



## **SOUTHWEST GAS CORPORATION**

Kyle O. Stephens, Senior Counsel/Legal Affairs

October 21, 2011

Administrative Law Judge Angela Minkin  
California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102-3298

**SUBJECT:** DRAFT RESOLUTION ALJ-274. Establishes Citation Procedures for the Enforcement of Safety Regulations by the Consumer Protection and Safety Division Staff for Violations by Gas Corporations of General Order 112-E and Code of Federal Regulations, Title 49, Parts 190, 191, 192, 193, and 199.

### **OPENING COMMENTS OF SOUTHWEST GAS CORPORATION**

#### **I. Introduction**

On October 10, 2011, the Administrative Law Judge Division of the California Public Utilities Commission ("Commission") issued Draft Resolution ALJ-274 which proposes to, among other things, establish citation and appellate procedures for the enforcement of safety regulations by the Consumer Protection and Safety Division Staff ("CPSD") for violations by gas corporations of General Order 112-E and Code of Federal Regulations, Title 49, Parts 190, 191, 192, 193, and 199 ("Resolution"). Parties were requested to file opening comments on or before October 21, 2011. Southwest Gas Corporation ("Southwest Gas" or "Company") submits these Opening Comments concerning the issues contained in the draft Resolution.

Southwest Gas supports the intent of the draft Resolution, which is to increase the effectiveness of the CPSD's enforcement authority. However, Southwest Gas does not agree with the provisions in the draft Resolution. Southwest Gas believes that utilization of the enforcement and appellate provisions in 49 CFR Part 190, which are already adopted in California General Order 112-E (GO-112), provides the effectiveness in enforcement authority sought by the draft Resolution. As such, Southwest Gas respectfully requests that the Commission not approve the draft Resolution and instead initiate a rulemaking to amend its prior adoption of 49 CFR Part 190 in order to substitute the names of the federal agencies, agency subdivisions, and job titles in those regulations with the corresponding names of the state agencies, agency subdivisions, and job titles.

5241 Spring Mountain Road / Las Vegas, Nevada 89150-0002  
P.O. Box 98510 / Las Vegas, Nevada 89193-8510 / (702) 876-7293  
[www.swgas.com](http://www.swgas.com)



Consistent with the October 10, 2011 notice, attached as Exhibit A is a subject index listing the recommended changes to the draft Resolution. Attached as Exhibit B is a table of authorities. Attached as Exhibit C is an appendix setting forth the proposed findings and ordering paragraphs.

## **II. Delegation of Citation Authority to CPSD Staff Inspectors**

Southwest Gas understands the intent of the draft Resolution is to delegate the authority to issue citations to each CPSD Staff Inspector. Southwest Gas is concerned that under such application, the issuance of a citation (and therefore penalties) can be applied unevenly based upon a particular inspector's experience, knowledge or interpretation of the law because the decision of whether to issue a citation will be based largely upon the subjective determination by each CPSD Staff Inspector. Southwest Gas instead, believes that the citation authority should be delegated solely to the Director of the CPSD to promote consistency and uniform interpretation of the law.

## **III. Response to Citation - Timing**

Southwest Gas believes that many of the timing requirements in the draft Resolution are unreasonably restrictive. The provisions regarding the cure period (I.C.1, I.C.1.a, and II.A.2) do not account for the possibilities that 1) some pipeline safety violations cannot be cured within the time restraints afforded by the proposed resolution, which currently prohibit any cure period longer than 14 days, and 2) no cure will be necessary because the purported violation was ultimately determined to not exist. Rather than applying such a rigid timeline, Southwest Gas proposes that the CPSD be afforded the discretion to ascribe a cure period in the citation, and further to allow the CPSD the authority to agree to modify the cure period.

Indeed, the draft Resolution references General Order 112-E which incorporates 49 CFR Part 190 and cites the objective of aligning the Commission's pipeline enforcement authority with that of the Office of the State Fire Marshal. A review of 49 CFR Part 190 and 19 CCR §§ 2070-2075 demonstrates that the Pipeline and Hazardous Materials Safety Administration's (PHMSA) regulations and the State Fire Marshal's regulations have adopted a more reasonable 30 day period to respond to a notice of probable violation of these very same pipeline safety regulations.<sup>1</sup>

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<sup>1</sup> See 49 CFR § 190.209 ("Within 30 days of a notice of probable violation, the respondent shall respond to the Regional Director who issued the notice ...."); 19 CCR § 2071 ("Within 30 days of the receipt of a notice of probable violation the respondent shall respond to the Division who issued the Notice...").



Another issue with respect to the timing requirements for the response to a citation is that a request for an extension must be made within three days of the date of service of a citation. Southwest Gas has multiple concerns with this provision. First, three days is often not enough time to fully investigate a citation and explore the possible remedies and the necessary timeframe to accomplish those remedies. Second, the draft Resolution does not extend the period to respond to account for delays in mailing. The draft Resolution dictates that, even if sent via first class mail, service of a citation is effective the date the citation is mailed. First class mail is not immediate service and in many circumstances, if the citation is sent via first class mail, the period of time in which a utility may request an extension, as currently contemplated by the draft Resolution, may expire prior to the gas corporation actually receiving notice of the violation. In contrast, Code of Civil Procedure § 1013(a), which applies to the courts, provides for extensions when documents are mailed.<sup>2</sup>

Southwest Gas believes that all gas pipeline operators should be afforded the same response options as are provided to companies and to municipalities in 49 CFR Part 190. Southwest Gas requests the Commission consider an initial 30 day period from the service of the notice to respond to a citation, and further requests that the gas corporation either be given the option of electing to receive electronic service over service by mail or that an additional five calendar days be added to the response period if the CPSD elects to serve notices by mail. If circumstances dictate a more immediate response, then the draft Resolution can provide for an expedited schedule based upon the exigency of the circumstances and an order by the Commission.

Also, Southwest Gas does not believe that extensions to cure should be limited to seven days. Instead, Southwest Gas proposes that if an extension is sought, then the CPSD should be given the discretion to agree to an extension of a period that is mutually acceptable to the gas corporation and the CPSD. If the CPSD and the gas corporation cannot agree, then the gas corporation should be allowed to petition to an Administrative Law Judge and at that time be required to demonstrate good cause for the extension based upon the circumstances.

Finally, the CPSD should be afforded the discretion to impose a cure date and also the discretion to modify that date. As drafted, the Resolution does not appear to give the CPSD or even the ALJ the ability to modify a cure date even if all parties and the ALJ agree that curing the violation within the seven to fourteen day period is physically impossible or, if possible, would result in economic waste. Southwest Gas believes that such a policy might actually *reduce* the effectiveness of the CPSD as it deprives the CPSD of the discretionary power that is usually afforded to enforcement

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<sup>2</sup> Civ. Pro. § 1013(a) provides that the period for a response, “shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California, 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States....”



units, which is to recommend the cure period appropriate to the circumstances and to include such periods within their citations.

#### IV. Response to Citation – Inability of CPSD to Negotiate a Different Penalty

Southwest Gas understands the intent of the draft Resolution is to assess the maximum penalty amount provided for by Pub. Util. Code § 2107 for each and every violation. As such, the draft Resolution appears to be in direct conflict with Pub. Util. Code § 2104.5, which requires that the amount of the penalty can only be determined after considering “the appropriateness of such penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation.” Indeed, as drafted, the draft Resolution appears to mandate the imposition of penalties in a manner that likely violates the Due Process Clause of the 14<sup>th</sup> Amendment of the U.S. Constitution and in an amount that violates the 8<sup>th</sup> Amendment of the U.S. Constitution.<sup>3</sup> See e.g. *U.S. v. Bajakajian*, 524 U.S. 321, 344, 118 S.Ct. 2028, 2041, 141 L.Ed.2d 314 (1998) (finding that a punitive fine violated the Excessive Fines Clause because it was grossly disproportional to the gravity of the offense).

Southwest Gas believes that the structure of the draft Resolution as it pertains to the CPSD’s ability to negotiate a different penalty, or withdraw a citation after issuing such a citation when the circumstances warrant, unreasonably restricts the CPSD’s and the gas corporation’s ability to negotiate a resolution short of a contest. As drafted, the gas corporation can either accept the CPSD’s finding of a pipeline safety violation and accept the CPSD’s commensurate penalty determinations, or the gas corporation may contest these determinations in an administrative proceeding. As drafted, no negotiation is possible once a citation is issued. Southwest Gas is concerned this will result in unnecessary contests as it is likely that there will be occasions when the CPSD and the gas corporation will, after an exchange of information, choose to agree to a compromise that will obviate the need for a contest. Indeed, the CPSD may learn of facts that will cause the CPSD to reconsider the citation in its entirety. However, as drafted, it appears that no compromise is possible once the citation is issued. Pub. Util. Code § 2104.5 implies that *someone* must be able to compromise a penalty on behalf of the Commission, but the draft Resolution forecloses the CPSD from achieving a compromise and the draft Resolution fails to identify who can authorize such a compromise.

Southwest Gas believes the draft Resolution might actually reduce the effectiveness of the CPSD as it deprives the CPSD of the discretionary power to recommend a penalty amount appropriate to the circumstances and within the range allowed by law. Southwest Gas believes the CPSD should be given the ability to

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<sup>3</sup> Southwest Gas hereby reserves the federal claims raised in this Comment for decision by a federal court in accordance with *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).



compromise a citation, including, but not limited to, withdrawing a citation, before the gas corporation files an appeal. Once the appeal is filed, then a compromise should be allowed upon the approval of an ALJ.

## V.

### **Response to Citation - Taking Property without Just Compensation**

The draft Resolution's requirement that the gas corporation must deposit the full amount of the penalty in order to appeal a citation likely gives rise to potential constitutional challenges if the gas corporation is not paid interest on these amounts in the event the gas corporation is successful in reducing or eliminating the penalty after those funds are deposited. Quite simply, if the government takes possession of a person's money, and if the government does not pay interest on that money for the period while the money is in the state's custody, the 5<sup>th</sup> Amendment to the U.S. Constitution requires the state to pay the person interest on that money. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Here, the gas corporation would be deprived of the loss of interest or other beneficial use of the funds while those funds are held by the Commission.

## VI.

### **Automatic Assessment of Maximum Penalty**

The draft Resolution acknowledges that the delegation to the CPSD of the authority to assess penalties stems from Pub. Util. Code § 2107. The draft Resolution provides that "[e]ach citation will assess the maximum penalty amount provided for by § 2107." Southwest Gas believes that such a strict application (one without a hearing or case by case determination) of Pub. Util. Code § 2107 violates a gas corporation's due process rights and is contrary to the legislative intent of Pub. Util. Code § 2107. A review of Pub. Util. Code § 2107, as recently amended, reveals that the legislature provided a range "of not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000) for each offense." By providing a range of penalties, coupled with the provisions of Pub. Util. Code § 2104.5 discussed above, the legislature was necessarily requiring an individual assessment of the severity or egregiousness of each offense before a penalty is imposed. In other words, if the legislature intended that a singular amount apply to each violation, then the legislature would not have provided a range or factors with which the Commission must consider before assessing the penalty. The draft Resolution's automatic assessment of the maximum penalty provided in Pub. Util. Code § 2107 without consideration of the severity or egregiousness of the conduct ignores the legislative intent of Pub. Util. Code §§ 2104.5 and 2107.



## **VII. Response to Citation – Sole Option of Appeal**

Southwest Gas is concerned that the structure of the draft Resolution as it pertains to a gas corporation's options to respond to a citation is too limited. The draft Resolution only allows for an appeal of the citation, and even if appealed, the alleged violation must be still be cured within the requirements of the draft Resolution (Section I.C.1. - seven day period to cure violation). As such, it appears that the gas corporation is foreclosed from appealing the cure period. When the draft Resolution is compared to the response options provided under 49 CFR Part 190, it demonstrates that the draft Resolution has severely restricted the gas corporation's options. Under 49 CFR § 190.209, a respondent can (1) pay the penalty and remediate the violation; (2) submit written explanations to respond to the allegations; or (3) request a hearing. Under the proposed terms of the draft Resolution, a gas corporation only has two options: (1) pay the penalty and remedy the alleged violation or (2) pay the penalty, remedy the alleged violation and appeal. Southwest Gas believes that the draft Resolution should provide for options similar to what is currently being utilized by PHMSA.

