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.	)	Application 08-11-001 (Filed November 4, 2008)
And Related Matters.	)	Rulemaking 06-02-013 Rulemaking 04-04-003 Rulemaking 04-04-025 Rulemaking 99-11-022

THE CITY AND COUNTY OF SAN FRANCISCO'S APPLICATION FOR REHEARING OF DECISION 10-12-035

January 18, 2011

Dennis J. Herrera, City Attorney
Theresa L. Mueller
Austin M. Yang
Jeanne M. Solé
Office of the City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Jeanne.sole@sfgov.org
(415) 554-4619 Telephone
(415) 554-4763 Facsimile

TABLE OF CONTENTS/SUBJECT MATTER INDEX

TABLE OF AUTHORITIES

United States Supreme Court Decisions

California Appellate Court Cases

California Statutes

California Public Utilities Commission Rules of Practice and Procedure

California Public Utilities Commission Decisions

Other California Public Utilities Commission Issuances

SUMMARY OF RECOMMENDATIONS

The Commission should grant rehearing and modify the Decision to remove from the Settlement Agreement those provisions that impose requirements on CCAs, ESPs, and MDLs, who were not represented in the negotiations.

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.	)	Application 08-11-001 (Filed November 4, 2008)
And Related Matters.	)	Rulemaking 06-02-013 Rulemaking 04-04-003 Rulemaking 04-04-025 Rulemaking 99-11-022

THE CITY AND COUNTY OF SAN FRANCISCO'S APPLICATION FOR REHEARING OF DECISION 10-12-035

I. INTRODUCTION

Pursuant to Rule 16.1 of the Commission's Rules of Practice and Procedure ("Rules"), the City and County of San Francisco (the "City") respectfully files this application for rehearing of Decision ("D.") 10-12-035 (the "Decision"). The Decision commits legal error by adopting, without change, a Settlement Agreement (the "Settlement Agreement") between the investor owned utilities ("IOUs"), The Utility Reform Network, the Division of Ratepayer Advocates, the California Cogeneration Council, the Cogeneration Association of California, the Energy Producers and Users Coalition, and the Independent Energy Producers Association (the "Settling Parties"). The Settlement Agreement resolves issues that directly affect the interests of Community Choice Aggregators ("CCAs"), Energy Service Providers ("ESPs"), and publicly owned utilities ("POUs") (collectively the "Non-Settling Parties"), even though none of these parties were represented in the eighteen month settlement process that resulted in the Settlement Agreement.

Not surprisingly, the provisions affecting CCAs, ESPs, and POUs are highly adverse to these parties, contrary to the law and public policy, and unsupported by the factual record. D. 10-12-035 is defective in that it (1) adopts provisions exceeding the Commission's jurisdiction, (2) provides for cost recovery that is unsupported by the factual record, inconsistent with the law,

and contrary to Commission precedent, (3) misapplies the heightened standard of review for settlements, and (4) fails to meet minimum standards of due process.

A. Oral Argument

Pursuant to Rule 16.3, the City requests an oral argument in this matter. Oral argument will materially assist the Commission in resolving the issues raised in this application because it will allow the City to present to the Commission the significant legal errors in D. 10-12-035 and the anticompetitive impacts of the approach taken by D. 10-12-035 to promote combined heat and power ("CHP"). D. 10-12-035 is of major significance because it is the first decision to rely on Section 365.1(c)(2)[1] for cost recovery since that section was enacted. D. 10-12-035 implements Section 365.1(c)(2) in a manner that exceeds the plain language of the statute and is anticompetitive and detrimental to the development of CCAs and direct access. Moreover D. 10-12-035 departs from Commission precedent providing cost recovery for combined heat and power ("CHP") resources that is considerably more favorable to the IOUs than the standard cost recovery that has been developed over the last decade by the Commission.

B. Background

On October 4, 2010, the Settling Parties notified CCAs and ESPs for the first time that a settlement had been concluded that significantly affected their interests. The Settlement Agreement was the product of eighteen months of negotiations. Prior to October 4th however, the only pleadings and rulings that could have alerted other parties of this effort stated that the parties were "actively involved in global settlement negotiations to resolve issues affecting ***the relationship of the IOUs with the QFs*** historically and going forward."[2] In addition to resolving numerous contentious and long-standing issues between the IOUs and representatives of

[1] All references are to the Public Utilities Code unless otherwise noted.

[2] See R. 04-04-003, R. 04-04-025, "Motion of Joint Parties for Limited Abeyance." p.2 (filed June 26, 2009) (emphasis added). SCE filed a similar motion in A. 08-11-001 on July 13, 2009.

qualifying facilities ("QFs"), the Settlement Agreement imposes an obligation on CCAs and ESPs to achieve greenhouse gas ("GHG") reduction goals by purchasing power from CHP facilities and provides for a corresponding cost recovery that departs significantly from the Commission's cost-recovery regime established over the past decade.

C. Policy Considerations

This case highlights important and interrelated issues that the Commission should consider in reviewing this application for rehearing and in developing policy going forward. If the Commission is to facilitate a competitive market between IOUs, CCAs and ESPs, it is important that the Commission carefully assess the competitive impacts of programs designed to achieve public policy objectives and seek alternatives that do not unfairly advantage one competitor over another.

The City strongly supports the increased use of CHP resources and has itself developed such resources and will develop additional CHP resources for its CCA program. But the City objects strongly to the anticompetitive manner of advancing these policies adopted by the Commission. By allowing the IOUs to use ratepayer and CCA customer money to implement CHP, the Commission has given the IOUs a risk-free sizeable fund that they can use to cherry pick potential CCA customers. In addition, IOUs are able to themselves meet increasing proportions of the supplies needed by CCA customers, narrowing more and more the services that CCAs can seek to offer more efficiently. Instead of condoning this approach, the Commission should have sought competitively neutral mechanisms of achieving its objectives, such as providing ratepayer funded subsidies in a neutral manner to any project that met the Commission's efficiency and reliability criteria, regardless of the identity of the developer and of whether such project was implemented at a bundled customer or CCA customer facility. In contrast, under the approach set forth in the Settlement Agreement, neither CCAs nor ESPs will be able to flourish in California, contrary to the express will of the legislature which authorized these programs.

Further, of the two alternatives for cost recovery set forth in the Settlement Agreement, the Commission opted for the least competitive option. The Settlement Agreement uses the cost allocation mechanism (CAM), rather than the well-established vintaged cost recovery, which at least allows CCA customers to eventually transition into a full CCA resource portfolio. This is the first case in which the Commission used CAM cost recovery since it was enacted by statute. The Commission's overbroad application of CAM cost recovery to a wide range of unspecified resources without any factual support, is contrary to the statute and inconsistent with development of competitive alternatives.

