



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

**FILED**

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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.

Application 08-11-001  
(Filed November 4, 2008)

And Related Matters.

Rulemaking 06-02-013  
Rulemaking 04-04-003  
Rulemaking 04-04-025  
Rulemaking 99-11-022

**COMMENTS OF CALIFORNIANS FOR RENEWABLE ENERGY, INC. (CARE)  
ON PROPOSED SETTLEMENT AND CONSOLIDATING PROCEEDINGS**

Michael E. Boyd President  
CALifornians for Renewable Energy, Inc.  
(CARE)  
5439 Soquel Drive  
Soquel, CA 95073  
Phone: (408) 891-9677  
E-mail: [michaelboyd@sbcglobal.net](mailto:michaelboyd@sbcglobal.net)

October 25<sup>th</sup>, 2010

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## **I. INTRODUCTION**

Pursuant to Rule 12.2<sup>1</sup> of the Commission's Rules of Practice and Procedures Californians for Renewable Energy, Inc. (CARE) respectfully files these Comments on the Proposed Settlement and Consolidating Proceedings. CALifornians for Renewable Energy, Inc. (CARE) respectfully contests, objects to, and protests the October 8, 2010 Proposed Settlement.

CARE is opposed to and contests the settlement as a matter pre-empted by federal law and Federal Energy Regulatory Commission (FERC) Orders.

## **II. PROCEDURAL BACKGROUND**

On October 8, 2010, Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company, The Utility Reform Network, California Cogeneration Council, Independent Energy Producers Association, Cogeneration Association of California, The Energy Producers and Users Coalition, and the Division of Ratepayer Advocates (Moving Parties) filed a joint motion with the California Public Utilities Commission (CPUC) for approval of the Proposed Settlement. Purportedly the Proposed Settlement would resolve numerous outstanding issues in each

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<sup>1</sup> Article 12. Settlements--12.2. (Rule 12.2) Comments.

Parties may file comments contesting all or part of the settlement within 30 days of the date that the motion for adoption of settlement was served.

Comments must specify the portions of the settlement that the party opposes, the legal basis of its opposition, and the factual issues that it contests. If the contesting party asserts that hearing is required by law, the party shall provide appropriate citation and specify the material contested facts that would require a hearing. Any failure by a party to file comments constitutes waiver by that party of all objections to the settlement, including the right to hearing.

Parties may file reply comments within 15 days after the last day for filing comments.

Note: Authority cited: Section 1701, Public Utilities Code. Reference: Section 1701, Public Utilities Code.

of the CPUC captioned proceedings, Application 08-11-001, Rulemaking 06-02-013, Rulemaking 04-04-003, Rulemaking 04-04-025, and Rulemaking 99-11-022 .<sup>2</sup>

Moving Parties concurrently filed a motion for expedited consideration of the Proposed Settlement. Specifically, they request that the time for comments on the Proposed Settlement be reduced from 30 days, as set in Rule 12.2 of the Commission's Rules of Practice and Procedure (Rules), to October 25, 2010. Moving Parties also requested that the time for filing replies to the comments be reduced from 15 days, as set by Rule 12.2, to November 1, 2010. Moving Parties further requested that the Administrative Law Judge's proposed decision be issued on November 16, 2010 and that the matter be scheduled for a Commission vote at its regularly scheduled meeting of December 16, 2010.

In support of their request for this expedited procedural schedule, Moving Parties explain that there are several conditions precedent to the Proposed Settlement becoming effective, the first of which is Commission approval. Other such conditions include Federal Energy Regulatory Commission (FERC) approval of a waiver of investor-owned utility (IOU) obligations under Section 210(m) of the Federal Power Act. *Moving Parties state that the application for waiver cannot be filed at the FERC until after this Commission approves the Proposed Settlement.* Moving Parties claim that given the substantial benefits of the Proposed Settlement, as explained in the joint motion for its approval, expeditious consideration and review is warranted.

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<sup>2</sup> The Settlement Agreement, as well as the rest of the Settlement Agreement documents filed by PG&E with the CPUC on October 8, 2010 are available at the websites of SCE, SDG&E, and PG&E at the URL links below:

SCE: <http://www3.sce.com/law/cpucproceedings.nsf/frmMainPage?ReadForm>

SDG&E: <http://www.sdge.com/regulatory/QFglobal.shtml>

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Moving Parties averred that no party will be prejudiced by the expedited review, noting that they issued notice of a settlement conference on September 24, 2010 and provided the Proposed Settlement's Term Sheet and pro forma agreements and amendments on the IOUs' websites on October 4, 2010.

