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

APPLICATION OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION FOR REHEARING OF DECISION 10-12-035

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OF THE STATE OF CALIFORNIA

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APPLICATION OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION FOR REHEARING OF DECISION 10-12-035

Pursuant to Rule 16.1 of the Rules of Practice and Procedure of the Public Utilities Commission of the State of California ("Commission"), the California Municipal Utilities Association[1] ("CMUA") hereby files this Application for Rehearing of Decision ("D.") 10-12-035.

I. Introduction and Summary of Position.

On October 8, 2010, Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("SCE"), and San Diego Gas & Electric Company ("SDG&E") (together, the "IOUs"), the California Cogeneration Council, the Independent Energy Producers Association, the Cogeneration Association of California, the Energy Producers and Users Coalition, the Division of

[1] CMUA is a statewide organization of local public agencies in California that provide electricity and water service to California consumers. CMUA membership includes publicly owned electric utilities ("POUs") that operate electric distribution and transmission systems. In total, CMUA members serve approximately 25-30 percent of the electricity load in California.

Ratepayer Advocates, and The Utility Reform Network (collectively, the "Settling Parties") filed the Joint Motion for Approval of Qualifying Facility and Combined Heat and Power ("CHP") Program Settlement Agreement ("Joint Motion"). As described in D.10-12-035, the Settlement Agreement resulted from more than a year and a half of negotiations, and resolves numerous disputed qualifying facility issues.[2] According to D.10-12-035, the CHP Program set forth in the Settlement Agreement is designed to (1) "preserve resource diversity, fuel efficiency, greenhouse gas (GHG) emissions reductions, and other benefits and contributions of CHP," and (2) "promote new, lower GHG-emitting CHP facilities and encourage the repowering, operational changes through utility-pre-scheduling, or retirement of existing, higher GHG-emitting CHP facilities."[3] As CMUA has repeatedly stated, in this regard CMUA has no issue with, and in fact commends, the Settling Parties for resolving longstanding differences in a manner that promotes development of CHP facilities that reduce GHG emissions.

While in general CMUA supports the Settlement Agreement, CMUA strenuously objects to the Commission's approval of the provisions of the Settlement Agreement that would impose new nonbypassable charges ("NBCs") on municipal departing load ("MDL") customers as a result of the CHP Program. It is legal error for the Commission to approve imposition of the new NBCs on MDL customers as requested in the Settlement Agreement, and the Commission should revise D.10-12-035 to reject the provisions of the Settlement Agreement that would do so. D.10-12-035 unlawfully (and inexplicably) overturns or departs from fundamental Commission precedent established in D.08-09-012 and is an abuse of the Commission's discretion. Overturning or departing from D.08-09-012 is not supported by the findings, and the findings are not supported by

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2 D.10-12-035 at 2.

3 *Id.*

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substantial evidence in light of the whole record. Additionally, neither CMUA nor its members were included in the discussions leading up to the Settlement Agreement or provided with reasonable notice that issues affecting CMUA members would be resolved adversely to them. As a result, the Commission's abrogation of D.08-09-012 violates due process.

The Commission should grant this Application for Rehearing, apply Commission precedent established in D.08-09-012 and determine that new NBCs shall not be applied to MDL customers as a result of the CHP Program.

II. Standard Of Review.

Public Utilities Code section 1757 provides that when a court reviews the validity of a Commission decision, it considers several factors, including whether (1) the Commission proceeded in the manner required by law, (2) the decision is supported by the findings, (3) the findings are supported by substantial evidence in light of the whole record, (4) the decision was an abuse of discretion, and (5) the decision violates any right of petitioner under the federal or state constitutions. Rule 16.1 directs applicants to set forth specifically the grounds on which they consider a Commission decision to be unlawful or erroneous, and to make specific references to the record or law. Where an applicant for rehearing seeks oral argument, it should demonstrate that the application raises issues of major significance because the challenged decision adopts new or departs from existing Commission precedent without adequate explanation, changes or refines existing Commission precedent, and/or presents legal issues of exceptional controversy, complexity, or public importance.[4]

As demonstrated in this Application, the provisions of D.10-12-035 that would impose new NBCs for new generation resources on MDL customers overturn or depart from fundamental

[4] Commission Rule 16.3(a).

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Commission precedent without adequate explanation. They are not supported by the findings, which in turn are not supported by substantial evidence in light of the whole record, and are an abuse of discretion. In imposing these new NBCs, the Commission did not proceed in the manner required by law, violating applicant's (and others) due process rights.

