

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application of Southern California Edison)	
Company (U338E) for Applying the Market)	
Index Formula and As-Available Capacity Prices)	A.08-11-001
Adopted in D.07-09-040 to Calculate Short-Run)	(Filed November 4, 2008)
Avoided Cost for Payments to Qualifying)	
Facilities beginning July 2003 and Associated)	
Relief.)	
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)	R.06-02-013
And Related Matters)	R.04-04-003
)	R.04-04-025
)	R.99-11-022
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**COMMENTS OF THE
CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION
ON THE PROPOSED DECISION**

Scott Blaising
Justin Wynne
BRAUN BLAISING McLAUGHLIN, P.C.
915 L Street, Suite 1270
Sacramento, CA 95814
Telephone: (916) 682-9702
Facsimile: (916) 563-8855
E-mail: blaising@braunlegal.com

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Attorneys for the
California Municipal Utilities Association

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application of Southern California Edison Company (U338E) for Applying the Market Index Formula and As-Available Capacity Prices adopted in D.07-09-040 to Calculate Short-Run Avoided Cost for Payments to Qualifying Facilities beginning July 2003 and Associated Relief.)	
)	A.08-11-001
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Pursuant to Rule 14.3 of the Rules of Practice and Procedure of the Public Utilities Commission of the State of California ("Commission"), the California Municipal Utilities Association ("CMUA") hereby provides opening comments on the proposed decision of Administrative Law Judge Wetzell adopting the proposed settlement relating to the qualifying facility ("QF") and combined heat and power ("CHP") program ("Proposed Decision").

I. BACKGROUND

On October 8, 2010, Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("SCE"), and San Diego Gas & Electric Company (collectively, "investor-owned utilities" or "IOUs"), the California Cogeneration Council, the Independent Energy Producers Association, the Cogeneration Association of California, the Energy Producers and Users Coalition, the Division of Ratepayer Advocates, and The Utility Reform Network (collectively, "Settling")

Parties”) filed the *Joint Motion for Approval of Qualifying Facility and Combined Heat and Power Program Settlement Agreement* (“Joint Motion”) seeking Commission approval of a CHP settlement agreement (“Settlement Agreement”). In nearly all respects, the Settlement Agreement reflects a commendable effort to support the development of CHP as a means of reducing greenhouse gas (“GHG”) emissions. This is a laudable goal, and CMUA supports these efforts. Regretfully, however, CMUA must oppose the Settlement Agreement. This is so because the Settling Parties, undoubtedly driven by the IOUs, have poisoned the Settlement Agreement by including a provision that would unnecessarily, unjustifiably, and improperly overturn a fundamental Commission decision affecting cost responsibility for municipal departing load (“MDL”) customers served by publicly owned utilities (“POUs”). Removal of this provision is proper (as shown below), and necessary to maintain the equitable outcome reached by the Commission in Decision (“D.”) 08-09-012 on precisely the same issue: cost responsibility for new generation. Perhaps equally important, from a practical perspective, removal of this provision would in no way have a negative effect on the overall goals and benefits of the Settlement Agreement.

A somewhat extended discussion of past Commission decisions (in particular, D.08-09-012) is necessary in order to provide context for CMUA’s comments. The Joint Motion notes that “[t]he relationship among qualifying facilities (‘QFs’), the investor-owned utilities (‘IOUs’) and ratepayer advocate groups has been contentious and litigious for most of the last thirty years.”¹ The same can be said of the relationship between the IOUs and POU’s over the last decade with respect to the imposition of so-called “non-bypassable charges” (“NBCs”) or “exit fees” on MDL customers. With the issuance of D.08-09-012, the Commission unambiguously put to rest the seemingly never-

¹ Joint Motion at 1.

ending battle between IOUs and POUs over the imposition of NBCs on MDL customers. For years leading to D.08-09-012, IOUs and POUs had been engaged in a “holy war”² in two monstrous rulemaking proceedings: R.02-01-011 and R.06-02-013 (Track 3). Days upon days of evidentiary hearings, and stacks upon stacks of testimony, motions, briefs, comments, requests for rehearing, rulings and decisions produced a voluminous record that wearied even the stoutest of heart. At one point, President Peevey urged the IOUs to simply move on:

But let me say that I am somewhat frustrated by having to continue to author decisions clarifying finer and finer points on this municipal departing load issue. It seems to me that with all these MDL decisions we have taken what seems to be a fairly simple concept of new load and created a very complex set of rules surrounding it. It is not lost on me that most of this need for clarification is created by the IOUs’ unwillingness to concede even the smallest point in favor of the munis. I find this senseless because the magnitude of the impact on the IOUs relative to their overall load is very, very small, while the impact on the municipal utility customers can be much larger. I encourage the IOUs to move on after this decision today and hopefully we’ll not need to work on yet another MDL decision.³

The IOUs could not, however, simply move on, and the skirmishes continued until the battle royal, namely, Track 3 of R.06-02-013 and the issuance of D.08-09-012. D.08-09-012 is a 100-plus-page treatise on the subject of NBCs, and is in many ways a model of clarity and authority concerning the basis for applying (and not applying) NBCs.⁴

² “[T]his has become a theology....” Transcribed oral comments of Commissioner Geoffrey Brown at the Commission’s July 21, 2005 business meeting. *See* http://cpuc.granicus.com/ViewPublisher.php?view_id=2; July 21, 2005 CPUC Meeting (“Audio Track”), starting at audio point 1:35:12, relating to Item 45A.

³ Transcribed oral comments of President Michael Peevey at the Commission’s July 21, 2005 business meeting. *See* Audio Track at audio point 1:35:12.

⁴ CMUA cannot overstate the importance of D.08-09-012, not necessarily because of the outcome but rather because of the amount of effort that went into the record supporting D.08-09-012. As described further below, this is why it is particularly troubling to see the Settling Parties (and in turn the Proposed Decision) so casually and summarily disregard the principles set forth in D.08-09-012.

D.08-09-012 addressed the applicability of NBCs for “new generation.”⁵ The centerpiece of the Commission’s analysis in D.08-09-012 was the so-called “fair share” principle, which was summarized by the Commission as follows: “[T]he rule is that when costs are incurred on its behalf, that customer must pay its fair share of the costs. A corollary rule is that if no costs are incurred on its behalf, then the customer’s fair share can be determined to be zero.”⁶ After documenting the record evidence supporting the fact that MDL has been historically excluded from the IOUs’ retail load data,⁷ and explaining the effect of being excluded from the underlying retail load data,⁸ the Commission concluded that the fair share of MDL customers for new generation should be zero and that no NBCs should be applicable to MDL customers (with the possible exception of so-called “large municipalizations”).⁹ In supporting its holding, the Commission concluded that the utilities’ resources are not procured on behalf of MDL and customer generation departing load (“CGDL”) customers and, therefore, no new procurement costs should be allocated to MDL and CGDL customers.¹⁰ The Commission could not have been clearer in Ordering Paragraph 2: “[With the possible exception of large municipalizations,] MDL customers are excluded from having to pay the [new generation] NBCs, including any above market costs related to RPS contracts....”¹¹

⁵ See D.08-09-012 at 2, note 1 (“New generation includes generation from both fossil fueled and renewable resources contracted for or constructed by the investor-owned utilities subsequent to January 1, 2003.”).

⁶ D.08-09-012 at 10-11.

⁷ See D.08-09-012 at 15-19.

⁸ See D.08-09-012 at 22-24.

⁹ See D.08-09-012 at 26.

¹⁰ See D.08-09-012 at 24 (“Consistent with our overall guiding principles for resolving NBC implementation issues, these departing customers should not pay any NBC related to new generation resources that were not procured on their behalf, as these customers’ fair share would be zero.”) See also D.08-09-012; Conclusion of Law 3.

¹¹ D.08-09-012; Ordering Paragraph 2.

The Commission recently revisited this same issue in D.10-04-028 because SCE had proposed to impose new generation NBCs on MDL CGDL customers based on the alleged societal benefit of certain generation resources. After affirming the relevance and applicability of D.08-09-012, the Commission noted that the perceived societal attributes of the generation resources do not trump the clear cost-causation principles espoused in D.08-09-012.¹²

Initially it was unclear to CMUA that the Settling Parties intended to overturn D.08-09-012 with respect to MDL customers, since the Settling Parties did not include any justification for overturning D.08-09-012 in their Joint Motion.¹³ However, with the revelation that the Settling Parties intended to overturn D.08-09-012 with respect to MDL customers, the Settling Parties (again, presumably lead by the IOUs) attempted to justify the modification by claiming that facts underlying D.08-09-012 had somehow changed.¹⁴ The Proposed Decision errs factually and legally by relying unquestioningly on the Settling Parties' purported justification for overturning D.08-09-012. The Proposed Decision, which is nearly a verbatim recitation of the Settling Parties' joint reply comments, states as follows:

In D.08-09-012, the Commission exempted MDL from stranded cost responsibility for new generation resources because the load forecast to determine new resource needs takes into account the departure of customers for municipal service. Here, however, the GHG Emissions Reduction Targets are not based on load forecasts that exclude MDL, but rather on actual retail sales data that includes all current bundled service customers, even if some of those customers later depart for municipal service. Because the IOUs' GHG Emissions Reduction Targets obligations are based on their current bundled service customers' retail sales (as compared to future load forecasts that account for departing customers), to the extent that a customer

¹² See D.10-04-028 at 30.

¹³ See Opening Comments of CMUA on the Joint Motion at 5-6.

¹⁴ See Settling Parties Joint Reply Comments at 23-24.

departs, that customer should bear its share of the costs incurred on its behalf.¹⁵

The Proposed Decision's unquestioning reliance on the IOUs' justification is misplaced. Since the IOUs' justification is unsupported and false (as shown below), the Proposed Decision, if adopted as written, would be subject to review and reversal on the grounds that, among other things, the decision is not supported by evidence and the findings. Accordingly, CMUA requests that the Proposed Decision be revised to comport with the clear cost-recovery principles in D.08-09-012. More specifically, CMUA requests that the Proposed Decision be revised to state that there is no basis for modifying D.08-09-012 with respect to MDL customers, and therefore, pursuant to D.08-09-012, MDL customers should be excluded from having to pay NBCs associated with new CHP costs (with the possible exception of so-called "large municipalizations").

II. COMMENTS

A. The Proposed Decision Errs In Concluding There Is A Factual Basis For Modifying D.08-09-012

Borrowing nearly verbatim from the Settling Parties' joint reply comments, the Proposed Decision finds that "[b]ecause the IOUs' GHG Emissions Reduction Targets obligations are based on their current bundled service customers' retail sales (as compared to future load forecasts that account for departing customers), to the extent that a customer departs, that customer should bear its share of the costs incurred on its behalf."¹⁶ In essence, what the Proposed Decision is saying is that the logic (and holding) of D.08-09-012 is inapplicable to MDL because the obligations under the Settlement Agreement are based on current retail sales instead of future load forecasts. This is the sole reason that the Proposed Decision allows the Settling Parties to depart from D.08-09-012. In

¹⁵ Proposed Decision at 53. (See Settling Parties Joint Reply Comments at 24, providing the language used by the Proposed Decision.)

¹⁶ Proposed Decision at 53.

this regard, the Proposed Decision, following the Settling Parties' joint reply comments, constructs a false dichotomy. As shown below, there is no difference under D.08-09-012 between "current bundled service customers' retail sales" and "future load forecasts that account for departing customers." Under D.08-09-012, the two phrases are inseparably joined, and it is therefore erroneous for the Proposed Decision to depart from D.08-09-012 in this instance and conclude that CHP costs will be incurred on behalf of MDL customers.