The fact that an anticompetitive approach has been adopted here is not surprising in view of the process used to reach the Settlement Agreement. In reaching the agreement, one set of competitors, CCAs and ESPs, were excluded while another, the IOUs, were allowed to impose terms to bind CCAs and ESPs. It is unfair to engage in lengthy negotiations on matters that will affect certain parties while at the same time keep those parties out of the room. The outcome is predictably skewed.

The Commission still has the opportunity to avoid an anticompetitive outcome by granting this application for rehearing and revising the Settlement Agreement so that it is consistent with the law. The City urges the Commission to do so.

II. DISCUSSION

A. Legal Standard

Any party to an action or proceeding may seek rehearing of a Commission decision.[3] An application for rehearing is appropriate where a Commission decision is unlawful or erroneous.[4] The application must set forth the grounds for legal error and make specific references to the

[3] Public Utilities Code § 1731.

[4] Commission Rule of Practice and Procedure 16.4; Cal. Admin. Code tit. 20, § 16.1.

record or law.[5] The purpose of the application is to "alert the Commission to a legal error, so that the Commission may correct it expeditiously."[6]

> A party may satisfy this burden by demonstrating that:
> (1) The commission acted without, or in excess of, its powers or jurisdiction.
>
> (2) The commission has not proceeded in the manner required by law.
>
> (3) The decision of the commission is not supported by the findings.
>
> (4) The findings in the decision of the commission are not supported by substantial evidence in light of the whole record.
>
> (5) The order or decision of the commission was procured by fraud or was an abuse of discretion.
>
> (6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.[7]

B. D. 10-12-035 Unlawfully Exceeds the Commission's Limited Jurisdiction Over CCAs.

The Settlement Agreement creates a GHG-based CHP procurement target for CCAs and ESPs, and requires CCAs to procure CHP resources to meet that target. The Settlement Agreement provides that the Commission could opt to have CCAs procure the requisite CHP themselves, or could opt to have the IOUs procure CHP on behalf of CCAs. In the event the Commission opted to have IOUs procure CHP on behalf of CCAs, the GHG and other benefits from these purchases would be assigned to CCAs and cost recovery would be pursuant to Public Utilities Code Section 365.1(c)(2). These provisions constitute legal error because the

---

[5] *Id.*

[6] Rule 16.4(c).

[7] Section 1757; *see also Santa Clara Valley Transportation Authority v. Public Utilities Com'n*, (2004) 124 Cal.App.4th 346 (Commission actions beyond scope of jurisdiction are void); *Southern California Edison v. Public Utilities Com'n*, (2006) 140 Cal.App.4th 1085 (failure to follow Commission rules constitutes failure to act in manner required by law); and *see generally TURN v. Public Utilities Com'n* (2008) 166 Cal.App.4th 522 (Commission decision inconsistent with statutory directive and cannot ignore unrebutted evidence in the record); *Fox v. FCC* (2009) 129, S.Ct. 1800 (agency may not change prior policy without providing good reasons for new policy).

Commission has no jurisdiction to require CCAs to undertake CHP purchases to meet GHG targets.

A Commission decision asserting jurisdiction in excess of the Commission's actual authority is unenforceable.[8] In *SCVTA*, the Court of Appeal rejected the Commission's attempt to assert exclusive jurisdiction over a railroad crossing. The Court found that the Commission's statutory assertion of jurisdiction was not supported by the underlying statutes, and consequently annulled the Commission's decision to the extent the Commission acted in excess of its jurisdiction. The Court focused on the timing of successive statutory changes, giving more weight to specific later enactments over broader earlier enactments, and reviewing the statutory scheme as a whole in order effectuate the will of the legislature. In the case of the Settlement Agreement, those aspects of D. 10-12-035 that require CCAs to undertake CHP purchases and direct IOUs to undertake the purchases on CCAs' behalf are beyond the Commission's jurisdiction, as set forth in specific statutory provisions relating to CCAs, and are therefore unenforceable.

D. 10-12-035 bases its conclusion that the CPUC has jurisdiction to direct CCAs to undertake CHP purchases on six mistaken grounds. In general, the analysis of jurisdiction fails because it does not distinguish between jurisdiction to require CCAs "to procure a share of GHG emission reduction targets established under the [Settlement Agreement]," on the one hand, and jurisdiction to require CCAs to pay for IOU purchases, on the other. However, these provisions are quite different and require different legal analyses.

First, D. 10-12-035 relies on Section 365.1(c)(1), which provides that the Commission shall:

> Ensure that other providers are subject to the same requirements that are applicable to the state's three largest electrical corporations under any programs or rules adopted by the commission to implement the resource adequacy provisions of Section 380, the renewables portfolio standard provisions of Article 16 (commencing with Section 399.11), and the requirements for the electricity sector adopted by the State Air

[8] *See Santa Clara Valley Transportation Authority v. Public Utilities Com'n*, 124 CalApp.4th 346.

> Resources Board pursuant to the California Global Warming Solutions Act of 2006 (Division 25.5 (commencing with Section 38500) of the Health and Safety Code).

However, the plain language of section 365.1(a) makes clear that Section 365.1(c)(1) does not apply to CCAs:

> For purposes of this section, "other provider" means any person, corporation, or other entity that is authorized to provide electric service within the service territory of an electrical corporation pursuant to this chapter, and includes an aggregator, broker, or marketer, as defined in Section 331, and an electric service provider, as defined in Section 218.3. **"Other provider" does not include a community choice aggregator, as defined in Section 331.1, and the limitations in this section do not apply to the sale of electricity by "other providers" to a community choice aggregator for resale to community choice aggregation electricity consumers pursuant to Section 366.2.** (Emphasis added.)

Thus, Section 365.1 clearly exempts CCAs from the requirements of Section 365.1(c)(1), and therefore, reliance upon that section to direct CCAs to procure CHP resources is unlawful.

Second, D. 10-12-035 improperly creates a legal requirement to procure CHP out of CARB's Scoping Plan. D. 10-12-035 itself does not conclude that the target in the Scoping Plan is a requirement, but instead quotes CARB's statement in the Scoping Plan that "'the measures in this Scoping Plan will be developed over the next two years and be in place by 2012.'" [9] D. 10-12-035 then explains that to the extent CARB's final rules or regulations are inconsistent with the Settlement Agreement, the procurement obligations of ESPs and CCAs will be modified.[10] This reasoning is illogical and based on an inaccurate reading of the Settlement Agreement. Moreover, it is irrelevant with respect to CCAs because pursuant to Section 365.1(c)(1), the Commission does not have jurisdiction to impose CARB based GHG requirements on CCAs.