Mr. Boyd of CARE participated in the October 7, 2010 settlement conference meeting remotely by telephone. As stated in CARE's October 14, 2010 Ex Parte communication<sup>3</sup> to CPUC ALJ Wetzell "[d]uring the October 7, 2010 conference call the Settling Parties stated that they had been told by CPUC staff to enter in to the Settlement with these specific terms including issues clearly outside the scope of those listed proceedings and precluded by Federal law where they seek to settle anyways. This is improper and CARE objects to CPUC staff exercising undue influence on the settlement as specific evidence of constructive retaliatory action against CARE and its members. We believe this is because we represent low-income, people of color and native people ratepayers in our complaints and pleadings before the FERC and CPUC which is a protected activity under both the Federal and State constitutions and civil rights statutes. The CPUC continues to seek to deny us our constitutional right to petition the government for grievances."

On October 19, 2010 the President of the CPUC and Assigned ALJ issued their *Assigned Commissioner and Administrative Law Judge's Joint Ruling and Amended*

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PG&E: <http://www.pge.com/b2b/energysupply/qualifyingfacilities/settlement/>  
<sup>3</sup> <http://docs.cpuc.ca.gov/efile/EXP/125364.pdf>

*Scoping Memo for Consolidated Proceedings* in which the expedited schedule was approved without any opportunity for the Parties to object.<sup>4</sup>

On October 20, 2010 CARE filed an amendment<sup>5</sup> to its September 1, 2010 Formal Complaint of Californians for Renewable Energy, Inc. (CARE) under EL10-84 *et al.*<sup>6</sup> The relief CARE seeks in the Amendment to the Complaint at FERC is straightforward; that FERC review the settlement for compliance with the requirements for wholesale rate setting as set forth in FERC's July 15, 2010 Order 132 FERC ¶ 61,047.

### **III. SHORTENING TIME FOR COMMENTS AND REPLIES ON PROPOSED SETTLEMENT AND CONSOLIDATING PROCEEDINGS VIOLATES PRECEDENT AND PROCEDURAL DUE PROCESS**

Californians for Renewable Energy, Inc. (CARE)<sup>7</sup> respectfully objects to and protests the October 8, 2010 ruling issued on October 13, 2010 Shortening Time for Comments and replies on Proposed Settlement and Consolidating Proceedings.<sup>8</sup> First the proposed schedule violates CARE's procedural due process rights because an October 25, 2010 (12 days) comments due date and a November, 1, 2010 (7 days) reply comment due date is unreasonable and unjustified considering the size of the settlement agreement, its complexity, and the complexity of the issued addressed in this purported "Combined Heat and Power ("CHP") settlement. Additionally Rule 12.2 allows that "[p]arties may

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<sup>4</sup> <http://www.cpuc.ca.gov/EFILE/RULC/125167.htm> at 3.

<sup>5</sup> See Issuance 20101021-3024, Notice of amended complaint re Californians for Renewable Energy, Inc v Pacific Gas and Electric Company et al under EL10-84 *et al.*

<http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12468287>

<sup>6</sup> See Issuance 20100901-3033 Notice of complaint re *Californians for Renewable Energy, Inc v Pacific Gas and Electric Co et al under EL10-84.*

<http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12428401>

<sup>7</sup> CARE in behalf of itself and members Robert Sarvey, and Michael Boyd individually who are QF# 03-80 and QF#03-76 respectively.

<sup>8</sup> <http://www.cpuc.ca.gov/EFILE/RULINGS/124598.htm>

file comments contesting all or part of the settlement within 30 days of the date that the motion for adoption of settlement was served” but the Rule does not specify that the Commission may shorten this comment period to 12 days. Therefore the proposed schedule violates CARE’s procedural due process rights.

Since in the May 2, 2007 ALJ's Ruling<sup>9</sup> following April 24, 2007 PHC Establishing Schedules and Topics for Workshops, Evidentiary Hearings and Briefs and Ruling on Motions for: Party Status, Filing Under Seal, and to Strike Testimony under R.06-02-013 it states “In addition, the Scoping Memo/Assigned Commissioner’s Ruling (ACR) issued September 25, 2006 in this proceeding further clarified that “This proceeding will not be the place to relitigate the targets already established elsewhere.”<sup>10</sup> “Therefore this proposed settlement is not allowed within the scope of R.06-02-013.

Additionally pursuant to Rule 12.1(a); Proposal of Settlements, “Parties may, by written motion any time after the first prehearing conference and within 30 days after the last day of hearing, propose settlements on the resolution of any material issue of law or fact or on a mutually agreeable outcome to the proceeding. Settlements need not be joined by all parties.” Since the hearings in R.06-02-013 where held in 2007 clearly the settlement is not “within 30 days after the last day of hearing”. This also appears to be the case for Docket R.99-11-022 where CARE is not a Party.

