

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



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Application of San Diego Gas & Electric Company  
(U 902 E) for Authority to Acquire the CalPeak El  
Cajon Energy Facility.

Application 11-01-004  
(Filed January 5, 2011)

**PROTEST OF THE INDEPENDENT ENERGY PRODUCERS  
ASSOCIATION**

**INDEPENDENT ENERGY PRODUCERS  
ASSOCIATION**

Steven Kelly  
Policy Director  
1215 K Street, Suite 900  
Sacramento, CA 95814  
Telephone: (916) 448-9499  
Facsimile: (916) 448-0182  
Email: steven@iepa.com

**GOODIN, MACBRIDE, SQUERI,  
DAY & LAMPREY, LLP**  
Brian T. Cragg  
505 Sansome Street, Suite 900  
San Francisco, CA 94111  
Telephone: (415) 392-7900  
Facsimile: (415) 398-4321  
Email: bcragg@goodinmacbride.com

Attorneys for the Independent Energy Producers  
Association

Date: February 9, 2011

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Application of San Diego Gas & Electric Company  
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Pursuant to Rule 2.6 of the Commission's Rules of Practice and Procedure, the Independent Energy Producers Association (IEP) submits its protest to the Application of San Diego Gas & Electric Company (SDG&E) to acquire the CalPeak El Cajon Energy Facility (ECEF), filed on January 5, 2011. Notice of this application was published in the Commission's Daily Calendar on January 10, 2011.

SDG&E seeks the Commission's permission to exercise an option to purchase the ECEF. According to the application, SDG&E obtained this option as part of a lease that it provided to CalPeak Power LLC (CalPeak) in 2001 for construction of the ECEF in conjunction with a contract between CalPeak and the California Department of Water Resources (DWR). SDG&E administers the contract between DWR and CalPeak and receives the output of the facility.

IEP objects to SDG&E's request on the following grounds:

1. SDG&E has not complied with the Commission's policies on long-term procurement or utility-owned generation, as stated in Decision (D.) 07-12-052. In particular, (1) SDG&E has not tested its option in a competitive

solicitation; (2) SDG&E has made no showing, much less the required strong showing, that a competitive request for offers (RFO) to replace the expiring CalPeak-DWR contract is infeasible; and (3) SDG&E has not demonstrated that its exercise of an option obtained in 2001 is a truly extraordinary circumstance or a unique opportunity that exempts SDG&E from the requirement to conduct a competitive RFO.

2. SDG&E has not demonstrated that utility ownership of the ECEF is the most beneficial or cost-effective ownership structure for ratepayers after all the costs and risks of utility ownership are taken into account.

IEP will address these and related points in the remainder of this protest.

**I. SDG&E HAS NOT COMPLIED WITH THE COMMISSION'S PROCUREMENT POLICIES**

As a matter of policy, the Commission has established that utilities should use competitive approaches to procure resources. In D.07-12-052, the Commission stated:

We want to make it clear that we continue to believe in a “competitive market first” approach. As such we believe that all long-term procurement should occur via competitive procurements, rather than through preemptive actions by the IOU, except in truly extraordinary circumstances.<sup>1</sup>

For proposals for utility-owned generation (UOG), the Commission was more emphatic:

“Because the Commission has a strong preference for competitive solicitations, in all cases, if an IOU proposes a UOG outside of a competitive RFO, the IOU must make a showing that holding a competitive RFO is infeasible.”<sup>2</sup> Although the Commission identified five categories of “truly extraordinary circumstances” (later reduced to four in D.08-11-008) that might justify an exception to this rule, none of them applies to the ECEF option.

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<sup>1</sup> D.07-12-052, p. 209 (emphasis in original).

<sup>2</sup> D.07-12-052, p. 210.

**A. SDG&E Has Not Exposed the ECEF Option to a Competitive Solicitation**

SDG&E makes no claim in its application that the ECEF option was bid into a competitive solicitation. Thus, the option has not been exposed to a competitive test, and there is no basis to conclude that it is preferable to other alternatives for replacing the CalPeak-DWR contract. Under the Commission's procurement policies, a failure to conduct a competitive solicitation for procurement of a UOG facility must be justified by either a showing that a competitive RFO is infeasible or that the situation qualifies as a "truly extraordinary circumstance."

**B. SDG&E Failed to Make a Strong Showing that a Competitive RFO Is Infeasible**

In its application, SDG&E makes **no** attempt to show that a competitive RFO is infeasible. Thus, there can be no dispute that SDG&E has not made the "strong showing" required by the Commission's procurement policies.