Further, CARB's statement that it will develop measures in the Scoping Plan over the next two years to be in place by 2012 does not turn the CHP target in the Scoping Plan into a requirement for the purposes of Section 365.1. Rather, it is simply a statement regarding the

---

[9] D. 10-12-035 at 48.

[10] *Id.*

time frame in which requirements may be developed. Similarly, the fact that the targets in the Settlement Agreement could be changed if CARB adopts final rules or regulations inconsistent with the Settlement Agreement does not justify using a target in the Scoping Plan as a requirement pursuant to Section 365.1. Therefore, using the Scoping Plan as a basis for the procurement obligations constitutes an unlawful abuse of discretion.

Third D. 10-12-035 attempts to rely on Section 365.1(c)(2) and fourth, D. 10-12-35 attempts to rely on Section 366.2(f)(2) to support a CPUC directive to CCAs to procure CHP. However, both of these sections relate solely to the recovery of costs for IOU purchases.[11] Thus, these sections contain no language supporting a Commission directive to CCAs to procure CHP, or any other type of resources.

Fifth, D. 10-12-035 relies on D. 06-07-029, which directed Pacific Gas and Electric Company ("PG&E") and Southern California Edison ("SCE"), respectively, to undertake purchases of additional generation, provided for cost recovery for such purchases, directed that the capacity and energy from such purchases should be unbundled, and provided a new form of cost recovery for such purchases. However, there are a number of problems with relying on D. 06-07-029. First and foremost, like Sections 365.1(c)(2) and 366.2(f)(2), D.06-07-029 provides only for cost recovery from ESP and CCA customers. It does not provide any basis for the

---

[11] Section 365.1(c) (2) provides that the Commission shall "(e)nsure that, in the event that the commission authorizes, in the situation of a contract with a third party, or orders, in the situation of utility-owned generation, an electrical corporation to obtain generation resources that the commission determines are needed to meet system or local area reliability needs for the benefit of all customers in the electrical corporation's distribution service territory, the net capacity costs of those generation resources are allocated on a fully nonbypassable basis consistent with departing load provisions as determined by the commission, to all of the following: (i) Bundled service customers of the electrical corporation. (ii) Customers that purchase electricity through a direct transaction with other providers." [Emphasis added.]

Section 366.2(f)(2) A retail end-use customer purchasing electricity from a community choice aggregator pursuant to this section shall reimburse the electrical corporation that previously served the customer for all of the following: (2) Any additional costs of the electrical corporation recoverable in commission-approved rates, equal to the share of the electrical corporation's estimated net unavoidable electricity purchase contract costs attributable to the customer, as determined by the commission, for the period commencing with the customer's purchases of electricity from the community choice aggregator, through the expiration of all then existing electricity purchase contracts entered into by the electrical corporation. [Emphasis added.]

CPUC to direct ESPs or CCAs to undertake particular procurements. Further, the cost recovery utilized in D. 06-07-029 is no longer relevant. In 2009, the Legislature enacted Section 365.1, which adopted a similar but modified form of the cost recovery discussed in D. 06-07-029. Thus, D. 06-07-029 has been superseded by Section 365.1, which, as discussed above does not serve as a basis for the Commission to assert jurisdiction over CCAs.

Sixth, D. 10-12-035 alludes to D. 06-02-032, where the Commission indicated it would adopt a load-based cap on GHG emissions and averred that it had jurisdiction to impose such a requirement on all load serving entities ("LSEs"). However, D. 06-02-032 was issued before the Legislature enacted both AB 32 and SB 695, and is superseded by this new legislation. Importantly, AB 32 identifies CARB as the state entity with the jurisdiction and obligation to implement a GHG reduction program. In addition, SB 695, expressly exempts CCAs and limits the Commission's ability to enforce GHG emission requirements on ESPs to "requirements for the electricity sector adopted by the State Air Resources Board pursuant to the California Global Warming Solutions Act of 2006 . . ." Thus, D. 06-02-032 provides no authority for the Commission to impose GHG related procurement obligations on CCAs.[12]

---

[12] D. 06-02-032, and the Commission's decision on rehearing, D.06-06-071, purported to impose a load-based cap on GHG, based on the Commission's undisputed authority to enforce RPS and RA requirements on ESPs and CCAs. In those decisions, the Commission reasoned that RPS and RA are intrinsically related to GHG reduction and that hence, the Commission could regulate GHG based on its authority to enforce RPS and RA requirements. This reasoning does not withstand scrutiny. There is no obvious link between RA and RPS requirements on the one hand, and a GHG reduction program on the other. If there were, it would have been unnecessary for the legislature to include in Section 365.1 an explicit reference to GHG requirements adopted by CARB in addition to references to the RPS and RA. Moreover, the decisions argued that pursuant to Section 701, the Commission could regulate LSEs as an ancillary matter to its regulation of public utilities, based on *PG&E Corp. v. PUC*, (2001) 118 Cal. App. 4th 1174, 1291. That case provided for limited Commission jurisdiction over public utility holding companies. This does not support Commission jurisdiction to impose GHG requirements on CCAs . Moreover, both of these arguments have been superseded by specific new language in Section 365.1(c)(1) that sets forth precisely the respective roles of CARB and the CPUC as to GHG regulation.

It is worth noting also that while both D.06-02-032 and D.06-06-071 contained broad pronouncements about CPUC jurisdiction to apply a GHG cap on all LSEs, in effect, the decisions only required reporting. The decisions left detailed development and application of the load based cap on LSEs and IOUs to subsequent decisions which were never enacted because the passage of AB 32 rendered the CPUC's early forays into GHG regulation unnecessary. Consequently, the strained reasoning in D.06-02-032 and D.06-06-071 was never fully litigated or applied.

D. 10-12-035 also cites statements in D.06-06-071 suggesting that the Commission can regulate GHG emissions of LSEs pursuant to its general authority over public utilities set forth in Section 701, because although CCAs are not public utilities, their operations affect public utilities. However, where there is a more specific statute directing Commission action, the Commission may not rely upon section 701 for such a proposition.[13] In *Assembly of the State of California*, the California Supreme Court specifically rejected the Commission's claim that section 701 conferred an "open-ended grant of authority to the Commission."[14] Here, any strained jurisdictional pronouncements in prior Commission decisions purporting to rest on its general statutory authority, and issued prior to enactment of AB 32 and Section 365.1(c)(1) cannot trump the clear, specific and explicit language of Section 365.1 which sets forth precisely what and as to whom the CPUC enforce with respect to GHG reductions. [15] In sum, neither Commission decisions, nor any provision of the Public Utilities Code provides any basis for the Commission to require CCAs to procure CHP resources.

