**BEFORE THE PUBLIC UTILITIES COMMISSION**
**OF THE STATE OF CALIFORNIA**

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| 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<br>(Filed November 4, 2008) |
| And Related Matters. | R.06-02-013<br>R.04-04-003<br>R.04-04-025<br>R.99-11-022 |

# COMMENTS OF THE MARIN ENERGY AUTHORITY, THE DIRECT ACCESS CUSTOMER COALITION AND THE ALLIANCE FOR RETAIL ENERGY MARKETS ON THE PROPOSED AND ALTERNATE PROPOSED DECISIONS


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September 28, 2011

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# COMMENTS OF THE MARIN ENERGY AUTHORITY, THE DIRECT ACCESS CUSTOMER COALITION AND THE ALLIANCE FOR RETAIL ENERGY MARKETS ON THE PROPOSED AND ALTERNATE PROPOSED DECISIONS

In accordance with Rule 14.6(b) of the Rules of the California Public Utilities Commission ("Commission") and the agreement among parties to shorten time for comments, the Marin Energy Authority ("MEA"),[1] the Direct Access Customer Coalition ("DACC"),[2] and the Alliance for Retail Energy Markets ("AReM")[3] (hereinafter collectively referred to as the "CCA/Direct Access Parties") respectfully submit these comments on the proposed *Decision Denying Petition to Modify Decision 11-07-010* ("Proposed Decision" or "PD") authored by Administrative Law Judge ("ALJ") Amy Yip-Kikugawa and the *Decision Granting, in Part, Petition to Modify Decision 11-07-010 and Request to Establish a Settlement Agreement*

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

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

[3] 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.

*Effective Date and Grant Motion For Closure* ("Alternate Proposed Decision" or "APD") sponsored by Assigned Commissioner Ferron. Both the PD and the APD concern the *Joint Petition For Modification of Decision 11-07-010 and Request to Establish Settlement Effective Date and to Grant Motion for Closure* ("Petition"), submitted to the Commission by the Joint Parties[4] on July 28, 2011.

## I. Introduction

On April 1, 2011, the Settling Parties and the California Municipal Utilities Association ("CMUA") submitted a petition for modification of Decision ("D.") 10-12-035 ("Original Petition") that was intended to implement a proposed settlement that had been reached among the Settling Parties and CMUA ("Proposed Settlement") with respect to the imposition of costs on Municipal Departing Load ("MDL") that will result from the CHP Settlement that was approved in D.10-12-035. The CCA/Direct Access Parties protested the Original Petition because the Proposed Settlement appeared to be structured such that there were would be costs incurred by the Investor-Owned Utilities ("IOUs") as a result of the implementation of the CHP Settlement that, absent the Proposed Settlement, would have been recovered by MDL; the CCA/Direct Access Parties argued that any costs that MDL was exempt from paying as a result of the Proposed Settlement should be paid by the Settling Parties, and not by Community Choice Aggregation ("CCA") or Direct Access ("DA") customers. In Decision 11-07-010 ("D.11-07-010" or "Decision"), the Commission ruled:

> The proposed modifications in the Petition limit the time period to recover certain costs associated with the Settlement from MDL Customers. Therefore, there is a possibility that MDL Customers would not be responsible for some

[4]The Joint Parties include Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, the California Cogeneration Council, the Independent Energy Producers Association, the Cogeneration Association of California, the Energy Producers and Users Coalition, the Division of Ratepayer Advocates, The Utility Reform Network, and the California Municipal Utilities Association ("CMUA").

> portion of the costs related to generation resources procured on their behalf. Pursuant to Pub. Util. Code § 366.2(d)(1), which prohibits the shifting of recoverable costs between customers, the IOUs cannot recover costs attributable to MDL Customers from bundled or other departing load customers (i.e., CCA and DA Customers). As such, any unrecovered costs attributable to MDL Customers shall be the responsibility of the Settling Parties. Since costs incurred on behalf of MDL Customers shall be the responsibility of MDL Customers, as specified in D.08-09-012, or Settling Parties, as required under Pub. Util. Code § 366.2(d)(1), Joint Respondents' concern that there would be a potential for cost shifting to CCA and DA Customers is unfounded.[5]

On July 28, 2011, the Joint Parties submitted the Petition stating that the language was "objectionable" and that it should be removed in its entirety, along with associated Conclusions of Law The Petition also stated that as a result of the Decision, the CHP settlement could not become effective.

## II. The Proposed Decision Accurately Summarizes the Law and the Facts

The PD succinctly and convincingly explains why the Petition should be rejected:

> While Joint Petitioners' assertions that the proposed changes in the April 2011 Petition "ensure that no cost shifting occurs" may be correct, that does not explain why there is a factual error for the Commission to state what would occur in the event there were unrecovered MDL costs. Indeed, the revisions to the proposed decision articulate existing law and prior Commission decisions, including D.08-09-012, implementing § 366.2(d)(1). If the utilities believe that this constitutes a modification, change or addition to the Settlement Agreement, it would suggest that the Settlement Agreement or the proposed changes in the April 2011 Petition had allowed cost shifting. Such an outcome is contrary to Rule 12.1(d) of the Commission's Rules of Practice and Procedure, which states:
>
> > The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest was not consistent with the law.
>
> Moreover, if the Commission had concluded that the Settlement Agreement had allowed cost-shifting, it would not have approved the Settlement Agreement in D.10-12-035.[6]

[5] See D.11-07-010, page 7.
[6] PD, at p. 6, footnote omitted.