In Application 08-11-001 CARE is not a Party also, but in this proceeding SCE addresses the Market Index Formula and As-Available Capacity Prices adopted in D.07-09-040. However under the two rulemaking proceedings where CARE is a Party; R.04-

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<sup>9</sup> <http://docs.epuc.ca.gov/EFILE/RULINGS/67374.htm>

<sup>10</sup> ACR, R.06-02-013, September 25, 2006, p. 17.

04-003 and R.04-04-025, on May 21, 2008 (prior to the Application 08-11-001) CARE filed its Petition for Modification of this same Decision D.07-09-040.

The October 8, 2010 ruling states “Moving Parties aver that no party will be prejudiced by the expedited review, noting that they issued notice of a settlement conference on September 24, 2010 and provided the Proposed Settlement’s Term Sheet and pro forma agreements and amendments on the IOUs’ websites on October 4, 2010. In addition, they presented the Proposed Settlement at a settlement conference on October 7, 2010.” What indifference and extreme prejudice towards CARE’s own May 21, 2008 PTM the MIF does this intend to demonstrate? Clearly we weren’t even given a fair hearing on our PTM.

Parties had only 3 days opportunity to review “the Proposed Settlement’s Term Sheet and pro forma agreements and amendments on the IOUs’ websites on October 4, 2010” for a “settlement conference on October 7, 2010.” According to Rule 12.1 (b) “Notice of the date, time, and place shall be served on all parties at least seven (7) days in advance of the conference.” Clearly the posting of the substantive documents necessary for the settlement conference fails to meet the requirements for proper notice if not the intent of the rule to provide sufficient notice to meaningful and informed participation in the settlement.

During the October 7, 2010 conference call the Settling Parties stated that they had been told by CPUC staff to enter in to the Settlement with these specific terms including issues clearly outside the scope of those listed proceedings and precluded by Federal law where they seek to settle anyways. This is improper and CARE objects to CPUC staff exercising undue influence on the settlement as specific evidence of

constructive retaliatory action against CARE and its members. We believe this is because we represent low-income, people of color and native people ratepayers in our complaints and pleadings before the FERC and CPUC which is a protected activity under both the Federal and State constitutions and civil rights statutes. The CPUC continues to seek to deny us our constitutional right to petition the government for grievances.

#### **IV. PROPOSED SETTLEMENT PREEMPTED BY FEDERAL LAW**

It is clear from the results of the CHP Settlement that its ultimate purpose is to eliminate QF contracts altogether for QFs greater than 20 MW taking away their anti-monopoly standard offer protections established under PURPA and returning to a market based formula where the CPUC regulated utilities maintain market share of the wholesale generation markets.

##### Results of CHP Settlement

- CHP procurement program through 2020
  - MW targets
  - GHG reduction targets
- Establishes new energy pricing for QFs
  - Transitions Short Run Avoided Cost Energy Pricing to a market based formula

by 2015

- New form contracts
  - CHP RFO form contract
  - Transition contract
  - PURPA contract for 20 MW or smaller
  - As-available contract

- Legacy energy pricing amendment
- Parties support utilities’ FERC PURPA 210 (m) application
- Settlement of pending CPUC cases and court litigation

In 132 FERC ¶ 61,047 the FERC found<sup>11</sup> regarding the California Public Utilities Commission (CPUC) petition for declaratory order:

*The Commission’s authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities.*<sup>12</sup> While Congress has authorized a role for States in setting wholesale rates under PURPA, Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission’s actions or inactions can give States this authority. We disagree with the characterization of the CPUC’s AB 1613 Decisions as merely establishing an “offering price” by the purchaser of power. Rather, we agree with the Joint Utilities that *the CPUC’s AB 1613 Decisions constitute impermissible wholesale rate-setting by the CPUC. Because the CPUC’s AB 1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA.*

As FERC’s July 15, 2010 Order 132 FERC ¶ 61,047 stated regarding CPUC’s limited wholesale ratemaking authority “[a]lthough the CPUC has not argued that its []

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<sup>11</sup> At paragraphs 64 of 132 FERC ¶ 61,047.

program is an implementation of PURPA, we find that, to the extent the CHP generators that can take part in the [] program obtain QF status, the CPUC's [] feed-in tariff is *not* preempted by the FPA, PURPA or Commission regulations,<sup>[13]</sup> subject to certain requirements,...” Therefore any CPUC approved PPA would be pre-empted by FERC’s authority short of the FERC’s first opportunity to review the contract.

Since any CPUC approved PPA without FERC's prior review would not be lawful, and would exist in violation of the Federal Power Act (FPA) if the CPUC sets a wholesale price for electricity over the avoided cost. Any of the CPUC Decisions listed in CARE’s original September 1, 2010 Complaint EL10-84 *et al.* must be consistent with and not exceed CPUC’s wholesale ratemaking authority under PURPA.