1. Applying a Procurement Requirement to CCAs is Contrary to Commission Precedent.

D. 10-12-035 does not even mention or distinguish Commission precedent recoguizing that the CPUC's jurisdiction over CCAs is limited to a few areas explicitly delineated by statute.[16] This sudden and unexplained departure from settled Commission policy without any reasoned explanation that fails to take into account justifiable reliance upon the Commission's prior position is arbitrary and capricious,[17] and contrary to public policy. When an agency

---

[13] Cal. Civil Code 3534, and *see Assembly of the State of California v. Public Utilities Com'n* (1995) 12 Cal.4th 87, 103.

[14] *Id.*

[15] See Cal. Civil Code Section 3524; see also *Stone Street Capital, LLC V. California State Lottery Com'n* (2008), 165 Cal.App. 4th 109; *Santa Clara Valley Transportation Authority v. Public Utilities Com'n*, (2004) 124 Cal.App.4th 346.

[16] See e.g. D. 05-12-014 at 8-9.

[17] See *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co* (1983) 463 U.S. 29, 41-42; *see also FCC v. Fox* (2009) 129 S. Ct. 1800, 1810; and *Henning v. Industrial Welfar Comm'n.* (1988) 46 Cal.3d 1262, 1270.

decides to change its position, it must "display awareness that it is changing position. An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books... And of course the agency must show that there are good reasons for the new policy."[18]

The Commission has established a consistent view of its jurisdiction over CCAs:

> In considering this Commission's jurisdiction over CCAs and the implementation of CCA program, we rely almost exclusively on the guidance provided by AB 117, which is the only California statute that guides the development of a CCA program. Our review of AB 117 leads us to the general conclusion that our authority over CCAs is circumscribed. AB 117's provisions are generally either permissive with respect to CCAs or direct us to regulate the utilities that serve them. That is, we interpret AB 117's requirements for the CCA to file an implementation plan, to register with the Commission, and to comply with program rules to be conditions of receiving related utility services. Just as a residential customer may have to submit a deposit as a condition of utility service or an industrial customer may have to install a meter to receive utility service, CCAs must take certain steps to receive the utility services they will require to provide power to their customers. The conditions of service imposed on utility customers do not confer upon this Commission general jurisdiction over customers. In the case of CCAs, the rules and procedures AB 117 requires are for the purpose of assuring the availability of adequate information for the utility to provide service and for the Commission to satisfy itself that the CCA's plans will not compromise the utility's ability to provide services to CCA customers and utility bundled customers.
>
> The Commission must adopt rules *for the utility* in order that it may provide adequate service to the CCA and its customers while simultaneously protecting utility bundled customers and the utility's system. Nothing in the statute directs the Commission to regulate the CCA's program except to the extent that its program elements may affect utility operations and the rates and services to other customers. For example, the statute does not require the Commission to set CCA rates or regulate the quality of its services. To the contrary, while providing very precise guidelines on a number of issues involving the utilities' services to CCAs and ways to protect utility customers, the statute does not refer to how the Commission might oversee the rates and services CCAs offer to their customers.[19]

The CHP requirements set forth in the Settlement Agreement and approved in D. 10-12-035 do not relate to "assuring the availability of adequate information for the utility to provide

---

[18] *FCC v. Fox* 129 S. Ct. at 1810 (internal citations omitted).

[19] D. 05-12-041 at 8-9 (emphasis in the original); see also D. 10-03-021 at 48.

service and for the Commission to satisfy itself that the CCA's plans will not compromise the utility's ability to provide services to CCA customers and utility bundled customers." Instead, identifying the best resources to meet customer needs, and approaches to minimize the GHG impact of electric service are precisely the types of decisions within the purview of the local governments that regulate a CCA. D. 10-12-035 errs in ignoring this well-settled precedent.

C. Providing for Expanded Stranded Cost Recovery for the CHP Program is Inconsistent With the Law and Contrary to Commission Precedent.

D. 10-12-035 errs in adopting cost recovery provisions that are inconsistent with the law and Commission precedent. The stranded cost recovery scheme adopted in D. 10-12-035 includes the following errors:

- D. 10-12-035 errs in providing cost allocation mechanism (CAM) cost recovery for IOU procurements pursuant to the Settlement Agreement, without any rational justification and contrary to applicable statutes, and Commission precedent.
- D. 10-12-035 errs in approving without a reasonable explanation provisions in the Settlement Agreement that would assess stranded costs to municipal departing load (MDL), in a manner that is contrary to Commission precedent.
- D. 10-12-035 errs in approving without justification provisions in the Settlement Agreement that provide for automatic twelve-year stranded cost recovery, contrary to Commission precedent which limits such recovery to ten years.

1. D. 10-12-035 errs in providing CAM cost recovery for IOU CHP procurement to meet their own and the CCAs procurement obligations.

Section 13 of the Settlement Agreement addresses cost allocation and departing load charges for CHP procurement. Pursuant to the Settlement Agreement, if the Commission opts for IOUs to procure CHP on behalf of CCAs, then IOUs may use CAM cost recovery for above market costs of all purchases undertaken pursuant to the Settlement Agreement. If the Commission opts for CCAs to procure on their own behalf, then the Settlement Agreement provides that for all purchases undertaken pursuant to the Settlement Agreement, vintaged cost recovery applies, consistent with previous Commission decisions, although with a few improper

changes (discussed further below). Because the Commission opted to have IOUs procure on behalf of CCAs in D. 10-12-05, under the terms of the Settlement Agreement, CAM cost recovery would apply to all IOU CHP purchases, including those made to meet their own procurement obligations and those made to meet the procurement obligations of CCAs and ESPs.

D. 10-12-035 relies on Section 365.1(c)(2), enacted as part of SB 695, to support the CAM cost recovery set forth in the Settlement Agreement. However, cost recovery pursuant to Section 365.1(c)(2) is limited to particular circumstances that are not met in the instant case. Moreover, affording IOUs CAM cost recovery of CHP purchases is contrary to Commission precedent and the public interest.

a. CAM cost recovery is not supported by the factual record in this case.

Section 365.1(c)(2)(A) codified and revised the cost-recovery regime from D. 06-07-029, but included specific limitations, as follows:

> in the event that the commission authorizes, in the situation of a contract with a third party, or orders, in the situation of utility-owned generation, an electrical corporation to obtain generation resources that the commission determines are needed to meet system or local area reliability needs for the benefit of all customers in the electrical corporation's distribution service territory, the net capacity costs of those generation resources are allocated on a fully nonbypassable basis consistent with departing load provisions as determined by the commission, to all of the following: (i) bundled service customers of the electrical corporation. (ii) Customers that purchase electricity through a direct transaction with other providers. (iii) Customers of community choice aggregators.

