**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

JOINT COMMENTS OF THE MARIN ENERGY AUTHORITY, THE ALLIANCE FOR RETAIL ENERGY MARKETS AND THE DIRECT ACCESS CUSTOMER COALITION ON THE ALJ WETZEL DECISION ADOPTING PROPOSED SETTLEMENT

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In accordance with Rule 14.3 of the Commission's Rules of Practice and Procedure and the "Assigned Commissioner and Administrative Law Judge's Joint Ruling and Amended Scoping Memo for Consolidated Proceedings," dated October 19, 2010, the Marin Energy Authority ("MEA")[1], the Alliance for Retail Energy Markets ("AReM")[2], and the Direct Access Customer Coalition ("DACC")[3] submit these joint comments in response to ALJ Wetzel's proposed *Decision Adopting Proposed Settlement* ("Proposed Decision" or "PD") issued on

[1] The Marin Energy Authority is the not-for-profit public agency formed by the County of Marin and seven other towns and cities that administers the Marin Clean Energy program, a renewable energy alternative to Pacific Gas and Electric Company's retail electric supply service administered and California's first Community Choice Aggregation (CCA) program.

[2] AReM is a California mutual benefit corporation formed by Electric Service Providers (ESPs) that are active in California's "direct access" retail electric supply market. The positions taken in this filing represent the views of AReM and its members but not necessarily the affiliates of its members with respect to the issues addressed herein.

[3] DACC is a regulatory alliance of educational, commercial and industrial customers that utilize direct access for all or a portion of their electricity requirements.

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November 16, 2010. MEA, AReM and DACC are hereinafter collectively referred to as the CCA/Direct Access Parties.

I. INTRODUCTION

On October 8, 2010, the Settling Parties[4] filed a Proposed Settlement Agreement ("PSA") for Commission approval. The development of the PSA, over a sixteen month period, was carried on without the participation of electricity service providers ("ESPs") or Community Choice Aggregators ("CCAs") even though the provisions of the PSA will have profound impacts on their business and on the manner in which they will work with their customers to contribute to greenhouse gas ("GHG") emission reductions. On November 16, the Proposed Decision was issued which, if adopted, approves the PSA in its entirety, including adopting provisions that require ESPs and CCAs to pay a share of the costs associated with the obligations of Southern California Edison ("SCE"), Pacific Gas & Electric ("PG&E"), and San Diego Gas & Electric ("SDG&E") (collectively, "utilities") to enter into contracts and/or build 3000 MW of CHP resources, and that require ESPs and CCAs to meet specific emission reduction targets by contracting directly with CHP resources.

It is important to note at the outset that the CCA/Direct Access parties do not object to certain provisions of the PSA that attempt to resolve what is described in the Joint Motion as numerous outstanding QF-related issues, and therefore do not object to elements of the PD that approve those provisions. If the provisions of the PSA that applied to the CCA/Direct Access Parties were to be removed, so that the PSA appropriately resolved solely the longstanding

[4] The Settling Parties are California's three largest investor-owned utilities ("IOUs"), namely Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company; cogeneration and combined heat and power qualifying facility ("CHP/QF") representatives, namely the California Cogeneration Council, the Independent Energy Producers Association, the Cogeneration Association of California, and the Energy Producers and Users Coalition; and the Division of Ratepayer Advocates ("DRA") and The Utility Reform Network ("TURN") (collectively, the "Joint Parties")

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disputes among the utilities and the QF/CHP parties, we would have no objection to the PSA whatsoever. However, since the PSA inappropriately goes beyond that and includes the CCA/Direct Access Parties, the Proposed Decision's approval of the PSA is fundamentally flawed. Specifically,

1. The PD incorrectly concludes that non-settling parties have been afforded appropriate due process required of settlements.
2. Sufficient time has not been allowed for non-settling parties to fully grasp the extent of their obligations under the PSA, as demonstrated by the list of issues contained in Attachment A to these comments.
3. Categorizing the 3000 MW of utility investment in CHP that is required in the first program period of the PSA as "reliability" investments is not supported by existing Commission policy or statute.
4. Imposing a specific investment paradigm on ESPs and CCAs to meet a GHG emission reduction target exceeds Commission authority, is contrary to existing Commission policy, and is not supported by existing statute.
5. If the PSA is adopted, the Commission must adopt additional provisions to ensure that:
    a. The non-bypassable charge imposed on DA and CCA customers is reasonably calculated.
    b. There is a series of workshops to explore each of the issues raised in Attachment A, and other issues that non-settling parties may discover as they continue to review the details of the PSA. At the conclusion of the workshops the Commission, on its own motion, or in response to petitions from non-

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settling parties, should be prepared to modify the Order approving the PSA as necessary to ensure ESPs and CCAs and their customers are fairly treated under the PSA provisions.