Likewise, it is precisely because “*Moving Parties state that the application for waiver cannot be filed at the FERC until after this Commission approves the Proposed Settlement*” which supports CPUC’s intentional usurpation of FERC’s exclusive ratemaking authority over wholesale rates, that CARE requests the FERC to review this Proposed Settlement as an amendment to CARE original complaint herein.

Additional this settlement seeks to avoid FERC’s lawful review of the Settlement before the CPUC approves it and effected Parties have had no opportunity to meaningfully participate in the Commission’s decision making process. This violates CARE’s rights to due process under both Federal and State law. That is why as part of CARE October 14, 2010 ExParte communication with the ALJ respectfully demand that

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<sup>12</sup> 16 U.S.C. §§ 824, 824d, 824e (2006); *e.g.*, *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

<sup>13</sup> 18 C.F.R. § 292.101 et seq. (2010).

the Commission direct the Settling Parties to file their Proposed Settlement with the FERC for its initial review prior to CPUC approval immediately.

Any CPUC approved PPA without FERC's prior review would not be lawful, and would exist in violation of the Federal Power Act (FPA) if the CPUC sets a wholesale price for electricity over the avoided cost. Any of the CPUC Decisions listed in CARE's Complaint EL10-84 *et al.* must be consistent with and not exceed CPUC's wholesale ratemaking authority under PURPA. Rightfully or wrongly so CARE believes that the FERC July 15, 2010 Order 132 FERC ¶ 61,047 found that except for setting the wholesale price for QFs the CPUC's authority to set the wholesale price for electricity and ancillary services is pre-empted by Federal Energy Regulatory Commission (FERC) wholesale ratemaking authority. Despite FERC's Order the CPUC continues to approve power purchase agreements ("PPAs" or "contracts") between the CPUC regulated retail selling utilities<sup>14</sup> Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas and Electric Company (SDG&E) and other independent FERC regulated wholesale sellers of energy and ancillary services regulated by the FERC without an initial opportunity to review the contracts.

As stated in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County, Washington, et al.* (06-1457)<sup>15</sup> at 1 to 2 "[t]he court held that contract rates are presumptively reasonable *only where FERC has had an initial opportunity to*

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<sup>14</sup> These three utilities are named as respondents to CARE's complaint before FERC in Docket EL10-84 for participating in an unlawful conspiracy and contrivance with CPUC to violate the FPA. These three utilities' sales are in to the wholesale markets operated by the California Independent System Operator Corporation (CAISO) and they are operating under FERC approved wholesale Tariffs as well as FERC authorized open access transmission tariffs (OATTs).

See FERC's Notice of Complaint <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12428401>

*review the contracts* without applying the *Mobile-Sierra* presumption and therefore that the presumption should not apply to contracts entered into under “market-based” tariffs.”

[*Emphasis* added]

V. **PROPOSED SETTLEMENT VIOLATES THE PRECEDENT SET BY THE FERC IN 133 FERC ¶ 61,059**

On July 15, 2010, the Commission issued an order addressing the California Public Utilities Commission’s (CPUC) petition for declaratory order and the separate petition for declaratory order filed by Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) (collectively, Joint Utilities).<sup>16</sup> On August 16, 2010, the CPUC filed a request for clarification, or, in the alternative, a request for rehearing of the July 15 Order.

On October 21, 2010 FERC clarified its decision regarding the California PUC's Combined Heat and Power purchase obligation and associated pricing, currently only applicable to the investor owned utilities, to hold that, "the concept of a multi-tiered avoided cost rate structure is consistent with the avoided cost requirements set forth in section 210 of PURPA and in the Commission's regulations."<sup>17</sup>

FERC said that an avoided cost rate may not include a "bonus" or "adder" above the calculated full avoided cost to reflect environmental externalities above avoided costs. However, if the environmental costs, "are real costs that would be incurred by utilities," then they, "may be accounted for in a determination of avoided cost rates."

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<sup>15</sup> <http://www.supremecourt.gov/opinions/07pdf/06-1457.pdf>

<sup>16</sup> *California Public Utilities Commission*, 132 FERC ¶ 61,047 (2010) (July 15 Order).

<sup>17</sup> <http://www.ferc.gov/whats-new/comm-meet/2010/102110/E-2.pdf> at 20

While the FERC made no judgment on the PUC's program, FERC did explain that if the PUC bases the avoided cost "adder" or "bonus" on an actual determination of the expected costs of upgrades to the distribution or transmission system that the QFs will permit the purchasing utility to avoid, such an "adder" or "bonus" would constitute an actual avoided cost determination and would be consistent with PURPA.