Thus, in order for Section 365.1(c)(2) to apply, the Commission must determine that the resources in question are "needed to meet system or local area reliability needs for the benefit of all customers in the electrical corporation's distribution service territory."

The proceedings that resulted in the Settlement Agreement did not examine 1) whether there is a system or local reliability need in any of the IOUs distribution service territories, or 2) whether the resources procured by the IOUs pursuant to the CHP Program will meet any such

need for the benefit of all customers in the IOU distribution service territories. The Settlement Agreement provides no factual or legal basis for making such findings.

The question of whether there is a system or local area reliability need in the IOUs' service territories (to be met by CHP or any other resources) is currently being examined in R. 10-05-006 and is far from determined. See Order Instituting Rulemaking in R. 10-05-006.[20] Without knowing whether there is a system or local reliability need, it is not feasible to determine that any resource or class of resources meets it. Indeed, D. 06-07-029 which created the CAM was decided only after an extensive review of system reliability needs in the service territories of the IOUs and the state more generally.

Further, it is not possible to determine whether the particular resources procured pursuant to the CHP Program would meet a system or local reliability need, should one be found. This is because under the Settlement Agreement it is not known which CHP projects will be contracted for, let alone their system or local reliability characteristics. Thus, it cannot be known at this time that any of the projects in question will meet a system or local reliability need, should one be identified.

Moreover, there is no analysis of CHP as a type of resource, to support a finding that there is something so different and distinct about CHP that it (unlike any other resource) by its mere existence anywhere, in any condition, in any part of the state, provides system and local reliability benefits to all customers in a given IOU's distribution service territory (assuming that a system or local reliability need had been found, which has not happened).

D. 10-12-035 points to no factual information in the record for its conclusion that all CHP procured by the IOUs through the CHP Program provide system and local reliability benefits,

---

[20] The Order provides: (1) **Track I** will identify California Public Utilities Commission (CPUC)-jurisdictional needs for new resources to meet system or local resource adequacy and to consider authorization of **IOU** procurement to meet that need, including issues related to long-term renewables planning and need for replacement generation infrastructure to eliminate reliance on power plants using once-through-cooling (OTC).

(2) **Track II** will address the development and approval of individual **IOU** "bundled" procurement plans consistent with §454.5.

nor has the City been able to find any such evidence in the record. D. 10-12-035 attempts to circumvent this utter lack of factual support for necessary the necessary findings under Section 365.1(c)(2) by stating that "[t]he '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."[21] The Goals and Objectives section sets forth goals and objectives of the parties and the settlement. A party's goal or objective is not a fact or evidence of any fact, and is of no use to support a factual finding. Moreover, the Goals and Objectives Section contains no statement to the effect that all the resources to be procured under the CHP Program will provide system or local reliability benefits to all customers. There is simply no factual basis in the record for a finding that all the resources to be procured under the CHP Program will provide system and local reliability benefits to all customers.

Finally, it is noteworthy that the Commission is only now in R. 10-05-006 examining the meaning of and standards for implementation of Section 365.1(c)(2). On September 14, 2010, the Administrative Law Judge issued a ruling seeking comments on key issues associated with the implementation of Section 365.1(c)(2) including the following fundamental questions: "1. How should the CAM process adopted in D. 06-07-029 and D. 07-09-044 be modified or refined to comply with SB 695? 2. How should the Commission interpret and define the term "all customers" in the context of SB 695 and existing procurement rules?"[22] It is premature for D.10-12-035 to conclude with no factual support that the CHP resources procured by IOUs pursuant to the Settlement Agreement meet a standard that has not yet even been defined and interpreted by the Commission.

---

[21] D. 10-12-035 at 51.

[22] September 14, 2010, Administrative Law Judge's Ruling on Implementation of SB 695 and the Cost Allocation Mechanism (Track III) in R. 10-05-006, at 5.

b. The Commission acted arbitrarily and capriciously in providing for CAM cost recovery with no basis, contrary to its well-reasoned precedent.

CAM cost recovery for CHP purchases is also contrary to Commission precedent. Balancing the interest of bundled customers and CCA and DA customers, the CPUC has put into place a cost recovery regime that provides for vintaging, allowing IOUs to recover stranded costs from CCA and DA customers for commitments made while such customers are IOU customers, for the life of the contract, or ten years whatever is less. See. D. 08-09-012 at 54-55. This regime sensibly recognizes that once customers depart from IOU service, IOUs should adjust their procurement activities to account for that fact, and that ten years is a more than sufficient period of time for IOUs to adjust their procurement practices. See *Id.*

The Commission has allowed non-vintaged cost recovery only in a special circumstance, where it found a need for additional resources in the State that was not being addressed by the IOUs or other market players, and it directed the IOUs to procure additional capacity. See D. 06-07-029. With vintaged and non-vintaged cost recovery coexisting in California side by side, the Commission has been cautious to limit use of the non-vintaged cost recovery to special circumstances "to get new system reliability resources built", see D. 08-09-012 at 37. Limiting non-vintaged cost recovery is appropriate since CAM cost recovery places ESPs and CCAs at a severe disadvantage, as it provides IOUs with an on-going role in procurement of supplies for customers of ESPs and CCAs. Supply procurement is the express responsibility transferred from IOUs to ESPs and CCAs, and providing the IOUs with an ongoing role in that procurement is contrary to the entire purpose of the laws providing for CCAs and ESPs. This approach limits the procurement that ESPs and CCAs can undertake for their customers and hence the benefits they can obtain for their customers. It also can force ESPs and CCAs to adjust supply procurement portfolios that they may already have in place (representing significant long-term financial and operational commitments) to account for the on-going procurement of resources by the IOUs on behalf of ESP and CCA customers who departed IOU service a long time ago.

In fact, in a prior decision, D. 08-09-012, the Commission specifically determined that it was not appropriate to apply the CAM categorically, upon ordering the IOUs to make standard offer contracts available to existing qualifying facilities (QFs) or to new QFs. *Id.* at 34. There, the Commission explained "[t]here has been no demonstration of need for cost recovery of these new QF contracts through the CAM that was authorized by D. 06-07-029, and we will not do so. The CAM was designed to get new system reliability resources built and the resigning of QF contracts does not accomplish that." *Id.* at 37. That decision addressed a circumstance very similar to the one addressed in the Settlement Agreement, yet D. 10-12-035 provides no basis for a departure from the ruling against use of the CAM in D. 08-09-012.