## **VIII. Order to Cure – Constitutional Concerns**

Section I.A.3. of the draft Resolution proposes that a citation will contain a statement that a respondent "shall cure the violation" and pay the fine. Section II.A.2. states that submitting a Notice of Appeal "does not excuse the Respondent from curing the violation described in the citation." Thus, the draft Resolution does not provide a gas corporation with due process - an opportunity for a hearing or an appeal on the order to cure the violation. The draft Resolution only contemplates an appeal of the fine. Such a structure may violate the gas corporation's due process rights under the 14<sup>th</sup> Amendment to the U.S. Constitution inasmuch as it eliminates the opportunity for genuine issues of dispute to be resolved in a fair process. Instead, as currently drafted, once the citation is issued, the gas corporation must cure the violation even if there is a genuine dispute as to the violation itself or a dispute on the means or timing necessary to cure the violation. *Compare with* Calif. OSHA Reg. Title 8, Section 333 (providing an employer an opportunity for a hearing to appeal "abatement periods" and "the reasonableness of the changes required by the division").

Southwest Gas understands that Due Process requires the gas corporation to be afforded an opportunity to appeal the cure period. If the draft Resolution does not account for such an appeal, then the gas corporation may be forced to seek such relief in the courts each and every time the gas corporation believes the cure period is inappropriate to the circumstances.



**IX.  
Order to Cure – Conflict with Other Law**

In addition to the issues raised above and in Section VII. Response to Citation – Sole Option of Appeal, the draft Resolution’s limited recourse appears to be in conflict with 49 CFR § 190.217, which has previously been adopted by the Commission. The order to cure an alleged violation is in fact a compliance order issued pursuant to 49 CFR Part 190. Pursuant to 49 CFR § 190.217, a hearing is conducted “to determine the nature and extent of the violations and to issue an order directing compliance.” Here, the draft Resolution establishes a process that automatically issues an order directing compliance without a hearing. Such a process contradicts 49 CFR § 190.217 and is in derogation of 49 USC §§ 60117(l) and 60118, which is part of the federal pipeline safety statutes that the Commission derives its authority from. Southwest Gas believes that gas corporations should be afforded an opportunity to a hearing before being required to cure the alleged violation. An opportunity for a hearing is fair and is consistent with the regulations that currently govern gas corporations.

**X.  
Request for Extension – Affidavit Requirement**

In addition to the issues discussed above regarding the timeframe to request an extension and the length of an extension to remedy a citation, Southwest Gas believes that requiring a gas corporation’s Chief Executive Officer to sign an affidavit requesting an extension to remedy a violation is not necessary. As noted above, Southwest Gas does believe that a request for an extension should include an explanation about why an extension is necessary, however, in the majority of circumstances, the Chief Executive Officer is not going to be the person with the knowledge or information to best explain why an extension is necessary. Indeed, even the draft Resolution recognizes this conundrum when the draft Resolution requires the Chief Executive Officer’s affidavit to include “[t]he name of the person and the person’s position that the Chief Executive Officer relied upon for this declaration.” See Section I.C.b.1. Moreover, considering the limited timeframe within which to request an extension (3 days), a Chief Executive Officer may not be available to sign an affidavit. Southwest Gas believes that a request for an extension should be supported by evidence (documentary and/or testimonial) that best supports the explanation of why an extension is necessary.



## XI. Conclusion

As set forth above, Southwest Gas respectfully requests the Commission not accept the proposed Resolution and instead open a rulemaking to impose slight modifications to its previous adoption of 49 CFR Part 190. Southwest Gas believes that a rulemaking will allow for gas corporations to participate and contribute in developing a procedure that accomplishes the intent of the draft Resolution. Southwest Gas appreciates the opportunity to provide comments and looks forward to actively working with the Commission and the other utilities to address the issues posed in this draft Resolution.

SOUTHWEST GAS CORPORATION

A handwritten signature in black ink, appearing to read "K. Stephens", written over a horizontal line.

Kyle O. Stephens  
Senior Counsel  
Southwest Gas Corporation  
5241 Spring Mountain Road  
Las Vegas, Nevada 89150-0002  
Phone: (702) 876-7293  
Fax: (702) 252-7283  
E-Mail: [kyle.stephens@swgas.com](mailto:kyle.stephens@swgas.com)



## **Exhibit A**

### **Subject Index Listing the Recommended Changes to the Draft Resolution**

Southwest Gas urges the Commission to reject the draft Resolution and, instead, initiate a rulemaking to amend its prior adoption of 49 CFR Part 190. Such a rulemaking would substitute the names of the federal agencies, agency subdivisions, and job titles in those regulations with the corresponding names of the state agencies, agency subdivisions, and job titles.

## **Exhibit B**

## Table of Authorities

### **Cases**

<i>England v. Louisiana State Bd. of Medical Examiners</i> , 375 U.S. 411 (1964) .....	4
<i>U.S. v. Bajakjian</i> , 524 U.S. 321, 344, 118 S.Ct. 2028, 2041, 141 L.Ed.2d 314 (1998) .....	4
<i>Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City</i> , 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).....	5

### **Statutes**

19 CCR § 2071 .....	2
19 CCR §§ 2070-2075.....	2
49 CFR § 190.209 .....	6
49 CFR § 190.217 .....	7
49 CFR Part 190.....	passim
49 USC §§ 60117(l) and 60118 .....	7
Civ. Pro. § 1013(a) .....	3
Code of Civil Procedure § 1013(a) .....	3
Pub. Util. Code § 2104.5 .....	4, 5
Pub. Util. Code § 2107 .....	4, 5

### **Other Authorities**

Calif. OSHA Reg. Title 8, Section 333 .....	6
California General Order 112-E .....	1

## **Exhibit C**

### **Appendix Setting Forth the Proposed Findings and Ordering Paragraphs**

Southwest Gas urges the Commission to reject the draft Resolution and, instead, initiate a rulemaking to amend its prior adoption of 49 CFR Part 190. Such a rulemaking would substitute the names of the federal agencies, agency subdivisions, and job titles in those regulations with the corresponding names of the state agencies, agency subdivisions, and job titles.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing **OPENING COMMENTS OF SOUTHWEST GAS CORPORATION (U905G)** upon the individuals on the established service list in proceedings A.10-12-005, A.10-12-006, A.09-09-013, and R.11-02-019 by electronic mail (email) service. Those individuals without an email address were served by regular, first-class mail.

Dated this 21<sup>st</sup> day of October, 2011 at Las Vegas, Nevada.

*/s/ Kristien M. Tary*

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Kristien M. Tary

State Regulatory Affairs

Southwest Gas Corporation

5241 Spring Mountain Road

Las Vegas, Nevada 89150-0002

*Phone: (702) 876-7253*

*E-mail: kristien.tary@swgas.com*

\*\*\*\*\*SERVICE LIST\*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT

A1012005 LIST

A1012006

\*\*\*\*\*PARTIES\*\*\*\*\*

Rachael E. Koss  
ADAMS BROADWELL JOSEPH & CARDOZO  
601 GATEWAY BOULEVARD, SUITE 1000  
SOUTH SAN FRANCISCO CA 94080  
(650) 589-1660  
rkoss@adamsbroadwell.com  
For: Coalition of California Utility Employees

---

James Weil  
Director  
AGLET CONSUMER ALLIANCE  
PO BOX 1916  
SEBASTOPOL CA 95473  
(707) 824-5656  
jweil@aglet.org  
For: Aglet Consumer Alliance

---

Seema Srinivasan  
ALCANTAR & KAHL LLP  
33 NEW MONTGOMERY STREET, SUITE 1850  
SAN FRANCISCO CA 94105  
(415) 421-4143  
sls@a-klaw.com  
For: Indicated Producers

---

Edward G. Poole  
ANDERSON & POOLE  
601 CALIFORNIA STREET, SUITE 1300  
SAN FRANCISCO CA 94108-2812  
(415) 956-6413 X-102  
epoole@adplaw.com  
For: Western Manufacture Housing Communities Assoc.

---

Rick D. Chamberlain  
Attorney  
BEHRENS, WHEELER & CHAMBERLAIN  
6 N.E. 63RD STREET, SUITE 400  
OKLAHOMA CITY OK 73105  
(405) 848-1014  
rdc\_law@swbell.net  
For: Wal-Mart Stores, Inc. and Sam's West, Inc.

---

Len Canty  
Chairman  
BLACK ECONOMIC COUNCIL  
484 LAKE PARK AVE., SUITE 338  
OAKLAND CA 94610  
(510) 452-1337  
lencanty@BlackEconomicCouncil.org  
For: Black Economic Council

---

Jonathan Bromson  
Legal Division  
RM. 4107  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2362  
jab@cpuc.ca.gov  
For: DRA

Karen Norene Mills  
Assoc. Counsel  
CALIFORNIA FARM BUREAU FEDERATION  
2300 RIVER PLAZA DRIVE  
SACRAMENTO CA 95833  
(916) 561-5655  
kmills@cfbf.com  
For: California Farm Bureau Federation

---

Rebecca Williford  
Ld Access/Ryder Fndtn Fellowship Atty.  
DISABILITY RIGHTS ADVOCATES  
2001 CENTER STREET, THIRD FLOOR  
BERKELEY CA 94704-1204  
(510) 665-8644 X123  
rwilliford@dralegal.org  
For: Disability Rights Advocates

---

Daniel W. Douglass  
Attorney  
DOUGLASS & LIDDELL  
21700 OXNARD ST., STE. 1030  
WOODLAND HILLS CA 91367  
(818) 961-3001  
douglass@energyattorney.com  
For: Direct Access Custome Coalition

---

Norman J. Furuta  
FEDERAL EXECUTIVE AGENCIES  
1455 MARKET ST., SUITE 1744  
SAN FRANCISCO CA 94103-1399  
(415) 503-6994  
norman.furuta@navy.mil  
For: Federal Executive Agencies

---

Norman A. Pedersen  
Attorney At Law  
HANNA AND MORTON, LLP  
444 SOUTH FLOWER STREET, NO. 1500  
LOS ANGELES CA 90071-2916  
(213) 430-2510  
npedersen@hanmor.com  
For: Southern California Generation Coalition

---



\*\*\*\*\***SERVICE LIST**\*\*\*\*\*  
**Last Updated on 10-OCT-2011 by: AMT**  
**A1012005 LIST**  
**A1012006**

William Julian Ii  
43556 ALMOND LANE  
DAVIS CA 95618  
(530) 758-8882  
billjulian@sbcglobal.net  
For: Utility Workers Union of America

---

Jorge Corralejo  
Chairman / President  
LAT. BUS. CHAMBER OF GREATER L.A.  
634 S. SPRING STREET, STE 600  
LOS ANGELES CA 90014  
(213) 347-0008  
jcorralejo@lbcgla.org  
For: Latino Business Chamber of Greater L.A.

