BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U338E) for Applying the Market Index Formula and As-Available Capacity Prices adopted in D.07-09-040 to Calculate Short-Run Avoided Cost for Payments to Qualifying Facilities beginning July 2003 and Associated Relief.	A.08-11-001 (Filed November 4, 2008)
And Related Matters.	R.06-02-013 R.04-04-003 R.04-04-025 R.99-11-022

COMMENTS OF THE MARIN ENERGY AUTHORITY, THE ALLIANCE FOR RETAIL ENERGY MARKETS, SHELL ENERGY NORTH AMERICA (US), L.P., AND THE DIRECT ACCESS CUSTOMER COALITION ON PROPOSED DECISION GRANTING PETITION TO MODIFY DECISION 10-12-035

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In accordance with Rule 14.3 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure, the Marin Energy Authority ("MEA")[1], the Alliance for Retail Energy Markets ("AReM")[2], Shell Energy North America (US), L.P. ("Shell Energy")[3] and the Direct Access Customer Coalition ("DACC")[4] (hereinafter collectively referred to as the "CCA/Direct Access Parties") respectfully submit these comments on the *Proposed Decision Granting Petition to Modify Decision 10-12-035* ("Proposed Decision") issued by Administrative Law Judge Yip-Kikugawa on June 14, 2011.

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

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

[3] Shell Energy has authorized Mr. Douglass to file on its behalf.

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

I. INTRODUCTION AND BACKGROUND

As background, On October 8, 2010, the Settling Parties[5] filed a Proposed Settlement Agreement ("Settlement Agreement") for Commission approval. It resolved numerous outstanding issues and disputes in several Commission proceedings among Qualifying Facility ("QF") and Combined Heat and Power ("CHP") owners and developers and investor-owned utilities ("IOUs"), and provided for a transition from the existing QF program to a new QF/CHP program. In an extremely accelerated proceeding, on December 21, 2010, the Commission issued Decision ("D.") 10-12-035 that reviewed the Settlement Agreement, found that it met established criteria for approval of settlements, and therefore approved it.

The development of the Settlement Agreement, over a sixteen month period, was carried on without the participation of Electric Service Providers ("ESPs") or Community Choice Aggregators ("CCAs"), even though its provisions have profound impacts on their business and on the manner in which they will work with their customers to reduce greenhouse gas ("GHG") emissions. Of particular importance to the CCA/Direct Access Parties were provisions that require ESPs and CCAs to pay a share of the costs associated with the obligations of the IOUs to enter into contracts and/or build 3000 MW of CHP resources, and that require ESPs and CCAs to meet specific emission reduction targets by contracting directly with CHP resources. It is important to note that the CCA/Direct Access parties did not object to the provisions of the Settlement Agreement that resolved numerous outstanding QF-related issues among QF and CHP owners and developers and IOUs.

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

However, since the Settlement Agreement inappropriately went beyond that and included the CCA/Direct Access Parties, the final decision that was approved by the Commission was fundamentally flawed. Specifically, it incorrectly concluded that non-settling parties had been afforded appropriate due process required of settlements; gave inadequate time for non-settling parties to fully grasp the extent of their obligations under the Settlement Agreement; categorized the 3000 MW of utility investment in CHP that is required in the first program period of the Settlement Agreement as "reliability" investments in a manner not supported by existing Commission policy or statute; and imposed a specific investment paradigm on ESPs and CCAs to meet a GHG emission reduction target that exceeded Commission authority, was contrary to existing Commission policy, and not supported by existing statute. Nevertheless, those arguments of the CCA/Direct Access Parties were of no avail, since in D.11-03-051, the Commission denied the various applications for rehearing of D.10-12-035 that were filed by several parties.[6]

Next, the Settling Parties and the California Municipal Utilities Association ("CMUA") submitted the Joint Petition for Modification of D. 10-12-035 on April 1, 2011 ("Petition"). The Petition explained that the Settling Parties and CMUA had reached a proposed settlement agreement ("Proposed Settlement") that, if approved, would "resolve CMUA's Application for Rehearing of D.10-12-035."[7] D.11-03-051, which denied several rehearing requests, did not deny CMUA's request for rehearing; instead, it was held in abeyance pending because the parties had reported to the ALJ that they were in settlement discussions.

[6] Applications for rehearing of D.10-12-035 were filed by the City and County of San Francisco ("CCSF"), the California Municipal Utilities Association ("CMUA"), and jointly filed by the Marin Energy Authority, the Alliance for Retail Energy Markets, and the Direct Access Customer Coalition.

[7] *See* Petition, at p. 1.

In comments on the Petition, the CCA/Direct Access Parties did not object to the Proposed Settlement, but did make two requests. The first request was for the Commission to clarify that the Proposed Settlement would not shift costs to Direct Access ("DA") or CCA customers. The second request was for the Commission to apply the vintaging approach contained in the Proposed Settlement to DA and CCA customers to ensure uniform treatment of all departing load. The rulings in the Proposed Decision on these topics are deeply flawed in that they continue the Commission's inexplicable behavior in this proceeding of totally ignoring the legitimate concerns of the CCA/Direct Access Parties and disregarding the harmful impacts that the Commission has created for retail competition by ignoring these concerns. The Proposed Decision therefore should not be adopted by the Commission, as explained in more detail below.