Stated simply, the "future load forecasts" relied on in D.08-09-012 to exempt MDL customers from new generation cost-responsibility are merely compilations of actual or "current retail sales" (as used in the Settlement Agreement). The fact that MDL was in one year's actual retail sales (because it had not yet departed) and then not in the next year's actual retail sales (because it had departed) was the basis for concluding that no generation costs were incurred on behalf of such MDL.¹⁷ In other words, the methodology used in the Settlement Agreement (recurring analysis of current bundled service customers' retail sales) was taken into account in and the basis for D.08-09-012. In fact, the Commission in D.08-09-012 commended this methodology as reasonable: "We note that the use of historic information and trends to reflect future departing load reduces some risk to the IOUs of possibly adopting overly optimistic estimates and tends to limit the dispute and litigation related to what the appropriate levels of departing load should be."¹⁸ Most importantly, the Commission firmly held that the key cost-responsibility touchstone ("bundled

¹⁷ See D.08-09-012 at 19, citing D.07-12-052 at 34-35 ("[F]uture DG and MDL is captured by historical trends [of actual sales] used to develop the forecast.") See also *id.*, note 25 ("MDL is implicitly reflected in SCE's load forecast as a decline in SCE's [actual] bundled load growth through the extrapolation of historical data. PG&E similarly takes projected POU departing load into account in its load forecast." (internal citations omitted)).

¹⁸ D.08-09-012 at 21.

customer indifference”) would be maintained by using this methodology, notwithstanding year-to-year fluctuations.¹⁹

Importantly, the same methodology is used and applies in the Settlement Agreement, although the Settling Parties would apparently have the Commission think otherwise. The Settling Parties apparently would have the Commission believe that obligations under the Settlement Agreement are *static* and not recurring, but rather based on a single year’s retail sales. This assertion is specious. While the initial obligation is based on 2007 load data,²⁰ it is clear from the Settlement Agreement that the obligation changes as load data changes.²¹ The obligations under the Settlement Agreement change based on historic data – data that implicitly takes into account MDL activity. As such, there is absolutely no substantive difference between the methodology employed in the Settlement Agreement and the methodology that the Commission relied on in D.08-09-012 to find that MDL customers should be exempt from stranded cost responsibility for new generation resources. The result in both cases is the same – costs will not be incurred on behalf of MDL customers.

Because there is no substantive difference in underlying methodologies, there is no reason to undo or “suspend” the clear rules regarding NBCs for new generation adopted in D.08-09-012 in connection with the Settlement Agreement. Specifically, MDL customers should not pay any NBCs

¹⁹ See D.08-09-012 at 21 (“While there may be differences between the amounts of departing load implicit in the load forecasts and the amounts recorded on a year-by-year basis, over time any such variations should level out and bundled customer indifference will be maintained.”).

²⁰ See IOU Settlement Agreement; Section 6.2.2.3.1.

²¹ See, e.g., Settlement Agreement; Sections 6.2.2.3.2 and 6.2.2.3.3. See also, Settlement Agreement; Section 6.7.3 (“During the Second Program Period, the CARB CHP RRM allocations will be *adjusted annually* by the CPUC Energy Division based upon *updated* and published CEC retail sales data.” (Emphasis added.)).

related to new CHP generation resources since these customers' fair share (as found in D.08-09-012) will be zero. The Proposed Decision should be revised accordingly.²²

B. The Proposed Settlement Should Not Be Mistakenly Construed As Altering Existing Nonbypassable Charge Agreements Between IOUs And POU's

Several POU's have entered into bilateral agreements with IOUs regarding the implementation, billing, and collection of various NBCs that may, under current Commission decisions, apply to the "transferred" and/or "new" MDL of the POU's that are parties to such agreements.²³ PG&E has also entered into an agreement relating to so-called "New WAPA" departing load.²⁴ (These agreements are referred to herein collectively as "NBC Agreements.") In most, if not all, cases, a fundamental goal of the NBC Agreements is to provide the POU's and their customers with certainty with respect to NBCs.

For the reasons stated above, the Proposed Decision should be revised to clarify that NBCs under the Settlement Agreement will not apply to MDL customers. However, in any event, it would disrupt the carefully negotiated allocation of benefit and risks between the NBC Agreement parties, thereby impairing existing contracts, if the terms providing for NBCs in the Proposed Settlement were somehow construed as applying to customers of POU parties to existing NBC Agreements. The POU's entered into the NBC Agreements in good faith, and there should be no doubt as to the

²² CMUA also objects to the Settling Parties' improper procedural attempt to modify D.08-09-012. The efforts of the Settling Parties to suspend or modify D.08-09-012 through terms of a Settlement Agreement violate due process. Affected POU's and MDL customers did not receive notice of the proposed changes to D.08-09-012, nor were they invited to participate in discussions leading to the proposed Settlement Agreement which purports to modify or suspend D.0809-012. If the Settling Parties seek to modify D.08-09-012, the Commission should require that they follow applicable procedural rules.

²³ See, e.g., D.10-11-011, approving a non-bypassable charge agreement between PG&E and the Modesto Irrigation District and the Merced Irrigation District. See *id.* at 7, referring to similar agreements entered into by SCE.

²⁴ See D.09-08-015, approving a non-bypassable charge agreement between PG&E and the Power and Water Resources Pooling Authority.

certainty of the NBC Agreements. Accordingly, CMUA requests that the Commission make clear that the Settling Agreement should not be construed as altering in any way the existing NBC Agreements. Specifically, CMUA requests that the Commission provide in any final decision it issues regarding the Settlement Agreement that (1) the NBC payment provisions in the existing NBC Agreements are deemed to cover all CHP Program costs, and (2) no additional NBCs or other CHP Program costs will be imposed on customers covered by existing NBC Agreements.

C. The Proposed Decision Has No Effect On POU GHG Emissions Reduction Targets

In its opening comments on the Joint Motion, CMUA expressed concern that the Settlement Agreement could be read as an improper attempt to influence POUs, over which the Commission has no jurisdiction. Specifically, CMUA stated that “the Settlement Agreement should not make recommendations as to the amount of GHG reductions that will be allocated to POUs” and “the Commission should not give the appearance (by adopting the Settlement Agreement as-is) that it is attempting to influence this issue, particularly before CARB has even issued its final regulations.”²⁵ In their reply, the Settling Parties attempted to assuage CMUA of its concerns, stating that “[i]n approving the Settlement Agreement, the Commission will not be imposing a GHG Emissions Reduction Target on the POUs” and “[the Settlement Agreement] does not impose an obligation on the POUs, nor does [anything in the Settlement Agreement] establish the Commission’s policy with regard to the POUs’ responsibilities for GHG Emissions Reduction Targets.”²⁶ CMUA appreciates the Settling Parties’ clarification. Moreover, CMUA appreciates the Proposed Decision’s

²⁵ CMUA Opening Comments at 4.

²⁶ Settling Parties Joint Reply Comments at 23.

affirmation that the Settlement Agreement shall have no effect on GHG Emissions Reduction Targets of the POUs.²⁷

III. CONCLUSION

CMUA appreciates the opportunity to submit these comments on the Proposed Decision, and urges the Commission to make the changes stated herein. Proposed revisions to Findings of Fact, Conclusions of Law, and Ordering Paragraphs are included in Attachment A hereto.

Dated: December 6, 2010

Respectfully submitted,



Scott Blaising

Justin Wynne

BRAUN BLAISING MCLAUGHLIN, P.C.

915 L Street, Suite 1270

Sacramento, California 95814

Telephone: (916) 682-9702

Facsimile: (916) 563-8855

E-mail: blaising@braunlegal.com

Attorneys for the
California Municipal Utilities Association

²⁷ See Proposed Decision at 52.

Attachment A

PROPOSED REVISIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERING PARAGRAPHS

Deletions are shown in strikethrough font and additions are underlined.

Findings of Fact

29. The GHG Emissions Reduction Targets are based on actual retail sales data that includes all current bundled service customers and, therefore, implicitly account for ~~not load forecasts that exclude~~ MDL.

Conclusions of Law

13. It is not appropriate to provide an exception to the D.08-09-012 conditions

14. The cost allocation provisions of the Proposed Settlement, ~~including provisions that~~ allocate the costs of the QF/CHP Program among all LSE's are not fair, reasonable, ~~and~~ or consistent with California law and D.08-09-012.

16. Requiring MDL customers to bear a share of the IOU costs incurred on their behalf is contrary to D.08-09-012 ~~appropriate~~, and it is therefore inappropriate to modify D.08-09-012 related to MDL.

Ordering Paragraphs

1. The "Qualifying Facility and Combined Heat and Power Program Settlement Agreement," filed on October 8, 2010, is approved and adopted ~~with~~ modification.

New Ordering Paragraph:

The terms of the Settlement Agreement proposing to modify D.08-09-012 to allow imposition of NBCs of MDL in connection with new QF/CHP resources are not approved. Cost recovery for new QF/CHP resources shall comply with D.08-09-012.

CERTIFICATE OF SERVICE

I certify that the following is true and correct:

On December 6, 2010, I caused to be served via electronic mail, or first class mail in the event of no electronic mail address, true copies of the attached:

**OPENING COMMENTS
OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION
ON THE PROPOSED DECISION**

on all parties to A.08-11-001 (see attached service list).

Executed this 6th day of December, 2010 at Sacramento, California.

A handwritten signature in black ink, appearing to read "Vicki Ferguson", with a long horizontal flourish extending to the right.

Vicki Ferguson

CALIFORNIA PUBLIC UTILITIES COMMISSION
Service Lists

PROCEEDING: A0811001 - EDISON - FOR APPLYN
FILER: SOUTHERN CALIFORNIA EDISON COMPANY
LIST NAME: LIST
LAST CHANGED: DECEMBER 3, 2010

Parties

KATHRYN WIG
NRG ENERGY, INC.
EMAIL ONLY
EMAIL ONLY, CA 00000

CYNTHIA BRADY
CONSTELLATION ENERGY RESOURCES, LLC
EMAIL ONLY
EMAIL ONLY, IL 00000-0000
FOR: CONSTELLATION ENERGY COMMODITIES
GROUP INC, CONSTELLATION NEWENERGY INC,
AND CONSTELLATION GENERATE LLC

NANCY RADER
EXECUTIVE DIRECTOR
CALIFORNIA WIND ENERGY ASSOCIATION
EMAIL ONLY
EMAIL ONLY, CA 00000-0000
FOR: CALIFORNIA WIND ENERGY ASSOCIATION

ALAN NOGEE
UNION OF CONCERNED SCIENTISTS
2 BRATTLE SQUARE
CAMBRIDGE, MA 02238

CHRISTOPHER C. O'HARA
ASSISTANT GENERAL COUNSEL-REGULATORY
NRG ENERGY
211 CARNEGIE CENTER DRIVE
PRINCETON, NJ 08540

KEITH R. MCCREA
ATTORNEY AT LAW
SUTHERLAND, ASBILL & BRENNAN, LLP
1275 PENNSYLVANIA AVE., N.W.
WASHINGTON, DC 20004-2415
FOR: CALIFORNIA MANUFACTURERS &
TECHNOLOGY ASSOCIATION

ROGER BERLINER
ATTORNEY AT LAW
BERLINER LAW PLLC
700 12TH STREET NW, STE 700
WASHINGTON, DC 20006
FOR: COUNTY OF LOS ANGELES

JAMES ROSS
RCS, INC.
500 CHESTERFIELD CENTER, SUITE 320
CHESTERFIELD, MO 63017
FOR: MIDSET COGENERATION COMPANY/MIDWY
SUNSET COGENERATION

TRENT A. CARLSON
RRI ENERGY, INC.
1000 MAIN STREET
HOUSTON, TX 77001
FOR: RRI ENERGY, INC.