II. Comments

A. The PD errs in its conclusion that non-settling parties have been afforded due process with respect to the Settlement.

The PD correctly concludes that the Commission may not evaluate the PSA under the standards of an all-party settlement, and that as a result, the standards for approval of the settlement must be more stringent. Despite the need to apply more stringent criteria to the approval of this settlement because of its lack of inclusiveness, the PD nevertheless manages to reach a conclusion that the due process rights of non-settling parties will not be breached by Commission approval of this PSA. It reaches this conclusion because a formal settlement conference was held on October 7, 2010, merely one day prior to the filing of the PSA. Because this notice and settlement conference comply with the letter of Commission regulations, rather than its spirit, and because the Proposed Decision determined that the PSA otherwise meets the criteria for a settlement that appropriately balances the interests of all parties, the PD concludes that the Settlement should be approved.

The fact that the PD utterly fails to balance the interests of all the parties is discussed in the sections that follow. As a threshold matter, however, the PD's conclusion that due process rights have not been breached is simply not supported by the facts, which are as follows:

1. Non-settling parties were provided the formal notice of settlement conference on September 24, 2010, to be held on October 7, 2010. That was the first formal notice that the CCA/Direct Access Parties became aware that ESP and CCA interests would be materially impacted by the PSA.

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2. Settlement documents to prepare for the October 7, 2010 settlement conference, comprising many hundreds of pages, were not made available to the non-settling parties until October 4, 2010.
3. The settlement conference on October 7, 2010 was not structured in any meaningful sense to solicit input from non-settling parties. Rather, it was intended to do nothing more than apprise non-settling parties of the complex and far reaching elements of the settlement provisions. Moreover, public statements made at that settlement conference revealed at least one settling party's recognition that the extensive settlement discussions neglected to include affected parties – ESPs and CCAs – who would be materially impacted by the provisions of the settlement.
4. The PSA was filed less than 24 hours after the purported settlement conference was concluded; thereby ensuring that there was no venue for any meaningful input from non-settling parties.

Based on these due process concerns alone, the PD should be modified to eliminate any and all requirements imposed on ESPs and CCAs and their customers unless and until those parties are afforded a meaningful opportunity to engage in a legitimate rulemaking where all the jurisdictional, policy, and protocol issues can be fully and fairly addressed.

However, lest the recitation of facts above is not sufficient to convince the Commission that due process protections have not been afforded to all parties, additional examination of the Proposed Decision lends further credence. Specifically, the PD notes in several instances that the PSA resolves "numerous complex and contentious" disputes among the Settling Parties[5], and that the negotiations among the settling parties have been "protracted and heated"[6] that resulted

[5] See PD, page 36 and 61.
[6] See PD, page 42.

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in settlement only after a "year and a half" of those protracted and heated negotiations[7] among parties who relationship has been "contentious and litigious for most of the last 30 years."[8] Miraculously, these warring parties managed to achieve a settlement. Perhaps not so miraculous, however, considering that the warring parties found a way to impose a significant portion of the costs of the war's settlement on parties that were not allowed to arm themselves for the battle.

Settlement was likely much easier to achieve by setting aside the strong opposition that both staff and at least some of the Settling Parties knew the CCA/Direct Access parties would have as they wrote the provisions that required ESPs and CCAs to pay for a share of 3000 MW of utility investment in CHP, and invest in unspecified additional MW of CHP investment under the guise of GHG emission reduction regulations that have yet to be written or adopted by the agency that has the statutory authority to require such investment. Indeed, for at least the utility members of the Settling Parties, the opportunity to saddle CCAs and ESPs with CHP obligations which they had no voice in creating probably represented the icing on the cake, as they signed the Settlement Agreement.

In short, there is no metric by which the Commission can reach a conclusion that due process has been afforded with respect to this settlement. Moreover, the superficial manner in which the PD sets aside the due process concerns, if allowed to stand, would be a travesty and makes a mockery of what due process actually means.

B. Sufficient Time has not been allowed for the Non-Settling parties to ascertain the far reaching implications of the Settlement on their interests.

As noted above, the PSA is comprised of hundreds of pages of terms and conditions, summaries of the terms and conditions, pro forma contracts, and motions – 1,708 pages to be

[7] See PD, page 2.
[8] See PD, page 36.