---

John W. Leslie, Esq.  
LUCE, FORWARD, HAMILTON & SCRIPPS, LLP  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(619) 699-2536  
jleslie@luce.com  
For: Shell Energy North America

---

David J. Byers, Esq.  
Attorney At Law  
MCCRACKEN, BYERS & HAESLOOP, LLP  
870 MITTEN ROAD  
BURLINGAME CA 94010  
(650) 579-5835  
dbyers@landuselaw.com  
For: California City-County Street Light Association "CAL-SLA"

---

Diane Conklin  
Spokesperson  
MUSSEY GRADE ROAD ALLIANCE  
PO BOX 683  
RAMONA CA 92065  
(760) 787-0794  
djoconklin@earthlink.net  
For: Mussey Grade Road Alliance

---

Faith Bautista  
President  
NATIONAL ASIAN AMERICAN COALITION  
1758 EL CAMINO REAL  
SAN BRUNO CA 94066  
(415) 307-3320  
Faith.Mabuhayalliance@gmail.com  
For: National Asian American Coalition

---

Steven W. Frank  
PACIFIC GAS AND ELECTRIC CO  
77 BEALE STREET, B30A  
SAN FRANCISCO CA 94105  
(415) 973-6976  
swf5@pge.com  
For: Pacific Gas and Electric Company

---

John A. Pacheco  
Attorney  
SAN DIEGO GAS & ELECTRIC COMPANY  
101 ASH STREET, HQ12B  
SAN DIEGO CA 92101-3017  
(619) 699-5130  
JPacheco@SempraUtilities.com  
For: San Diego Gas & Electric

---

Keith Melville  
SAN DIEGO GAS & ELECTRIC COMPANY  
101 ASH STREET, HQ-12B  
SAN DIEGO CA 92101  
(619) 699-5039  
KMelville@SempraUtilities.com  
For: San Diego Gas & Electric/SoCal Gas

---

Ronald Van Der Leeden  
SAN DIEGO GAS & ELECTRIC COMPANY  
555 WEST 5TH STREET, SUITE 1400  
LOS ANGELES CA 90013-1011  
(213) 244-2009  
RVanderleeden@SempraUtilities.com  
For: San Deigo Gas & Electric Company

---

Francis McNulty  
Attorney At Law  
SOUTHERN CALIFORNIA EDISON COMPANY  
2244 WALNUT GROVE AVENUE  
ROSEMEAD CA 91770  
(626) 302-1499  
francis.mcnulty@sce.com  
For: SCE

---

David J. Gilmore  
SOUTHERN CALIFORNIA GAS COMPANY  
555 WEST FIFTH STREET  
LOS ANGELES CA 90071  
(213) 244-2945  
DGilmore@SempraUtilities.com  
For: SDG&E/SoCal Gas

---

\*\*\*\*\*SERVICE LIST\*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT

A1012005 LIST

A1012006

Nicholas Sher  
Legal Division  
RM. 4007  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-4232  
nms@cpuc.ca.gov  
For: DRA

Stephanie Chen  
Attorney At Law  
THE GREENLINING INSTITUTE  
1918 UNIVERSITY AVE., 2ND FLOOR  
BERKELEY CA 94704  
(510) 398-0506  
stephaniec@greenlining.org  
For: The Greenlining Institute

---

Nina Suetake  
THE UTILITY REFORM NETWORK  
115 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94104  
(415) 929-8876 X 308  
nsuetake@turn.org  
For: The Utility Reform Network

---

Michael Shames  
UCAN  
3405 KENYON ST., STE. 401  
SAN DIEGO CA 92110  
(619) 696-6966  
mshames@ucan.org  
For: Utility Consumer's Action Network

---

\*\*\*\*\* STATE EMPLOYEE \*\*\*\*\*

Donna-Fay Bower  
Division of Ratepayer Advocates  
RM. 4205  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1420  
dfb@cpuc.ca.gov

Truman L. Burns  
Division of Ratepayer Advocates  
RM. 4205  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2932  
txb@cpuc.ca.gov

Michael Colvin  
Advisor - Energy  
CPUC  
RM. 5212  
SAN FRANCISCO CA 94102  
(415) 355-5484  
michael.colvin@cpuc.ca.gov

Belinda Gatti  
Energy Division  
AREA 4-A  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-3272  
beg@cpuc.ca.gov

Stephanie Green  
Executive Division  
AREA 2-B  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-5245  
sjg@cpuc.ca.gov

Donald J. Lafrenz  
Energy Division  
AREA 4-A  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1063  
dlf@cpuc.ca.gov

Elaine Chan Lau  
Energy Division  
AREA 4-A  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-5621  
ec2@cpuc.ca.gov

Scott Murtishaw  
Executive Division  
RM. 5303  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-5863  
sgm@cpuc.ca.gov

Richard A. Myers  
Energy Division  
AREA 4-A  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1228  
ram@cpuc.ca.gov

\*\*\*\*\* SERVICE LIST \*\*\*\*\*

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A1012005 LIST

A1012006

Robert M. Pocta  
Division of Ratepayer Advocates  
RM. 4205  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2871  
rmp@cpuc.ca.gov

Sarah R. Thomas  
Executive Division  
RM. 5033  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2310  
srt@cpuc.ca.gov

John S. Wong  
Administrative Law Judge Division  
RM. 5106  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-3130  
jsw@cpuc.ca.gov

James R. Wuehler  
Division of Ratepayer Advocates  
RM. 4208  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1667  
jrw@cpuc.ca.gov

Marzia Zafar  
Executive Division  
RM. 2-B  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1997  
zaf@cpuc.ca.gov

\*\*\*\*\* INFORMATION ONLY \*\*\*\*\*

Marc D. Joseph  
ADAMS BROADWELL JOSEPH & CARDOZO  
601 GATEWAY BLVD., STE. 1000  
SOUTH SAN FRANCISCO CA 94080-7037  
(650) 589-1660  
mdjoseph@adamsbroadwell.com

Karen Terranova  
ALCANTAR & KAHL  
33 NEW MONTGOMERY STREET, SUITE 1850  
SAN FRANCISCO CA 94105  
(415) 403-5542  
filings@a-klaw.com

Evelyn Kahl  
ALCANTAR & KAHL, LLP  
33 NEW MONTGOMERY STREET, SUITE 1850  
SAN FRANCISCO CA 94015  
(415) 421-4143  
ek@a-klaw.com

Fassil T. Fenikile  
Director, Regulatory  
AT&T CALIFORNIA  
525 MARKET STREET, ROOM 1925  
SAN FRANCISCO CA 94105  
(415) 778-1455  
Fassil.t.Fenikile@att.com

Noah Hauser  
BARCLAYS CAPITAL  
745 - 7TH AVENUE, 17TH FLOOR  
NEW YORK NY 10003  
(212) 526-6203  
noah.hauser@barclayscapital.com

Catherine E. Yap  
BARKOVICH & YAP, INC.  
PO BOX 11031  
OAKLAND CA 94611  
(510) 450-1270  
ceyap@earthlink.net

Alison Lechowicz  
BARTLE WELLS ASSOCIATES  
EMAIL ONLY  
EMAIL ONLY CA 00000-0000  
(510) 653-3399  
alison@bartlewells.com

Reed Schmidt  
BARTLE WELLS ASSOCIATES  
1889 ALCATRAZ AVENUE  
BERKELEY CA 94703-2714  
(510) 653-3399 X-111  
rschmidt@bartlewells.com

Bruno Jeider  
BURBANK WATER & POWER  
164 WEST MAGNOLIA BLVD.  
BURBANK CA 91502  
(818) 238-3700  
bjeider@ci.burbank.ca.us

\*\*\*\*\*SERVICE LIST\*\*\*\*\*

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A1012005 LIST

A1012006

CALIFORNIA ENERGY MARKETS  
425 DIVISADERO STREET, SUITE 303  
SAN FRANCISCO CA 94117  
(415) 963-4439  
cem@newsdata.com

Melissa W. Kasnitz  
CENTER FOR ACCESSIBLE TECHNOLOGY  
3075 ADELINE STREET, STE. 220  
BERKELEY CA 94703  
(510) 841-3224  
service@cforat.org

Charles Guss  
CITY OF ANAHEIM  
200 SOUTH ANAHEIM BLVD.  
ANAHEIM CA 92805  
(415) 765-4242  
cguss@anaheim.net

Steven Sciortino  
CITY OF ANAHEIM  
200 SOUTH ANAHEIM BOULEVARD  
ANAHEIM CA 92805  
(714) 765-5177  
ssciortino@anaheim.net

Valerie Puffer  
CITY OF GLENDALE WATER & POWER  
700 N. BRAND, SUITE 590  
GLENDALE CA 91203  
(818) 548-4096  
VPuffer@ci.glendale.ca.us

DAVIS WRIGHT TREMAINE, LLP  
EMAIL ONLY  
EMAIL ONLY CA 00000  
dwtcpudockets@dwt.com

Ralph E. Dennis  
DENNIS CONSULTING  
2805 BITTERSWEET LANE  
LA GRANGE KY 40031  
(502) 241-5686  
ralphdennis@insightbb.com

Don Liddell  
DOUGLASS & LIDDELL  
2928 2ND AVENUE  
SAN DIEGO CA 92103  
(619) 993-9096  
liddell@EnergyAttorney.com

Ronald Liebert  
Attorney At Law  
ELLISON SCHNEIDER & HARRIS LLP  
2600 CAPITOL AVENUE, STE. 400  
SACRAMENTO CA 95816  
(916) 447-2166  
rl@eslawfirm.com

Daniel J. Brink  
Counsel  
EXXON MOBIL CORP.  
800 BELL ST., RM. 3497-0  
HOUSTON TX 77002  
(713) 656-4418  
daniel.j.brink@exxonmobil.com

Randy E. Parker  
EXXON MOBIL CORPORATION  
800 BELL STREET, SUITE 3505CC  
HOUSTON TX 77002  
(713) 656-4418  
randy.e.parker@exxonmobil.com

Khojasteh Davoodi  
FEDERAL EXECUTIVE AGENCIES  
DEPARTMENT OF THE NAVY  
1322 PATTERSON AVENUE SE  
WASHINGTON NAVY YARD DC 20374-5018  
(202) 685-0130  
khojasteh.davoodi@navy.mil

Steven G. Lins  
Assistant General Manager Supply  
GLENDALE WATER AND POWER  
141 N. GLENDALE AVENUE, LEVEL 4  
GLENDALE CA 91206-4394  
(818) 548-2136  
slins@ci.glendale.ca.us

Paul Patterson  
GLENROCK ASSOCIATES LLC  
EMAIL ONLY  
EMAIL ONLY NY 00000  
(212) 246-3318  
ppatterson2@nyc.rr.com

Robert Gnaizda  
Of Counsel  
200 29TH STREET, NO. 1  
SAN FRANCISCO CA 94131  
(415) 307-3320  
RobertGnaizda@gmail.com

\*\*\*\*\*SERVICE LIST\*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT

A1012005 LIST

A1012006

Stephen J. Keene  
Asst. General Counsel  
IMPERIAL IRRIGATION DISTRICT  
333 EAST BARIONI BLVD.  
IMPERIAL CA 92251  
(760) 339-9574  
sjkeene@iid.com

Garrick Jones  
JBS ENERGY  
311 D STREET  
WEST SACRAMENTO CA 95605  
(916) 372-0534  
garrick@jbsenergy.com

John Sugar  
JBS ENERGY  
311 D STREET, SUITE A  
WEST SACRAMENTO CA 95605  
(916) 372-0534  
john@jbsenergy.com

Kirby Bosley  
JP MORGAN VENTURES ENERGY CORP.  
700 LOUISIANA ST. STE 1000, 10TH FLR  
HOUSTON TX 77002  
(713) 236-3383  
kirby.bosley@jpmorgan.com

Paul Tramonte  
JP MORGAN VENTURES ENERGY CORP.  
700 LOUISIANA ST., STE 1000, 10TH FLR  
HOUSTON TX 77002  
(713) 236-3079  
Paul.Tramonte@jpmorgan.com

Paul Gendron  
JP MORGAN VENTURES ENERGY CORP.  
700 LOUISIANA STREET SUITE 1000  
HOUSTON TX 77002  
(925) 708-4994  
paul.gendron@JPMorgan.com

Ralph Smith  
LARKIN & ASSOCIATES  
15728 FARMINGTON ROAD  
LIVONIA MI 48154  
(734) 522-3420  
rsmithla@aol.com

Carrie A. Downey  
LAW OFFICES OF CARRIE ANNE DOWNEY  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(619) 522-2040  
cadowney@cadowneylaw.com

James J. Heckler  
LEVIN CAPITAL STRATEGIES  
595 MADISON AVENUE  
NEW YORK NY 10022  
(212) 259-0851  
jheckler@levincap.com

