BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Approval of its 2009-2011 Energy Efficiency Program Plans and Associated Public Goods Charge (PGC) and Procurement Funding Requests.	Application 08-07-021 (Filed July 21, 2008)
And Related Matters.	Application 08-07-022 Application 08-07-023 Application 08-07-031 (Filed July 21, 2008)

JOINT RESPONSE OF NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL ASSOCIATION OF ENERGY SERVICE COMPANIES, ENERNOC, INC, AND GLOBAL ENERGY PARTNERS, LLC, IN OPPOSITION TO DRA'S REQUEST TO TAKE OFFICIAL NOTICE AND REOPEN THE RECORD

Peter Miller, Senior Scientist
Natural Resources Defense Council
111 Sutter St., 20th Floor
San Francisco, CA 94104
Telephone: 415-875-6100
Email: pmiller@nrdc.org

Donald D. Gilligan, President
National Ass'n of Energy Service Companies
1615 M Street, NW
Washington, DC 20036
Telephone: 978-740-8820
Email: dgilligan@naesco.org

John Kotowski, Ph.D.,
Vice President – Utility Solutions
Global Energy Partners, LLC.
500 Ygnacio Valley Rd, Suite 450
Walnut Creek, CA 94596
Telephone: 925-482-2000
Facsimile: 925-284-3147
Email: jak@gepllc.com

Melanie Gillette, Director, Regulatory Affairs
EnerNOC, Inc.
115 Hazelmere Drive
Folsom, CA 93430
Telephone: 916-501-9573
Facsimile: 415-343-9575
Email: mgillette@enernoc.com

Sara Steck Myers
Attorney at Law
122-28th Avenue
San Francisco, CA 94121
Telephone: (415) 387-1904
Facsimile: (415) 387-4708
Email: ssmyers@att.net

June 24, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Approval of its 2009-2011 Energy Efficiency Program Plans and Associated Public Goods Charge (PGC) and Procurement Funding Requests.	Application 08-07-021 (Filed July 21, 2008)
And Related Matters.	Application 08-07-022 Application 08-07-023 Application 08-07-031 (Filed July 21, 2008)

JOINT RESPONSE OF NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL ASSOCIATION OF ENERGY SERVICE COMPANIES, ENERNOC, INC, AND GLOBAL ENERGY PARTNERS, LLC, IN OPPOSITION TO DRA'S REQUEST TO TAKE OFFICIAL NOTICE AND REOPEN THE RECORD

The Natural Resources Defense Council (NRDC), the National Association of Energy Service Companies (NAESCO), EnerNOC, Inc. (EnerNOC), and Global Energy Partners, LLC (GEP) jointly respond ("Joint Response") to the "Request of the Division of Ratepayer Advocates for Official Notice and for Reopening the Record" ("Request") filed in this proceeding on June 9, 2011. While Division of Ratepayer Advocates (DRA) pleading was labeled a "Request," it was filed as a "Motion." Therefore, this Joint Response is filed and served pursuant to Rule 11.1(e) of the Commission's Rules of Practice and Procedure.

DRA'S "REQUEST" IS NOT TIMELY, DOES NOT INVOLVE A "MATTER" THAT CAN BE OFFICIALLY NOTICED OR REQUIRES REOPENING OF THIS PROCEEDING, AND WILL CERTAINLY PREJUDICE OTHER PARTIES.

By its Request, DRA asks that the Commission "reopen the record" in these applications "to take official notice of the Energy Division's Final 2006-2008 Energy Efficiency Evaluation

Report" [1] ("Report"). While this Report has never been part of the record developed in these applications, DRA still contends that it "would enhance the record and support better-supported decision making."[2] However, DRA admits that, even in the proceeding in which it was "filed" (R.09-01-019), the Commission "opted not to use the values" in that Report and only noted that it might have value in '"planning of future energy efficiency portfolio design."'[3] DRA also admits that, while the Report may have been cited, it has never been made part of the record in any other pending energy efficiency proceeding, including this one.

Nevertheless, DRA now asks for this Report to be part of a record that is *closed* in a proceeding (these consolidated applications) that itself will be *closed* upon the issuance of a currently pending Proposed Decision addressing the investor-owned utilities' (IOUs') petition for modification of D.09-09-047, an order that adopts modifications and clarifications regarding energy efficiency portfolios for 2010 through 2012. By its terms, this Proposed Decision is intended to be the last order in these applications.[4]

Further, while the Report might have been "cited" by parties in advocating for their positions on this petition in the workshop or Case Management Statement developed months before issuance of the Proposed Decision, none of these parties asked for its inclusion in the record of these applications during that time until the DRA's Request was filed weeks *after* the Proposed Decision was issued and comments on the Proposed Decision had been filed. More importantly, the Report *has not been relied upon* by the Proposed Decision and *does not* in any way relate to the programs, measures, or portfolios approved in this proceeding by D.09-09-047.

---

[1] DRA Request, at p. 1.
[2] DRA Request, at p. 1.
[3] DRA Request, at p. 2, quoting from D.10-12-049, at p. 30.
[4] Proposed Decision, Ordering Paragraph 9, at p. 49.