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precise. While the Settling Parties had their year and half of marathon of meetings and discussions during which they presumably reached a comprehensive understanding of the impact of all its terms and conditions, there have been two months since the 1,708 pages of the PSA were made available to the CCA/Direct Access Parties. Given the inordinately expedited schedule that is being afforded this PSA – CCA/Direct Access Parties had only ten business days to file their opposition to the Settlement in the first place, and only fourteen business days to prepare these comments on the PD, while simultaneously engaged with the Settling Parties in confidential settlement discussions. The net result is that there has been insufficient time to delve into the myriad details of the PSA.

Therefore, CCA/Direct Access Parties request, that the Commission direct staff to convene workshops that will serve two distinct purposes:

> First, the manner in which any non-bypassable charge to be imposed on the customers of the CCA/Direct Access Parties must be fully evaluated and understood by all parties. The CCA/Direct Access Parties note that there is an ongoing phase of Rulemaking 07-05-025 that is looking at similar issues with respect to the Power Charge Indifference Adjustment ("PCIA"). That proceeding has a full agenda and the related workshops will be completed just nine days after these comments are filed. However, the Commission should consider examining the CHP-related non-bypassable charges in a separate workshop.
>
> Second, one or more workshops should be convened to allow the CCA/Direct Access Parties, and any other interested parties, to work through with the Settling Parties and Staff the myriad details included in 1,708 pages of the PSA. The CCA/Direct Access Parties have included Attachment A to these comments, which lists at least some of the

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issues that should be discussed in such a workshop, but notes that the list is not necessarily exhaustive at this point in time.

Therefore, if the Commission is at all inclined to approve the provisions of PSA that impact the CCA/Direct Access Parties, the CCA/Direct Access Parties request that the date for these workshops be set for late January 2011, and that parties be allowed to provide a comprehensive list of the issues for which discussion is necessary one week prior to the workshop. To the extent that the workshops reveal that modifications are needed to the PSA for clarifications or to ensure that the CCA/Direct Access Parties are fairly treated under the PSA, the Commission, on its own motion, or in response to petitions from non-settling parties, should be prepared to modify the Order accordingly.

C. Categorizing as "reliability" investments the 3000 MW of utility investment in CHP that is required in the first program period of the PSA is not supported by existing Commission policy or statute.

The PD provides that ESP and CCA customers must pay for the 3000 MW of resources purchased or built by the utilities pursuant to the cost allocation mechanisms in Public Utilities Code Section 365.1(c)(2). The PD makes this determination on the basis that

> CHP resources count toward resource adequacy requirements and provide system and local reliability benefits commensurate with their Net Qualifying Capacity. The "Goals and Objectives" section of the Proposed Settlement specifically cites the reliability benefits of CHP procurement. Thus, a requirement for procurement of CHP by the IOUs fits squarely within the parameters of SB 695.[9]

This interpretation of SB 695 is fraught with error. First, there is simply no reasonable reading of the statute that establishes Net Qualifying Capacity or the fact that any resources serve to meet a resource adequacy ("RA") requirement as the determinants for the application of this form of cost allocation. Under this logic, each and every contract executed by the IOUs with a

[9] See PD, page 51.

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resource that provides Net Qualifying Capacity and meets an RA obligations would be eligible for similar cost allocation, an outcome that would have the utilities managing the RA procurement for all load in their footprint. Such an outcome would, of course, totally undermine the very purpose of the Commission's RA program, in which parties responsible for load are directly responsible for their proportionate share of resource adequacy capacity. Indeed, the issues of how to apply the provisions of SB 695, which allows customers to choose service from an alternate retail supplier, to ongoing utility investments, have already been included within the scope of the LTPP proceeding, where a full vetting can take place. That full process should not be short-circuited here by a simplistic and superficial rationale.

Second, at the time that SB 695 was enacted, there was only one instance of the imposition of the type of cost allocation proposed herein for the CHP program. That instance was the direct mandate issued by the Commission to Southern California Edison to construct 250 MW of new peaker facilities in Southern California in the aftermath of the summer 2006 heat storm. The PSA's provisions that seek to ensure the continued operation of a fleet of existing QF facilities hardly compares to that reliability metric.

Third, the fact that the PSA is intended to ensure that the existing fleet of QF facilities remains under contract to the utilities does not and should not carry with it a quid pro quo that customers not served by the utilities should pay for those contracts. Indeed, the current recovery of QF charges pursuant to the Competitive Transition Charge was never intended to continue into perpetuity, and to do so pursuant to a settlement that will preclude the evaluation of any other approach is contrary to established Commission policy that promises increased attention to resolving the inherent flaws in the current hybrid market structure.