II. COMMENTS

Under the Proposed Settlement, the terms of D.10-12-035 are modified with respect to non-bypassable charges to be paid by municipal departing load ("MDL"), such that (i) MDL will be exempt from certain non-bypassable charges and (ii) the methodology for applying the remaining non-bypassable charges will be different – specifically, vintaged – for MDL load than for CCA and DA departing loads. Approving these modifications without addressing the issues raised by the CCA/Direct Access is discriminatory and unfair.

A. Further Clarification is Necessary with regard to the Proposed Decision's Determination that MDL Customers Remain Responsible for Costs Incurred on Their Own Behalf.

In their comments on the Petition, the CCA/Direct Access Parties argued that if the Settling Parties are prepared to make this accommodation for MDL, the costs of such accommodation should be borne by the Settling Parties, and not by DA and/or CCA customers. In fact, the CCA/Direct Access Parties note that the Proposed Decision recognizes that "MDL

Customers remain responsible for costs incurred on their own behalf."[8] However, pursuant to the Proposed Settlement, the Settling Parties and CMUA seek to deem that certain CHP costs are not incurred on behalf of MDL customers, notwithstanding the determination made in D.10-12-035 that "[r]equiring MDL customers to bear a share of the IOU costs incurred on their behalf is appropriate, and it is therefore appropriate to approve an exception to D.08-09-012 related to MDL."[9] For this reason, the CCA/Direct Access Parties strenuously disagree with the assertion in the Proposed Decision that the CCA/Direct Access Parties' "concern that there would be a potential for cost shifting to CCA and DA Customers is unfounded."[10] The Proposed Decision's reasoning in this regard cannot be accurate, especially since the Petition specifically enumerates the CHP costs that MDL will not be required to pay.[11] Therefore, the PD's suggestion that there will be no cost shifting, while at the same time it recognizes that there are specific costs that MDL will no longer be required to pay, is utterly illogical.

To provide a simplified example, let's assume that the CHP costs totaled $100, and the Commission allocated those costs proportionally, as required under D. 10-12-035. The Proposed Decision makes two things clear: that the CCA/Direct Access Parties cost concerns are "unfounded" and that certain MDL loads would be excluded from paying the fixed IOU CHP costs. Therefore the following hypothetical result[12] is as follows:

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[8] *See* Proposed Decision at p. 7.

[9] D.10-12-035, Conclusion of Law 16.

[10] *See* Proposed Decision, at p. 7.

[11] "In no event shall the NBC for CHP Settlement PPAs apply to Transferred MDL customers after July 1, 2027." Petition, Attachment A at p. 2.

[12] All numbers are purely hypothetical and included for illustrative purposes.

Methodology	**D. 10-12-035**	**Proposed Decision**
CHP Costs	$100	$100
Customer Allocation of Costs	IOU: $25 MDL: $25 CCA: $25 DA: $25	IOU: $25 MDL: $10 CCA: $25 DA: $25
Unaccounted for Amount	$0	$15

The CCA/Direct Access Parties have simply asked for the Commission to be clear in its order that CCA and DA customers will not have to pick up any share of the non-bypassable charge that would have been allocated to MDL under D.10-12-035. The Settling Parties have determined that reaching an accommodation with CMUA is in their best interests. Such an accommodation carries with it a specific set of costs. The Settling Parties, and not other parties who had no say in the Proposed Settlement, should bear those costs, and it is the obligation of the Commission provide clear instruction to the parties as to the allocation of costs otherwise attributable to MDL. Moreover, the Settling Parties acknowledge in their response to the comments of the CCA/Direct Access Parties, dated April 28, 2011, that there very well could be some specific costs shifted away from MDL:

> First, with regard to non-bypassable charges that would otherwise have been incurred by MDL customers under D.10-12-035, it is premature at this juncture to conclude that there will be *any* NBCs and, if there are, the amount of these charges. The specific calculation and allocation of generation-related non-bypassable charges is conducted on an annual basis in each Investor-Owned Utility's ("IOU") respective Energy Resource Recovery Account ("ERRA") proceeding.[13]

This statement seems to suggest that that there is some foregone conclusion that utility customers should pay the costs that result from the Proposed Settlement, when, in fact, the

[13] *See* Joint Parties' Response, at p. 2.

Petition does not address at all how the costs of the Proposed Settlement will be accounted for. How the Settling Parties plan to account for these costs should have been included in the Petition since imposing these costs on utility ratepayers is not the only viable approach. For example, the IOUs' shareholders could be responsible for these costs, or the Settling Parties that represent the QF and CHP owners and developers could be responsible for these costs. In any event, the Joint Parties Response confirms that the Proposed Settlement will create costs that would have been covered by the MDL customers but for the Proposed Settlement, and that these costs now need to be recovered elsewhere. It is entirely appropriate that the Commission ensure CCA/Direct Access Parties who receive no benefit whatsoever from the Proposed Settlement – and were not included in the settlement discussions leading up to the Proposed Settlement – are protected from paying for any costs that the Proposed Settlement creates.