SDG&E may attempt to justify its failure after the fact by suggesting that there was insufficient time to conduct a competitive RFO to expose the ECEF option to a market test. That contention should be quickly rejected. SDG&E acquired its option to purchase the ECEF in 2001, but it waited until January 2011 to seek the Commission's authority to exercise an option that is triggered by the expiration of the CalPeak-DWR contract on January 1, 2012. Having chosen to wait so long to file its application, SDG&E cannot credibly contend that it lacked sufficient time to conduct an RFO to replace the expiring contract.

It is illuminating that SDG&E proceeded very differently in a comparable situation. When SDG&E obtained an option to purchase the El Dorado power plant, it filed the application to exercise that option **over four years** before the triggering event, which allowed plenty of time for an RFO **and** the Commission's consideration of the desirability of exercising

the option. The RFO was issued on March 7, 2007, and even though the RFO involved a variety of other products, SDG&E was able to receive bids, evaluate the bids, consult with the Procurement Review Group, retain an Independent Evaluator (IE) to analyze the conduct of the RFO, receive the IE's report, and file an application five months later, on August 8, 2007.

Even within the tight time constraints SDG&E attempts to place on the Commission, an RFO for the narrow purpose of replacing the expiring CalPeak-DWR contract could be conducted and completed on a compressed schedule, and complying with the Commission's requirements need not unduly delay the ability of the Commission to render a decision on the ECEF option by the end of this year. IEP notes that when Southern California Edison Company (SCE) was confronted with a potential capacity shortage after the July 2006 heat storm, it responded to the Commission's direction and quickly added a Summer 2007 track to an RFO that was launched on August 14, 2006. Bids were due on September 19, contracts were negotiated and signed by November 9, and an application seeking the Commission's approval (A.06-11-007) was filed on November 15, 2006, exactly three months after SCE was directed to conduct an RFO for additional resources.

Thus, SDG&E's failure to conduct a competitive RFO to test the ECEF option should not be excused because SDG&E waited until the last year of the CalPeak-DWR contract to seek authority to exercise the option.

**C. The ECEF Option Is Not a Truly Extraordinary Circumstance or a Unique Opportunity**

Instead of conducting a competitive RFO as the Commission's procurement policies require in all cases or making a strong showing that an RFO is infeasible, SDG&E asserts that its acquisition of ECEF is exempt from the competitive procurement requirement under the "unique opportunity" exception. However, SDG&E offers little support for its claim.

In D.07-12-052, a “unique opportunity” was described as “an attractively priced resource resulting from a settlement or bankruptcy proceeding.” Neither a settlement nor a bankruptcy (or similar circumstance) is present here.

SDG&E tries to overcome this fundamental definitional problem in three ways. *First*, it lists the characteristics of the ECEF that it believes are beneficial to ratepayers. But even if SDG&E’s assertions are accurate, nothing about those claimed benefits is necessarily unique to the ECEF or sufficient to constitute a unique opportunity. Other facilities may also be low-cost, use commercially proven technology, be located in SDG&E’s service territory, and offer resource adequacy capacity and quick-start capability. None of these characteristics, individually or in combination, is clearly unique to the ECEF.

*Second*, SDG&E makes several unsupported assertions about the state of the energy market, claiming that “it would be virtually impossible for any seller to offer a fully constructed, operational facility with equivalent benefits at a lower cost,” and “conducting an RFO to solicit similar projects would serve little purpose.”<sup>3</sup> It is hardly as certain as SDG&E portrays that no other seller could offer comparable capacity at a lower cost or that no similar projects would bid in a competitive solicitation, given the opportunity. The more important point, however, is that the Commission **requires** a competitive solicitation for UOG as a matter of policy so that it is not put in the position of having to rely on a utility’s unsupported assertions and its claims about the virtues of a prospective utility asset. Instead, the Commission requires a competitive RFO, which will identify any more beneficial or lower-cost alternatives to the proposed UOG facility. It will be “virtually impossible” for comparable facilities to offer a

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<sup>3</sup> Application, pp. 6-7.

similar project at a lower price **only if** SDG&E is permitted to exercise its option without first conducting a competitive solicitation, as the Commission’s policy requires.