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Fourth, the PD attaches the reliability imprimatur to the 3000 MW of CHP investment without any analysis of the economic implications. In every other application where the utilities have sought authority for special purposes investments, there has been a specific price tag associated with it. For instance, the Solar PV programs approved for SCE, PG&E, and SDG&E carry with them specifically identified price tags, as did the fuel cell programs approved for PG&E and SCE. Here, with this CHP settlement, there is no analysis, at least none that is publicly available, that speaks to the costs of the program. Nevertheless, the PD blithely categorizes these investments as meeting a reliability standard without even any superficial economic justifications, much less any rigorous assessment of the economic impacts on bundled ratepayers, or on ESPs and CCAs and their customers, or whether there are more better or equally good approaches.

In summary, assessing a cost allocation scheme on these resources based on a role they may play with respect to ensuring a reliable system requires much more rigor to the extent it relies on SB 695 to make that case. Moreover, the utter lack of economic analysis associated with this settlement, especially with respect to the impact that it will have on ESPs and CCAs and their customers, existing and future, does not constitute reasoned decision making and must be rejected.

The PD correctly observes that "Rule 12.1(d) provides that "[t]he Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest."[10] However, it totally omits any discussion or recognition of the fact that both this Commission and the Legislature have repeatedly recognized that it is in the public interest for customers to be able to take service from competitive suppliers, either through community choice aggregation or direct access. The

[10] PD, at p. 26.

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PD fails to recognize that there are competing interests at stake here and that a fair and impartial approach would be to attempt a careful and comprehensive balancing of those interests so that multiple state and Commission goals can be furthered without unduly promoting one to the detriment of the other. By ignoring the fact that this settlement will impose unquantifiable and potentially punitive and excessive costs on the customers that have exercised their right to choose competitive suppliers, the PD effectively serves as a vehicle to assist in the stifling and denial of competitive options for California ratepayers.

D. Imposing a specific investment paradigm on ESPs and CCAs to meet a GHG emission reduction target exceeds Commission authority is contrary to existing Commission policy and is not supported by existing statute.

The PD perpetuates the same myth about GHG emission reduction targets as have been promulgated by the Settling Parties in the PSA. Namely, that the California Air Resources Board ("CARB") has established such targets, when in fact, they have issued nothing more than a draft Scoping Plan for meeting the requirements of AB 32, and draft regulations for a cap and trade program to achieve electric sector emission reductions. The Settling Parties are ascribing to the Scoping Plan and draft cap and trade regulations a level of compliance obligation that simply does not exist. Therefore the PD's reliance on CARB as a rationale for adopting the PSA is without merit. Indeed, until the emission reduction regulations are fully formed, the Commission runs a real risk of imposing costs on ratepayers through this program that ultimately are unnecessary or counterproductive to meeting emission reduction goals.

So, with reliance on CARB as an excuse for adopting the PSA shown to be insupportable, it becomes clear that the PSA is nothing more than a utility investment program that the Settling Parties wish to have this Commission approve. The Commission dockets are replete with examples of similar requests by the utilities for approval of such programs (the Solar PV and

Fuel Cell programs referenced in Section C above are examples). Some of those programs have been approved, and some have been rejected. For some the costs are imposed on ESP and CCA customers, and some are not. In all instances, those decisions have allowed all interested parties to meaningfully contribute to the Commission decision making deliberations, which simply did not occur in this instance, as fully demonstrated in Section A above, and in specific protests to the PSA.

Moreover, even if the Commission agrees with the PD's premise that ESP and CCAs should be subject to emission reduction targets, it does not follow that the Commission must find that ESPs and CCAs need to meet these targets in exactly the same manner as is imposed on the IOUs under this settlement. Indeed, imposing that burden on ESPs and CCAs would severely inhibit the ability of ESPs to provide customized energy solutions to their customer and of CCAs to meet the environmental goals set forth by their city and county leaders. Had attention to these differences been paid during the development of the settlement, there undoubtedly would have been a different outcome, one that would have more fairly evaluated the ways that emission reductions can be achieved, and how the various LSEs are best prepared to do so.

Furthermore, the PSA inappropriately ties the hands of ESPs and CCAs from providing service to their existing and prospective customers. This attempt to direct CCAs and ESPs to procure a specified power mix on a going forward basis is a fundamental and inappropriate expansion of CPUC jurisdiction. In the RPS context, such a directive is permissible because of the legislative mandate. Here, however, the CPUC is assuming the existence of a legislative mandate where there is none. Furthermore, the PD ignores the fact that there may well be lower cost and more environmentally beneficial means for achieving GHG emissions reduction than CHP and that CCAs and ESPs should be permitted, on behalf of their respective customer bases,

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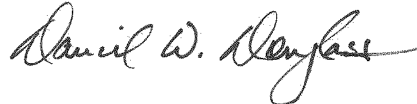
to seek out and develop such alternatives. As a result, the PD's conclusion that disparate treatment for ESPs/CCAs versus the utilities creates a competitive disadvantage for the utilities is a perverse commentary on the state of retail competition in California, and, if implemented by this Commission, will undermine in lasting and irrevocable ways, the success of retail choice markets and the benefits that competitive markets can bring.