Aaron Lewis  
721 BAKER STREET  
SAN FRANCISCO CA 94115  
(530) 400-9136  
aaron.joseph.lewis@gmail.com

Robert L. Pettinato  
LOS ANGELES DEPT. OF WATER & POWER  
111 NORTH HOPE STREET, RM. 1150  
LOS ANGELES CA 90012  
(213) 367-1735  
robert.pettinato@ladwp.com

Joseph W. Mitchell, Ph. D.  
M-BAR TECHNOLOGIES AND CONSULTING, LLC  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(760) 703-7521  
jwmitchell@mbartek.com

David Marcus  
PO BOX 1287  
BERKELEY CA 94701  
(510) 528-0728  
dmarcus2@sbcglobal.net

Naaz Khumawala  
MERRILL LYNCH, PIERCE, FENNER & SMITH  
EMAIL ONLY  
EMAIL ONLY TX 00000  
(713) 247-7313  
naaz.khumawala@baml.com

Richard J. Morillo  
PO BOX 6459  
BURBANK CA 91510-6459  
(818) 238-5702  
rmorillo@ci.burbank.ca.us

\*\*\*\*\*SERVICE LIST\*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT

A1012005 LIST

A1012006

MRW & ASSOCIATES, LLC  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(510) 834-1999  
mrw@mrwassoc.com

Shalini Swaroop  
NATIONAL ASIAN AMERICAN COALITION ET AL  
1758 EL CAMINO REAL  
SAN BRUNO CA 94066  
(650) 952-0522 X-231  
sswaroop@naacoalition.org

Makda Solomon  
NAVY UTILITY RATES AND STUDIES OFFICE  
1322 PATTERSON AVENUE SE - BLDG. 33  
WASHINGTON DC 20374-5018  
(202) 685-0130  
makda.solomon@navy.mil

Jessica Yip  
ONGRID SOLAR  
EMAIL ONLY  
EMAIL ONLY CA 00000  
jessica@ongrid.net

Shelly Sharp  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE STREET  
SAN FRANCISCO CA 94177  
(415) 973-2636  
ssm3@pge.com

Steven Endo  
PASADENA DEPARTMENT OF WATER & POWER  
150 S. LOS ROBLES, SUITE 200  
PASADENA CA 91101  
(626) 744-7599  
sendo@cityofpasadena.net

Eric Klinkner  
PASADENA DEPARTMENT OF WATER AND POWER  
150 SOUTH LOS ROBLES AVENUE, SUITE 200  
PASADENA CA 91101-2437  
(626) 744-4478  
eklinkner@cityofpasadena.net

Tom Roth  
ROTH ENERGY COMPANY  
545 S. FIGUEROA STREET, SUITE 1235  
LOS ANGELES CA 90071  
(213) 622-6700  
rothenergy@sbcglobal.net

Sue Mara  
Consultant  
RTO ADVISORS, LLC  
164 SPRINGDALE WAY  
REDWOOD CITY CA 94062  
(415) 902-4108  
sue.mara@RTOadvisors.com

Pete Girard  
SAN DIEGO GAS & ELECTRIC  
8330 CENTURY PARK CT., STE. 32E  
SAN DIEGO CA 92123  
(858) 654-8218  
pgirard@semprautilities.com

Laura Earl  
Sr. Counsel - Regulatory  
SAN DIEGO GAS & ELECTRIC COMPANY  
101 ASH STREET  
SAN DIEGO CA 92101  
(619) 696-0583  
learl@SempraUtilities.com

Rasha Prince  
SAN DIEGO GAS & ELECTRIC COMPANY  
555 WEST 5TH STREET, GT14D6  
LOS ANGELES CA 90013  
(213) 244-5141  
RPrince@SempraUtilities.com

Central Files  
SAN DIEGO GAS AND ELECTRIC COMPANY  
8330 CENTURY PARK CT, CP32D, RM CP31-E  
SAN DIEGO CA 92123-1530  
(858) 654-1852  
CentralFiles@SempraUtilities.com

Chuck Manzuk  
SAN DIEGO GAS AND ELECTRIC COMPANY  
8330 CENTURY PARK CT, CP32D  
SAN DIEGO CA 92123  
(858) 636-5548  
CManzuk@SempraUtilities.com

Onell Soto  
SAN DIEGO UNION-TRIBUNE  
PO BOX 120191  
SAN DIEGO CA 92112-0191  
(619) 293-1280  
onell.soto@uniontrib.com

\*\*\*\*\*SERVICE LIST\*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT

A1012005 LIST

A1012006

Marcie A. Milner  
SHELL ENERGY NORTH AMERICA (US), L.P.  
4445 EASTGATE MALL, STE. 100  
SAN DIEGO CA 92121  
(858) 526-2106  
marcie.milner@shell.com

Carl Wood  
UTILITY WORKERS UNION OF AMERICA  
10103 LIVE OAK AVE.  
CHERRY VALLEY CA 92223  
(951) 567-1199  
carl.wood@verizon.net

Case Administration  
SOUTHERN CALIFORNIA EDISON COMPANY  
2244 WALNUT GROVE AVE., PO BOX 800  
ROSEMEAD CA 91770  
(626) 302-4875  
case.admin@sce.com

Kevin Woodruff  
WOODRUFF EXPERT SERVICES  
1100 K STREET, SUITE 204  
SACRAMENTO CA 95814  
(916) 442-4877  
kdw@woodruffexpert-services.com

Johnny Pong  
SOUTHERN CALIFORNIA GAS / SDG&E COMPANY  
555 WEST FIFTH STREET NO. 1400, GT14E7  
LOS ANGELES CA 90013-1011  
(213) 244-2990  
JPong@SempraUtilities.com  
For: Southern California Gas Company / San Diego Gas and Electric  
Company

---

Andrew Steinberg  
SOUTHERN CALIFORNIA GAS CO.  
555 W. 5TH STREET, GT 14D6  
LOS ANGELES CA 90013-1034  
(213) 244-3817  
ASteinberg@SempraUtilities.com

Robert Finkelstein  
Legal Director  
THE UTILITY REFORM NETWORK  
115 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94104  
(415) 929-8876 X-307  
bfinkelstein@turn.org  
For: The Utility Reform Network

---

Thomas J. Long  
Attorney At Law  
TURN  
115 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94104  
(415) 929-8876  
tlong@turn.org

Michael Scott  
UTILITY CONSUMERS' ACTION NETWORK  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(619) 696-6966  
mike@ucan.org

\*\*\*\*\* SERVICE LIST \*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT  
A0909013 LIST

\*\*\*\*\* PARTIES \*\*\*\*\*

Gerald L. Lahr  
ABAG POWER  
101 EIGHTH STREET  
OAKLAND CA 94607  
(510) 464-7908  
JerryL@abag.ca.gov  
For: ABAG Power

---

Seema Srinivasan  
EVELYN KAHL  
ALCANTAR & KAHL LLP  
33 NEW MONTGOMERY STREET, SUITE 1850  
SAN FRANCISCO CA 94105  
(415) 421-4143  
sls@a-klaw.com  
For: Chevron USA/ ConocoPhillips/OccidentalEnergy Marketing, Inc.

---

R. Thomas Beach  
JOSEPH KARP  
CALIFORNIA COGENERATION COUNCIL  
2560 NINTH STREET, SUITE 213A  
BERKELEY CA 94710-2557  
(510) 549-6922  
tomb@crossborderenergy.com  
For: Calpine Corporation and The California Cogeneration Council

---

Mark Pinney  
CANADIAN ASSN. OF PETROLEUM PRODUCERS  
2100, 350-7TH AVE., S.W.  
CALGARY AB T2P 3N9  
CANADA  
(403) 267-1173  
pinney@capp.ca  
For: Canadian Association of Petroleum Producers

---

Grant Kolling  
Sr. Assistant City Attorney  
CITY OF PALO ALTO  
250 HAMILTON AVENUE, PO BOX 10250  
PALO ALTO CA 94303  
(650) 329-2171  
Grant.Kolling@cityofpaloalto.org  
For: City of Palo Alto

---

Ann L. Trowbridge  
CARLIN A. YAMACHIKA  
DAY CARTER & MURPHY LLP  
3620 AMERICAN RIVER DRIVE, SUITE 205  
SACRAMENTO CA 95864  
(916) 570-2500 X 103  
atrowbridge@daycartermurphy.com  
For: Gill Ranch Storage, LLC

---

Dan L. Carroll  
Attorney At Law  
DOWNEY BRAND, LLP  
621 CAPITOL MALL, 18TH FLOOR  
SACRAMENTO CA 95814  
(916) 444-1000  
dcarroll@downeybrand.com  
For: Lodi Gas Storage, L.L.C.

---

Francesca E. Ciliberti  
Counsel  
EL PASO CORPORATION - WESTERN PIPELINES  
2 N. NEVADA AVEUE  
COLORADO SPRINGS CO 80903  
(719) 520-4579  
francesca.ciliberti@elpaso.com  
For: El Paso Corporation

---

Greggory L. Wheatland  
ELLISON SCHNEIDER & HARRIS L.L.P.  
2600 CAPITOL AVENUE, SUITE 400  
SACRAMENTO CA 95816-5905  
(916) 447-2166  
glw@eslawfirm.com  
For: Clearwater Port LLC

---

Sean P. Beatty  
GENON CALIFORNIA NORTH LLC  
696 WEST 10TH STREET  
PITTSBURG CA 94565  
(925) 427-3483  
Sean.Beatty@mirant.com  
For: Mirant California, LLC and Mirant Delta, LLC

---

Michael B. Day  
GOODIN MACBRIDE SQUERI DAY & LAMPREY LLP  
505 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94111-3133  
(415) 392-7900  
mday@goodinmacbride.com  
For: Wild Goose Storage, LLC

---



\*\*\*\*\*SERVICE LIST\*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT  
A0909013 LIST

Brian T. Cragg  
GOODIN, MACBRIDE, SQUERI, DAY & LAMPREY  
505 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94111  
(415) 392-7900  
bcragg@goodinmacbride.com  
For: Dynegy Moss Landing, LLC

---

Norman A. Pedersen  
HANNA AND MORTON LLP  
444 SOUTH FLOWER STREET, SUITE 1500  
LOS ANGELES CA 90071-2916  
(213) 430-2510  
npedersen@hanmor.com  
For: Southern California Generation Coaliton

---

Patricia M. French  
KERN RIVER GAS TRANSMISSION  
2755 E. CONTTONWOOD PARKWAY, STE. 300  
SALT LAKE CITY UT 84121  
(801) 937-6000  
trish.french@kernrivergas.com  
For: Kern River Gas Transmission Co.

---

John W. Leslie, Esq.  
LUCE, FORWARD, HAMILTON & SCRIPPS, LLP  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(619) 699-2536  
jleslie@luce.com  
For: Shell Energy North America (US) LP

---

David L. Huard  
MANATT, PHELPS & PHILLIPS, LLP  
1 EMBARCADERO CTR, STE 2900  
SAN FRANCISCO CA 94111-3736  
(310) 312-4247  
dhuard@manatt.com  
For: Gas Transmission Northwest Corporation

---

Barry F. Mccarthy  
MICHAEL NELSON  
MCCARTHY & BERLIN, LLP  
100 WEST SAN FERNANDO ST., STE. 501  
SAN JOSE CA 95113  
(408) 288-2080  
bmcc@mccarthylaw.com  
For: Northern California Generation Coalition

---

Kerry C. Klein  
Attorney At Law  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE ST., MC B30A  
SAN FRANCISCO CA 94105  
(415) 973-3251  
kck5@pge.com  
For: Pacific Gas and Electric Company

---

Marion Peleo  
Legal Division  
RM. 4107  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2130  
map@cpuc.ca.gov  
For: DRA

---

Michael Rochman  
Managing Director  
SCHOOL PROJECT UTILITY RATE REDUCTION  
1850 GATEWAY BLVD., STE. 235  
CONCORD CA 94520  
(925) 743-1292  
service@spurr.org  
For: School Project for Utility Rate Reduction (SPURR)

---

Johnny Pong  
SOUTHERN CALIFORNIA GAS / SDG&E COMPANY  
555 WEST FIFTH STREET NO. 1400, GT14E7  
LOS ANGELES CA 90013-1011  
(213) 244-2990  
JPong@SempraUtilities.com  
For: SDG&E/SoCal Gas

---

Ken Ziober  
SPARK ENERGY GAS, LP.  
2105 CITYWEST BLVD., SUITE 100  
HOUSTON TX 77042  
(713) 977-5634  
kziober@sparkenergy.com  
For: Spark Energy Gas, LP.