B. This Docket is the Appropriate Forum for Determining the Methodology for Calculating and Allocating NBCs; Energy Resource Recovery Account Proceedings are Generally Used to Implement Methodologies Determined in Other Proceedings.

With regard to the calculation and allocation of non-bypassable charges ("NBCs"), the Proposed Decision's proposes to have "Joint Respondents […] raise [their] concerns in each IOU's respective Energy Resource Recovery Account [("ERRA")] proceeding."[14] This is not only the wrong forum for such an analysis. Additionally, this proposed procedure would be a heavy burden on the CCA/Direct Access Parties, and will inevitably result in disparate treatment across IOUs. In short, the CCA/Direct Access Parties should not be forced into costly and time consuming participation in each IOU's ERRA proceeding to protect their interests with respect to this MDL exemption, when all of the issues are fully ripe for a decision now in this proceeding. Therefore, we respectfully request that the Commission provide clear direction in its

[14] *See*, Proposed Decision, at p. 7.

Order approving the Proposed Settlement that there is consistent treatment across all the IOUs' ERRA proceedings that excludes the costs that would have been borne by MDL but for the Proposed Settlement from being allocated to CCA or DA customers.

C. The Approach Taken in the Proposed Settlement to Vintage QF/CHP Costs Is Reasonable; However the Commission Should Vintage All QF/CHP Costs, Not Only Those Applicable to MDL

As discussed in the CCA/Direct Access Parties' April 18, 2011, Comments on the Petition, the vintaging proposal contained in the Proposed Settlement represents a much more reasonable approach to cost recovery than the Cost Allocation Mechanism ("CAM") approach that D.10-12-035 would impose. Furthermore, the application of two cost recovery approaches to two groups of similarly situated departing load customers is neither efficient nor fair, and the Commission has not provided a sufficient rationale for the disparate treatment of non-bypassable charges.

The Proposed Decision suggests that "[t]o the extent that Joint Respondents wish to have similar treatment applied to CCA and DA Customers, they should attempt to resolve this issue with Settling Parties,"[15] but thus far, the IOUs have expressed no interest in settlement discussions with the CCA/Direct Access Parties. Therefore it is incumbent upon the Commission to determine whether it is permissible and/or appropriate for this disparate payment of non-bypassable charges to occur.

In short, the Commission issued a decision, (D.10-12-035) that said all load must pay the charges associated with the QF/CHP settlement. Then, the IOUs decided that they would like to offer CMUA a different set of non-bypassable charges, and have memorialized that offer in a settlement. The fact that the IOUs prefer not to offer the same accommodation to DA and CCA

[15] *See*, Proposed Decision, at 8.

customers – possibly for anticompetitive reasons – should have no bearing on whether the same accommodation should be afforded to DA and CCA customers; that is something for the Commission to decide in its role as regulator. The Commission, in adopting this Proposed Decision, will be changing its mind about what it said on the topic of non-bypassable charges and the QF/CHP program, at least for CMUA's clients.

But the Proposed Decision provides no sound basis for doing so other than the fact that the parties asking for the change do not object to it. So, if the Commission agrees that CMUA's clients should be afforded this disparate and more advantageous treatment with respect to non-bypassable charges, they must provide some rationale as to why this should be permitted for CMUA and not to the other parties who would benefit from this type of treatment. To suggest that the CCA/Direct Access Parties can achieve this outcome only if they can get the IOUs to agree to it is a seriously flawed approach to reasoned decision making and should not be endorsed by the Commission.

The CCA/Direct Access Parties therefore request that all departing load customers, MDL and non-MDL alike, receive the same vintaging treatment, or to explain why the use of two methodologies to calculate CHP costs is efficient and fair.

III. CONCLUSION

For the reasons set forth above, the CCA/Direct Access Parties urge the Commission to modify the Proposed Decision to:

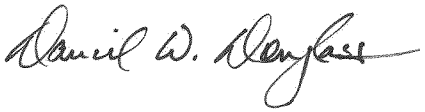
(i) ensure CCA/Direct Access Parties are protected from paying for any costs that the Proposed Settlement would allocate to CCA/Direct Access Parties over and above those costs allocated under the original settlement agreement;

(ii) determine the cost allocation methodology for QF/CHP costs in this proceeding and not have those costs determined in ERRA; and

(iii) impose the same vintaged methodology on all non-exempt departing loads, rather than have a CAM methodology for certain parties and a vintaged methodology for others.

The CCA/Direct Access Parties thank the Commission, Assigned Commissioner Ferron, and Assigned ALJ Yip-Kikugawa for their consideration of the concerns expressed herein.

Respectfully submitted,



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