JOSEPH PAUL
SENIOR CORPORATE COUNSEL
DYNEGY-WEST GENERATION
1000LOUISIANA STREET, STE. 5800
HOUSTON, TX 77002
FOR: DYNEGY

TOM SKUPNJAK
CPG ENERGY
5211 BIRCH GLEN
RICHMOND, TX 77469
FOR: JUNIPER GENERATION

STEVE ISSER
VP, GENERAL COUNSEL
GOOD COMPANY ASSOCIATES
816 CONGRESS AVE., SUITE 1400
AUSTIN, TX 78701
FOR: GOOD COMPANY ASSOCIATES

JORDAN A. WHITE
SR. ATTORNEY
PACIFICORP
1407 W. NORTH TEMPLE, SUITE 320
SALT LAKE CITY, UT 84116
FOR: PACIFICORP

ROBERT BEACH
SONOMA COUNTY WATER AGENCY
1022 SIERRA VISTA CT.
GARDNERVILLE, NY 89460-8686

ELENA MELLO
SIERRA PACIFIC POWER COMPANY
6100 NEIL ROAD
RENO, NV 89520
FOR: SIERRA PACIFIC POWER COMPANY (SPPC)

JOSEPH GRECO
TERRA-GEN POWER LLC
9590 PROTOTYPE COURT, SUITE 200
RENO, NV 89521

HOWARD CHOY
COUNTY OF LOS ANGELES
1100 NORTH EASTERN AVENUE, ROOM 300
LOS ANGELES, CA 90063
FOR: COUNTY OF LOS ANGELES

JERRY R. BLOOM
ATTORNEY AT LAW
WINSTON & STRAWN LLP
333 SOUTH GRAND AVENUE, 38TH FLOOR
LOS ANGELES, CA 90071-1543
FOR: CALIFORNIA COGENERATION COUNCIL

DAN WOODS
WHITE & CASE LLP
633 WEST FIFTH STREET, SUITE 1900
LOS ANGELES, CA 90071-2007
FOR: SMURFIT STONE CONTAINER
CORPORATION,/DELTA POWER CO./WILLAMETTE
INDUSTRIES, INC./E.F.OXNARD, INC.

SUSAN ROSSI
ATTORNEY AT LAW
CALIFORNIA POWER EXCHANGE CORPORATION
201 S LAKE AVE STE 409
PASADENA, CA 91101-4807
FOR: CALIFORNIA POWER EXCHANGE

DANIEL W. DOUGLASS
DOUGLASS & LIDDELL
21700 OXNARD STREET, SUITE 1030
WOODLAND HILLS, CA 91367-8102
FOR: ALLIANCE FOR RETAIL ENERGY
MARKETS/MARIN ENERGY AUTHORITY

GREGORY KLATT
DOUGLASS & LIDDELL
21700 OXNARD STREET, SUITE 1030
WOODLAND HILLS, CA 91367-8102
FOR: ALLIANCE FOR RETAIL ENERGY
MARKETS/THE FILING PARTIES/DIRECT
ACCESS CUSTOMER COALITION (I/O)

CAROL A. SCHMID-FRAZEE
ATTORNEY AT LAW
SOUTHERN CALIFORNIA EDISON COMPANY
PO BOX 800 2244 WALNUT GROVE AVE
ROSEMEAD, CA 91770
FOR: SOUTHERN CALIFORNIA EDISON COMPANY

DEANA MICHELLE NG
SOUTHERN CALIFORNIA EDISON CO.
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770
FOR: SOUTHERN CALIFORNIA EDISON COMPANY

JANET COMBS
SR. ATTORNEY
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

ROBERT KEELER
SR. ATTORNEY
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770
FOR: SOUTHERN CALIFORNIA EDISON

DANIEL A. KING
ATTORNEY AT LAW
SEMPRA ENERGY RESOURCES
101 ASH STREET
SAN DIEGO, CA 92101
FOR: SEMPRE GLOBAL

FRITZ ORTLIEB
ATTORNEY AT LAW
CITY OF SAN DIEGO
1200 THIRD AVENUE, SUITE 1200
SAN DIEGO, CA 92101
FOR: CITY OF SAN DIEGO

GEORGETTA J. BAKER
SAN DIEGO GAS & ELECTRIC/SOCAL GAS
101 ASH STREET, HQ 13
SAN DIEGO, CA 92101
FOR: SAN DIEGO GAS & ELECTRIC COMPANY
AND SOUTHERN CALIFORNIA GAS COMPANY

LISA URICK
SAN DIEGO GAS & ELECTRIC COMPANY
101 ASH STREET, HQ-12B
SAN DIEGO, CA 92101
FOR: SAN DIEGO GAS & ELECTRIC

JOHN A. PACHECO
SAN DIEGO GAS & ELECTRIC COMPANY
101 ASH STREET, HQ12B
SAN DIEGO, CA 92101-3017
FOR: SAN DIEGO GAS & ELECTRIC

THEODORE ROBERTS
SEMPRA BROADBAND
101 ASH STREET, HQ 13
SAN DIEGO, CA 92101-3017
FOR: SEMPRE GLOBAL

MICHAEL SHAMES
UTILITY CONSUMERS' ACTION NETWORK (UCAN)
3100 FIFTH AVE., STE. B
SAN DIEGO, CA 92103
FOR: UCAN

MICHAEL D. EVANS
SHELL ENERGY NORTH AMERICA (US) L.P.
4445 EASTGATE MALL, SUITE 100
SAN DIEGO, CA 92120
FOR: SHELL ENERGY NORTH AMERICA (US)
L.P.

KELLY M. MORTON
SAN DIEGO GAS & ELECTRIC
101 ASH STREET
SAN DIEGO, CA 92123
FOR: SAN DIEGO GAS & ELECTRIC

WENDY KEILANI
SAN DIEGO GAS & ELECTRIC
8330 CENTURY PARK COURT, CP32D
SAN DIEGO, CA 92123

CENTRAL FILES
SDG&E AND SOCALGAS
8330 CENTURY PARK COURT, CP31-E
SAN DIEGO, CA 92123-1550

CRYSTAL NEEDHAM
SENIOR DIRECTOR, COUNSEL
EDISON MISSION ENERGY
18101 VON KARMAN AVE, STE 1700
IRVINE, CA 92612-1046

PHILLIP W. REESE
CALIFORNIA BIOMASS ENERGY ALLIANCE, LLC
PO BOX 8
3379 SOMIS ROAD
SOMIS, CA 93066
FOR: CBEA

EVELYN KAHL
ALCANTAR & KAHL, LLP
33 NEW MONTGOMERY STREET, SUITE 1850
SAN FRANCISCO, CA 94015
FOR: COUNSEL TO THE ENERGY PRODUCERS
AND USERS COALITION

LINDA SHERIF
ATTORNEY AT LAW
ALCANTAR & KAHL LLP
33 NEW MONTGOMERY STREET, SUITE 1850
SAN FRANCISCO, CA 94015
FOR: COGENERATION ASSOCIATION OF
CALIFORNIA (CAC) AND EPUC

MARC D. JOSEPH
ATTORNEY AT LAW
ADAMS, BROADWELL, JOSEPH & CARDOZO
601 GATEWAY BLVD., STE. 1000
SOUTH SAN FRANCISCO, CA 94080
FOR: COALITION OF CALIFORNIA UTILITY
EMPLOYEES AND CALIFORNIA UNIONS FOR
RELIABLE ENERGY

RORY COX
RATEPAYERS FOR AFFORDABLE CLEAN ENERGY
251 KEARNY STREET, 2ND FLOOR
SAN FRANCISCO, CA 94102
FOR: LOCAL POWER

THERESA L. MUELLER
DEPUTY CITY ATTORNEY
CITY ATTORNEY'S OFFICE
CITY HALL, ROOM 234
SAN FRANCISCO, CA 94102
FOR: CITY AND COUNTY OF SAN FRANCISCO

MARION PELEO

NOEL OBIORA

CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4107
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
FOR: DRA

CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4107
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
FOR: DIVISION OF RATEPAYER ADVOCATES

STEPHEN A. S. MORRISON
CITY & COUNTY OF SAN FRANCISCO
CITY HALL, SUITE 234
1 DR CARLTON B. GOODLET PLACE
SAN FRANCISCO, CA 94102-4682
FOR: CITY & COUNTY OF SAN FRANCISCO

THERESA L. MUELLER
CITY AND COUNTY OF SAN FRANCISCO
1 DR. CARLTON B. GOODLETT PLACE
SAN FRANCISCO, CA 94102-4682
FOR: CITY AND COUNTY OF SAN FRANCISCO

JIM HENDRY
SAN FRANCISCO PUBLIC UTILITIES COMM.
1155 MARKET STREET, 4TH FLOOR
SAN FRANCISCO, CA 94103

NORMAN J. FURUTA
FEDERAL EXECUTIVE AGENCIES
1455 MARKET ST., SUITE 1744
SAN FRANCISCO, CA 94103-1399
FOR: FEDERAL EXECUTIVE AGENCIES

LARA ETTENSON
NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER STREET, 20TH FLOOR
SAN FRANCISCO, CA 94104
FOR: NRDC

MICHEL PETER FLORIO
THE UTILITY REFORM NETWORK
115 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94104
FOR: THE UTILITY REFORM NETWORK (TURN)

MICHAEL S. HINDUS
PILLSBURY WINTHROP SHAW PITTMAN LLP
50 FREMONT STREET
SAN FRANCISCO, CA 94105
FOR: VALERO REFINING COMPANY-CALIFORNIA

SHIRLEY WOO
ATTORNEY AT LAW
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, B30A
SAN FRANCISCO, CA 94105
FOR: PACIFIC GAS AND ELECTRIC COMPANY

STEPHEN L. GARBER
ATTORNEY AT LAW
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET; MCB30A
SAN FRANCISCO, CA 94105
FOR: PACIFIC GAS AND ELECTRIC COMPANY

WESLEY M. SPOWHN
PILLSBURY WINTHROP SHAW PITTMAN LLP
50 FREMONT STREET
SAN FRANCISCO, CA 94105
FOR: PILLSBURY WINTHROP SHAW PITTMAN LLP

ANN G. GRIMALDI
MCKENNA LONG & ALDRIDGE LLP
101 CALIFORNIA STREET, 41ST FLOOR
SAN FRANCISCO, CA 94111
FOR: CENTER FOR ENERGY AND ECONOMIC
DEVELOPMENT

BRIAN T. CRAGG
GOODIN, MACBRIDE, SQUERI, DAY & LAMPREY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111
FOR: INDEPENDENT ENERGY PRODUCERS
ASSOCIATION

CARL K. OSHIRO
ATTORNEY AT LAW
CSBRT/CSBA
100 PINE STREET, SUITE 3110
SAN FRANCISCO, CA 94111

JAMES D. SQUERI
ATTORNEY AT LAW
GOODIN, MACBRIDE, SQUERI, DAY & LAMPREY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111
FOR: MONSANTO CO./POWEREX CORP.

JEANNE ARMSTRONG
ATTORNEY AT LAW
GOODIN, MACBRIDE, SQUERI, RITCHIE & DAY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111
FOR: SOUTH SAN JOAQUIN IRRIGATION
DISTRICT/RRI ENERGY, INC.