"We also note that, although a state may not include a bonus or an adder in the avoided cost rate unless it reflects actual costs avoided, a state may separately provide additional compensation for environmental externalities, outside the confines of, and, in addition to the PURPA avoided cost rate, through the creation of renewable energy credits (RECs)<sup>18</sup>," FERC said.<sup>19</sup>

## **VI. CONCLUSIONS**

Because the Proposed Settlement violates the precedent set by the FERC in 133 FERC ¶ 61,059 on October 21, 2010 and is inconsistent with Federal law, therefore the Commission must pursuant to Rule 12.4 reject the settlement. The Commission may reject a proposed settlement whenever it determines that the settlement is not in the public interest. Upon rejection of the settlement, the Commission may take various steps, including the following:(a) Hold hearings on the underlying issues, in which case the

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<sup>18</sup> *American Ref-Fuel*, 105 FERC ¶ 61,004 at P 23. Compensation for such environmental externalities through RECs is outside of PURPA, and is not part of the avoided cost calculation; RECs are separate commodities from the capacity and energy produced by QFs. If a state chooses to create these separate commodities, they are not compensation for capacity and energy.

The CPUC may also grant loans, subsidies or tax credits to particular facilities on environmental or policy grounds. *CGE Fulton, LLC*, 70 FERC ¶ 61,290, *reconsideration denied*, 71 FERC ¶ 61,232 (1995); *see also SoCal Edison*, 71 FERC ¶ 61,269 at 62,080 (explaining that "a state may also subsidize certain types of generation, for instance wind, or other renewables, through, *e.g.*, tax credits.").

<sup>19</sup> *Id* at 31.

parties to the settlement may either withdraw it or offer it as joint testimony, (b) Allow the parties time to renegotiate the settlement, (c) Propose alternative terms to the parties to the settlement which are acceptable to the Commission and allow the parties reasonable time within which to elect to accept such terms or to request other relief.<sup>20</sup>

If the Settling Parties agree to withdraw their current proposal CARE is willing to meet and confer with the settling parties to renegotiate the settlement to establish a program that is consistent with the Commission's authority under PURPA as specified by FERC Orders.

Respectfully Submitted,



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Michael E. Boyd President  
CALifornians for Renewable Energy, Inc.  
(CARE)  
5439 Soquel Drive  
Soquel, CA 95073  
Phone: (408) 891-9677  
E-mail: [michaelboyd@sbcglobal.net](mailto:michaelboyd@sbcglobal.net)



---

Mr. Lynne Brown Vice-President  
CALifornians for Renewable Energy, Inc.  
(CARE)  
24 Harbor Road  
San Francisco, CA 94124  
E-mail: [l\\_brown369@yahoo.com](mailto:l_brown369@yahoo.com)

October 25<sup>th</sup>, 2010

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<sup>20</sup> Note: Authority cited: Section 1701, Public Utilities Code. Reference: Section 1701, Public Utilities Code.

**Verification**

I am an officer of the Intervening Corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on this 25<sup>th</sup> day of October 2010, at San Francisco, California.



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Lynne Brown Vice-President  
CALifornians for Renewable Energy,  
Inc. (CARE)

**Certificate of Service**

I hereby certify that I have this day served the foregoing document “*Comments of CALifornians for Renewable Energy, Inc. (CARE) on the Proposed Settlement and Consolidating Proceedings*” under CPUC A 08-11-001, R 06-02-013, R 04-04-003, R 04-04-025, and R 99-11-022. Each person designated on the official service list, has been provided a copy via e-mail, to all persons on the attached service list on October 25, 2010, for the proceedings, A 08-11-001, R 06-02-013, R 04-04-003, R 04-04-025, and R 99-11-022 Service List, transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on this 25<sup>th</sup> day of October 2010, at Soquel, California.



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Michael E. Boyd President  
CALifornians for Renewable Energy, Inc.  
(CARE)  
5439 Soquel Drive  
Soquel, CA 95073  
Phone: (408) 891-9677  
E-mail: [michaelboyd@sbcglobal.net](mailto:michaelboyd@sbcglobal.net)