The Commission's departure from its well-reasoned precedent with no analysis or explanation is arbitrary and capricious. D. 10-12-035 does not even mention D.08-09-012 which is precisely on point. [23]

2. D. 10-12-035 errs in approving provisions in the Settlement Agreement that could be interpreted to assess stranded costs to municipal departing load, in a manner that is contrary to Commission precedent.

The Settlement Agreement provides that above market costs of IOU CHP procurement should be recovered from all departing load customers, exempting only CHP departing load customers. See Settlement Agreement at 13.1.2.1. and 13.1.2.2. Noticeably absent is an exemption for municipal departing load (MDL). D. 10-12-035 acknowledges that in D.08-09-012, the Commission exempted MDL from stranded cost responsibility for new generation resources, but upholds the imposition of CHP Program stranded costs on MDL in the Settlement Agreement on the grounds that GHG targets are based on "actual retail sales data that includes all current bundled service customers, even if some of those customers later depart for municipal service." D. 10-12-035 at 52-53.

---

[23] See *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co* (1983) 463 U.S. 29, 41-42; *see also see also FCC v. Fox* (2009) 129 S. Ct. 1800, 1810; and *Henning v. Industrial Welfar Comm'n.* (1988) 46 Cal.3d 1262, 1270.

D. 10-12-035 does not point to any evidence in the record for this assertion, or even to any statement in the Settlement Agreement. Rather this statement is taken directly from the reply comments of the Settling Parties.[24] These reply comments do not constitute evidence. The Commission previously identified two types of MDL: 1) new municipal departing load, from new developments that do not yet exist, and 2) transferred municipal departing load, existing load that transfers from IOU service to service from a municipal utility. See D. 08-09-012 at 2. Actual retail sales do not include new municipal departing load, which by its nature, does not currently exist. Thus, D. 10-12-035 's reasoning does not support a change from settled Commission precedent as to new MDL.

Further, actual retail sales are not static. Thus, there is no way to know today what the retail sales of a particular IOU will be at the time of departure of the other type of MDL, transferred MDL. It is entirely possible that at the time transferred MDL departs, an IOUs retail sales will have changed in a manner that makes that departure immaterial for purposes of calculating the CHP targets. A categorical determination that MDL should be responsible for stranded costs just because the targets are based on current retail sales is nonsensical in the absence of information about the retail sales of the IOU at the time the MDL departs, a fact that cannot be known now. Thus, D. 10-12-035 is arbitrary and capricious in departing, with no credible justification, from established Commission precedent.

3. D. 10-12-035 errs in approving, with no justification, provisions in the Settlement Agreement that provide for automatic twelve year stranded cost recovery, contrary to Commission precedent.

D. 10-12-035 approves provisions in the Settlement Agreement that automatically extend cost recovery for CHP resources procured by the IOUs from the ten year limit set forth in prior Commission decisions, see e.g. D. 08-09-012 at 54-55, to twelve years. D. 10-12-035 provides no justification for this change other than to state that "[t]he Commission has extended the 10-

[24] See Joint Reply Comments in Support of Motion for Approval of Qualifying Facility and Combined Heat and Power Program Settlement Agreement, at 24.

year non-bypassable charge limitation in other areas, most notably with RPS contracts, which are recovered over the life of the PPA and thus may be recovered for a period substantially longer then 10 years." D. 10-12-035 at 51. The fact that the Commission has extended the 10-year contract limitation in other limited, specific circumstances and after analysis of each individual contract provides no basis for a determination that such an extension is appropriate categorically in the case of CHP.

The Commission has in past decisions explained eloquently the rationale for the 10 year limit as follows:

> Utilities have ten years to adjust their portfolios to reflect their current customer base; and departing load has a finite term for contributing towards uneconomic utility purchases. With respect to non-RPS resources that will be available for more than 10 year but which are limited to 10-year NBC recovery, the utilities can, over time, adjust their load forecasts and resource portfolios to mitigate the effects of DA, CCA, and any large municipalizations on bundled service customer indifference. By the end of a 10-year period, we assume the IOUs would be able to make substantial progress in eliminating such effects for customer who cease taking bundled service during that period. Furthermore, as provided in D.04-12-048, uneconomic costs associated with new non-RPS resource contracts of 10 years or less are fully recoverable, and the uneconomic cost of new RPS are fully recoverable over the length of the contract with no limitation. D. 08-09-012 at 54-55.

D. 10-12-035 is arbitrary and capricious in determining that the Commission should depart from this well-reasoned Commission precedent in the case of CHP. D. 10-12-035 provides no explanation for why, in the case of CHP, IOUs are less able than in the case of other types of resources, to adjust their procurement practices over an extended ten year period, in light of CCA and ESP departing load. In fact, there is no such distinction.

D. D. 10-12-35 Fails to Appropriately Apply the Heightened Standard for Settlements That Do Not Include All Parties

The Commission's failure to properly apply the heightened standard for settlement agreements that do not include all parties constitutes legal error. Ordinarily, the Commission will not adopt a settlement agreement unless it is "reasonable in light of the whole record, consistent with law, and in the public interest." Rule 12.1(d). In applying this standard some

factors that the Commission has considered include: "(1) the risk, expense, complexity and likely duration of litigation, (2) whether the settlement negotiations were arms-length, (3) whether major issues were addressed, and (4) whether the parties were adequately represented." D. 10-12-035 at 26. Given the legal infirmities discussed herein, the Settlement Agreement does not satisfy even this lower standard, and certainly does not meet the higher standard that is appropriate in this case.

D. 10-12-035 correctly notes that because the Settlement Agreement has not been joined by all parties, the Settlement must be examined against a heightened standard. See D. 10-12-035, at 28. As the Commission has explained:

> The standard of review here is somewhat more stringent. Here, we consider whether the settlement taken as a whole is in the public interest. In doing so, we consider the individual elements of the settlement in order to determine whether the settlement generally balances the various interests at stake as well as to assure that each element is consistent with our policy objectives and the law. D. 10-12-035 at 27 [citations omitted].