LISA A. COTTLE
ATTORNEY AT LAW
WINSTON & STRAWN LLP
101 CALIFORNIA STREET, 39TH FLOOR
SAN FRANCISCO, CA 94111
FOR: MIRANT CALIFORNIA, LLC, MIRANT
DELTA, LLC, AND MIRANT POTRERO, LLC

MONICA SCHWEBS
BINGHAM MCCUTCHEM LLP
THREE EMBARCADERO CENTER
SAN FRANCISCO, CA 94111-4067
FOR: REPRESENTING RIPON COGENERATION LLC

JOSEPH M. KARP
ATTORNEY AT LAW
WINSTON & STRAWN LLP
101 CALIFORNIA STREET, 39TH FLOOR
SAN FRANCISCO, CA 94111-5894
FOR: CALIFORNIA COGENERATION COUNCIL &
CALIFORNIA WIND ENERGY ASSOCIATION

EDWARD W. O'NEILL
ATTORNEY AT LAW
DAVIS WRIGHT TREMAINE LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533
FOR: CALIFORNIA LARGE ENERGY CONSUMERS
ASSOCIATION

JEFFREY P. GRAY
ATTORNEY AT LAW
DAVIS WRIGHT TREMAINE, LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533
FOR: CALPINE CORPORATION/DYNAMIS
INCORPORATED

SALLE E. YOO
ATTORNEY AT LAW
DAVIS WRIGHT TREMAINE
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533
FOR: SOUTH SAN JOAQUIN IRRIGATION
DISTRICT

CHARLES R. MIDDLEKAUFF
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442
SAN FRANCISCO, CA 94120
FOR: PACIFIC GAS AND ELECTRIC COMPANY

WILLIAM V. MANHEIM
ATTORNEY AT LAW
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442, LAW DEPT.
SAN FRANCISCO, CA 94120
FOR: PACIFIC GAS AND ELECTRIC COMPANY

MARY A. GANDESBERY
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442, MC B30A-3005
SAN FRANCISCO, CA 94120-7442
FOR: PACIFIC GAS AND ELECTRIC COMPANY

SARA STECK MYERS
ATTORNEY AT LAW
122 28TH AVENUE
SAN FRANCISCO, CA 94121
FOR: CENTER FOR ENERGY EFFICIENCY AND
RENEWABLE TECHNOLOGIES

LYNNE M. BROWN
CALIFORNIANS FOR RENEWABLE ENERGY INC.
24 HARBOR ROAD
SAN FRANCISCO, CA 94124

HYPOWER, INC
1150 BALLENA BLVD, 220
ALAMEDA, CA 94501
FOR: HYPOWER, INC.

KERRY HATTEVIK
DIRECTOR OF REG. AND MARKET AFFAIRS
NEXTERA ENERGY
829 ARLINGTON BLVD.
EL CERRITO, CA 94530
FOR: MIRANT CORPORATION, NRG ENERGY

SEAN BEATTY
MIRANT CALIFORNIA, LLC
696 WEST 10TH STREET
PITTSBURG, CA 94565
FOR: MIRANT CALIFORNIA, LLC/MIRANT
DELTA, LLC/MIRANT POTRERO, LLC

ROBERT FREEHLING
LOCAL POWER RESEARCH DIRECTOR
LOCAL POWER
PO BOX 606
FAIR OAKS, CA 94574
FOR: WOMEN'S ENERGY MATTERS/LOCAL POWER

RICK NOGER
PRAXAIR, INC.
2430 CAMINO RAMON DRIVE, STE. 300
SAN RAMON, CA 94583
FOR: PRAXAIR PLAINFIELD, INC.

ERIC C. WOYCHIK
STRATEGY INTEGRATION LLC
9901 CALODEN LANE
OAKLAND, CA 94605
FOR: COMVERGE, INC.

ANDREW HOERNER
REDEFINING PROGRESS
1904 FRANKLIN STREET, 6TH FLOOR
OAKLAND, CA 94612

GREGG MORRIS
DIRECTOR
GREEN POWER INSTITUTE
2039 SHATTUCK AVENUE, STE 402
BERKELEY, CA 94704
FOR: GREEN POWER INSTITUTE

CLYDE MURLEY
CONSULTANT TO NRDC
1031 ORDWAY STREET
ALBANY, CA 94706
FOR: UNION OF CONCERNED SCIENTISTS

R. THOMAS BEACH
CALIFORNIA COGENERATION COUNCIL
2560 NINTH STREET, SUITE 213A
BERKELEY, CA 94710-2557
FOR: CALIFORNIA COGENERATION COUNCIL
(CCC)/WATSON COGENERATION COMPANY

LOCAL POWER
22888 HIGHWAY 1
MARSHALL, CA 94940-9701

PATRICK MCDONNELL
AGLAND ENERGY
2000 NICASIO VALLEY
NICASIO, CA 94946
FOR: TXU ENERGY SERVICES

BARBARA GEORGE
WOMEN'S ENERGY MATTERS
PO BOX 548
FAIRFAX, CA 94978
FOR: WOMEN'S ENERGY MATTERS

L. JAN REID
COAST ECONOMIC CONSULTING
3185 GROSS ROAD
SANTA CRUZ, CA 95062

MICHAEL E. BOYD
PRESIDENT
CALIFORNIANS FOR RENEWABLE ENERGY, INC.
5439 SOQUEL DRIVE
SOQUEL, CA 95073
FOR: CALIFORNIANS FOR RENEWABLE ENERGY,
INC.

STEVE FELTE
GENERAL MANAGER
TRI-DAM PROJECT & POWER AUTHORITY
PO BOX 1158
PINECREST, CA 95364-0158
FOR: TRI-DAM POWER AUTHORITY

JEFFREY SHIELDS
SOUTH SAN JOAQUIN IRRIGATION DISTRICT
PO BOX 747
RIPON, CA 95366

JOHN R. REDDING
ARCTURUS ENERGY CONSULTING, INC.
44810 ROSEWOOD TERRACE
MENDOCINO, CA 95460-9525
FOR: SILICON VALLEY LEADERSHIP GROUP

JAMES WEIL
DIRECTOR
AGLET CONSUMER ALLIANCE
PO BOX 1916
SEBASTOPOL, CA 95473
FOR: AGLET CONSUMER ALLIANCE

MICHAEL GREEN
PLANT MANAGER
PACIFIC LUMBER COMPANY
125 MAIN STREET
SCOTIA, CA 95565
FOR: PACIFIC LUMBER COMPANY

WILLIAM B. MARCUS
JBS ENERGY, INC.
311 D STREET, SUITE A

DALE W. MAHON
CENTRAL HYDROELECTRIC CORPORATION
9951 GRANT LINE ROAD

WEST SACRAMENTO, CA 95608
FOR: TURN

ELK GROVE, CA 95624-1441
FOR: CENTRAL HYDROELECTRIC CORPORATION

BALDASSARO DI CAPO, ESQ.
CALIFORNIA ISO
LEGAL AND REGULATORY DEPARTMENT
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

GRANT A. ROSENBLUM
STAFF COUNSEL
CALIFORNIA ISO
151 BLUE RAVINE ROAD
FOLSOM, CA 95630
FOR: CALIFORNIA INDEPENDENT SYSTEM
OPERATOR CORP.

MIKE D. DOZIER
CALIFORNIA ISO
151 BLUE RAVINE ROAD
FOLSOM, CA 95630
FOR: CALIFORNIA ISO

MARY LYNCH
CONSTELLATION ENERGY COMMODITIES GRP
2377 GOLD MEADOW WAY, STE 100
GOLD RIVER, CA 95670
FOR: CECC

CAROLYN KEHREIN
ENERGY MANAGEMENT SERVICES
2602 CELEBRATION WAY
WOODLAND, CA 95776

DAN L. CARROLL
ATTORNEY AT LAW
DOWNEY BRAND, LLP
621 CAPITOL MALL, 18TH FLOOR
SACRAMENTO, CA 95814
FOR: MERCED IRRIGATION DISTRICT AND
MODESTO IRRIGATION DISTRICT

JANE E. LUCKHARDT
ATTORNEY AT LAW
DOWNEY BRAND LLP
621 CAPITOL MALL, 18TH FLOOR
SACRAMENTO, CA 95814

SCOTT BLAISING
BRAUN BLAISING MCLAUGHLIN P.C.
915 L STREET, STE. 1270
SACRAMENTO, CA 95814
FOR: CALIFORNIA MUNICIPAL UTILITIES
ASSN.

STEVEN KELLY
INDEPENDENT ENERGY PRODUCERS ASSOCIATION
1215 K STREET, SUITE 900
SACRAMENTO, CA 95814
FOR: INDEPENDENT ENERGY PRODUCERS ASSN

ANDREW B. BROWN
ATTORNEY AT LAW
ELLISON SCHNEIDER & HARRIS, LLP (1359)
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CA 95816-5905
FOR: DEPARTMENT OF GENERAL
SERVICES/CONSTELLATION ENERGY
COMMODITIES GROUP, CONSTELLATION
NEWENERGY, INC.

DOUGLAS K. KERNER
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS, LLP
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CA 95816-5905
FOR: INDEPENDENT ENERGY PRODUCERS
ASSOCIATION

GREGGORY L. WHEATLAND
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS, LLP
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CA 95816-5905
FOR: HERCULES MUNICIPAL UTILITY

JEFFERY D. HARRIS
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CA 95816-5905

ANN L. TROWBRIDGE
DAY CARTER MURPHY LLC
3620 AMERICAN RIVER DRIVE, SUITE 205
SACRAMENTO, CA 95864
FOR: MERCED IRRIGATION
DISTRICT/SACRAMENTO MUNICIPAL UTILITY
DISTRICT/CALIFORNIA CLEAN DG COALITION

CATHY ENGBRETSON
SIERRA PACIFIC INDUSTRIES
PO BOX 496014
REDDING, CA 96014-6014
FOR: SIERRA PACIFIC INDUSTRIES

MICHAEL ALCANTAR
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
1300 SW FIFTH AVENUE, SUITE 1750
PORTLAND, OR 97201
FOR: COGENERATION ASSOCIATION OF
CALIFORNIA

Information Only

AUDREY CHANG
CA ENERGY EFFICIENCY INDUSTRY COUNCIL
EMAIL ONLY
EMAIL ONLY, CA 00000

CINDY L. CASSELMAN
PILOT POWER GROUP, INC. (1365)
EMAIL ONLY
EMAIL ONLY, CA 00000

CINDY ZAMMIT
SAN DIEGO GAS & ELECTRIC CO.
EMAIL ONLY
EMAIL ONLY, CA 00000

HUGH YAO
SOUTHERN CALIFORNIA GAS COMPANY
EMAIL ONLY
EMAIL ONLY, CA 00000

JAN PEPPER
ELECTRIC DIV., MGR.
SILICON VALLEY POWER
EMAIL ONLY
EMAIL ONLY, CA 00000

JANICE LIN
MANAGING PARTNER
STRATEGEN CONSULTING LLC
EMAIL ONLY
EMAIL ONLY, CA 00000

JOHN W. LESLIE, ESQ.
LUCE, FORWARD, HAMILTON & SCRIPPS, LLP
EMAIL ONLY
EMAIL ONLY, CA 00000
FOR: CORAL ENERGY RESOURCED, LLC/ENGAGE
ENERGY US, L.P./SHELL ENERGY NORTH
AMERICA (U.S.) LP

PEDRO VILLEGAS
SAN DIEGO GAS & ELECTRIC/ SO. CAL. GAS
EMAIL ONLY
EMAIL ONLY, CA 00000
FOR: SAN DIEGO GAS & ELECTRIC/ SO. CAL.
GAS

TAM HUNT
HUNT CONSULTING
EMAIL ONLY
EMAIL ONLY, CA 00000

TARYN CIARDELLA
SR. LEGAL SECRETARY
NV ENERGY
EMAIL ONLY
EMAIL ONLY, NV 00000

THOMAS R. DARTON
PILOT POWER GROUP, INC. (1365)
EMAIL ONLY
EMAIL ONLY, CA 00000

WILLIAM BLATTNER
SOUTHERN CALIF GAS CO & SDG&E CO
EMAIL ONLY
EMAIL ONLY, CA 00000

MRW & ASSOCIATES, LLC
EMAIL ONLY
EMAIL ONLY, CA 00000

G. PATRICK STONER
PROGRAM DIRECTOR
LOCAL GOVERNMENT COMMISSION
EMAIL ONLY
EMAIL ONLY, CA 00000-0000

IRENE M. STILLINGS
EXECUTIVE DIRECTOR
CALIF. CTR. FOR SUSTAINABLE ENERGY
EMAIL ONLY
EMAIL ONLY, CA 00000-0000

JENNIFER BARNES
NAVIGANT CONSULTING, INC.
EMAIL ONLY
EMAIL ONLY, CA 00000-0000

JENNIFER PORTER
POLICY ANALYST
CALIFORNIA CENTER FOR SUSTAINABLE ENERGY
EMAIL ONLY
EMAIL ONLY, CA 00000-0000

JUDY PAU
DAVIS WRIGHT TREMAINE LLP
EMAIL ONLY
EMAIL ONLY, CA 00000-0000

MARTIN HOMECA
CALIFORNIANS FOR RENEWABLE ENERGY, INC.
EMAIL ONLY
EMAIL ONLY, CA 00000-0000
FOR: CALIFORNIANS FOR RENEWABLE ENERGY,
INC.