Also, the PD accurately deals with the Joint Parties' suggestion that D.11-07-010 is legally flawed because it suggests that § 366.2(d)(1) "might potentially be violated by changes proposed" in the April 2011 Petition and "endeavor[s] to impose costs from the [Settlement Agreement] on non-jurisdictional entities."[7] The PD accurately clarifies that the Decision did not conclude that there is a potential violation of § 366.2(d)(1), but instead simply stated that, consistent with § 366.2(d)(1), any unrecovered costs attributable to MDL customers could not be shifted to DA or CCA customers, and would be the responsibility of the Settling Parties. The PD ignores the bluster by the Settling Parties and appropriately concludes that, "they do not have such authority over what may be included in a Commission decision."[8] For these and other reasons, the CCA/Direct Access Parties endorse to PD and recommend its adoption.

## III. The Alternate Proposed Decision Simply Accepts the Joint Parties Argument that Cost Shifting will Not Occur, but Ignores the Statutory Issue.

In the Petition, the Joint Parties argued that the date specifications contained in the Original Petition were "carefully chosen" to:

> …limit NBCs for Initial Program Period PPAs to 2022 for existing facilities and 2027 for new facilities. These specified dates ensure that no cost shifting occurs as a result of the Original Petition.[9]

The Alternate PD concurs with this statement:

> Based on the additional context provided by July 2011 Petition, we agree that no cost-shifting will occur between customers as a result of the procurement conducted in the QF/CHP program by the inclusion of the dates as proposed in the April 2011 Petition and as adopted in D.11-07-010. We agree that the dates specified in D.11-07-010 with respect to cost allocation correspond to the dates of the term lengths of various procurement options adopted in D.10-12-035, and that

[7] Petition at p. 7.
[8] PD, at p. 8.
[9] See Petition, page 6.

> the existence of dates does not create the opportunity for cost shifting beyond those specified times.[10]

The APD the concludes that, "On balance, the contested language may or may not cause direct harm, but it does create additional uncertainty and delay in the establishment of the QF/CHP Settlement."[11] It then grants the Petition and establishes that, "the Settlement Agreement Effective Date shall be when D.10-12-035 and this decision are final and non-appealable."[12]

The CCA/Direct Access Parties are appreciative of the fact that the APD firmly states that no cost shifting will occur. We hope it proves to be correct. However, the suggestion that approval of the APD will eliminate future uncertainty is illusory. If there is one fact of which the investor-owned utilities should have no illusions, it is that DA and CCA parties will give close scrutiny in future years to all efforts to allocate Settlement costs to their customers.

Furthermore, it is remarkable that in the guise of avoiding future uncertainty, the APD completely ignores the statutory issue elucidated by the PD. The statute is plain and clear on its face: "It is further the intent of the Legislature to prevent any shifting of recoverable costs between customers."[13] By ignoring the statute and simply declining to discuss its applicability, the issue does not go away. Rather, the APD adds to future uncertainty by enhancing the possibility for future legal appeals, which is in no one's best interests.

The Petition suggested that the Joint Parties might abandon the CHP Settlement altogether unless the Commission bowed to the demands contained in the Petition. The APD acquiesces to this implicit threat by approving the Petition. Logically, of course, the CHP Settlement is not threatened at all by the Decision. The CMUA Settlement may be at risk should the Commission approve the Proposed Decision, but the CHP Settlement can go forward as its

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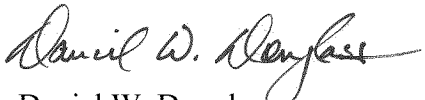
[10] APD, at p. 10.
[11] APD, at p. 11.
[12] APD, at p. 16.
[13] P.U. Code Section 366.2(d)(1).

signatories desire. The CCA/Direct Access Parties reiterate the statement made in our opening comments on the Petition: if the Settling Parties need to go back to their negotiating table to figure out how to implement the Decision, they should do so. But the Commission should not think that approval of the APD will lessen future uncertainty when, in all likelihood, it will enhance it.

## IV. Conclusion

The procedural history in this proceeding may be extensive, but the issue is not complex. Simply put, it comes down to whether a decision unanimously approved by the Commission can, after the fact, be determined to be deficient simply because it contains an accurate statement of the law. From a policy and precedent basis, the Commission should be wary of being manipulated by parties who find it easier to make the Commission conform itself to their needs rather than having the parties conform their actions to the Commission's directives. The Petition is an obvious example of the Joint Parties opting for the former course of action in lieu of the latter. Approval of the APD would undoubtedly encourage more such behavior in the future, likely to the Commission's dismay. The CCA/Direct Access Parties therefore urge the Commission to approve the Proposed Decision of ALJ Yip-Kikugawa and reject the Alternate Proposed Decision of Commissioner Ferron for all the reasons outlined in this Protest.

Respectfully submitted,



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