*Third*, SDG&E offers a comparison of the ECEF option with the results of its “Product 5” solicitation in its 2009 RFO. But that comparison ignores several fundamental differences that undermine its validity:

- Product 5 requested offers for 10-year power purchase agreements, while the ECEF option would result in a commitment (*i.e.*, utility ownership) of at least 15 years. Bidders in the Product 5 solicitation were not given an opportunity to bid for a longer commitment, but the ECEF “price” was calculated by levelizing revenue requirements over a 15-year period.<sup>4</sup> In effect, bidders for Product 5 were forced to attempt to recover fixed costs over 10 years, while SDG&E gave itself 15 years to recover comparable costs. Moreover, SDG&E’s attempts to correct for this discrepancy in the duration of the commitment are based on unrealistic scenarios that have no relation to the price a bidder might actually bid for a 15-year commitment. Specifically, SDG&E adjusts for the 5-year discrepancy by (1) assuming a second 5-year power purchase agreement (PPA) at the same price as the 10-year PPA; (2) assuming a second 5-year PPA at a price equal to just the operation and maintenance costs of the facility; or (3) assuming that SDG&E buys a new

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<sup>4</sup> Testimony, p. 21. In other passages, SDG&E claims that savings from ECEF will increase “as the revenue requirement decreases over the 15-year remaining book life of the plant” (p. 24)—a statement that seems to contradict the levelization approach.

facility at the end of the 10-year PPA, which it sells after five years at its book value adjusted for inflation.<sup>5</sup>

- Existing units subject to once-through cooling regulations issued by the State Water Resource Control Board were not offered even the 10-year contract option for Product 5; instead, they were limited to bids for a two-year contract with eight one-year extension options.<sup>6</sup> For these units, SDG&E is in effect comparing the price of a 15-year contract with the price of a two-year contract.

SDG&E's position also contradicts the approach it took in similar circumstances when it obtained the Commission's approval to acquire another UOG facility. In A.07-08-006, SDG&E sought the Commission's authority to exercise an option to purchase the 480 MW El Dorado power plant. This application preceded the issuance of D.07-12-052 and the Commission's policy statement on how proposals for UOG should be handled. The option for purchase of El Dorado resulted from a settlement, and thus could have qualified for an exception to the competitive solicitation requirement, as a "unique opportunity," had D.07-12-052 been in effect at the time. Even without the guidance of D.07-12-052, however, SDG&E elected to expose its option to a competitive solicitation of comparable resources. Even though SDG&E might have assumed that it would be "virtually impossible" to match the price of the partially depreciated El Dorado plant,<sup>7</sup> the RFO attracted at least one other competitive offer. As it turned out, the Commission determined that the El Dorado option was more beneficial than the

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<sup>5</sup> Testimony, p. 22.

<sup>6</sup> Testimony, p. 14.

<sup>7</sup> The El Dorado plant began commercial operation in May 2000, and pursuant to the option SDG&E will take ownership in October 2011.

competitive offer, and in D.07-11-046, it authorized SDG&E to exercise the option. In issuing its authorization, however, the Commission was able to rely on facts, not unsupported assumptions, and on a comparison between the specifics of two projects, not on untested assertions about the superiority of the El Dorado facility over all other alternatives.

**D. The Consequences of SDG&E's Failures**

SDG&E's proposed treatment of the ECEF option is contrary to both the Commission's policies and express instructions in D.07-12-052 and SDG&E's own process for demonstrating the benefits of the El Dorado option. The Commission should adhere to and enforce its policy preference for competitive procurement and not authorize SDG&E to exercise its option to purchase the ECEF unless and until it conducts a competitive solicitation to determine the best resource to replace the expiring CalPeak-DWR contract.

In similar circumstances, the Commission acted quickly to dismiss a utility application for UOG. In D.08-11-004, the Commission dismissed the application of Pacific Gas and Electric Company (PG&E) to acquire the Tesla facility because:

PG&E's proposal fails to conform to Commission policies under which all long-term power should be obtained through "competitive procurements, rather than through preemptive actions by the Investor-owned Utilities, except in truly extraordinary circumstances."

More specifically, the Commission finds that facts that PG&E has alleged in its application do not adequately establish that conducting a request for offer is infeasible; a central requirement to proposing utility owned generation outside of a competitive process, as required by Decision 07-12-052.

(D.08-11-004, p. 2 (footnotes omitted).)

Although the precedent of the Tesla decision provides ample support for dismissing SDG&E's application, a more moderate remedy is appropriate in these circumstances. SDG&E has time, if it chooses or the Commission so orders, to conduct an RFO

for resources to replace the expiring CalPeak-DWR contract. For that reason, as soon as is procedurally possible, the Commission should issue an order suspending further processing of this application and requiring SDG&E to conduct an RFO to replace the CalPeak-DWR contract. SDG&E should be further required to supplement the testimony submitted with its application to report the results of the RFO. At that point, this application can either proceed promptly to resolution (if exercising the ECEF option proves to be the most beneficial and cost-effective way to replace the expiring contract) or dismissal (if other resources are the most beneficial and cost-effective way to replace the expiring contract).