SEPHRA A. NINOW
CALIFORNIA CENTER FOR SUSTAINABLE ENERGY
EMAIL ONLY
EMAIL ONLY, CA 00000-0000

SHAUN HALVERSON
PACIFIC GAS AND ELECTRIC COMPANY
EMAIL ONLY
EMAIL ONLY, CA 00000-0000
FOR: PACIFIC GAS AND ELECTRIC COMPANY

CARLO ZORZOLI
ENEL NORTH AMERICA, INC.
1 TECH DRIVE, SUITE 220
ANDOVER, MA 01810
FOR: ENEL NORTH AMERICA, INC.

GRACE C. WUNG
MCDERMOTT WILL & EMERY LLP
28 STATE STREET
BOSTON, MA 02109
FOR: MORGAN STANLEY CAPITAL GROUP, INC.

JAMES MCMAHON
29 DANBURY ROAD
NASHUA, NH 03064

DANIEL V. GULINO
RIDGWOOD POWER MANAGEMENT, LLC
947 LINWOOD AVENUE
RIDGWOOD, NJ 07450
FOR: RIDGWOOD POWER MANAGEMENT, LLC

WENDY LIVORNESE
RIDGWOOD POWER CORPORATION
947 LINWOOD AVENUE
RIDGWOOD, NJ 07450
FOR: ALTAMONT COGEN CORPORATION,
MONTEREY POWER COMPANY

RICHARD M. ESTEVES
SESCO, INC.
77 YACHT CLUB DRIVE, SUITE 1000
LAKE HOPATCONG, NJ 07849
FOR: SESCO INC.

JULIEN DUMOULIN-SMITH
ASSOCIATE ANALYST
UBS INVESTMENT RESEARCH
1285 AVENUE OF THE AMERICAS
NEW YORK, NY 10019

DOUGLAS R. KIVIAT
EXECUTIVE DIRECTOR
MORGAN STANLEY / COMMODITIES
2000 WESTCHESTER AVENUE
PURCHASE, NY 10577

STEVEN HUHMANN
MORGAN STANLEY CAPITAL GROUP INC.
2000 WESTCHESTER AVENUE
PURCHASE, NY 10577

CAROL A. SMOOTS
PERKINS COIE LLP
607 FOURTEENTH STREET, NW, SUITE 800
WASHINGTON, DC 20005
FOR: THELEN REID & PRIEST LLP

MICHAEL A. YUFFEE
MCDERMOTT WILL & EMERY LLP
600 THIRTEENTH STREET, N.W.
WASHINGTON, DC 20005-3096

ANAN H. SOKKER
LEGAL ASSISTANT
CHADBOURNE & PARKE LLP

ROBERT SHAPIRO
CHADBOURNE & PARKE LLP
1200 NEW HAMPSHIRE AVE. NW

1200 NEW HAMPSHIRE AVE. NW
WASHINGTON, DC 20036

WASHINGTON, DC 20036

KAY DAVOODI
ACQ UTILITY RATES AND STUDIES OFFICE
NAVAL FACILITIES ENGINEERING COMMAND HQ
1322 PATTERSON AVE., SE - BLDG 33
WASHINGTON, DC 20374-5018

DOUGLAS MCFARLAN
VP, PUBLIC AFFAIRS
MIDWEST GENERATION EME
440 SOUTH LASALLE ST., SUITE 3500
CHICAGO, IL 60605

LYNNE MACKEY
LS POWER DEVELOPMENT
400 CHESTERFIELD CTR., SUITE 110
ST. LOUIS, MO 63017

MAURICE BRUBAKER
BRUBAKER & ASSOCIATES
PO BOX 412000
1215 FERN RIDGE PARKWAY, SUITE 208
ST. LOUIS, MO 63141

BRIAN HANEY
UTILITY SYSTEM EFFICIENCIES, INC.
1000 BOURBON ST., 341
NEW ORLEANS, LA 70116
FOR: UTILITY SYSTEM EFFICIENCIES, INC.

KEVIN BOUDREAUX
CALPINE CORPORATION
717 TEXAS AVENUE SUITE 1000
HOUSTON, TX 77002

ROBERT OTT
RRI ENERGY, INC
1000 MAIN STREET
HOUSTON, TX 77002

JULIE L. MARTIN
NORTH AMERICA GAS AND POWER
BP ENERGY COMPANY
501 WESTLAKE PARK BLVD.
HOUSTON, TX 77079

PAULETTE HEUER
VICE PRESIDENT-OPERATIONS
RIPON COGENERATION LLC
8500 CYPRESSWOOD DRIVE, SUITE 202
SPRING, TX 77379

ANDREW J. DALTON
VALERO SERVICES, INC.
ONE VALERO WAY
SAN ANTONIO, TX 78249-1616

ISSER STEVE
VICE PRESIDENT/GENERAL COUNSEL
GOOD COMPANY ASSOCIATES
816 CONGRESS AVENUE, STE 1400
AUSTIN, TX 78701

KATHERINE MUDGE
COVAD COMMUNICATIONS COMPANY
7000 N. MOPAC EXPRESSWAY, FLOOR 2
AUSTIN, TX 78731

TIMOTHY R. ODIL
MCKENNA LONG & ALDRIDGE LLP
1400 WEWATTA ST., STE. 700
DENVER, CO 80202

STEVE KOERNER
SENIOR CONSEL
EL PASO CORPORATION
2 NORTH NEVADA AVENUE
COLORADO SPRINGS, CO 80903

WAYNE TOMLINSON
RUBY PIPELINE, LLC
2 NORTH NEVADA AVENUE, 14TH FLR
COLORADO SPRINGS, CO 80903

KATHLEEN ESPOSITO
CRESTED BUTTE CATALYSTS LLC
PO BOX 668
CRESTED BUTTE, CO 81224

KEVIN J. SIMONSEN
ENERGY MANAGEMENT SERVICES
646 EAST THIRD AVENUE
DURANGO, CO 81301

DAVID SAUL
PACIFIC SOLAR & POWER CORPORATION
2850 W. HORIZON RIDGE PKWY, SUITE 200
HENDERSON, NV 89052
FOR: SOLEL, INC.

CHRISTOPHER A. HILEN
NV ENERGY
6100 NEIL ROAD, MS A35
RENO, NV 89511

TREVOR DILLARD
RAE REGULATORY RELATIONS
SIERRA PACIFIC POWER COMPANY
6100 NEAL ROAD, MS S4A50 / PO BOX 10100
RENO, NV 89520-0024

CLIFF ROCHLIN
SOUTHERN CALIFORNIA GAS COMPANY
555 W. FIFTH STREET, ML 22A1
LOS ANGELES, CA 90013
FOR: SEMPRA ENERGY

RANDALL W. KEEN
MANATT, PHLEPS & PHILLIPS, LLP
11355 WEST OLYMPICS BLVD.
LOS ANGELES, CA 90064

DENNIS M.P. EHLING
ATTORNEY AT LAW
KIRKPATRICK & LOCKHART NICHOLSON GRAHAM
10100 SANTA MONICA BLVD., 7TH FLOOR
LOS ANGELES, CA 90067

BO BUCHYNSKY
DIAMOND GENERATING CORPORATION
333 SOUTH GRAND AVE., SUITE 1570
LOS ANGELES, CA 90071

CLAIRE E. TORCHIA
CHADBOURNE & PARKE LLP
350 SOUTH GRAND AVE., STE 3300
LOS ANGELES, CA 90071

SETH F. RICHARDSON
WINSTON & STRAWN
333 SOUTH GRAND AVENUE, SUITE 3800
LOS ANGELES, CA 90071

NORMAN A. PEDERSEN
HANNA AND MORTON LLP
444 SOUTH FLOWER STREET, SUITE 1500
LOS ANGELES, CA 90071-2916

ED J. WHELESS
DIVISION ENGINEER
COUNTY SANITATION DIST. OF L.A. COUNTY
SOLID WASTER MANAGEMENT DEPT

PO BOX 4998
WHITTIER, CA 90607-7411

THOMAS LU
EXECUTIVE DIRECTOR
WATSON COGENERATION COMPANY
22850 S. WILMINGTON AVENUE
CARSON, CA 90745

E.J. WRIGHT
OCCIDENTAL POWER SERVICES, INC.
111 WEST OCEAN BOULEVARD
LONG BEACH, TX 90802

DON VAWTER
AES ALAMITOS, LLC
690 N. STUDEBAKER RD.
LONG BEACH, CA 90803

GUSTAVO LUNA
AES CORPORATION
690 N. STUDEBAKER RD.
LONG BEACH, CA 90803

VALERIE J. WINN
PACIFIC GAS AND ELECTRIC COMPANY
245 MARKET STREET, MC N12G
SAN FRANCISCO, CA 91105
FOR: PACIFIC GAS & ELECTRIC COMPANY

JACK MCNAMARA
GEO-ENERGY PARTNERS-1983 LTD.
PO BOX 1380
AGOURA HILLS, CA 91376

TORY S. WEBER
SOUTHERN CALIFORNIA EDISON COMPANY
6042 N. IRWINDALE AVENUE, SUITE A
IRWINDALE, CA 91702

BOB TANG
ASSISTANT DIRECTOR
CITY OF AZUSA
729 NORTH AZUSA AVENUE
AZUSA, CA 91702-9500

FRANK ANNUNZIATO
PRESIDENT
AMERICAN UTILITY NETWORK INC.
10705 DEER CANYON DR.
ALTA LOMA, CA 91737-2483

AMBER WYATT
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

BETH A. FOX
ATTORNEY AT LAW
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE, GOL, ROOM 351C
ROSEMEAD, CA 91770
FOR: SOUTHERN CALIFORNIA EDISON COMPANY

CASE ADMINISTRATION
SOUTHERN CALIFORNIA EDISON COMPANY
PO BOX 800 / 2244 WALNUT GROVE AVE.
ROSEMEAD, CA 91770
FOR: SOUTHERN CALIFORNIA EDISON COMPANY

CATHY A. KARLSTAD
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE.
ROSEMEAD, CA 91770

GARY L. ALLEN
SOUTHERN CALIFORNIA EDISON
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

J. ERIC ISKEN
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

KAREN I. LEE
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

LAURA GENAO
SOUTHERN CALIFORNIA EDISON COMPANY
LAW DEPARTMENT
2244 WALNUT GROVE AVE.
ROSEMEAD, CA 91770
FOR: SOUTHERN CALIFORNIA EDISON COMPANY

LEON BASS
SENIOR ATTORNEY
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

MICHAEL A. BACKSTROM
ATTORNEY AT LAW
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

MICHAEL D. MONTOYA
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE, PO BOX 800
ROSEMEAD, CA 91770
FOR: SOUTHERN CALIFORNIA EDISON COMPANY

ROBYN NARAMORE
SOUTHERN CALIFORNIA EDISON
2244 WALNUT GROVE AVE
ROSEMEAD, CA 91770

RONALD MOORE
GOLDEN STATE WATER/BEAR VALLEY ELECTRIC
630 EAST FOOTHILL BOULEVARD
SAN DIMAS, CA 91773

DON WOOD
PACIFIC ENERGY POLICY CENTER
4539 LEE AVENUE
LA MESA, CA 91941

JENNIFER A. HEIN
GENERAL COUNSEL-WEST REGION
NRG ENERGY, INC.
5790 FLEET STREET, SUITE 200
CARLSBAD, CA 92008

TIM HEMIG
NRG ENERGY, INC.
1817 ASTON AVENUE, SUITE 104
CARLSBAD, CA 92008

ALLEN K. TRIAL
SAN DIEGO GAS & ELECTRIC COMPANY
101 ASH STREET, HQ-12B
SAN DIEGO, CA 92101

CRAIG WILLIAMS
DG FAIRHAVEN POWER, LLC
1660 UNION STREET, SUITE 200
SAN DIEGO, CA 92101

KEITH W. MELVILLE
SEMPRA ENERGY
101 ASH STREET, HQ 12
SAN DIEGO, CA 92101

SUSAN FREEDMAN
SENIOR REGIONAL ENERGY PLANNER
SAN DIEGO ASSOCIATION OF GOVERNMENTS
401 B STREET, SUITE 800
SAN DIEGO, CA 92101

WILLIAM TOBIN
SEMPRA GLOBAL
101 ASH STREET, HQ08C
SAN DIEGO, CA 92101

STEVEN C. NELSON
SEMPRA ENERGY
101 ASH STREET HQ-12B
SAN DIEGO, CA 92101-3017

DONALD C. LIDDELL
DOUGLASS & LIDDELL
2928 2ND AVENUE
SAN DIEGO, CA 92103

DONALD C. LIDDELL, PC
DOUGLASS & LIDDELL
2928 2ND AVENUE
SAN DIEGO, CA 92103
FOR: WOODLAND BIOMASS POWER, LTD.