---

Keith R. Mccrea  
Attorney At Law  
SUTHERLAND ASBILL & BRENNAN LLP  
1275 PENNSYLVANIA AVE, NW  
WASHINGTON DC 20004-2415  
(202) 383-0705  
keith.mccrea@sutherland.com  
For: California Manufacturers and Technology Association (CMTA)

---

\*\*\*\*\* SERVICE LIST \*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT  
A0909013 LIST

Marcel Hawiger  
Energy Attorney  
THE UTILITY REFORM NETWORK  
EMAIL ONLY  
EMAIL ONLY CA 00000-0000  
(415) 929-8876 X311  
marcel@turn.org  
For: TURN

---

Ken Bohn  
TIGER NATURAL GAS AND IN-HOUSE ENERGY  
337 ALEXANDER PLACE  
CLAYTON CA 94517  
(925) 215-0822  
ken@in-houseenergy.com  
For: Tiger Natural Gas and In-House Energy

---

Joseph M. Karp  
Attorney  
WINSTON & STRAWN LLP  
101 CALIFORNIA STREET, 39TH FL  
SAN FRANCISCO CA 94111-5894  
(415) 591-1000  
jkarp@winston.com  
For: The Calpine corp/The Calif. Cogeneration council

---

\*\*\*\*\* STATE EMPLOYEE \*\*\*\*\*

David Peck  
CALIFORNIA PUBLIC UTILITIES COMMISSION  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(415) 703-1213  
DBP@cpuc.ca.gov

Dra  
CPUC - ENERGY COST OF SRVC & NAT'L GAS  
RM 4102  
SAN FRANCISCO CA 94102  
(415) 703-1079

Eugene Cadenasso  
Energy Division  
AREA 4-A  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1214  
cpe@cpuc.ca.gov

Kelly C. Lee  
Division of Ratepayer Advocates  
RM. 4102  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1795  
kcl@cpuc.ca.gov

Richard A. Myers  
Energy Division  
AREA 4-A  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1228  
ram@cpuc.ca.gov

OFFICE OF ASSEMBLYMEMBER JERRY HILL  
PO BOX 942849  
SACRAMENTO CA 94249-0019  
nate.solo@asm.ca.gov

Thomas M. Renaghan  
Division of Ratepayer Advocates  
RM. 4205  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2107  
tmr@cpuc.ca.gov

Pearlie Sabino  
Division of Ratepayer Advocates  
RM. 4209  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1883  
pzs@cpuc.ca.gov

John S. Wong  
Administrative Law Judge Division  
RM. 5106  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-3130  
jsw@cpuc.ca.gov

\*\*\*\*\* INFORMATION ONLY \*\*\*\*\*

Karen Terranova  
ALCANTAR & KAHL  
33 NEW MONTGOMERY STREET, SUITE 1850  
SAN FRANCISCO CA 94105  
(415) 403-5542  
filings@a-klaw.com

\*\*\*\*\*SERVICE LIST\*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT  
A0909013 LIST

Evelyn Kahl  
ALCANTAR & KAHL, LLP  
33 NEW MONTGOMERY STREET, SUITE 1850  
SAN FRANCISCO CA 94015  
(415) 421-4143  
ek@a-klaw.com  
For: Chevron USA/ ConocoPhillips/OccidentalEnergy Marketing, Inc

---

Mike Cade  
ALCANTAR & KAHL, LLP  
1300 SW 5TH AVE, SUITE 1750  
PORTLAND OR 97201  
(503) 402-8711  
wmc@a-klaw.com

Catherine E. Yap  
BARKOVICH & YAP, INC.  
PO BOX 11031  
OAKLAND CA 94611  
(510) 450-1270  
ceyap@earthlink.net

Len Canty  
Chairman  
BLACK ECONOMIC COUNCIL  
484 LAKE PARK AVE., SUITE 338  
OAKLAND CA 94610  
(510) 452-1337  
lencanty@BlackEconomicCouncil.org  
For: Black Economic Council

---

Beth Vaughan  
CALIFORNIA COGENERATION COUNCIL  
4391 NORTH MARSH ELDER CT.  
CONCORD CA 94521  
(925) 408-5142  
beth@beth411.com

Hilary Corrigan  
CALIFORNIA ENERGY MARKETS  
425 DIVISADERO ST. SUITE 303  
SAN FRANCISCO CA 94117-2242  
(415) 963-4439  
cem@newsdata.com

Avis Kowalewski  
CALPINE CORPORATION  
4160 DUBLIN BLVD, SUITE 100  
DUBLIN CA 94568  
(925) 557-2284  
kowalewskia@calpine.com

Jay Dibble  
CALPINE CORPORATION  
717 TEXAS AVENUE, SUITE 1000  
HOUSTON TX 77002  
(713) 570-3514  
jdibble@calpine.com

Gary Baum  
City Attorney  
CITY OF PALO ALTO  
250 HAMILTON AVENUE  
PALO ALTO CA 94301  
(650) 329-2171  
Grant.kolling@CityofPaloAlto.org  
For: City of Palo Alto

---

Karla Dailey  
Sr. Resource Planner  
CITY OF PALO ALTO  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(650) 329-2523  
karla.Dailey@CityofPaloAlto.org

Doug Van Brunt  
CREDIT SUISSE  
11000 LOUISIANA STREET, STE. 4600  
HOUSTON TX 77002  
(713) 890-1602  
doug.vanbrunt@creditsuisse.com

Peter G. Esposito  
CRESTED BUTTE CATALYSTS LLC  
PO BOX 668 / 1181 GOTHIC CORRIDOR CR317  
CRESTED BUTTE CO 81224  
(970) 349-2080  
peteresposito@earthlink.net

Edward W. O'Neill  
DAVIS WRIGHT TREMAINE  
505 MONTGOMERY STREET, SUITE 800  
SAN FRANCISCO CA 94111-6533  
(415) 276-6500  
edwardoneill@dwt.com

Ralph R. Nevis  
DAY CARTER & MURPHY LLP  
3620 AMERICAN RIVER DR., SUITE 205  
SACRAMENTO CA 95864  
(916) 570-2500 X109  
RNevis@daycartermurphy.com

\*\*\*\*\* SERVICE LIST \*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT  
A0909013 LIST

Gregory S.G. Klatt  
DOUGLASS & LIDDELL  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(626) 294-9421  
klatt@energyattorney.com

Cassandra Sweet  
DOW JONES NEWSWIRES  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(415) 439-6468  
cassandra.sweet@dowjones.com

Michelle D. Grant  
DYNEGY, INC.  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(713) 767-0387  
michelle.d.grant@dynegy.com

William W. Tomlinson  
EL PASO CORPORATION  
2 NORTH NEVADA AVE.  
COLORADO SPRINGS CA 80919  
(719) 520-4579  
william.tomlinson@elpaso.com

Brian Biering  
Attorney At Law  
ELLISON SCHNEIDER & HARRIS  
2600 CAPITOL AVENUE, SUITE 400  
SACRAMENTO CA 95816-5905  
(916) 447-2166  
bsb@eslawfirm.com

Jeffery D. Harris  
ELLISON, SCHNEIDER & HARRIS LLP  
2600 CAPITOL AVENUE, SUITE 400  
SACRAMENTO CA 95816-5905  
(916) 447-2166  
jdh@eslawfirm.com

Joshua Sperry  
ENGINEERS & SCIENTISTS OF CA.-LOCAL 20  
835 HOWARD STREET, 2ND FLOOR  
SAN FRANCISCO CA 94103  
(415) 543-8320  
jsperry@ifpte20.org

Eva N. Neufeld  
Associate General Counsel  
GAS TRANSMISSION NORTHWEST CORPORATION  
717 TEXAS STREET, SUITE 26260  
HOUSTON TX 77002-2761  
(832) 320-5623  
eva\_neufeld@transcanada.com

Robert Gnaizda  
Of Counsel  
200 29TH STREET, NO. 1  
SAN FRANCISCO CA 94131  
(415) 307-3320  
RobertGnaizda@gmail.com

Jeanne B. Armstrong  
GOODIN MACBRIDE SQUERI RITCHIE & DAY LLP  
505 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94111  
(415) 392-7900  
jarmstrong@gmsr.com

Julie Morris  
IBERDROLA RENEWABLES INC  
1125 NW COUCH STREET, SUITE 700  
PORTLAND OR 97209  
(503) 796-7078  
Julie.Morris@iberdrolaren.com

William Marcus  
JBS ENERGY, INC.  
311 D STREET, SUITE A  
WEST SACRAMENTO CA 95605  
(916) 372-0534  
bill@jbsenergy.com

Jorge Corralejo  
Chairman / President  
LAT. BUS. CHAMBER OF GREATER L.A.  
634 S. SPRING STREET, STE 600  
LOS ANGELES CA 90014  
(213) 347-0008  
jcorralejo@lbcgla.org  
For: Latino Business Chamber of Greater Los Angeles

---

James J. Heckler  
LEVIN CAPITAL STRATEGIES  
595 MADISON AVENUE  
NEW YORK NY 10022  
(212) 259-0851  
jheckler@levincap.com

\*\*\*\*\*SERVICE LIST\*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT  
A0909013 LIST

Cleo Zagrean  
MACQUARIE CAPITAL (USA)  
EMAIL ONLY  
EMAIL ONLY NY 00000  
(212) 231-1749  
cleo.zagrean@macquarie.com

Tara S. Kaushik  
MANATT, PHELPS & PHILLIPS, LLP  
ONE EMBARCADERO CENTER, 30TH FLOOR  
SAN FRANCISCO CA 94111  
(415) 291-7409  
tkaushik@manatt.com  
For: Gas Transmission Northwest Corporation

---

MRW & ASSOCIATES, LLC  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(510) 834-1999  
mrw@mrwassoc.com

Faith Bautista  
President  
NATIONAL ASIAN AMERICAN COALITION  
1758 EL CAMINO REAL  
SAN BRUNO CA 94066  
(415) 307-3320  
Faith.Mabuhayalliance@gmail.com  
For: National Asian American Coalition

---

Ray Welch  
Associate Director  
NAVIGANT CONSULTING, INC.  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(415) 399-2176  
ray.welch@navigantconsulting.com

Nathan Solov  
OFFICE OF ASSEMBLYMAN JERRY HILL  
PO BOX 942849  
SACRAMENTO CA 94249-0019  
nathan.solov@asm.ca.gov

Roger Graham  
PACIFIC GAS & ELECTRIC COMPANY  
245 MARKET STREET, MC N15A  
SAN FRANCISCO CA 94105  
RAG5@pge.com

Carl Orr  
PACIFIC GAS AND ELECTRIC COMPANY  
245 MARKET STREET, MC N15A  
SAN FRANCISCO CA 94105  
CDO1@pge.com

Case Administration  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE STREET, MC B9A  
SAN FRANCISCO CA 94177  
RegRelCPUCCases@pge.com

Case Coordination  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE ST., PO BOX 770000 MC B9A  
SAN FRANCISCO CA 94105  
(415) 973-2776  
RegRelCPUCCases@pge.com

Daniel McLafferty  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE ST., B10B  
SAN FRANCISCO CA 94105  
(415) 973-2592  
mdm8@pge.com

Jennifer Dowdell  
PACIFIC GAS AND ELECTRIC COMPANY  
44 BEALE STREET, MC B10C  
SAN FRANCISCO CA 94105  
(415) 973-8098  
JKD5@pge.com