## **II. UTILITY OWNERSHIP OF GENERATING RESOURCES**

In the hybrid market structure, UOG proposals compete directly with projects developed by independent power producers (IPPs), but the Commission has yet to develop a systematic methodology for comparing the costs, benefits, and risk allocation associated with the two forms of ownership. This issue is scheduled to be addressed in the current long-term procurement proceeding, R.10-05-006, starting in Spring 2011. While the Commission has delayed its consideration of this issue, proposals for UOG have continued to come before the Commission. Recently, in the proceeding on the results of PG&E's 2008 long-term request for offers (A.09-09-021), some parties with access to confidential information concluded that the benefits attributed to the UOG proposal were highly uncertain and were concentrated in the later years of the plant's assumed 30-year useful life, which distorted the comparison to 10-year PPAs for projects sponsored by IPPs.<sup>8</sup> The point for purposes of this protest is that the Commission cannot automatically assume that a utility's assertions about the benefits of a project it hopes to

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<sup>8</sup> See, e.g., *Concurrent Opening Brief of The Utility Reform Network*, A.09-09-021, April 14, 2010, p. 14.

own are accurate or that no other facility can provide greater benefits. The Commission needs to look beyond the asserted “price” of a UOG proposals and consider **all** of the costs and **all** of the risks, direct and indirect, that ratepayers are expected to bear for a UOG project. Unless all of the costs and risks assigned to ratepayers are accounted for, a UOG-IPP comparison will be unfairly and inaccurately skewed toward the utility’s proposal.

### **III. CONCENTRATION OF OWNERSHIP OF GENERATING RESOURCES**

The hybrid market structure is on the verge of extinction in SDG&E’s territory, as SDG&E quietly acquires the dominant share of the generation resources in its area:

- The 546 MW Palomar power plant, which was originally developed by Sempra Energy Resources, became an SDG&E-owned project.
- After receiving no expressions of interest in a competitive solicitation, SDG&E decided to develop the 46.5 MW Miramar II project using an Engineering, Procurement, and Construction contract.<sup>9</sup> (SDG&E already owns and operates the 46 MW Miramar I plant.)
- SDG&E acquired an option to purchase the 583 MW Otay Mesa power plant at the expiration of its current 10-year PPA.<sup>10</sup>
- As discussed above, SDG&E obtained and exercised a option to purchase the 480 MW El Dorado power plant.

Thus, SDG&E owns or has the potential to own over 1,700 MW of gas-fired capacity, nearly all of the new capacity brought on line since SDG&E divested its fossil generation resources in 1998. If this current trend continues, SDG&E will re-emerge as a

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<sup>9</sup> See D.09-01-008.

<sup>10</sup> D.06-09-021.

vertically integrated monopoly operating without any significant competitive pressure within a decade.

The use of options to convert projects developed by IPPs into UOG facilities has already drawn the Commission's attention. In D.07-12-052, the Commission expressly disapproved some utilities' practice of requiring or including as an option a transfer of ownership of a generating facility to the utility at the conclusion of a PPA. This practice "distorts the market," and the utilities were prohibited from including this requirement or option in their competitive RFOs.<sup>11</sup>

To be sure, SDG&E obtained the options to acquire these facilities before D.07-12-052 was issued, and SDG&E received the Commission's approval to acquire all of these options and generating resources. Nevertheless, the Commission has stated its concern that utility options to acquire the projects developed by IPPs can distort the market. For similar reasons, SDG&E's increasing ownership of generating resources should give the Commission pause and should lead the Commission to closely scrutinize SDG&E's latest proposed acquisition.

#### **IV. COMPLIANCE WITH RULE 2.6**

##### **A. Rule 2.6(b)**

Rule 2.6(b) requires a party protesting an application to state the grounds for the protest, the effect of the application on the protestant, and the reasons the protestant believes the application is not justified and to state whether it believes evidentiary hearings will be necessary.

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<sup>11</sup> D.07-12-052, p. 212; see also pp. 287 (Finding of Fact No. 97), 297 (Conclusion of Law No. 49, and 306 (Ordering Paragraph No. 32).