**A 08-11-001, R 06-02-013, R 04-04-003,  
R 04-04-025, R 99-11-022 Service List**

abl@cpuc.ca.gov  
abb@eslawfirm.com  
achang@efficiencycouncil.org  
ACT6@pge.com  
AEG@cpuc.ca.gov  
agc@cpuc.ca.gov  
agrimaldi@mckennalong.com  
alexm@calpine.com  
ALHo@pge.com  
aliddell@icfi.com  
allwazeready@aol.com  
ALR4@pge.com  
amber.wyatt@sce.com  
amber@iepa.com  
andrea.morrison@directenergy.com  
andrew.dalton@valero.com  
andy.vanhorn@vhcenergy.com  
angela.kim@fticonsulting.com  
anogee@ucsusa.org  
ATrial@SempraUtilities.com  
atrowbridge@daycartermurphy.com  
AxL3@pge.com  
ayk@cpuc.ca.gov  
b.buchynsky@dgc-us.com  
bbc@cpuc.ca.gov  
bcragg@goodinmacbride.com  
bdicapo@caiso.com  
bernardo@braunlegal.com  
beth.fox@sce.com  
beth@beth411.com  
bfinkelstein@turn.org  
bhines@svlg.net  
bill@jbsenergy.com  
billjulian@sbcglobal.net  
bjl@bry.com  
bkc7@pge.com  
blaising@braunlegal.com  
bmcc@mccarthyllaw.com  
bmd@cpuc.ca.gov  
bmeister@energy.state.ca.us  
bobgex@dwt.com  
bpowers@powersengineering.com  
brbarkovich@earthlink.net  
brianhaney@useconsulting.com  
bruce.foster@sce.com  
btang@ci.azusa.ca.us  
californiadockets@pacificorp.com  
car@cpuc.ca.gov  
carla.peterman@gmail.com  
carlo.zorzoli@enel.it  
carol.schmidfrazee@sce.com  
Case.Admin@sce.com  
cathy.karlstad@sce.com  
cbk@eslawfirm.com  
ccasselmann@pilotpowergroup.com  
cem@newsdata.com  
CentralFiles@SempraUtilities.com  
CFPena@SempraUtilities.com  
chilen@NVEnergy.com  
chris.ohara@nrgenergy.com  
Claufenb@energy.state.ca.us  
cleni@energy.state.ca.us  
clyde.murley@comcast.net  
cmkehrein@ems-ca.com  
cneedham@edisonmission.com  
cpollina@winston.com  
CPUCCases@pge.com  
cpucdockets@keyesandfox.com  
crmd@pge.com  
crochlin@socalgas.com  
ctorchia@chadbourne.com  
cynthia.brady@constellation.com  
CZammit@SempraUtilities.com  
daipm@daioildale.com  
DAKing@SempraUtilities.com  
DAKinports@SempraUtilities.com  
david.reynolds@ncpa.com  
david@branchcomb.com  
davidmorse9@gmail.com  
DBP@cpuc.ca.gov  
dbr@cpuc.ca.gov  
dcarroll@downeybrand.com  
ddavie@wellhead.com  
deana.ng@sce.com  
deb@a-klaw.com  
dehling@kln.com  
dfredericks@dgpowers.com  
dgrandy@caonsitegen.com  
dgulino@ridgewoodpower.com  
dhuard@manatt.com  
Diane.Fellman@nrgenergy.com  
Dick@DavisHydro.com  
djh@cpuc.ca.gov  
dkk@eslawfirm.com

Dkolk@compenergy.com  
dmarcus2@sbcglobal.net  
dmcfarlan@mwgen.com  
DNiehaus@SempraUtilities.com  
Don.Vawter@AES.com  
doug.kiviat@morganstanley.com  
douglass@energyattorney.com  
dsaul@pacificsolar.net  
dtateosian@powereng.com  
dug@cpuc.ca.gov  
dvidaver@energy.state.ca.us  
dwood8@cox.net  
dwoods@whitecase.com  
dws@r-c-s-inc.com  
ecrem@ix.netcom.com  
edchang@flynnrci.com  
edf@cpuc.ca.gov  
editorial@californiaenergycircuit.net  
edwardoneill@dwt.com  
ej\_wright@oxy.com  
ek@a-klaw.com  
eks@cpuc.ca.gov  
eleuze@rrienergy.com  
ELL5@pge.com  
emello@sppc.com  
epoole@adplaw.com  
e-recipient@caiso.com  
eric@strategyi.com  
etiedemann@kmtg.com  
ewheless@lacs.org  
filings@a-klaw.com  
fmobasheri@aol.com  
fortlieb@sandiego.gov  
gabriellilaw@sbcglobal.net  
gary.allen@sce.com  
garyi@enxco.com  
gaw@cpuc.ca.gov  
GBaker@SempraUtilities.com  
GDixon@SempraUtilities.com  
gig@cpuc.ca.gov  
glw@eslawfirm.com  
gmorris@emf.net  
grosenblum@caiso.com  
gtd@cpuc.ca.gov  
gustavo.luna@aes.com  
gwung@mwe.com  
GXL2@pge.com  
GxZ5@pge.com