III. D.08-09-012 Unambiguously and Finally Resolved Critical NBC Issues for MDL.

Just as the CHP Program and the Settlement Agreement resolve years-old disputes between the Settling Parties, D.08-09-012 unambiguously and finally resolved years-old disputes between POUs and the IOUs regarding the imposition of new NBCs on MDL customers. For nearly a decade, the IOUs have pushed for imposition of NBCs on customers who depart IOU service to take service from a POU (so-called "*Transferred* MDL"), and on customers who take service in the first instance from a POU (so-called "*New* MDL"). The POUs have vigorously resisted these efforts. The records in R.02-01-011 and R.06-02-013 (Tracks 2 and 3) include weeks of evidentiary hearings, hundreds of pages of testimony, pleadings, comments, applications for rehearing, petitions for modification, and multiple Commission decisions. In 2005, even President Peevey acknowledged the diminishing returns associated with ongoing consideration of NBC issues and admonished the IOUs to "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.[5]

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[5] Transcribed oral comments of President Michael Peevey at the Commission's July 21, 2005 business meeting (Audio Track at audio point 1:35:12).

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The IOUs did not move on, choosing instead to conceive new categories of NBCs. Tracks 2 and 3 of R.06-12-013 addressed the IOUs' proposal to impose the above-market procurement costs of new generation resources, like the new CHP resources promoted by the CHP Settlement and the Settlement Agreement, on Transferred and New MDL customers. In D.08-09-012 (issued in Track 3 of R.06-12-013), the Commission concluded that new generation procurement costs *should not* be allocated to MDL or Customer Generation Departing Load ("CGDL") customers, applying the "fair share" principle. "[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]

In Track 2 of R.06-12-062, the Commission considered whether the IOUs include MDL in their load forecast, and found that they do as a matter of course account for MDL. The Commission explained that the "IOUs are *required* to quantify and document their assumptions about migrating load" in the Integrated Energy Policy Report ("IEPR") process and that Public Resources Code section 25302.5 *requires* that all load serving entities provide the California Energy Commission with "'forecasted load that may be lost or added'" by a POU.[7] The CPUC further pointed out that the fact "[t]hat bundled load does not include POU load (and the associated MDL) is demonstrated on Form 1.4b in the 2007 IEPR Demand Forecast which shows bundled and direct access loads separately from POU loads."[8] The Commission went on: "The above discussion of how departing load is reflected in the adopted load forecasts is also consistent with our understanding of how departing load is considered in the load forecasts prepared by the IOUs."[9] "'Regarding parties'

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6 D.08-09-012 at 10-11.

7 *Id.* at 17 (emphasis added).

8 *Id.* at 18.

9 *Id.* at 18-19.

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concerns over PG&E's assessment of departing load, we concur with PG&E's response that … future DG and MDL is captured by historical trends used to develop the forecast.'"[10]

The Commission went on to consider (1) what it means for MDL to be excluded from load forecasts, and (2) whether excluded (*i.e.*, forecast) MDL should be responsible for new resource NBCs.[11] The Commission concluded that:

> Exclusion of MDL and CGDL from the load forecast can only logically be interpreted to mean that the LTPP, which uses that load forecast to determine resource needs in the forecast year, *does not include* any resources to serve departing load in that forecast year and beyond. *Accordingly, in such circumstances, it would be reasonable to determine that the fair share of departing load for paying the new generation NBCs would be zero.*[12]

Based on this detailed analysis, the Commission ultimately concluded that no new generation NBCs should be applicable to MDL customers, with the possible exception of so-called "large municipalizations."[13] The Commission unambiguously memorialized its findings in Ordering Paragraph 2 of D.08-09-012:

> Because [CGDL] and [MDL] are excluded, as classes, from the adopted load forecasts on which the investor-owned utilities (IOUs) long term procurement plans (LTPPs) are based, CGDL and MDL customers are excluded from having to pay the D.04-12-048 and D.06-07-029 NBCs, including any above market costs related to RPS contracts, with the exception of [large municipalizations] described in Ordering Paragraph 3.[14]

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[10] *Id*. at 19 (*quoting* D.07-12-052 at 34-35). The Commission noted that D.07-12-052 contained similar statements with respect to SCE's and SDG&E's departing load. (*Id*. at 19.)

[11] D.08-09-012 at 22.

[12] *Id*. at 23 (emphasis added).

[13] *Id*. at 26.

[14] Ordering Paragraph 3 provides that an IOU may file an application requesting implementation of new generation NBCs on departing load associated with large municipalizations.