Here, the key substantive provisions of the Settlement and D. 10-12-035 that apply to CCAs are not in the public interest and they do not represent a fair balance of the various interests at stake. Quite to the contrary, the terms of the Settlement Agreement are manifestly uncompetitive. First, IOUs would have the ability to enter into attractive CHP deals with their large customers, and hence retain them. This, while their costs for such arrangements are being paid by their competitors, the CCAs, through non-bypassable charges.[25] Second, IOUs then have an on-going role in resource procurement for CCAs – while resource procurement is expressly the service that the CCA is responsible for providing to its customers, and is the role that CCAs are intended to provide as a competitive alternative to IOU service. The more IOUs are allowed to procure resources on behalf of CCAs, the less room there is for CCAs to differentiate their service from IOU service and offer real alternative service to their customers. The Settlement Agreement undermines the CCA's competitive position and skews the playing field towards IOU

[25] This problem already exists with respect to energy efficiency programs. Giving IOUs a no-risk structure to undertake CHP purchases "on behalf of" CCA customers will just create a similar problem in the context of CHP.

service. Thus, contrary to the conclusion in D. 10-12-035 that the allocation of CHP targets to CCAs is fair, such allocation gives IOUs an unfair competitive advantage over CCAs.

The cost recovery provisions in the Settlement Agreement that are approved in D.10-12-035, are similarly contrary to the public interest. If the Commission applies Section 365.1(c)(2) carelessly, with no attention to ensuring that the standards of the law are met, it will eviscerate CCA and DA and their associated competitive benefits for all customers, because IOUs will have an open door to take over all procurement on behalf of CCA and DA customers. Any electricity resource could be said to have some reliability benefit. If, as in D. 10-12-035, any theoretical reliability benefit is deemed sufficient to meet the standard of Section 365.1(c)(2), then IOUs will obtain ongoing cost recovery from any and all CCA and DA customers, including those long departed, for all IOU purchases and expenditures on their own facilities and contracts. This leaves no room for a CCA or DA provider to offer a competitive program and provides no incentives for IOUs to minimize their procurement costs. Given that the legislature has authorized CCAs and limited direct access, the Commission must interpret and implement provisions affecting these entities in a manner that does not eviscerate their opportunities to operate successfully.[26]

In addition, as discussed more fully below, CCAs were not represented at all in the process leading to the settlement. By the time CCAs learned of the settlement, the positions of the parties were firm. Moreover, because the time frame for review of and comment on the complex Settlement Agreement was so abbreviated, CCAs were unable to fully appreciate its implications before the comment period was over. Thus, the Commission cannot find that the parties were adequately represented, and the Settlement Agreement as adopted, does not satisfy the heightened standard of review.

---

[26] See Cal. Code of Civil Procedure § 1858; and *State Farm Mut. Auto. Ins. Co. v. Garamendi,* (2004) 32 Cal.4th 1029, 1043 (Courts "read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." Internal quotations omitted).

E. The Commission Failed to Provide the Non-Settling Parties a Meaningful Notice or Opportunity to Comment on the Settlement Agreement.

Due process requires adequate notice and an opportunity to be heard when the substantive rights of individuals are being adjudicated.[27] As entities affected by the Settlement Agreement, ESPs and CCAs were entitled to a meaningful opportunity to be heard on the facts, law and policy underlying the proposals. CCAs and ESPs had no notice that matters imposing a Greenhouse Gas (GHG) related obligation to procure particular resources were under consideration in the consolidated proceedings, and were provided inadequate opportunities to comment once the Settlement Agreement was filed. Moreover the entire process failed to follow the Commission's own rules for timely notice to parties on the scope of the relevant proceedings. Accordingly, D.10-12-035 is invalid.[28]

Where a Commission decision incorporates issues beyond those contemplated by the order instituting rulemaking and scoping memos, the decision is invalid for failure to comply with the Commission's own procedural rules. *Southern California Edison v. Public Utilities Comm'n*, (2006) 140 Cal.App.4th 1085, 1106. In that case, the Commission opened a rulemaking to address the practices of "bid shopping" and "reverse auctions" with regards to utility construction contracts. The scoping memo reiterated that the rulemaking was limited to these two issues. On October 8, 2004, the Southern California District Council of Laborers filed comments raising the issue of prevailing wages.[29] The ALJ issued an order providing parties six business days to reply to the Laborers' comments. Based on the objections and replies arguing that the prevailing wage was outside the scope of the proceeding, on November 5, 2004, the ALJ provided another six calendar days for additional comment, and on November 16, 2004, issued a proposed decision, which included a requirement to pay prevailing wages. On December 16,

---

[27] *See* PUC Section 1701.1(a); see also D. 09-03-046 (March 26, 2009)("the constitutional requirements of due process and equal protection are applicable to . . . Commission proceedings . . .").

[28] See *Southern California Edison v. Public Utilities Comm'n* (2006) 140 Cal.App.4th 1085, 1106.

[29] This was the Laborer's second attempt at e-filing their comments.

2004, the Commission adopted D. 04-12-056. SCE applied for rehearing and eventually sought review by the Court of Appeal.

The Court of Appeal annulled the portion of D. 04-12-056 requiring the payment of prevailing wages. The Court held that the issue of prevailing wages "was beyond the scope of issues identified in the scoping memo, [that] the PUC violated its own rules by considering the new issue, and [that] three business days was insufficient time for the parties to respond to the new proposals." The Court specifically rejected arguments that the OIR[30] and scoping memo[31] contained broad enough language to encompass the issue of prevailing wages, and held that "the PUC's failure to comply with its own rules concerning the scope of issues to be addressed in the proceeding therefore was prejudicial."

During the eighteen month settlement process, the only notice CCAs and ESPs had about the existence of the settlement process and the issues under consideration stemmed from requests by the Settling Parties to hold two proceedings in abeyance: A. 08-11-001 and R. 04-04-003/R. 04-04-025. These motions requested limited abeyance because the parties were "actively involved in global settlement negotiations to resolve issues affecting the ***relationship of the IOUs with the QFs*** historically and going forward."[32] Thus, CCAs and ESPs had no reason to suspect that issues affecting them were under discussion, and were unable to represent their respective interests during the negotiations.

CCAs and ESPs became aware that their interests were affected, only when, on October 4, the Joint Parties finally made the 76 page term sheet available. Well before then, however, Commission staff had participated in settlement discussions, again without CCAs and ESPs, and

---

[30] The OIR provided "We will consider adopting rules to ensure that utility construction practices are consistent with rules governing state and federal public works contracting practices."

[31] The scoping memo stated that the assigned commissioner "may modify the scope of issues following the receipt and evaluation of additional information and testimony."