hchoy@isd.co.la.ca.us  
Henry.Nanjo@dgs.ca.gov  
hoerner@redefiningprogress.org  
HYao@SempraUtilities.com  
hypower@pacbell.net  
irene.stillings@energycenter.org  
iryana.kwasny@doj.ca.gov  
j.eric.isken@sce.com  
jackmack@suesec.com  
janet.combs@sce.com  
janice@strategenconsulting.com  
janreid@coastecon.com  
jarmstrong@gmssr.com  
jbloom@winston.com  
jdh@eslawfirm.com  
jeanne.sole@sfgov.org  
jeffgray@dwt.com  
Jennifer.Barnes@Navigantconsulting.com  
jennifer.porter@energycenter.org  
jesus.arredondo@nrgenergy.com  
jgreco@terra-genpower.com  
jhendry@sfwater.org  
jimross@r-c-s-inc.com  
jkarp@winston.com  
JKloberdanz@SempraUtilities.com  
jlehman@anaheim.net  
jleslie@luce.com  
jluckhardt@downeybrand.com  
jm3@cpuc.ca.gov  
jmcMahon@8760energy.com  
jmh@cpuc.ca.gov  
joc@cpuc.ca.gov  
jody\_london\_consulting@earthlink.net  
joe.paul@dynegey.com  
joh@cpuc.ca.gov  
johnredding@earthlink.net  
jon.jacobs@paconsulting.com  
jordan.white@pacificorp.com  
joyw@mid.org  
JPacheco@SempraUtilities.com  
jscancarelli@crowell.com  
jshields@ssjid.com  
jsp5@pge.com  
jsqueri@gmssr.com  
jst@cpuc.ca.gov  
judypau@dwt.com  
julie.martin@bp.com  
julien.dumoulin-smith@ubs.com

jweil@aglet.org  
jwoodwar@energy.state.ca.us  
JYamagata@SempraUtilities.com  
k.abreu@sbcglobal.net  
karen.lee@sce.com  
karen@klindh.com  
Kathryn.Wig@nrgenergy.com  
kcj5@pge.com  
KCordova@SempraUtilities.com  
kdusel@navigantconsulting.com  
kdw@cpuc.ca.gov  
kdw@woodruff-expert-services.com  
keith.mccrea@sablauw.com  
kenneth.swain@navigantconsulting.com  
kerry.hattevik@nexteraenergy.com  
kgriffin@energy.state.ca.us  
kho@cpuc.ca.gov  
khojasteh.davoodi@navy.mil  
kjk@kjkammerer.com  
kjohnson@caiso.com  
kjsimonsen@ems-ca.com  
klatt@energyattorney.com  
KMelville@SempraUtilities.com  
kmills@cfbf.com  
kmkiener@cox.net  
KMorton@SempraUtilities.com  
kmudge@covad.com  
kowalewskia@calpine.com  
kpp@cpuc.ca.gov  
l\_brown369@yahoo.com  
lau@cpuc.ca.gov  
LauckhartR@bv.com  
laura.genao@sce.com  
lcottle@winston.com  
leon.bass@sce.com  
lettenson@nrdc.org  
lgk2@pge.com  
liddell@energyattorney.com  
lisa\_weinzimer@platts.com  
lisaweinzimer@sbcglobal.net  
lkostrzewa@edisonmission.com  
lmackey@lspower.com  
lmh@eslawfirm.com  
loe@cpuc.ca.gov  
lra@cpuc.ca.gov  
LSchavrien@SempraUtilities.com  
luluw@newsdata.com  
LUrick@SempraUtilities.com

luta1@bp.com  
lwong@energy.state.ca.us  
lys@a-klaw.com  
MAGq@pge.com  
map@cpuc.ca.gov  
marcie.milner@shell.com  
Marshall.Clark@dgs.ca.gov  
martinhomec@gmail.com  
mary.lynch@constellation.com  
mbrubaker@consultbai.com  
mc3@cpuc.ca.gov  
mclaughlin@braunlegal.com  
mdjoseph@adamsbroadwell.com  
mdozier@caiso.com  
mecsoft@pacbell.net  
mflorio@turn.org  
mgreen@palco.com  
mhharrer@sbcglobal.net  
michael.backstrom@sce.com  
michael.evans@shell.com  
michael.hindus@pillsburylaw.com  
michaelboyd@sbcglobal.net  
mike.montoya@sce.com  
mike.tierney@nrgenergy.com  
mjaske@energy.state.ca.us  
mjd@cpuc.ca.gov  
mkh@cpuc.ca.gov  
mmiller@energy.state.ca.us  
Monica.Schwebs@bingham.com  
mpa@a-klaw.com  
mpryor@energy.state.ca.us  
mrh2@pge.com  
mrw@mrwassoc.com  
mshames@ucan.org  
msw@cpuc.ca.gov  
mth@cpuc.ca.gov  
myuffee@mwe.com  
nao@cpuc.ca.gov  
neburgess@sycamore.com  
nes@a-klaw.com  
nlong@nrdc.org  
norman.furuta@navy.mil  
npedersen@hanmor.com  
nrader@igc.org  
oshirock@pacbell.net  
paulfenn@local.org  
pcmcdonnell@earthlink.net  
pduvair@energy.state.ca.us

