utilities to decide when to use (or not to use) the "Engage 360" brand would undermine the goal of providing clear, consistent information about energy efficiency and ways that Californians can reduce their energy use and greenhouse gas emissions.

D. DRA and TURN Agree that the Commission Should Modify Requirements for the Statewide Whole House Program, but not to the extent that the Utilities Request.

D.09-09-047 required changes to the Utilities' "Whole House Programs," which are designed to "comprehensively address the potential for energy savings in residential buildings."[49] According to the PFM, the Utilities have worked with Energy Division to develop the Whole House Prescriptive Program (WHPP) designs, but the Energy Division and the Utilities have determined it is "technically infeasible to achieve an average of 20% annual energy savings by the end of 2012."[50] The PFM requests a change in the requirement to achieve an average of 20% annual energy savings for their Whole House Programs by the end of the cycle, to an average of 10% for the Prescriptive (Basic) strategy"[51] and request "a minimum 10% energy savings per treated home/unit for the

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[47] D.09-09-047, Ordering Paragraph 34, p. 382 (emphasis added).

[48] ttp://www.engage360.com/index.php?option=com_content&view=article&id=51&Itemid=39&lang=en

[49] PFM, p. 18.

[50] PFM, p. 19.

[51] PFM, p. 19.

Performance (Advanced) strategy (the second performance tier of the proposed Whole House program) in their respective local WHPP."[52]

DRA and TURN do not oppose the reduction of the savings goal for the Prescriptive Home Program, but recommend that the Commission deny the request to lower the goals for the Advanced Home Programs. The higher incentives and additional expenditures authorized for the Advanced Home Program should produce a higher level of savings than achieved under the Basic Program. The Commission should not lower the goal in the absence of more information to support the requested reduction.

E. The Commission Should Maintain Consistent Requirements for Statewide Reporting.

The PFM acknowledges that the Commission has directed the Utilities during the 2010-2012 program cycle to develop and implement twelve statewide programs that have the same name, same incentive levels, and the same or very similar delivery mechanisms and marketing materials, as well as directing close coordination across the programs.[53] Such statewide coordination among ratepayer-funded energy efficiency programs ensures that utility customers statewide have the same customer experience in choosing energy efficiency programs. The Utilities nevertheless request that they be allowed to make "reasonable and appropriate variations to best address unique IOU needs." In particular, they request authority to implement changes to the twelve statewide programs limited only by the requirements that

> "(1) any variation of incentives that is greater/less than 50% of the agreed upon statewide incentive level would require immediate Energy Division notification; and (2) any program modification that would require changes to the structure of the program logic model

[52] PFM, p. 19.

[53] PFM. p. 20.

> would require immediate Energy Division notification, to ensure coordination with evaluation, measurement, and verification processes."

In other words, any utility could abandon the approach seeking statewide uniformity, so long as it notifies Energy Division that it is so doing. The Commission should reject this request to reverse the progress that has been made in developing consistent statewide programs, and instead require the Utilities to offer consistent program offerings across the state. If the Commission is inclined to allow the Utilities to propose specific variations in the twelve statewide programs, it should require that proposed deviations be presented in a Tier 3 advice letter, which requires approval via a Commission Resolution.

F. DRA and TURN Do Not Oppose the Utilities' Request that Sponsorship Costs For Energy Efficiency Events or Activities That Directly Promote Energy Efficiency Programs Be Defined As Allowable Costs

The PFM requests that the Commission modify D.09-09-047 "to expand the definition of allowable costs to include costs for energy efficiency program-specific sponsored events or activities, including costs such as conference entry fees for membership-based, issue specific trade organizations with membership benefits, energy efficiency program recognition, promotions, and staff travel costs to participate in these energy efficiency conferences."[54] DRA and TURN remain concerned about the overall high level of administrative costs for energy efficiency programs as compared to other clean energy programs, but do not oppose the request to expand the definition of allowable costs as proposed in the PFM.

[54] PFM, p. 23,

G. DRA and TURN Support the Utilities' Request that the Commission Clarify that the California Advanced Homes Program Should Offer A Performance Bonus for Single Family Units Only, or Should Offer a More Appropriate Bonus For Multifamily Units

The PFM notes that D.09-09-047 requires that the California Advanced Homes Program (CAHP) include a $1,000 performance bonus for each unit that qualifies for the California Energy Commission's New Solar Home Partnership (NSHP), but contends that it is unclear whether the performance bonus should apply to multi-family units as well. The Utilities claim that the $1,000 performance bonus is too high for multi-family units and will encourage free-ridership, and request that the Commission either clarify that the performance bonus does not apply to multifamily units, or that the performance bonus for such units should be more proportional.

DRA and TURN agree that a $1,000 performance bonus for multifamily unit appears excessive. DRA and TURN recommend that the Commission clarify that the $1,000 performance bonus applies only to single family units, and that the Commission's Energy Division work with the Utilities to evaluate how to effectively increase the adoption of the California Advanced Homes Program within the multifamily market.

H. DRA and TURN Support the Utilities' Request that the Commission Explicitly Authorize Joint Contracting on Statewide Programs to Further the Goals of the Energy Efficiency Statewide Programs.

The Utilities contend that further Commission direction is needed to resolve a legal issue "regarding joint-utility cooperation posed by the antitrust laws that could impede the Utilities' ability to comply with the Commission's directives for their energy efficiency programs unless the Commission" establishes the basis for

state action immunity for such cooperation[55]. The Utilities contend that "agreements between competitors such as the Joint IOUs concerning core elements of the competitive process, including agreements on price and output, could be viewed as unlawful under the antitrust laws under certain circumstances, thus subjecting the ratepayers or shareholders to the significant costs of defending an antitrust lawsuit and the potential of treble damages if the lawsuit is successful."[56]

The Utilities raised this issue during the Peer Review Group that operated during the 2006-2008 energy efficiency program cycle, when they argued that potential antitrust liability hindered their ability to cooperate in providing programs. DRA and TURN continue to support statewide cooperation among the Utilities to provide energy efficiency. The PFM does not make clear how the Utilities are competitors in this regard. However, should the Commission determine that they are indeed "competitors" in some material way, DRA and TURN would support the Utilities' requested modifications to D.09-09-047, directing the Utilities to jointly cooperate in various contracting and negotiation activities pertaining to implementation of statewide energy efficiency programs and maintaining continued close Commission oversight of those activities though the Commission's Energy Division staff.

III. CONCLUSION

In D.09-09-047, the Commission adopted an important trade-off – if *ex ante* values for purposes of planning and reporting accomplishments were to be frozen, such a freeze needs to reflect the best available information that captures the maximum amount of updates before the freeze takes place.[57] The Utilities

[55] PFM, P. 25.

[56] PFM, p. 25.

[57] D.09-09-047, pp. 42-43.

objected to the updating when it was first proposed. The addition of language calling for correction of "mutually agreed" errors and similar collaborative efforts between the Utilities and Energy Division might have reflected a reasonable aspiration at the time D.09-09-047 issued. But the PFM shows that the Utilities have turned that language on its head, obstructing what was intended to be a collaborative process by withholding their consent and, in doing so, blocking progress.

TURN and DRA urge the Commission to recognize that the most effective and efficient solution to this problem is to remove the reference to "mutually agreed" outcomes and to reaffirm that the Energy Division plays the primary role ///

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in the updating process. The Utilities should continue to be consulted, and should continue to have reasonable opportunities to provide input on such matters. The Utilities should not however determine what gets updated and how such updates occur.

Respectfully submitted,

/s/ DIANA L. LEE

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