III. CONCLUSION

For the reasons herein, the CCA/Direct Access Parties respectfully request that the Commission reject the elements of the Proposed Decision that impose obligations on them. In the alternative, if the Commission does not issue an Order that does so, the CCA/Direct Access Parties request that the Commission specifically modify the PD to provide for the workshops described herein.

Respectfully submitted,



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Attachment A

Preliminary List of Workshop Issues

1. There are numerous provision in the PSA that impose specific requirements on parties with respect to the advocacy on CHP related matters in regulatory and legislative forums; do those provisions apply to CCA/Direct Access Parties?

2. The Second Program Period provides that a calculation will occur that determines the amount of GHG emission reductions that each IOU has achieved in the first program period; do those provisions apply to CCA/Direct Access Parties?

3. Section 13.1.2.1 says that the cost recovery under stranded costs will be in accordance with D06-07-029; however, there is an initiative underway that could modify the way that stranded costs are calculated; would this settlement preclude those changes from being applicable to CHP investments?

4. Section 13.1.2.2 says that ESPs and CCAs would get Resource Adequacy benefits if the CAM approach is used for cost recovery, but it does not mention whether ESPs and CCAs would get any share of emission reduction benefits.

5. Section 13.1.3 says: "The parties agree that they will not advocate charging load served by CHP that meets the criteria of PUC 218(b) and 216.6 for the costs of the CHP Program through any cost allocation mechanism. What does this mean?

6. Section 16.2.4 says "The CPUC Decision adopting the Settlement will supersede certain portions of existing CPUC decisions as occurs with any subsequent CPUC decision or order." What does this mean?

7. Section 16.2.6 says that "the procurement obligations in this Settlement and under the RPS program supersede and replace the QF MW in D.07-12-052? How many QF MW were in that decision? If less that 3000, doesn't that mean that is settlement will lead to over procurement by the utilities?

8. Section 16.2.8 says that "To the extent that any Generating Facility has Green Attributes associated with the Related product (as Green Attributes and Related Product are defined in each of the form PPA attached to this Settlement, such Green Attributes shall be counted or credited toward the purchasing IOU's RPS program or any successor program." This appears to allow CHP investments to count both toward emissions reduction and RPS requirements; is that correct?

9. Section 4 talks about the CHP Procurement process – if the PD is approved, is all or any portion of this section of the settlement applicable to ESPs and or CCAs?

10. Section 5.2.2 gives IOUs credit for contracts back to September 2009; how many MW does this represent? What is the significance of that date?

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11. With respect to Section 7 and the accounting, if ESPs and CCA are responsible for their own procurement, will the emission reductions associated with their investment be measured in the same way; pursuant to the same double benchmarks?

12. Do all elements of the CHP program reports in Section 8 apply to ESPs and/or CCAs?

13. Do the CHP Auditor functions described in Section 9 apply to ESPs and/or CCAs?

14. Are ESPs and/or CCAs required to follow the pricing structures embedded in any of the contract options?

15. A provision of the PSA allows the utilities to seek exemptions to the CHP requirements; will those provisions apply to ESPs and CCAs as well?

16. How will the emissions reduction target be impacted by CARB's proposed cap and trade program and the allocation of allowances?

17. What are the specific procurement obligations of ESPs/CCAs compared to the requirements outlined for the IOUs in the Settlement – for instance, must ESPs/CCAs use the same form of contracts?

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the *Joint Comments Of The Marin Energy Authority, The Alliance For Retail Energy Markets And The* ***Direct Access Customer Coalition On The Alj Wetzel Decision Adopting Proposed Settlement*** on all parties of record in *A.08-11-001, R.06-02-013, R.04-04-003, R.04-04-025 and R.99-11-022*, by serving an electronic copy on their email addresses of record and by mailing a properly addressed copy by first-class mail with postage prepaid to each party for whom an email address is not available.

Executed on December 6, 2010, at Woodland Hills, California.

Michelle Dangott

SERVICE LISTS FOR
A.08-11-001, R.06-02-013, R.04-04-003, R.04-04-025 and R.99-11-022

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