pepper@cleanpowermarkets.com  
phanschen@mofo.com  
pherrington@edisonmission.com  
pheuer-cv@comcast.net  
phil@reesechambers.com  
philha@astound.net  
philm@scdenergy.com  
pholley@covantaenergy.com  
pmaxwell@navigantconsulting.com  
ppl@cpuc.ca.gov  
psd@cpuc.ca.gov  
pstoner@lgc.org  
pucservice@manatt.com  
PVillegas@SempraUtilities.com  
pzs@cpuc.ca.gov  
r.forgione@intpower.com  
raj.pankhania@ci.hercules.ca.us  
ralf1241a@cs.com  
rantonopoulos@calpine.com  
rcox@pacificenvironment.org  
regrelcuccases@pge.com  
ren@ethree.com  
REO5@pge.com  
RFG2@pge.com  
rfp@eesconsulting.com  
rfreeh123@sbcglobal.net  
rhwiser@lbl.gov  
rick\_noger@praxair.com  
rkmoore@gswater.com  
rls@cpuc.ca.gov  
rmccann@umich.edu  
rmiller@energy.state.ca.us  
rnevis@daycartermurphy.com  
robyn.naramore@sce.com  
rocky.ho@fticonsulting.com  
roger@berlinerlawpllc.com  
ron.dahlin@ge.com  
rott@rrienergy.com  
rsanders@hlpower.com  
rschmidt@bartlewells.com  
rshapiro@chadbourne.com  
rwalther@pacbell.net  
saeed.farrokhpay@ferc.gov  
salleyoo@dwt.com  
sarveybob@aol.com  
saw0@pge.com  
sberlin@mccarthy.com  
sbeserra@sbcglobal.net

scott.tomashefsky@ncpa.com  
sdavies@caiso.com  
sdrossi@calpx.com  
Sean.Beatty@mirant.com  
seb@cpuc.ca.gov  
seboyd@tid.org  
SEHC@pge.com  
sephra.ninow@energycenter.org  
sesco@optonline.net  
sfr@sandag.org  
sfrichardson@winston.com  
shi@cpuc.ca.gov  
sisser@goodcompanyassociates.com  
SJP@cpuc.ca.gov  
ska@cpuc.ca.gov  
skg@cpuc.ca.gov  
skh@cpuc.ca.gov  
slefton@aptecheng.com  
slg0@pge.com  
sls@a-klaw.com  
SMK@cpuc.ca.gov  
SNelson@SempraUtilities.com  
snuller@ethree.com  
srovetti@sflower.org  
sscb@pge.com  
ssmyers@att.net  
steve.koerner@el Paso.com  
stevegreenwald@dwt.com  
steven.huhman@morganstanley.com  
steven.schleimer@barclayscapital.com  
steven@iepa.com  
steveng@destrategies.com  
svn@cpuc.ca.gov  
taj8@pge.com  
tam.hunt@gmail.com  
tblair@sandiego.gov  
tbo@cpuc.ca.gov  
tcarlson@rrienergy.com  
tciardella@nvenergy.com  
tcr@cpuc.ca.gov  
tcx@cpuc.ca.gov  
tdarton@pilotpowergroup.com  
tdillard@sppc.com  
tdp@cpuc.ca.gov  
ted@energy-solution.com  
tim.hemig@nrgenergy.com  
timea.Zentai@navigantconsulting.com  
todil@mckennalong.com

tomb@crossborderenergy.com  
tomk@mid.org  
toms@i-cpg.com  
tory.weber@sce.com  
TRoberts@SempraUtilities.com  
tsolomon@winston.com  
tyf@cpuc.ca.gov  
unc@cpuc.ca.gov  
vjb@cpuc.ca.gov  
vjw3@pge.com  
vwood@smud.org  
wamer@kirkwood.com  
WBlattner@SempraUtilities.com  
wbooth@booth-law.com  
wem@igc.org  
wesley.spowhn@pillsburylaw.com  
will.mitchell@cpv.com  
william.tomlinson@el Paso.com  
WKeilani@SempraUtilities.com  
wolff@smwlaw.com  
wsm@cpuc.ca.gov  
WTobin@SempraGlobal.com  
wvm3@pge.com  
yxg4@pge.com