[32] See R. 04-04-003, R. 04-04-025, "Motion of Joint Parties for Limited Abeyance." p.2 (filed June 26, 2009) (emphasis added). SCE filed a similar motion in A. 08-11-001 on July 13, 2009.

the Commission had clearly determined to accept the Settlement Agreement as quickly as possible, irrespective of any concerns raised by any non-settling party.[33]

The proceedings that followed the filing of the proposed Settlement Agreement were unacceptably brief. Three days after the terms of the Settlement Agreement were made public, a settlement conference was held on October 7, 2010. A final Settlement Agreement was filed one day later on October 8, 2010 along with a request for a shortened comment period. Clearly the Settling Parties did not expect to engage in serious discussions during the settlement conference, as they filed the settlement the following day. The Administrative Law Judge granted the request for a shortened comment period, *before the next business day*, October 12, 2010, as October 11, 2010 was Columbus Day (a holiday for the City). Thus, CCAs and ESPs had no opportunity to oppose the shortened comment period.

Given the breadth of issues covered by the Settlement Agreement, having only three days to review the term sheet and prepare for the settlement conference clearly was "insufficient time for [CCAs and ESPs] to comment on the issues raised by the proposals, including issues of public policy, economic effects, legal implications, and effective administration ... of the new rules."[34] Further, the shortened comment period similarly gave non-settling parties inadequate time to fully understand the Settlement Agreement and prepare well developed comments.

On October 11, 2010, an ALJ ruling consolidated proceedings A. 08-11-001 and R. 04-04-003/R. 04-04-025, as well as R. 06-02-013 and R. 99-11-022. R. 06-02-013 and R. 99-11-022 were previously unrelated cases with a substantially broader scope than A. 08-11-001 and R. 04-04-003/R. 04-04-025. Then on October 19, 2010, six days before comments were due on the Settlement Agreement, that the Commission finally issued a scoping memorandum which after eighteen months of proceedings. By these two actions, the Commission retroactively attempted

---

[33] Moreover, because numerous long standing contentious issues were resolved between the main contenders (the IOUs and the QFs), the fact that these parties opted to solve their problems in part by imposing obligations on parties not at the table was treated as irrelevant.

[34] *Southern California Edison v. Public Utilities Comm'n* 140 Cal.App.4th at 1106.

to substantially expand and conform the scope of issues in the proceeding[s] to those addressed in the Settlement Agreement.

This process failed to afford non-settling parties an adequate opportunity to prepare and respond to and prepare comments on the Settlement Agreement. It is also inconsistent with Rule of Practice and Procedure 7.3 which provides that (a) At or after the prehearing conference (if one is held), the Assigned Commissioner shall issue the scoping memo for the proceeding, which shall determine the schedule (with projected submission date) and issues to be addressed. In an adjudicatory proceeding, the scoping memo shall also designate the presiding officer. In a proceeding initiated by application or order instituting rulemaking, the scoping memo shall also determine the category and need for hearing.[35] Although Rule 7.3 does not state precisely when (other than at or after the prehearing conference) the scoping memo is to be issued, since the purpose of the scoping memo is to give notice to parties of the issues to be considered, and hence whether or not they have an interest in it, issuing a Scoping Memo after the bulk of meaningful proceedings have been concluded, clearly fails to meet the intent of the rule.

In this case, the Commission acted even more egregiously than it did in *SoCal Edison.* For eighteen months it failed to give parties a clear indication of the scope of the proceeding, as required by Rule 7.3. CCAs were not represented in the process that resulted in the Settlement Agreement and D. 10-12-035, and were not invited to, or even told of, the settlement discussions. It then attempted to unlawfully expand the scope of the proceeding retroactively by consolidating previously unrelated cases and issuing an amended scoping memo days before the expedited time period for comment expired. These procedural shortcoming demonstrate that the Commission "failed to proceed in a manner required by law," and constitute legal error.

---

[35] Rule 7.3 (b) provides that "[t]he assigned Commissioner has the discretion not to issue a scoping memo in any proceeding in which it is preliminarily determined that a hearing is not needed and (1) in a proceeding initiated by application, complaint, or order instituting investigation, no timely protest, answer, or response is filed, or (2) in any proceeding initiated by Commission order, no timely request for hearing is filed. This provision does not apply since there were timely protests filed in A. 08-11-001.

III. CONCLUSION.

The City appreciates that the Settlement Agreement addresses a myriad of thorny issues that needed to be resolved between the IOUs and CHP providers. It was however unnecessary and inappropriate for these parties to include in the Settlement Agreement provisions highly detrimental to CCAs, who were not in the room and are the natural competitors of the IOUs. These provisions are contrary to the law and the public interest, and unsupported by the record. D. 10-12-035 erred in adopting these provisions contrary to law, public policy and the factual record. The Commission should grant rehearing and modify the Decision to remove from the Settlement Agreement those provisions that impose requirements on CCAs, ESPs, and MDLs, who were not represented in the negotiations.

Respectfully submitted,

Dated: January 18, 2011

Dennis J. Herrera, City Attorney
Theresa L. Mueller
Austin M. Yang
Jeanne M. Solé
Deputy City Attorneys

/S/
Jeanne M. Solé
Office of the City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Jeanne.sole@sfgov.org
(415) 554-4619 Telephone
(415) 554-4763 Facsimile

Attorneys for the
City and County of San Francisco

CERTIFICATE OF SERVICE

I, KIANA V. DAVIS, declare that:

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action. My business address is City Attorney's Office, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102; telephone (415) 554-4698.

On January 18, 2011, I served:

THE CITY AND COUNTY OF SAN FRANCISCO'S APPLICATION FOR REHEARING OF DECISION 10-12-035

by electronic mail on all parties in CPUC Proceeding No. A.08-11-001.

The following addresses without an email address were served:
☒

BY UNITED STATES MAIL: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

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

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

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

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

DALE W. MAHON
CENTRAL HYDROELECTRIC CORPORATION
9951 GRANT LINE ROAD
ELK GROVE, CA 95624-1441

CATHY ENGEBRETSON
SIERRA PACIFIC INDUSTRIES
PO BOX 496014
REDDING, CA 96014-6014

WENDY LIVORNESE
RIDGEWOOD POWER CORPORATION
947 LINWOOD AVENUE
RIDGEWOOD, NJ 07450

ANAN H. SOKKER
LEGAL ASSISTANT
CHADBOURNE & PARKE LLP
1200 NEW HAMPSHIRE AVE. NW
WASHINGTON, DC 20036

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

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

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

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

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

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

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

CAROL A. SMOOTS
PERKINS COIE LLP
607 FOURTEENTH STREET, NW, SUITE
800
WASHINGTON, DC 20005
KEVIN BOUDREAUX
CALPINE CORPORATION
717 TEXAS AVENUE SUITE 1000
HOUSTON, TX 77002

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

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

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

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

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

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

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

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

NANCY TRONAAS
CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET, MS 20
SACRAMENTO, CA 95814-5512

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

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 18, 2011, at San Francisco, California.

/S/
KIANA V. DAVIS