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 (Filed November 4, 2008)
And Related Matters	)	R.06-02-013 R.04-04-003 R.04-04-025 R.99-11-022

COMMENTS OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION ON THE PROPOSED DECISION

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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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 POUs 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]

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[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]

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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

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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

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[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.08-09-012commended 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

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[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

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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 POUs

Several POUs 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 POUs 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 POUs 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 POUs entered into the NBC Agreements in good faith, and there should be no doubt as to the

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[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 POUs 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

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[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,

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[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~~out~~ 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.

Vicki Ferguson

CALIFORNIA PUBLIC UTILITIES COMMISSION
Service Lists

PROCEEDING: A0811001 - EDISON - FOR APPLYIN
FILER: SOUTHERN CALIFORNIA EDISON COMPANY
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