Kenneth Brennan  
PACIFIC GAS AND ELECTRIC COMPANY  
PO BOX 770000, MC N15A  
SAN FRANCISCO CA 94177  
KJBh@pge.com

Kristina M. Castrence  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE ST., MC B10A  
SAN FRANCISCO CA 94105  
(415) 973-1479  
kmmj@pge.com

Mark D. Patrizio  
PACIFIC GAS AND ELECTRIC COMPANY  
PO BOX 7442, B30A  
SAN FRANCISCO CA 94120  
MDP5@pge.com  
For: Pacific Gas and Electric Company

---

\*\*\*\*\*SERVICE LIST\*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT  
A0909013 LIST

Nicolas Klein  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE STREET, MC B9A  
SAN FRANCISCO CA 94105  
NXKI@pge.com

Tom Roth  
ROTH ENERGY COMPANY  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(213) 622-6700  
rothenery@sbcglobal.net

Marcie A. Milner  
SHELL ENERGY NORTH AMERICA (US), L.P.  
4445 EASTGATE MALL, STE. 100  
SAN DIEGO CA 92121  
(858) 526-2106  
marcie.milner@shell.com

Sandra Moorman  
SMUD  
6301 S STREET  
SACRAMENTO CA 95817  
(916) 732-6951  
smoorma@smud.org

Michael S. Alexander  
Energy Supplly And Management  
SOUTHERN CALIFORNIA EDISON  
2244 WALNUT GROVE AVE  
ROSEMEAD CA 91006  
(626) 302-2029  
michael.alexander@sce.com

Jeffrey L. Salazar  
SOUTHERN CALIFORNIA GAS COMPANY  
555 WEST FIFTH STREET, GT14D6  
LOS ANGELES CA 90013  
JL.Salazar@SempraUtilities.com

Brandi E. Day  
SPARK ENERGY GAS, LP  
2105 CITYWEST BLVD., SUITE 100  
HOUSTON TX 77042  
(713) 977-5634  
bday@sparkenergy.com

Julien Dumoulin-Smith  
Associate Analyst  
UBS INVESTMENT RESEARCH  
1285 AVENUE OF THE AMERICAS  
NEW YORK NY 10019  
(212) 713-9848  
julien.dumoulin-smith@ubs.com

Jason A. Dubchak  
WILD GOOSE STORAGE LLC  
607 8TH AVENUE S.W., SUITE 400  
CALGARY AB T2P 047  
CANADA  
(403) 513-8647  
jason.dubchak@niskags.com

Lisa A. Cottle  
THOMAS A. SOLOMON  
WINSTON & STRAWN LLP  
101 CALIFORNIA STREET, 39TH FLOOR  
SAN FRANCISCO CA 94114  
(415) 591-1579  
lcottle@winston.com  
For: Mirant California, LLC and Mirant Delta, LLC

---

Thomas W. Solomon  
LISA A. COTTLE  
Attorney At Law  
WINSTON & STRAWN LLP  
101 CALIFORNIA STREET, 39TH FLOOR  
SAN FRANCISCO CA 94111-5894  
(415) 591-1000  
tsolomon@winston.com  
For: Mirant California, LLC/Mirant Delta, LLC

---

Andrew Yim  
ZIMMER LUCAS PARTNERS  
535 MADISON AVE., 6TH FLOOR  
NEW YORK NY 10022  
(212) 440-0761  
Yim@ZimmerLucas.com

\*\*\*\*\*SERVICE LIST\*\*\*\*\*

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\*\*\*\*\*PARTIES\*\*\*\*\*

Rachael E. Koss  
ADAMS BROADWELL JOSEPH & CARDOZO  
601 GATEWAY BOULEVARD, SUITE 1000  
SOUTH SAN FRANCISCO CA 94080  
(650) 589-1660 X20  
rkoss@adamsbroadwell.com  
For: Coalition of California Utility Employees

---

Mike Lamond  
Chief Financial Officer  
ALPINE NATURAL GAS OPERATING CO. #1 LLC  
PO BOX 550, 15 ST. ANDREWS ROAD  
VALLEY SPRINGS CA 95252  
(209) 772-3006  
Mike@alpinenaturalgas.com  
For: Alpine Natural Gas

---

Len Canty  
Chairman  
BLACK ECONOMIC COUNCIL  
484 LAKE PARK AVE., SUITE 338  
OAKLAND CA 94610  
(510) 452-1337  
lencanty@BlackEconomicCouncil.org  
For: Black Economic Council

---

Transmission Evaluation Unit  
CALIFORNIA ENERGY COMMISSION  
1516 NINTH STREET, MS-46  
SACRAMENTO CA 95814-5512  
For: California Energy Commission

---

Bob Gorham  
Division Chief -Pipeline Safety Division  
CALIFORNIA STATE FIRE MARSHALL  
3950 PARAMOUNT BLVD., NO. 210  
LAKEWOOD CA 90712  
(562) 497-9102  
bob.gorham@fire.ca.gov  
For: California State Fire Marshall - Safety Division

---

Michael E. Boyd  
CALIFORNIANS FOR RENEWABLE ENERGY, INC.  
5439 SOQUEL DRIVE  
SOQUEL CA 95073  
(408) 891-9677  
michaelboyd@sbcglobal.net  
For: Californians for Renewable Energy, Inc.

---

Stephen Cittadine  
CENTRAL VALLEY GAS STORAGE, LLC  
3333 WARRENVILLE ROAD, STE. 630  
LISLE IL 60532  
(630) 245-7845  
scittad@nicor.com  
For: Central Valley Gas Storage, LLC

---

Austin M. Yang  
DENNIS J. HERRERA/THERESA L. MUELLER  
CITY AND COUNTY OF SAN FRANCISCO  
OFFICE OF THE CITY ATTORNEY, RM. 234  
1 DR. CARLTON B. GODDLETT PLACE  
SAN FRANCISCO CA 94102-4682  
(415) 554-6761  
austin.yang@sfgov.org  
For: City and County of San Francisco

---

Connie Jackson  
City Manager  
CITY OF SAN BRUNO  
567 EL CAMINO REAL  
SAN BRUNO CA 94066-4299  
(650) 616-7056  
cjackson@sanbruno.ca.gov  
For: City of San Bruno

---

Sarah Grossman-Swenson  
JOHN DAVIS, JR.  
DAVIS, COWELL & BOWE, LLP  
595 MARKET STREET, STE. 1400  
SAN FRANCISCO CA 94105  
(415) 977-7200  
sgs@dcbsf.com  
For: Plumbers & Steamfitters Union Local Nos. 246 & 342

---

Rebecca Williford  
Ld Access/Ryder Fndtn Fellowship Atty.  
DISABILITY RIGHTS ADVOCATES  
2001 CENTER STREET, THIRD FLOOR  
BERKELEY CA 94704-1204  
(510) 665-8644 X123  
rwilliford@dralegal.org  
For: Disability Rights Advocates

---

\*\*\*\*\*SERVICE LIST\*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT  
R1102019 LIST

Dan L. Carroll  
Attorney At Law  
DOWNEY BRAND, LLP  
621 CAPITOL MALL, 18TH FLOOR  
SACRAMENTO CA 95814  
(916) 520-5239  
dcarroll@downeybrand.com  
For: Lodi Gas Storage, LLC

---

Dave Weber  
GILL RANCH STORAGE, LLC  
220 NW SECOND AVENUE  
PORTLAND OR 97209  
(503) 220-2405  
Dave.Weber@nwnatural.com  
For: Gill Ranch Storage, LLC

---

Norman A. Pedersen  
Attorney At Law  
HANNA & MORTON  
444 S. FLOWER STREET, SUITE 1500  
LOS ANGELES CA 90071  
(213) 430-2510  
npedersen@hanmor.com  
For: Southern California Generation Coalition

---

Gregory Heiden  
Legal Division  
RM. 5039  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 355-5539  
gxh@cpuc.ca.gov  
For: CPSD

Alfred F. Jahns  
LAW OFFICE ALFRED F. JAHNS  
3620 AMERICAN RIVER DRIVE, SUITE 105  
SACRAMENTO CA 95864  
(916) 483-5000  
ajahns@jahnsatlaw.com  
For: Sacramento Natural Gas Storage, LLC

---

Barry F. Mccarthy  
Attorney  
MCCARTHY & BERLIN, LLP  
100 W. SAN FERNANDO ST., SUITE 501  
SAN JOSE CA 95113  
(408) 288-2080  
bmcc@mccarthylaw.com  
For: Northern California Generation Coalition (NCGC)

---

Steven R. Meyers  
Principal  
MEYERS NAVE  
555 12TH STREET, STE. 1500  
OAKLAND CA 94607  
(510) 808-2000  
smeyers@meyersnave.com  
For: City of San Bruno

---

Faith Bautista  
President  
NATIONAL ASIAN AMERICAN COALITION  
1758 EL CAMINO REAL  
SAN BRUNO CA 94066  
(415) 307-3320  
Faith.Mabuhayalliance@gmail.com  
For: National Asian American Coalition

---

Brian K. Cherry  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE ST., MC B10C, PO BOX 770000  
SAN FRANCISCO CA 94177  
(415) 973-4977  
bkc7@pge.com  
For: Pacific Gas and Electric Company

---

Christopher P. Johns  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE STREET  
SAN FRANCISCO CA 94105  
cpj2@pge.com  
For: Pacific Gas and Electric Company

---

Steven Garber  
PACIFIC GAS AND ELECTRIC COMPANY  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(415) 973-2916  
SLG0@pge.com  
For: Pacific Gas and Electric Company

---

Marion Peleo  
Legal Division  
RM. 4107  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2130  
map@cpuc.ca.gov  
For: DRA



\*\*\*\*\* SERVICE LIST \*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT  
R1102019 LIST

William W. Westerfield Iii  
SACRAMENTO MUNICIPAL UTILITY DISTRICT  
6201 S ST., MS B406 / PO BOX 15830  
SACRAMENTO CA 95852-1830  
(916) 732-7107  
wwester@smud.org  
For: Sacramento Municipal Utility District

---

Douglas Porter  
SOUTHERN CALIFORNIA EDISON COMPANY  
2244 WALNUT GROVE AVE./PO BOX 800  
ROSEMEAD CA 91770  
(626) 302-3964  
douglas.porter@sce.com  
For: So. Calif. Edison Co. (Catalina Island)

---

Sharon L. Tomkins  
SOUTHERN CALIFORNIA GAS COMPANY  
555 WEST FIFTH STREET, SUITE 1400  
LOS ANGELES CA 90013-1034  
(213) 244-2955  
STomkins@semprautilities.com  
For: San Diego Gas & Electric Company/Southern California Gas Company

---

Justin Lee Brown  
Assist Counsel - Legal  
SOUTHWEST GAS CORPORATION  
5241 SPRING MOUNTAIN ROAD  
LAS VEGAS NV 89150-0002  
(702) 876-7183  
justin.brown@swgas.com  
For: Southwest Gas Corporation

---

Stephanie C. Chen  
Attorney  
THE GREENLINING INSTITUTE  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(510) 898-0506  
StephanieC@greenlining.org  
For: The Greenlining Institute

---

Marcel Hawiger  
THE UTILITY REFORM NETWORK  
115 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94104  
(415) 929-8876  
marcel@turn.org  
For: The Utility Reform Network

---

Carl Wood  
UTILITY WORKERS UNION OF AMERICA  
EMAIL ONLY  
EMAIL ONLY CA 00000-0000  
(951) 567-1199  
carlwood@uwua.net  
For: Utility Workers Union of America

---

Raymond J. Czahar  
Chief Financial Officer  
WEST COAST GAS CO., INC.  
9203 BEATTY DR.  
SACRAMENTO CA 95826-9702  
(916) 364-4100  
westgas@aol.com  
For: West Coast Gas Company, Inc.