KIMBERLY KIENER
IMPERIAL IRRIGATION DISTRICT
504 CATALINA BLVD.
SAN DIEGO, CA 92106

ANDY FRIEDL
CP KELCO
2025 E. HARBOR DRIVE
SAN DIEGO, CA 92113

WILLIAM E. POWERS
POWERS ENGINEERING
4452 PARK BLVD., STE. 209
SAN DIEGO, CA 92116
FOR: POWERS ENGINEERING

MARCIE MILNER
DIRECTOR - REGULATORY AFFAIRS
SHELL TRADING GAS & POWER COMPANY
4445 EASTGATE MALL, SUITE 100
SAN DIEGO, CA 92121

DEAN A. KINPORTS
SAN DIEGO GAS & ELECTRIC COMPANY
8306 CENTURY PARK COURT CP32D
SAN DIEGO, CA 92123

KATHLEEN CORDOVA
SAN DIEGO GAS AND ELECTRIC COMPANY
8330 CENTURY PARK CT CP32D
SAN DIEGO, CA 92123

THOMAS BLAIR
CITY OF SAN DIEGO
9601 RIDGEBHAVEN COURT, STE. 120/MS11
SAN DIEGO, CA 92123

DESPINA NIEHAUS
SAN DIEGO GAS AND ELECTRIC COMPANY
8330 CENTURY PARK COURT-CP32H
SAN DIEGO, CA 92123-1530

JOY C. YAMAGATA
SAN DIEGO GAS & ELECTRIC/SOCALGAS
8330 CENTURY PARK COURT, CP 32 D
SAN DIEGO, CA 92123-1533

STEVE RAHON
SAN DIEGO GAS & ELECTRIC COMPANY
8330 CENTURY PARK COURT, CP32C
SAN DIEGO, CA 92123-1548

KURT KAMMERER
DIRECTOR OF PROGRAMS
SAN DIEGO REGIONAL ENERGY OFFICE
PO BOX 60738
SAN DIEGO, CA 92166-8738

DAVID X. KOLK, PH.D.
COMPLETE ENERGY SERVICE, INC.
41422 MAGNOLIA STREET
MURRIETA, CA 92562

LAWRENCE KOSTRZEWA
REGIONAL VP, DEVELOPMENT
EDISON MISSION ENERGY
18101 VON KARMAN AVE., STE 1700
IRVINE, CA 92612-1046

PHILIP HERRINGTON
REGIONAL VP, BUSINESS MANAGEMENT
EDISON MISSION ENERGY
18101 VON KARMAN AVENUE, STE 1700
IRVINE, CA 92612-1046

JANIS LEHMAN
ANAHEIM PUBLIC UTILITIES
201 S. ANAHEIM BLVD., SUITE 1101
ANAHEIM, CA 92805
FOR: ANAHEIM PUBLIC UTILITIES

DAVID OLSEN
IMPERIAL VALLEY STUDY GROUP
3804 PACIFIC COAST HIGHWAY
VENTURA, CA 93001

JAMES L. MCARTHUR
DAI OILDALE, INC
3300 MANOR DRIVE
BAKERSFIELD, CA 93308

BARRY LOVELL
BERRY PETROLEUM COMPANY
5201 TRUXTUN AVE., SUITE 100
BAKERSFIELD, CA 93309-0422
FOR: BERRY PETROLEUM COMPANY

NEIL BURGESS
EXECUTIVE DIRECTOR
SYCAMORE COGENERATION COMPANY
PO BOX 80598
BAKERSFIELD, CA 93380

ANDREA MORRISON
DIRECT ENERGY SERVICES, LLC
415 DIXON STREET
ARROYO GRANDE, CA 93420

CLEAN POWER MARKETS, INC.
PO BOX 3206
LOS ALTOS, CA 94024
FOR: CLEAN POWER MARKETS, INC.

ATTN.: DIRECTOR FACILITIES SERVICES
SRI INTERNATIONAL
333 RAVENSWOOD AVENUE
MENLO PARK, CA 94025

STEVEN A. LEFTON
VP POWER PLANT PROJECTS
APTECH ENGINEERING SERVICES INC.
PO BOX 3440
SUNNYVALE, CA 94089-3440
FOR: APTECH ENGINEERING SERVICES INC.

BRUCE FOSTER
SOUTHERN CALIFORNIA EDISON COMPANY

OSA L. WOLFF
ATTORNEY AT LAW

601 VAN NESS AVENUE, STE. 2040
SAN FRANCISCO, CA 94102

SHUTE, MIHALY & WEINBERGER, LLC
396 HAYES STREET
SAN FRANCISCO, CA 94102

PAUL FENN
LOCAL POWER
35 GROVE STREET
SAN FRANCISCO, CA 94102

ELIZABETH STOLTZFUS
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LAURENCE CHASET
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5131
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JEANNE M. SOLE
DEPUTY CITY ATTORNEY
CITY AND COUNTY OF SAN FRANCISCO
1 DR. CARLTON B. GOODLETT PLACE, RM. 375
SAN FRANCISCO, CA 94102-4682

SANDRA ROVETTI
REGULATORY AFFAIRS MANAGER
SAN FRANCISCO PUC
1155 MARKET STREET, 4TH FLOOR
SAN FRANCISCO, CA 94103

NOAH LONG
NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER STREET, 20TH FLOOR
SAN FRANCISCO, CA 94104

ROBERT FINKELSTEIN
THE UTILITY REFORM NETWORK
115 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94104
FOR: THE UTILITY REFORM NETWORK

REN ORENS
ENERGY AND ENVIRONMENTAL ECONOMICS
101 MONTGOMERY ST STE 1500
SAN FRANCISCO, CA 94104-4133

ALICE GONG
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE ST. MC B9A
SAN FRANCISCO, CA 94105
FOR: PACIFIC GAS AND ELECTRIC COMPANY

ALICE L. REID
LAW DEPARTMENT
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, RM 3081-B30A
SAN FRANCISCO, CA 94105

ANGELA TORR
PACIFIC GAS & ELECTRIC COMPANY
MC N13E
245 MARKET STREET
SAN FRANCISCO, CA 94105

CASE COORDINATION
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE ST., PO BOX 770000 MC B9A
SAN FRANCISCO, CA 94105

ED LUCHA
CASE COORDINATOR
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, MC B9A, ROOM 991
SAN FRANCISCO, CA 94105

GEORGE ZAHARIUDAKIS
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, RM. 904, MC B9A
SAN FRANCISCO, CA 94105

JENNY GLUZGOLD
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET MCB9A
SAN FRANCISCO, CA 94105

JOHN PAPPAS
UTILITY ELECTRIC PORTFOLIO MANAGEMENT
PACIFIC GAS AND ELECTRIC COMPANY
245 MARKET STREET, MC N12G
SAN FRANCISCO, CA 94105

KAREN TERRANOVA
ALCANTAR & KAHL, LLP
33 NEW MONTGOMERY STREET, SUITE 1850
SAN FRANCISCO, CA 94105

KIMBERLY C. JONES
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, MC B9A
SAN FRANCISCO, CA 94105

MARK R. HUFFMAN
ATTORNEY AT LAW
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET / PO BOX 7442 (B30A)
SAN FRANCISCO, CA 94105
FOR: PACIFIC GAS AND ELECTRIC COMPANY

NORA SHERIFF
ALCANTAR & KAHL, LLP
33 NEW MONTGOMERY STREET, SUITE 1850
SAN FRANCISCO, CA 94105
FOR: ENERGY PRODUCERS AND USERS
COALITION

ROGER GOLDSTEIN
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, MC B9A
SAN FRANCISCO, CA 94105

RUTH OSCAR
PACIFIC GAS AND ELECTRIC COMPANY
245 MARKET STREET, N12G
SAN FRANCISCO, CA 94105

SEEMA SRINIVASAN
ALCANTAR & KAHL, LLP
33 NEW MONTGOMERY STREET, SUITE 1850
SAN FRANCISCO, CA 94105

WILLIAM MITCHELL
COMPETITIVE POWER VENTURES, INC.
55 2ND STREET, SUITE 525
SAN FRANCISCO, CA 94105

TOM JARMAN
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, RM. 909, MC B9A
SAN FRANCISCO, CA 94105-1814
FOR: PACIFIC GAS AND ELECTRIC COMPANY

ALICE LIDDELL
ICF INTERNATIONAL
620 FOLSOM STREET, STE, 200
SAN FRANCISCO, CA 94107

TONY WAKIM

EDWARD G. POOLE

KENNEDY/JENKS CONSULTANTS
622 FOLSOM STREET
SAN FRANCISCO, CA 94107

ANDERSON & POOLE
601 CALIFORNIA STREET, SUITE 1300
SAN FRANCISCO, CA 94108-2812

ARTHUR V. O'DONNELL
CALIFORNIA ENERGY MARKETS
9 ROSCOE STREET
SAN FRANCISCO, CA 94110-5921
FOR: MEDIA

JANINE L. SCANCARELLI
ATTORNEY AT LAW
CROWELL & MORING LLP
275 BATTERY STREET, 23RD FLOOR
SAN FRANCISCO, CA 94111

DAVID L. HUARD
MANATT, PHELPS & PHILLIPS, LLP
ONE EMBARCADERO CENTER, STE 2900
SAN FRANCISCO, CA 94111-3736

ANGELA KIM
FTI CONSULTING
1 FRONT ST STE 1600
SAN FRANCISCO, CA 94111-5353
FOR: FTI CONSULTING

ROCKY HO
FTI CONSULTING
1 FRONT ST STE 1600
SAN FRANCISCO, CA 94111-5353
FOR: FTI CONSULTING

CATHERINE POLLINA
WINSTON STRAWN LLP
101 CALIFORNIA STREET, STE 3900
SAN FRANCISCO, CA 94111-5894
FOR: CALIFORNIA COGENERATION COUNCIL

THOMAS W. SOLOMON
ATTORNEY AT LAW
WINSTON & STRAWN LLP
101 CALIFORNIA STREET, 39TH FLOOR
SAN FRANCISCO, CA 94111-5894
FOR: CALIFORNIA COGENERATION COUNCIL

ROBERT B. GEX
ATTORNEY AT LAW,
DAVIS WRIGHT TREMAINE LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533

STEVEN F. GREENWALD
ATTORNEY AT LAW
DAVIS WRIGHT TREMAINE, LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533

DIANE I. FELLMAN
NRG WEST
73 DOWNEY STREET
SAN FRANCISCO, CA 94117

CALIFORNIA ENERGY MARKETS
425 DIVISADERO ST., STE. 303
SAN FRANCISCO, CA 94117-2242
FOR: CALIFORNIA ENERGY MARKETS

LISA WEINZIMER
PLATTS MCGRAW-HILL
695 NINTH AVENUE, NO. 2
SAN FRANCISCO, CA 94118

LULU WEINZIMER
CALIFORNIA ENERGY CIRCUIT
695 9TH AVE. NO.2
SAN FRANCISCO, CA 94118

REGULATORY FILE ROOM
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442
SAN FRANCISCO, CA 94120

EDWARD C. REMEDIOS
33 TOLEDO WAY
SAN FRANCISCO, CA 94123-2108

LARRY FINNE
MANAGER
UNITED AIRLINES
SAN FRANCISCO INTERNATIONAL AIRPORT
SAN FRANCISCO, CA 94128

MAURICE CAMPBELL
MEMBER
CALIFORNIANS FOR RENEWABLE ENERGY, INC.
1100 BRUSSELS ST.
SAN FRANCISCO, CA 94134
FOR: CALIFORNIANS FOR RENEWABLE ENERGY,
INC.