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Notwithstanding this clear rule regarding new generation and NBCs, SCE recently proposed to impose new generation NBCs on MDL and CGDL customers based on the alleged societal benefit of certain generation resources. The Commission rejected this proposal, applying the fundamental precedent established in D.-8-09-012.[15] In so doing, the Commission explained that the perceived societal attributes of the generation resources do not trump the clear cost-causation principles established in D.08-09-012.[16]

IV. D.10-12-035 Unlawfully Overturns Fundamental Commission Precedent.

In order to justify NBCs for new CHP generation resources that result from the CHP Program, the Commission in D.10-12-035 inexplicably and unlawfully departs from the fundamental precedent set in D.08-09-012, apparently solely on the basis of the Settling Parties' sham argument. The Decision adopts the Settling Parties circular assertions nearly verbatim:

> 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 departs, that customer should bear its share of the costs incurred on its behalf.[17]

These few sentences (which are factually erroneous, as described below) constitute the Commission's entire justification for overturning a one hundred plus page decision, based on months of litigation, which explicitly provides that new generation NBCs do not apply to MDL customers. D.10-012-035 seems to imply that this drastic action is warranted because certain

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15 D.10-04-028 at 30.

16 *Id.*

17 D.10-12-035 at 52-53; *see also* Settling Parties' Joint Reply Comments at 23-24.

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obligations under the Settlement Agreement are based on current retail sales instead of future load forecasts. This "distinction" is false, and the Commission's reliance on it has led to legal error.

There is no difference under D.08-09-012 between current bundled customers' retail sales and future load forecasts that account for departing customers. The future load forecasts that the Commission so carefully considered and relied on in D.08-09-012 to demonstrate that the IOUs do not incur new generation costs on behalf of MDL customers, such that MDL customers are exempt from new generation NBCs, are compilations of actual or current "retail sales" (as that term is 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 sales because it had departed, was the fundamental premise for the Commission's conclusion that the IOUs do not incur generation procurement costs on behalf of MDL customers. Notably, the Commission recognized that "[i]n general, forecasts of demand, including that for MDL, reflect historical consumption, economic and demographic projections, weather adjustments and specific inputs from LSEs."[18]

These and other statements in D.08-09-012 demonstrate the error in the Settling Parties' and D.10-12-035's unfounded assertion that there is some sort of substantive difference between bundled service customers' retails sales and future load forecasts. D.08-09-012 is crystal clear – the exact same methodology used in the Settlement Agreement (recurring analysis of current bundled service customers' retail sales) is used in D.08-09-012. In D.08-09-012, that methodology supports the conclusion that because the IOUs' resource purchases are based on load forecasts that in turn are based on historic sales data that accounts for MDL, the IOUs are not incurring generation costs on behalf of MDL. The Commission further explained the reasonableness of this approach: "We note

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[18] D.08-09-012 at 18 (*see also id.* at 19, *quoting* 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;" and fn. 25: "MDL is implicitly reflected in SCE's load forecast as a decline in SCE's bundled load growth through the extrapolation of historical data [reflecting actual sales].")

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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."[19] Most importantly, the Commission found that reliance on historic information to develop load forecasts would maintain bundled customer indifference: "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]

Relying on the limited statements of the Settling Parties described above, D.10-12-035 appears to erroneously conclude that obligations under the Settlement Agreement are not recurring, but instead are based on a single year's retail sales data. The terms of the Settlement Agreement prove the falsity of this conclusion. The initial GHG Emission Reduction Targets are based on 2007 CEC retail sales data.[21] The GHG Emission Reductions Targets will change over time, based on the same "historic information and trends" that was accounted for in D.08-09-012. The Settlement Agreement explicitly provides that "as the electric market continues to evolve, the portion of electric sales attributable to each IOU will change."[22] In other words, GHG Emission Reduction Targets will change based on historic information and trends – data that the Commission determined in D.08-09-012 takes into account MDL activity.[23] Contrary to the erroneous summary conclusion in D.10-12-035, there is absolutely no substantive difference between the methodology

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19 *Id.* at 21.

20 *Id.*

21 Settlement Agreement, Section 6.2.2.3.1.

22 *Id.*

23 *Id.* at 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 on *updated and published CEC retail sales data*." (Emphasis added.))

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employed in the Settlement Agreement in connection with GHG Emission Reduction Targets and the methodology established in D.08-09-012 to determine that MDL is exempt from new generation NBCs. The result is the same regardless whether the new generation is new CHP procured under the CHP Program, or other new generation – costs are not incurred by IOUs on behalf of MDL.[24]