---

Jason A. Dubchak  
WILD GOOSE STORAGE LLC  
607 8TH AVENUE S.W., SUITE 400  
CALGARY AB T2P 047  
CANADA  
(403) 513-8647  
jason.dubchak@niskags.com  
For: Wild Goose Storage, LLC

---

\*\*\*\*\* STATE EMPLOYEE \*\*\*\*\*

Joyce Alfton  
Energy Division  
AREA 4-A  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2616  
alf@cpuc.ca.gov

Maribeth A. Bushey  
Administrative Law Judge Division  
RM. 5018  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-3362  
mab@cpuc.ca.gov

Janill Richards  
Deputy Attorney General  
CALIFORNIA ATTORNEY GENERAL'S OFFICE  
1515 CLAY STREET, 20TH FLOOR  
OAKLAND CA 94702  
(510) 622-2130  
janill.richards@doj.ca.gov  
For: Department of Justice

---

\*\*\*\*\*SERVICE LIST\*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT  
R1102019 LIST

Geoffrey Lesh  
CALIFORNIA ENERGY COMMISSION  
1516 9TH STREET, MS-46  
SACRAMENTO CA 95814  
(916) 651-9859  
glesh@energy.state.ca.us

Robert Kennedy  
CALIFORNIA ENERGY COMMISSION  
1516 9TH STREET, MS-20  
SACRAMENTO CA 95814  
(916) 654-5061  
rkennedy@energy.state.ca.us

Sylvia Bender  
CALIFORNIA ENERGY COMMISSION  
1516 NINTH STREET, MS 29  
SACRAMENTO CA 95814  
sbender@energy.state.ca.us

D. Isaiah Larsen, P.E.  
CPUC  
CPSD  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(415) 793-6472  
MD7@cpuc.ca.gov

Eugene Cadenasso  
Energy Division  
AREA 4-A  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1214  
cpe@cpuc.ca.gov

Aimee Cauquiran  
Consumer Protection & Safety Division  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2055  
aad@cpuc.ca.gov

Darryl J. Gruen  
Legal Division  
RM. 5133  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1973  
djg@cpuc.ca.gov

Julie Halligan  
Consumer Protection & Safety Division  
RM. 2203  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1587  
jmh@cpuc.ca.gov

Kelly C. Lee  
Division of Ratepayer Advocates  
RM. 4102  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1795  
kcl@cpuc.ca.gov

Elizabeth M. McQuillan  
Legal Division  
RM. 4107  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1471  
emm@cpuc.ca.gov

Angela K. Minkin  
Executive Division  
RM. 5017  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1573  
ang@cpuc.ca.gov

Harvey Y. Morris  
Legal Division  
RM. 5036  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1086  
hym@cpuc.ca.gov

Richard A. Myers  
Energy Division  
AREA 4-A  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1228  
ram@cpuc.ca.gov

David Peck  
Division of Ratepayer Advocates  
RM. 4108  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1213  
dbp@cpuc.ca.gov

\*\*\*\*\* SERVICE LIST \*\*\*\*\*

Last Updated on 10-OCT-2011 by: AMT  
R1102019 LIST

Paul A. Penney  
Consumer Protection & Safety Division  
AREA 2-D  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1817  
pap@cpuc.ca.gov

Paul S. Phillips  
Executive Division  
RM. 4-A  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2274  
psp@cpuc.ca.gov

Robert M. Pocta  
Division of Ratepayer Advocates  
RM. 4205  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2871  
rmp@cpuc.ca.gov

Marcelo Poirier  
Legal Division  
RM. 5025  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2913  
mpo@cpuc.ca.gov

Jonathan J. Reiger  
Legal Division  
RM. 5035  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 355-5596  
jzr@cpuc.ca.gov

Pearlie Sabino  
Division of Ratepayer Advocates  
RM. 4209  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-1883  
pzs@cpuc.ca.gov

Sarah R. Thomas  
Executive Division  
RM. 5033  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2310  
srt@cpuc.ca.gov

Matthew Tisdale  
Executive Division  
RM. 5202  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-5137  
mwt@cpuc.ca.gov

\*\*\*\*\* INFORMATION ONLY \*\*\*\*\*

Richard Kuprewicz  
ACCUFACTS, INC.  
4643 - 192ND DR., NE  
REDMOND WA 98074-4641  
(425) 836-4041  
kuprewicz@comcast.net

David Marcus  
ADAMS BROADWELL & JOSEPH  
PO BOX 1287  
BERKELEY CA 94701-1287  
(510) 528-0728  
dmarcus2@sbcglobal.net

Marc D. Joseph  
ADAMS BROADWELL JOSEPH & CARDOZO  
601 GATEWAY BLVD., STE. 1000  
SOUTH SAN FRANCISCO CA 94080-7037  
(650) 589-1660  
mdjoseph@adamsbroadwell.com

Karen Terranova  
ALCANTAR & KAHL  
33 NEW MONTGOMERY ST., STE. 1850  
SAN FRANCISCO CA 94105  
(415) 403-5542  
filings@a-klaw.com

Seema Srinivasan  
ALCANTAR & KAHL  
33 NEW MONTGOMERY ST., SUITE 1850  
SAN FRANCISCO CA 94105  
(415) 403-5542  
sls@a-klaw.com

Mike Cade  
ALCANTAR & KAHL, LLP  
1300 SW 5TH AVE, SUITE 1750  
PORTLAND OR 97201  
(503) 402-8711  
wmc@a-klaw.com

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Rochelle Alexander  
445 VALVERDE DRIVE  
SOUTH SAN FRANCISCO CA 94080  
(650) 588-3702

Andrew Gay  
ARC ASSET MANAGEMENT, LTD  
237 PARK AVENUE, 9TH FLOOR  
NEW YORK NY 10017  
(212) 231-4960  
andrewgay@arcassetltd.com

Ellen Isaacs  
Trans. Deputy  
ASM MIKE FEUER  
9200 SUNSET BLVD., STE. 1212  
WEST HOLLYWOOD CA 90069  
(610) 285-5490  
ellen.isaacs@asm.ca.gov

Catherine M. Elder  
ASPEN ENVIRONMENT GROUP  
8801 FOLSOM BLVD., SUITE 290  
SACRAMENTO CA 95826  
(916) 397-0350  
kelder@aspeneg.com

Bregory Van Pelt  
CAL. INDEPENDENT SYSTEM OPERATOR  
250 OUTCROPPING WAY  
FOLSOM CA 95630  
(916) 351-2190  
gvanpelt@caiso.com

Beth Ann Burns  
CAL. INDEPENDENT SYSTEM OPERATOR CORP.  
250 OUTCROPPING WAY  
FOLSOM CA 95630  
(916) 608-7146  
bburns@caiso.com  
For: CAISO

---

CALIFORNIA ENERGY MARKETS  
425 DIVISADERO ST. STE 303  
SAN FRANCISCO CA 94117-2242  
(415) 936-4439  
cem@newsdata.com

Susan Durbin  
CALIFORNIA STATE DEPARTMENT OF JUSTICE  
1300 I STREET, PO BOX 944255  
SACRAMENTO CA 94244-2550  
(916) 324-5475  
Susan.Durbin@doj.ca.gov

Leslie Carney  
4804 LAUREL CANYON BLVD., NO. 399  
VALLEY VILLAGE CA 91607  
(818) 404-4034  
carneycomic@sbcglobal.net

Melissa Kasnitz  
CENTER FOR ACCESSIBLE TECHNOLOGY  
3075 ADELINE STREET, STE. 220  
BERKELEY CA 94703  
(510) 841-3224 X2019  
service@cforat.org

Theresa L. Mueller  
CITY AND COUNTY OF SAN FRANCISCO  
CITY HALL, ROOM 234  
1 DR. CARLTON B. GOODLETT PLACE  
SAN FRANCISCO CA 94102-4682  
(415) 554-4640  
theresa.mueller@sfgov.org

Grant Kolling  
CITY OF PALO ALTO  
EMAIL ONLY  
EMAIL ONLY CA 00000  
grant.kolling@cityofpaloalto.org

Karla Dailey  
Sr. Resource Planner  
CITY OF PALO ALTO  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(650) 329-2523  
karla.Dailey@CityofPaloAlto.org

Christine Tam  
CITY OF PALO ALTO - UTILITIES  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(650) 329-2289  
christine.tam@cityofpaloalto.org

Geoff Caldwell  
Police Sergeant - Police Dept.  
CITY OF SAN BRUNO  
567 EL CAMINO REAL  
SAN BRUNO CA 94066-4299  
(650) 616-7100  
gcaldwell@sanbruno.ca.gov

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Klara A. Fabry  
Dir. - Dept. Of Public Services  
CITY OF SAN BRUNO  
567 EL CAMINO REAL  
SAN BRUNO CA 94066-4247  
(650) 616-7065  
kfabry@sanbruno.ca.gov  
For: City of San Bruno

---

David E. Torres  
Field Operation Manager  
CITY OF SOUTHGATE  
4244 SANTA ANA ST.  
SOUTHGATE CA 90280  
(323) 563-5784  
dtorres@sogate.org

Wisam Altowaiji  
Public Works Manager  
CITY OF TUSTIN  
300 CENTENNIAL WAY  
TUSTIN CA 92780  
waltowaiji@tustinca.org

Nicole Blake  
CONSUMER FEDERATION OF CALIFORNIA  
1107 9TH STREET, STE. 625  
SACRAMENTO CA 95814  
(916) 498-9608  
blake@consumercal.org

Thomas Beach  
CROSSBORDER ENERGY  
2560 9TH ST., SUITE 213A  
BERKELEY CA 94710-2557  
(510) 549-6922  
tomb@crossborderenergy.com

Joe Como  
Division of Ratepayer Advocates  
RM. 4101  
505 Van Ness Avenue  
San Francisco CA 94102 3298  
(415) 703-2381  
joc@cpuc.ca.gov  
For: DRA

John J. Davis  
DAVIS COWELL & BOWE, LLP  
595 MARKET STREET, STE. 1400  
SAN FRANCISCO CA 94105  
(415) 597-7200  
jjdavis@dcbsf.com

Ann L. Trowbridge  
DAY CARTER & MURPHY LLP  
3620 AMERICAN RIVER DRIVE, SUITE 205  
SACRAMENTO CA 95864  
(916) 570-2500 X103  
atrowbridge@daycartermurphy.com

Scott Senchak  
DECADE CAPITAL  
EMAIL ONLY  
EMAIL ONLY NY 00000-0000  
(212) 320-1933  
scott.senchak@decade-llc.com

Lauren Duke  
DEUTSCHE BANK SECURITIES INC.  
EMAIL ONLY  
EMAIL ONLY NY 00000  
(212) 250-8204  
lauren.duke@db.com

Daniel W. Douglass  
Attorney  
DOUGLASS & LIDDELL  
21700 OXNARD ST., STE. 1030  
WOODLAND HILLS CA 91367  
(818) 961-3001  
douglass@energyattorney.com  
For: TranswesternPipeline Company

---

Gregory Klatt  
DOUGLASS & LIDDELL  
411 E. HUNTINGTON DR., STE. 107-356  
ARCADIA CA 91006  
(818) 961-3002  
klatt@energyattorney.com

Cassandra Sweet  
DOW JONES NEWSWIRES  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(415) 439-6468  
cassandra.sweet@dowjones.com

Daniel J. Brink  
Counsel  
EXXON MOBIL CORP.  
800 BELL ST., RM. 3497-0  
HOUSTON TX 77002  
(713) 656-4418  
daniel.j.brink@exxonmobil.com

\*\*\*\*\*SERVICE LIST\*\*\*\*\*

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Sean P. Beatty  
Dir - West Regulatory Affairs  
GENON ENERGY, INC.  
PO BOX 192  
PITTSBURGH CA 94565  
(925) 427-3483  
sean.beatty@genon.com

Robert Gnaizda  
Of Counsel  
200 29TH STREET, NO. 1  
SAN FRANCISCO CA 94131  
(415) 307-3320  
RobertGnaizda@gmail.com

Jeanne B. Armstrong  
Attorney  
GOODIN MACBRIDE SQUERI DAY & LAMPREY LLP  
505 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94111  
(415) 392-7900  
jarmstrong@goodinmacbride.com  
For: Wild Goose Storage,, LLC