BRIAN K. CHERRY
DIRECTOR, REGULATORY RELATIONS
PACIFIC GAS AND ELECTRIC COMPANY (39)
77N BEALE ST., PO BOX 770000, MC B10C
SAN FRANCISCO, CA 94177

CASE COORDINATION
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000; MC B9A
SAN FRANCISCO, CA 94177

GRACE LIVINGSTON-NUNLEY
ASSISTANT PROJECT MANAGER
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000 MAIL CODE B9A
SAN FRANCISCO, CA 94177

LUCY FUKUI
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, RM. 918 - MC B9A
SAN FRANCISCO, CA 94177
FOR: PACIFIC GAS AND ELECTRIC COMPANY

ANDREW L. HARRIS
ENERGY
PACIFIC GAS & ELECTRIC COMPANY
PO BOX 770000 MAIL CODE B9A
SAN FRANCISCO, CA 94177-0001

ROBIN J. WALTHER
1380 OAK CREEK DRIVE, NO. 316
PALO ALTO, CA 94304-2016

RON DAHLIN
GENERAL MANAGER
CARDINAL COGEN, INC.
288 CAMPUS DRIVE WEST
STANFORD, CA 94305
FOR: GE ENERGY

KENNETH E. ABREU
853 OVERLOOK COURT
SAN MATEO, CA 94403

GOODWIN SCOTT
AMERICAN ENERGY, INC.
3330 CLAYTON ROAD, SUITE B
CONCORD, CA 94519

SCOTT GOODWIN
FAR WEST POWER CORPORATION
3330 CLAYTON ROAD, SUITE B
CONCORD, CA 94519

BETH VAUGHAN
CALIFORNIA COGENERATION COUNCIL
4391 NORTH MARSH ELDER CT.
CONCORD, CA 94521

MARK HARRER
56 ST. TIMOTHY CT.
DANVILLE, CA 94526

JOHN DUTCHER
MOUNTAIN UTILITIES
3210 CORTE VALENCIA
FAIRFIELD, CA 94534-7875
FOR: MOUNTAIN UTILITIES

RAJ N. PANKHANIA
HERCULES MUNICIPAL UTILITY
111 CIVIC DRIVE
HERCULES, CA 94547

DAVID TATEOSIAN
POWER ENGINEERS
PO BOX 2037
MARTINEZ, CA 94553

SCOTT HATANAKA
MARTINEZ COGEN LIMITED PARTNERSHIP
550 SOLANO WAY
MARTINEZ, CA 94553

WILLIAM H. BOOTH
LAW OFFICES OF WILLIAM H. BOOTH
67 CARR DRIVE
MORAGA, CA 94556
FOR: CA LARGE ENERGY CONSUMERS
ASSOCIATION

ANDREW J. VAN HORN
VAN HORN CONSULTING
12 LIND COURT
ORINDA, CA 94563

ALEXANDER B. MAKLER
VP AND MANAGING COUNSEL
CALPINE CORPORATION
4160 DULBIN BLVD., SUITE 100
DUBLIN, CA 94568
FOR: CALPINE CORPORATION

AVIS KOWALEWSKI
DIR. - REGULATORY AFFAIRS
CALPINE CORPORATION
4160 DUBLIN BLVD., SUITE 100
DUBLIN, CA 94568

ROSEMARY ANTONOPOULOS
CALPINE CORPORATION
4160 DUBLIN BLVD., SUITE 100
DUBLIN, CA 94568

GARY M. IZING
ENXCO DEVELOPMENT CORP.
4000 EXECUTIVE PARKWAY, STE. 100
SAN RAMON, CA 94583-4381

SARAH BESERRA
CALIFORNIA REPORTS.COM
39 CASTLE HILL COURT
VALLEJO, CA 94591

PETER W. HANSCHEN
ATTORNEY AT LAW
MORRISON & FOERSTER, LLP
101 YGNACIO VALLEY ROAD, SUITE 450
WALNUT CREEK, CA 94596

TIMEA ZENTAI
NAVIGANT CONSULTING
1990 NORTH CALIFORNIA AVE., SUITE 700
WALNUT CREEK, CA 94596

DALE E. FREDERICKS
DG POWER INTERNATIONAL LLC
PO BOX 4400
WALNUT CREEK, CA 94596-0400

PHILIPPE AUCLAIR
11 RUSSELL COURT
WALNUT CREEK, CA 94598

J.A. SAVAGE
CALIFORNIA ENERGY CIRCUIT
3006 SHEFFIELD AVE.
OAKLAND, CA 94602

JODY S. LONDON
JODY LONDON CONSULTING
PO BOX 3629
OAKLAND, CA 94609

JONATHAN JACOBS
PA CONSULTING GROUP
75 NOVA DRIVE
PIEDMONT, CA 94610-1037

TED POPE
DIRECTOR
COHEN VENTURES, INC./ENERGY SOLUTIONS
1610 HARRISON ST.
OAKLAND, CA 94612

DOCKET COORDINATOR
5727 KEITH ST.
OAKLAND, CA 94618

DAVID MARCUS
PO BOX 1287
BERKELEY, CA 94701

REED V. SCHMIDT
BARTLE WELLS ASSOCIATES
1889 ALCATRAZ AVENUE
BERKELEY, CA 94703-2714

CARLA PETERMAN
UCEI
2547 CHANNING WAY
BERKELEY, CA 94720

RYAN WISER
BERKELEY LAB
1 CYCLOTRON ROAD, MS-90-4000
BERKELEY, CA 94720

PHILLIP J. MULLER
SCD ENERGY SOLUTIONS
436 NOVA ALBION WAY
SAN RAFAEL, CA 94903

BOB HINES
SILICON VALLEY LEADERSHIP GROUP
224 AIRPORT PARKWAY, SUITE 620
SAN JOSE, CA 95110

BARRY F. MCCARTHY
ATTORNEY AT LAW
MCCARTHY & BERLIN, LLP
100 W. SAN FERNANDO ST., SUITE 501
SAN JOSE, CA 95113

C. SUSIE BERLIN
MCCARTHY & BERLIN LLP
100 W. SAN FERNANDO ST., SUITE 501
SAN JOSE, CA 95113

ROBERT FORGIONE
INTERNATIONAL POWER TECHNOLOGY, INC.
1042 W. HEDDING ST., SUITE 100
SAN JOSE, CA 95126

ELENA STOIAN
SAN JOSE STATE UNIVERSTIY
ONE WASHINGTON SQUARE
SAN JOSE, CA 95192

KAREN HENRY
COVANTA POWER PACIFIC, INC.
PO BOX 278
CROWS LANDING, CA 95313

THOMAS S KIMBALL
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95352-4060
FOR: MODESTO IRRIGATION DISTRICT

JOY A. WARREN
REGULATORY ADMINISTRATOR
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95354

ROBERT SARVEY
RACE
501 W. GRANLINE RD
TRACY, CA 95376
FOR: CALIFORNIANS FOR RENEWABLE ENERGY,
INC.

STEVE BOYD
TURLOCK IRRIGATION DISTRICT
333 EAST CANAL DRIVE
TURLOCK, CA 95381-0949

RICHARD BENEDETTI
GEORGIA - PACIFIC CORPORATION
90 W. REDWOOD AVE.
FORT BRAGG, CA 95437

BARBARA R. BARKOVICH
BARKOVICH & YAP, INC.
44810 ROSEWOOD TERRACE
MENDOCINO, CA 95460

HENRY NANJO
ASSISTANT CHIEF COUNSEL, LEGAL SERVICES
DEPARTMENT OF GENERAL SERVICES
707 3RD STREET, SUITE 7-330
WEST SACRAMENTO, CA 95605

DOUGLAS M. GRANDY, P.E.
CALIFORNIA ONSITE GENERATION
DG TECHNOLOGIES
1220 MACAULAY CIRCLE
CARMICHAEL, CA 95608
FOR: CALIFORNIA ONSITE GENERATION

DAVID E. MORSE
217 F STREET, NO. 53
DAVIS, CA 95616

JOHN C. GABRIELLI
GABRIELLI LAW OFFICE
430 D STREET
DAVIS, CA 95616
FOR: GABRIELLI LAW OFFICE

RICHARD MC CANN
M.CUBED
2655 PORTAGE BAY ROAD, SUITE 3
DAVIS, CA 95616

RICHARD MCCANN
M.CUBED
2655 PORTAGE BAY ROAD, SUITE 3
DAVIS, CA 95616

RICHARD D. ELY
DAVIS HYDRO
27264 MEADOWBROOK DRIVE
DAVIS, CA 95618

ERIC LEUZE
RRI ENERGY, INC
4174 RIVA RIDGE DRIVE
FAIR OAKS, CA 95628

SAEED FARROKHPAY
FEDERAL ENERGY REGULATORY COMMISSION
110 BLUE RAVINE RD., SUITE 107
FOLSOM, CA 95630

SIDNEY DAVIES
CALIFORNIA ISO
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

LEGAL & REGULATORY DEPARTMENT
CALIFORNIA ISO
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

WAYNE AMER
PRESIDENT
MOUNTAIN UTILITIES (906)
PO BOX 205
KIRKWOOD, CA 95646

ROBERT E. BURT
INSULATION CONTRACTORS ASSN.
3479 ORANGE GROVE AVE., STE. A
NORTH HIGHLANDS, CA 95660
FOR: INSULATION CONTRACTORS ASSOCIATION

DAVID BRANCHCOMB
BRANCHCOMB ASSOCIATES, LLC
9360 OAKTREE LANE
ORANGEVILLE, CA 95662

J. RICHARD LAUCKHART
BLACK & VEATCH
10995 GOLD CENTER DRIVE, SUITE 100
RANCHO CORDOVA, CA 95670

KENNY SWAIN
NAVIGANT CONSULTING
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670

KIRBY DUSEL
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670

PAUL D. MAXWELL
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670-6078

DAVID REYNOLDS
MEMBER SERVICES MANAGER
NORTHERN CALIFORNIA POWER AGENCY
651 COMMERCE DRIVE

SCOTT TOMASHEFSKY
NORTHERN CALIFORNIA POWER AGENCY
651 COMMERCE DRIVE
ROSEVILLE, CA 95678-6420

ROSEVILLE, CA 95678-6420
FOR: ASPEN SYSTEMS CORP

KEITH G. JOHNSON
SENIOR MARKET AND PRODUCT DEVELOPER
151 BLUE RAVINE ROAD
FOLSOM, CA 95682

STEVEN A. GREENBERG
DISTRIBUTED ENERGY STRATEGIES
4100 ORCHARD CANYON LANE
VACAVILLE, CA 95688
FOR: DISTRIBUTED ENERGY STRATEGIES