In fact, the Proposed Decision makes that clear in specifically *rejecting* DRA's contention that "all parties should have understood that the 2006-2008 EM&V process would have substantial impacts on the ex ante values for use in planning and reporting accomplishments."[5] Instead, the Proposed Decision confirms that the Report "was not released in final form until February 2010, after the start of the 2010-2012 portfolio," was a "contested" matter, and cannot be relied upon in resolving the values or evaluation process for that portfolio at issue in the Proposed Decision.[6] Thus, for both net to gross ratio values or calculation of the gross realization rate, the Proposed Decision concludes, with respect to reliance on the Report:

> "The revised Energy Division GRR values in Table 1 represent more current data than anticipated by D.09-09-047, as they take into account 2006-2008 analyses which were unavailable for consideration in D.09-09-047, or in the Energy Division's next updated E3 calculators. *However, consistent with our discussion of NTG ratio values in this decision, we will not adopt new, contested data that did not exist at the start of the portfolio cycle and was not anticipated by D.09-09-047.*"[7]

All parties, including DRA, had the opportunity, and, in the case of DRA, took the opportunity to file comments and reply comments on these findings in the Proposed Decision and contest any findings or conclusions made therein, including its determination that use of the Report was irrelevant and prejudicial to what will be the final order in this proceeding. DRA's "Request," therefore, represents an inappropriate "second bite at the apple" and extra-judicial end run on the adopted process that would certainly prejudice the interests and rights of other parties who hold a contrary view, who have followed the applicable process, and who would certainly contest the Report's accuracy and applicability to this proceeding, as the Proposed Decision recognizes.

---

[5] Proposed Decision, at p. 14.
[6] Proposed Decision, at pp. 18, 37.
[7] Proposed Decision, at p. 37; emphasis added.

In addition, while DRA references Commission rules and the Evidence Code to support its request for "official notice" and reopening of this record to admit the Report, it completely ignores the basic requirements of those rules and code sections. To begin with, DRA fails to establish that this Report of the Commission's *staff* is in fact an "official act" of this "administrative agency" (the Commission). The fact that the Report might have been prepared at the direction of the Commission does not make it an "act" of the Commission unless it has been admitted into the record of the proceeding at issue or reviewed and adopted in a Commission decision or resolution signed out by a majority of the Commissioners at a publicly noticed meeting. Not only has that not happened, but the pending Proposed Decision to be issued in *this* proceeding makes clear that it is not appropriate or relevant to this proceeding or the issues it resolves.

Further, DRA only addresses the first requirement of taking judicial notice – whether the Report is a "matter" of which judicial notice can be taken. However, the Evidence Code not only identifies the "matters" that can be noticed, but the "propriety" of doing so. On that point, official notice can only be taken if the "matter" is "relevant" or "pertinent" to the subject proceeding.[8] DRA's request never addresses this issue relative to the Evidence Code or especially the Proposed Decision, which finds that the Report, which represents "new, contested data," is outside the scope of this proceeding. [9]

DRA's request is also not timely. DRA was citing to the Report months before the Proposed Decision was issued and could have made its Request during the Workshops or Case Management process in which it argued for reliance on the Report. DRA's decision to delay this Request until a Proposed Decision adverse to its advocacy has been issued and comments on that

[8] California Evidence Code, §§454, 455.
[9] Proposed Decision, at p. 37; emphasis added.

Proposed Decision have been filed has clearly been made to gain an inappropriate extrajudicial advantage over other parties.

Finally, DRA's request fails to meet the Commission rules governing the "reopening" of a proceeding. Specifically, a motion to "set aside submission and reopen the record for the taking of additional evidence" must identify "material changes of fact or of law alleged to have occurred *since* the conclusion of the hearing."[10] The Report at issue here is by DRA's own admission *not* a "change," material or otherwise, in facts or law that has occurred since the conclusion of the process on which the Proposed Decision is based. Specifically, DRA has throughout that process leading to the Proposed Decision cited and asked the Commission to rely on the Report. Thus, the Report is *not* new or changed facts or law as underscored by the Proposed Decision itself, which rejects reliance on that Report, and cannot serve as the basis for reopening the record in this proceeding to permit its admission into that record.

II.
DRA'S REQUEST SHOULD BE PROMPTLY DENIED BY THE COMMISSION.

For the reasons stated herein, *no* basis exists in fact or law for the Commission to grant DRA's Request, which seeks by indirection to achieve a result that has been directly rejected by the pending Proposed Decision. To grant DRA's Request would conflict with applicable statute, the Commission's Rules of Practice and Procedure, and the process and scope adopted by this

[10] Commission Rules of Practice and Procedure, Rule 13.14; emphasis added.

Commission for this proceeding to the disadvantage of all other participating parties. DRA's Request should, therefore, be promptly denied by the Commission.

Respectfully submitted,

June 24, 2011

/s/ SARA STECK MYERS

SARA STECK MYERS
On Behalf of
NRDC, NAESCO, EnerNOC, & GEP

Sara Steck Myers
Attorney at Law
122-28th Avenue
San Francisco, CA 94121
Telephone: (415) 387-1904
Facsimile: (415) 387-4708
Email: ssmyers@att.net

Peter Miller, Senior Scientist
Natural Resources Defense Council
111 Sutter St., 20th Floor
San Francisco, CA 94104
Telephone: 415-875-6100
Email: pmiller@nrdc.org

Donald D. Gilligan, President
National Ass'n of Energy Service Companies
1615 M Street, NW
Washington, DC 20036
Telephone: 978-740-8820
Email: dgilligan@naesco.org

John Kotowski, Ph.D.,
Vice President – Utility Solutions
Global Energy Partners, LLC.
500 Ygnacio Valley Rd, Suite 450
Walnut Creek, CA 94596
Telephone: 925-482-2000
Facsimile: 925-284-3147
Email: jak@gepllc.com

Melanie Gillette, Director, Regulatory Affairs
EnerNOC, Inc.
115 Hazelmere Drive
Folsom, CA 93430
Telephone: 916-501-9573
Facsimile: 415-343-9575
Email: mgillette@enernoc.com