The Commission's departure from D.08-09-012 is an abuse of discretion. Because there is no substantive difference between the methodologies related to CHP procurement and allocation of GHG Emission Reduction Targets on the one hand, and load forecasts and resource procurement on the other, there is no lawful basis for the Commission to overturn or "supersede" D.08-09-012. As described herein, the record developed in D.08-09-012 is extensive and clear; the record supporting the Commission's determination in D.10-12-035 is comprised of only a few factually erroneous sentences. The Commission should revise D.10-12-035 to correct the factual errors in its summary consideration of historic sales data versus load forecasts, which factual errors led the Commission to commit legal error by overturning its own precedent. Specifically, the Commission should revise D.10-12-035 to confirm that because the IOUs will not incur costs on behalf of MDL in connection with *new* CHP procurement under the CHP Program, any *new* CHP Program related NBCs do not apply to MDL consistent with the precedent established in D.08-09-012.[25]

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[24] The example of New MDL highlights with crystal clarity the essential flaw in the Commission's reasoning in D.10-12-035. As discussed above, the departure from D.08-09-012 that was taken in D.10-12-035 to impose NBCs on MDL customers was based on an erroneous reliance on the reply comments of the Settling Parties, which created a false distinction between "actual retail sales data" and load forecasts. Even under D.10-12-035's erroneous analysis, however, in no event will *New* MDL customers ever be included in an IOU's "actual retail sales data" as such customers have "never been served by an IOU." (*See* D.08-09-012 at 2, fn. 5, defining New MDL as "load that has never been served by an IOU but is located in an area that had previously been in the IOU's service territory as that territory existed on February 1, 2001) and was annexed or otherwise expanded into by a POU." (*See also* D.08-09-012, Appendix C (List of Terms).))

[25] CMUA notes a key distinction under D.08-09-012 and other Commission precedent. Under D.08-09-012, MDL customers are not responsible for any *new generation* NBCs. Under Public Utilities Code section 367 and current Commission decisions, certain MDL customers are

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V. D.10-12-035 Violates Due Process.

By adopting D.10-12-035, the Commission, among other things, overturned or departed from D.08-09-012. Under the Commission's rules, there are two mechanisms for seeking modification of prior Commission decisions: (1) an application for rehearing (Rule 16.1), and (2) a petition for modification (Rule 16.4). The Settling Parties followed neither. Instead the Settling Parties asked the Commission to approve a Settlement Agreement, provisions of which call for "superseding" a prior Commission decision.[26] POUs were not included in the year-and-a-half discussions leading to the Settlement Agreement, even though the Settlement Agreement purports to address an issue of known paramount importance to POUs. POUs only learned of the potential for "superseding" by Settlement Agreement a prior Commission decision when the Settlement Agreement was filed with the Commission. Even then, it is important to note that the Joint Motion describing the Settlement Agreement made no mention of the proposal to "supersede" a prior Commission decision. Thus, POUs, who were excluded from settlement discussions and not afforded a preview of the critical NBC issue in the Joint Motion, only found out about the proposed new NBCs by reading the lengthy Settlement Agreement and conducting discovery to confirm the Settling Parties' intent. Adversely affected non-settling parties, including POUs, were not afforded a reasonable, much less meaningful, opportunity to comment on the Settlement Agreement.

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responsible for various existing generation (*i.e.*, Qualifying Facility or "QF") costs included in the Ongoing Competition Transition Charge ("CTC"). Accordingly, there may be a basis for recovering certain First Program Period costs (as that term is used in the Settlement Agreement) from MDL customers, but only on a vintage basis, and only to the extent such costs are presently included in Ongoing CTC. The costs of new generation resources procured during the First Program Period and the Second Program should not be recovered from MDL customers, as any such new generation costs are precisely the costs the Commission determined in D.08-09-012 may not be imposed on MDL customers.

[26] *See, e.g.*, Settlement Agreement, Sections 13.1.1, 13.1.2.1, 13.1.2.2, 16.2.4, and 16.2.5.

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Approval of the Settlement Agreement appears to have been a foregone conclusion. Not only was senior CPUC staff actively involved in settlement negotiations, but also the Settlement Agreement was approved on a fast-track schedule compared to a majority of Commission decisions. Although parties had an opportunity to comment on the Settlement Agreement and a Proposed Decision, comments by non-settling parties seeking to modify certain terms of the Settlement Agreement and addressing procedural defects were given short shrift. The process followed in approving the Settlement Agreement violated Commission Rules and the due process rights of POUs. Rehearing should be granted to address procedural defects.

VI. Conclusion.

CMUA appreciates the opportunity to submit this Application for Rehearing of D.10-12-035 and urges the Commission to uphold its own precedent and make the changes described herein.

Dated: January 20, 2011

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CERTIFICATE OF SERVICE

I certify that the following is true and correct:

On January 20, 2011, 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:

APPLICATION OF THE
CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION
FOR REHEARING OF DECISION 10-12-035

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

Executed this 20th day of January, 2011 at Sacramento, California.

Vicki Ferguson

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