ED CHANG
FLYNN RESOURCE CONSULTANTS, INC.
2165 MOONSTONE CIRCLE
EL DORADO HILLS, CA 95762

DOUGLAS DAVIE
WELLHEAD ELECTRIC COMPANY, INC
650 BERCUT DRIVE, SUITE C
SACRAMENTO, CA 95811

AMBER RIESENHUBER
ENERGY ANALYST
INDEPENDENT ENERGY PRODUCERS ASSOC.
1215 K STREET, SUITE 900
SACRAMENTO, CA 95814

BRUCE MCLAUGHLIN
ATTORNEY AT LAW
BRAUN & BLAISING, P.C.
915 L STREET SUITE 1270
SACRAMENTO, CA 95814

CONTANCE LENI
CALIFORNIA ENERGY COMMISSION
1516 NINTH ST., MS-20
SACRAMENTO, CA 95814

JUSTIN C. WYNNE
ATTORNEY AT LAW
BRAUN BLAISING MCLAUGHLIN, P.C.
915 L STREET, SUITE 1270
SACRAMENTO, CA 95814
FOR: CALIFORNIA MUNICIPAL UTILITIES
ASSOCIATION

KEVIN WOODRUFF
WOODRUFF EXPERT SERVICES, INC.
1100 K STREET, SUITE 204
SACRAMENTO, CA 95814

PIERRE H. DUVAIR, PH.D
CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET
SACRAMENTO, CA 95814

RYAN BERNARDO
BRAUN BLAISING MCLAUGHLIN, P.C.
915 L STREET, SUITE 1270
SACRAMENTO, CA 95814

EDWARD J. TIEDEMANN
ATTORNEY AT LAW
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
400 CAPITOL MALL, 27TH FLOOR
SACRAMENTO, CA 95814-4416
FOR: PLACER COUNTY WATER AGENCY

ANDREW BROWN
ELLISON, SCHNEIDER & HARRIS L.L.P.
2600 CAPITOL AVE, SUITE 400
SACRAMENTO, CA 95816-5905

CHASE B. KAPPEL
ELLISON SCHNEIDER & HARRIS LLP
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CA 95816-5905

LYNN HAUG
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS, LLP
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CA 95816-5905

VIKKI WOOD
SACRAMENTO MUNICIPAL UTILITY DISTRICT
6301 S STREET, MS A204
SACRAMENTO, CA 95817-1899

KAREN MILLS
CALIFORNIA FARM BUREAU FEDERATION
2300 RIVER PLAZA DRIVE
SACRAMENTO, CA 95833

E. JESUS ARREDONDO
DIRECTOR, REGULATORY AND GOVERNMENTAL
NRG ENERGY, INC.
3741 GRESHAM LANE
SACRAMENTO, CA 95835
FOR: NRG ENERGY, INC.

KAREN LINDH
CALIFORNIA ONSITE GENERATION
7909 WALERGA ROAD, NO. 112, PMB 119
ANTELOPE, CA 95843

RALPH R. NEVIS
DAY CARTER & MURPHY LLP
3620 AMERICAN RIVER DR., SUITE 205
SACRAMENTO, CA 95864

ZANE GLENN
BIG VALLEY POWER, LLC.
1615 CONTINENTAL STREET, SUITE 100
REDDING, CA 96001

ROD MORTENSEN
WHEELABRATOR HUDSON ENERGY COMPANY, INC.
20811 INDUSTRY RD.
ANDERSON, CA 96007

ATTN.: BUSINESS MANAGER
OGDEN POWER PACIFIC, INC.
2829 CHILDRESS DR.
ANDERSON, CA 96007

PATRICK HOLLEY
COVANTA ENERGY CORPORATION
2829 CHILDRESS DR.
ANDERSON, CA 96007-3563
FOR: COVANTA ENERGY CORP

RALPH SANDERS
HL POWER COMPANY
732-025 WENDEL ROAD
WENDEL, CA 96136

DONALD BROOKHYSER
ALCANTAR & KAHL LLP
1300 SW FIFTH AVENUE, SUITE 1750
PORTLAND, OR 97201
FOR: COGENERATION ASSOCIATION OF
CALIFORNIA

CATHIE ALLEN
DIR., REGULATORY AFFAIRS

ANNE FALCON
EES CONSULTING, INC.

PACIFICORP
825 NE MULTNOMAH STREET, SUITE 2000
PORTLAND, OR 97232

570 KIRKLAND AVE
KIRLAND, WA 98033

DONALD SCHOENBECK
RCS, INC.
900 WASHINGTON STREET, SUITE 780
VANCOUVER, WA 98660

State Service

ANNE GILLETTE
CALIFORNIA PUBLIC UTILITIES COMMISSION
EMAIL ONLY
EMAIL ONLY, CA 00000

DAVID PECK
CALIFORNIA PUBLIC UTILITIES COMMISSION
EMAIL ONLY
EMAIL ONLY, CA 00000

DONALD J. BROOKS
CALIFORNIA PUBLIC UTILITIES COMMISSION
EMAIL ONLY
EMAIL ONLY, CA 00000

SARA KAMINS
CALIFORNIA PUBLIC UTILITIES COMMISSION
EMAIL ONLY
EMAIL ONLY, CA 00000

SOPHIA PARK
CALIFORNIA PUBLIC UTILITIES COMMISSION
EMAIL ONLY
EMAIL ONLY, CA 00000

CLAIRE EUSTACE
CALIFORNIA PUBLIC UTILITIES COMMISSION
EMAIL ONLY
EMAIL ONLY, CA 00000-0000

JAMES LOEWEN
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
320 WEST 4TH STREET SUITE 500
LOS ANGELES, CA 90013

PETER LAI
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
320 WEST 4TH STREET SUITE 500
LOS ANGELES, CA 90013

FRED MOBASHERI
CONSULTANT
ELECTRIC POWER GROUP, LLC
201 SOUTH LAKE AVE., SUITE 400
PASADENA, CA 91101

AMY C. BAKER
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

AMY C. YIP-KIKUGAWA
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 2106
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

BISHU CHATTERJEE
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

BRUCE DEBERRY
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 5043
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

DARWIN FARRAR
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 5041
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

DONNA J. HINES
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY PLANNING & POLICY BRANCH
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

DOUGLAS M. LONG
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 5023
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

GREGORY A. WILSON
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
FOR: CPUC - ENERGY DIVISION

GRETCHEN T. DUMAS
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4300
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JACLYN MARKS
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

GEORGE S. TAGNIPES
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JERRY OH
CALIF PUBLIC UTILITIES COMMISSION
WATER BRANCH
ROOM 3200
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JOE COMO
CALIF PUBLIC UTILITIES COMMISSION
DRA - ADMINISTRATIVE BRANCH
ROOM 4101
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JULIE HALLIGAN

KAREN P. PAULL

CALIF PUBLIC UTILITIES COMMISSION
CONSUMER PROTECTION AND SAFETY DIVISION
ROOM 2203
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4300
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

KATHRYN AURIEMMA
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

KE HAO OUYANG
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRA
ROOM 4104
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LAURA A. MARTIN
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LISA-MARIE SALVACION
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4107
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

MARK S. WETZELL
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 5009
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

MATTHEW DEAL
CALIF PUBLIC UTILITIES COMMISSION
POLICY & PLANNING DIVISION
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

MELISSA SEMCER
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

MICHAEL COLVIN
CALIF PUBLIC UTILITIES COMMISSION
POLICY & PLANNING DIVISION
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

MIKHAIL HARAMATI
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

PAUL DOUGLAS
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

PEARLIE SABINO
CALIF PUBLIC UTILITIES COMMISSION
ENERGY COST OF SERVICE & NATURAL GAS BRA
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
FOR: OFFICE OF RATEPAYER ADVOCATES (ORA)

PETER SKALA
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ROBERT KINOSIAN
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5202
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ROBERT L. STRAUSS
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
FOR: ENERGY DIVISION

SEAN A. SIMON
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SEPIDEH KHOSROWJAH
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5204
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SIMON BAKER
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

STEVE LINSEY
CALIF PUBLIC UTILITIES COMMISSION
CONSUMER ISSUES ANALYSIS BRANCH
ROOM 2013
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
FOR: ORA

STEVEN K. HAINE
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SUDHEER GOKHALE
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY PLANNING & POLICY BRANCH
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

TERESA HORTINELA
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY PLANNING & POLICY BRANCH
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

TERRIE D. PROSPER
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5301
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

THERESA CHO
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5207
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

THOMAS ROBERTS
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRA
ROOM 4104
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

TRACI BONE
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5027
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

TRACY Y. FOK
CALIF PUBLIC UTILITIES COMMISSION
UTILITY AUDIT, FINANCE & COMPLIANCE BRAN
ROOM 3-B
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

VALERIE BECK
CALIF PUBLIC UTILITIES COMMISSION
ELECTRIC GENERATION PERFORMANCE BRANCH
AREA 2-D
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SNULLER PRICE
ENERGY AND ENVIRONMENTAL ECONOMICS
101 MONTGOMERY, SUITE 1600
SAN FRANCISCO, CA 94104

MARSHALL D. CLARK
MANAGER
COGENERATION CONTRACT SERVICES
PO BOX 989052, MS-408; ORIM ROOM 1-435
WEST SACRAMENTO, CA 95798-9052

BILL JULIAN
OFFICE OF STATE SENATOR MARTHA ESCUTIA
STATE CAPITOL, ROOM 5080
SACRAMENTO, CA 95814

BRADLEY MEISTER
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS-26
SACRAMENTO, CA 95814
FOR: CALIFORNIA ENERGY COMMISSION

CLARE LAUFENBERG
CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET, MS 46
SACRAMENTO, CA 95814

KAREN GRIFFIN
EXECUTIVE OFFICE
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS 39
SACRAMENTO, CA 95814
FOR: CALIFORNIA ENERGY COMMISSION

KEVIN KENNEDY
SUPERVISOR, SPECIAL PROJECTS
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS-48
SACRAMENTO, CA 95814

LANA WONG
CALIFORNIA ENERGY COMMISSION
1516 NINTH ST., MS-20
SACRAMENTO, CA 95814

MARC PRYOR
CALIFORNIA ENERGY COMMISSION
1516 9TH ST, MS 20
SACRAMENTO, CA 95814

MICHAEL JASKE
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS-39
SACRAMENTO, CA 95814

ROSS MILLER
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET
SACRAMENTO, CA 95814
FOR: CALIFORNIA ENERGY COMMISSION

WADE MCCARTNEY
CALIF PUBLIC UTILITIES COMMISSION
POLICY & PLANNING DIVISION
770 L STREET, SUITE 1050
SACRAMENTO, CA 95814

DAVID VIDAVER
CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET, MS-20
SACRAMENTO, CA 95814-5512
FOR: CALIFORNIA ENERGY COMMISSION

JIM WOODWARD
ELECTRICITY SUPPLY ANALYSIS DIVISION
CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET, MS 20
SACRAMENTO, CA 95814-5512

NANCY TRONAAS
CALIFORNIA ENERGY COMMISSION
1516 9TH ST. MS-20
SACRAMENTO, CA 95814-5512

CHI DOAN
CALIF. DEPT OF WATER RESOURCES
3310 EL CAMINO AVE., ROOM LL94
SACRAMENTO, CA 95821

IRYNA KWASNY
DEPT. OF WATER RESOURCES-CERS DIVISION
3310 EL CAMINO AVE., STE.120
SACRAMENTO, CA 95821

MARY ANN MILLER
ELECTRICITY ANALYSIS OFFICE
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS 20
SACRAMENTO, CA 96814-5512
FOR: CALIFORNIA ENERGY COMMISSION