---

Brian T. Cragg  
GOODIN, MACBRIDE, SQUERI, DAY & LAMPREY  
505 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94111  
(415) 392-7900  
bcragg@goodinmacbride.com  
For: Engineers and Scientists of California, Local 20

---

Jorge Corralejo  
Chairman / President  
LAT. BUS. CHAMBER OF GREATER L.A.  
634 S. SPRING STREET, STE 600  
LOS ANGELES CA 90014  
(213) 347-0008  
jcorralejo@lbcgla.org  
For: Latino Business Chamber of Greater Los Angeles

---

James J. Heckler  
LEVIN CAPITAL STRATEGIES  
EMAIL ONLY  
EMAIL ONLY NY 00000  
(212) 259-0851  
jheckler@levincap.com

Scott Collier  
LOCI GAS STORAGE, LLC  
EMAIL ONLY  
EMAIL ONLY CA 00000  
tcollier@buckeye.com

Greg Clark  
Compliance Mgr.  
LODI GAS STORAGE, LLC  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(209) 368-9277 X21  
gclark@lodistorage.com

Robert Russell  
LODI GAS STORAGE, LLC  
EMAIL ONLY  
EMAIL ONLY CA 00000  
rrussell@lodistorage.com

William H. Schmidt, Jr  
LODI GAS STORAGE, LLC  
FIVE TEK PARK  
9999 HAMILTON BOULEVARD  
BREINIGSVILLE PA 18031  
(832) 615-8610  
wschmidt@buckeye.com  
For: Lodi Gas Storage, LLC

---

Priscila Castillo  
LOS ANGELES DEPT OF WATER & POWER  
111 NORTH HOPE ST., RM. 340  
LOS ANGELES CA 90012  
(213) 367-2850  
priscila.castillo@ladwp.com

Robert L. Pettinato  
LOS ANGELES DEPT. OF WATER & POWER  
111 NORTH HOPE ST., RM. 1150  
LOS ANGELES CA 90012  
(213) 367-1735  
robert.pettinato@hdwp.com

John W. Leslie  
LUCE FORWARD HAMILTON & SCRIPPS LLP  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(619) 699-2536  
jleslie@luce.com

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Cleo Zagrean  
MACQUARIE CAPITAL (USA)  
EMAIL ONLY  
EMAIL ONLY NY 00000  
(212) 231-1749  
cleo.zagrean@macquarie.com

C. Susie Berlin  
Attorney At Law  
MC CARTHY & BERLIN, LLP  
100 W SAN FERNANDO ST., STE 501  
SAN JOSE CA 95113  
(408) 288-2080  
sberlin@mccarthyllaw.com

Jim Mcquiston  
MCQUISTON ASSOCIATES  
6212 YUCCA STREET  
LOS ANGELES CA 90028-5223

Britt Strotman  
Attorney At Law  
MEYERS NAVE  
555 12TH STREET, STE. 1500  
OAKLAND CA 94607  
(510) 808-2000  
bstrotman@meyersnave.com  
For: City of San Bruno

---

MRW & ASSOCIATES, LLC  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(510) 834-1999  
mrw@mrwassoc.com

Ray Welch  
Associate Director  
NAVIGANT CONSULTING, INC.  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(415) 399-2176  
ray.welch@navigantconsulting.com

Martin A. Mattes  
Attorney  
NOSSAMAN, LLP  
50 CALIFORNIA STREET, 34TH FLOOR  
SAN FRANCISCO CA 94111-4799  
(415) 398-3600  
mmattes@nossaman.com

Joseph M. Malkin  
Attorney At Law  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
405 HOWARD STREET  
SAN FRANCISCO CA 94105  
(415) 773-5705  
jmalkin@orrick.com  
For: Pacific Gas and Electric Company

---

Allie McMahon  
PACIFIC GAS & ELECTRIC COMPANY  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(415) 973-0107  
a2mx@pge.com

Jessica Tsang  
PACIFIC GAS & ELECTRIC COMPANY  
EMAIL ONLY  
EMAIL ONLY CA 00000  
j2ti@pge.com

Melissa A. Lavinson  
PACIFIC GAS & ELECTRIC COMPANY  
900 7TH ST., NW STE. 950  
WASHINGTON DC 20001  
(202) 638-1958  
malp@pge.com

PACIFIC GAS AND ELECTRIC COMPANY  
EMAIL ONLY  
EMAIL ONLY CA 00000  
regrelcpuccases@pge.com

Anthea Lee  
PACIFIC GAS AND ELECTRIC COMPANY  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(415) 973-5382  
AGL9@pge.com

Christine Munce  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE ST., MC B9A  
SAN FRANCISCO CA 94105  
(415) 973-7806  
C4MU@pge.com

Chuck Marre  
PACIFIC GAS AND ELECTRIC COMPANY  
EMAIL ONLY  
EMAIL ONLY CA 00000  
CMM6@pge.com

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Daren Chan  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE ST., MC B10C  
SAN FRANCISCO CA 94105  
(415) 973-5361  
d1ct@pge.com

Jonathan D. Pendleton  
Attorney At Law  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE STREET, B30A  
SAN FRANCISCO CA 94105  
(415) 973-2916  
jlpc@pge.com  
For: Pacific Gas and Electric Company

---

Kerry C. Klein  
Attorney At Law  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE ST., MC B30A  
SAN FRANCISCO CA 94105  
(415) 973-3251  
kck5@pge.com

Kristina M. Castrence  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE ST., MC B10A  
SAN FRANCISCO CA 84105  
(415) 973-1479  
kmmj@pge.com

Trina Horner  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE ST., MC B10C  
SAN FRANCISCO CA 94105  
tnhc@pge.com

William V. Manheim  
Attorney At Law  
PACIFIC GAS AND ELECTRIC COMPANY  
77 BEALE ST., MC B30A  
SAN FRANCISCO CA 94105  
(415) 973-6628  
wvm3@pge.com  
For: Pacific Gas and Electric Company

---

Timothy Rea  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(650) 454-6400  
timothyrea@hotmail.com

Jason Hunter  
RIVERSIDE PUBLIC UTILITIES  
3435 14TH STREET  
RIVERSIDE CA 92501  
(951) 715-2637  
jhunter@riversideca.gov

Timothy Tutt  
SACRAMENTO MUNICIPAL UTILITY DISTRICT  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(916) 732-5038  
ttutt@smud.org

Sharon Randle  
SAN BRUNO GAS SAFETY TEAM  
505 VAN NESS AVE., RM. 2-D  
SAN FRANCISCO CA 94102  
(415) 703-1056  
SanBrunoGasSafety@cpuc.ca.gov

Central Files  
SDG&E AND SOCALGAS  
8330 CENTURY PARK COURT, CP31-E  
SAN DIEGO CA 92123-1550  
(858) 654-1148  
CentralFiles@SempraUtilities.com

Laura Semik  
PO BOX 1107  
BELMONT CA 94002  
(650) 678-1610  
laura@messimer.com

Marcie A. Milner  
SHELL ENERGY NORTH AMERICA (US), L.P.  
4445 EASTGATE MALL, STE. 100  
SAN DIEGO CA 92121  
(858) 526-2106  
marcie.milner@shell.com

Christina Scarborough  
Regional Conservation Organizer  
SIERRA CLUB  
8125 MORSE AVE.  
NORTH HOLLYWOOD CA 91605  
ssc.chrissy@gmail.com

Nadia Aftab  
SOCALGAS/SDG&E  
555 W. FIFTH STREET (GT14D6)  
LOS ANGELES CA 90013  
(213) 244-4843  
Naftab@semprautilities.com



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Janet Combs  
SOUTHERN CALIFORNIA EDISON  
2244 WALNUT GROVE AVENUE  
ROSEMEAD CA 91770  
(626) 302-1524  
janet.combs@sce.com

Michael S. Alexander  
Energy Supply And Management  
SOUTHERN CALIFORNIA EDISON  
2244 WALNUT GROVE AVE  
ROSEMEAD CA 91006  
(626) 302-2029  
michael.alexander@sce.com

Case Administration  
SOUTHERN CALIFORNIA EDISON COMPANY  
2244 WALNUT GROVE AVENUE, PO BOX 800  
ROSEMEAD CA 91770  
(626) 302-1063  
case.admin@sce.com

Gloria Ing  
Attorney At Law  
SOUTHERN CALIFORNIA EDISON COMPANY  
2244 WALNUT GROVE AVE./PO BOX 800  
ROSEMEAD CA 91770  
(626) 302-1999  
gloria.ing@sce.com

Robert F. Lemoine  
Attorney At Law  
SOUTHERN CALIFORNIA EDISON COMPANY  
2244 WALNUT GROVE AVE. SUITE 346L  
ROSEMEAD CA 91770  
(626) 302-4182  
Robert.F.Lemoine@sce.com

Deana Ng  
SOUTHERN CALIFORNIA GAS COMPANY  
555 WEST FIFTH STREET, SUITE 1400  
LOS ANGELES CA 90013-1034  
(213) 244-3013  
DNg@semprautilities.com

Greg Healy  
SOUTHERN CALIFORNIA GAS COMPANY  
555 W. FIFTH ST., GT14D6  
LOS ANGELES CA 90013  
GHealy@semprautilities.com

Jeffrey L. Salazar  
SOUTHERN CALIFORNIA GAS COMPANY  
555 WEST FIFTH STREET, GT14D6  
LOS ANGELES CA 90013  
JLSalazar@SempraUtilities.com

Rasha Prince  
SOUTHERN CALIFORNIA GAS COMPANY  
555 WEST 5TH STREET, GT14D6  
LOS ANGELES CA 90013-1034  
(213) 244-5141  
RPrince@SempraUtilities.com

Ronald S. Cavalleri  
SOUTHERN CALIFORNIA GAS COMPANY  
555 W. FIFTH STREET, GT14D6  
LOS ANGELES CA 90013-1011  
(213) 244-3732  
RCavalleri@SempraUtilities.com

Christy Berger  
Mgr - State Reg Affairs  
SOUTHWEST GAS CORPORATION  
5241 SPRING MOUNTAIN ROAD  
LAS VEGAS NV 89150-0002  
(702) 364-3267  
christy.berger@swgas.com

Jim Mathews  
Admin - Compliance - Engineering  
SOUTHWEST GAS CORPORATION  
5241 SPRING MOUNTAIN ROAD  
LAS VEGAS NV 89150-0002  
(702) 364-3550  
jim.mathews@swgas.com

Michael Rochman  
Managing Director  
SPURR  
1850 GATEWAY BLVD., SUITE 235  
CONCORD CA 94520  
(925) 743-1292  
Service@spurr.org

Pat Jackson  
Branch Manager  
TEAM INDUSTRIAL SERVICES, INC.  
14909 GWENCHRIS COURT  
PARAMOUNT CA 90723  
(562) 531-0797  
pat.jackson@teaminc.com

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Enrique Gallardo  
THE GREENLINING INSTITUTE  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(510) 926-4017  
enriqueg@greenlining.org

Robert Finkelstein  
Legal Director  
THE UTILITY REFORM NETWORK  
115 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94104  
(415) 929-8876 X-307  
bfinkelstein@turn.org

Thomas J. Long  
Attorney At Law  
TURN  
115 SANSOME STREET, SUITE 900  
SAN FRANCISCO CA 94104  
(415) 929-8876  
tlong@turn.org

Aaron J. Lewis  
UC-HASTINGS COLLEGE OF LAW  
721 BAKER STREET  
SAN FRANCISCO CA 94115  
(530) 400-9136  
aaron.joseph.lewis@gmail.com

William Julian  
UTILITY WORKERS UNION OF AMERICA  
43556 ALMOND LANE  
DAVIS CA 95618  
(530) 219-7638  
billjulian@sbcglobal.net

Art Frias  
UWUA LOCAL 132  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(562) 696-0142  
artfrias@uwua.net

Nancy Logan  
UWUA LOCAL 132  
EMAIL ONLY  
EMAIL ONLY CA 00000  
(562) 696-0142  
unionnancy@gmail.com