**1. Grounds for the Protest**

The grounds for IEP’s protest are stated in the preceding sections of this protest.

**2. The Effect of the Application on IEP**

IEP is a nonprofit public benefit corporation formed under the laws of the State of California to encourage the development and use of independent electric resources. Its members own and operate roughly 20,000 megawatts of electric generation capacity in California, including about 5,000 megawatts of renewable and alternative generating resources. IEP has been representing the interests of the developers and operators of renewable and other independent electricity resources before the Commission, other agencies, the Legislature, and the courts since 1982.

As the trade association for many of the IPPs providing electricity to California consumers, IEP has an enduring interest in the structure and development of California energy markets. IEP has been active in the proceedings that developed the current hybrid market structure, including the proceeding that resulted in D.07-12-052. IEP has a continuing interest in ensuring that the policies established in D.07-12-052 are followed and that UOG projects and projects developed by independent producers compete fairly and are compared using methodologies that consider all of the costs and risks that ratepayers bear when utilities acquire ownership interests in generating resources on their behalf.

**3. The Reasons the Application Is Not Justified**

IEP has stated the reasons for its protest in the preceding sections of this protest.

**4. Evidentiary Hearings**

The issues raised in IEP’s protest are primarily issues of policy and the implementation of the Commission’s policies, and evidentiary hearings are not required to resolve these issues.

**B. Rule 2.6(d)**

Rule 2.6(d) requires a party protesting an application to state any comments or objections regarding the applicant's statement on the proposed category, need for hearing, issues to be considered, and proposed schedule.

IEP does not dispute SDG&E's proposal that this is a ratesetting proceeding and that no evidentiary hearings are required. As discussed above, IEP contends that SDG&E has sidestepped the key issues that need to be resolved in this application.

IEP cannot agree with the schedule as proposed in the application. As discussed above, IEP urges the Commission, as soon as is procedurally possible, to suspend further processing of this application and to require SDG&E to conduct an RFO to replace the CalPeak-DWR contract. Once that RFO is completed and SDG&E supplements the testimony submitted with its application to report the results of the RFO, the proceeding can resume on an expedited schedule. If exercising the ECEF option proves to be the most beneficial and cost-effective way to replace the expiring contract, this application can proceed promptly to resolution. If other resources are the most beneficial and cost-effective way to replace the expiring contract, this application can be promptly dismissed. In either event, the Commission stay on schedule to issue its decision by the end of the year, **provided** that SDG&E commences the RFO promptly.

**V. CONCLUSION**

For the reasons stated in this protest, IEP respectfully requests the Commission to suspend further processing of this application as soon as possible and to require SDG&E to conduct an RFO to replace the CalPeak-DWR contract. Once that RFO is completed, SDG&E should be further required to supplement the testimony submitted with its application to report the results of the RFO. Depending on the results of the RFO, this proceeding can then either (1) proceed promptly to resolution or (2) be dismissed.

Respectfully submitted this 9th day of February, 2011 at San Francisco,

California.

GOODIN, MACBRIDE, SQUERI,  
DAY & LAMPREY, LLP

Brian T. Cragg

505 Sansome Street, Suite 900

San Francisco, California 94111

Telephone: (415) 392-7900

Facsimile: (415) 398-4321

By /s/ Brian T. Cragg

Brian T. Cragg

Attorneys for the Independent Energy  
Producers Association

2970/024/X126287.v4

**CERTIFICATE OF SERVICE**

I, Melinda LaJaunie, certify that I have on this 9<sup>th</sup> day of February 2011 caused a copy of the foregoing

**PROTEST OF THE OF THE INDEPENDENT ENERGY  
PRODUCERS ASSOCIATION**

to be served on all known parties to A.11-01-004 and R.10-05-006 listed on the most recently updated service list available on the California Public Utilities Commission website, via email to those listed with email and via U.S. mail to those without email service. I also caused courtesy copies to be hand-delivered as follows:

Commissioner President Michael R. Peevey  
California Public Utilities Commission  
State Building, Room 5218  
505 Van Ness Avenue  
San Francisco, CA 94102

ALJ Amy Yip-Kikugawa  
California Public Utilities Commission  
State Building, Room 5102  
505 Van Ness Avenue  
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9<sup>th</sup> day of February 2011 at San Francisco, California.

/s/ Melinda LaJaunie  
Melinda LaJaunie

**SERVICE LIST – A.11-01-004  
(Updated February 8, 2011)**

WENDY KEILANI  
SAN DIEGO GAS & ELECTRIC  
COMPANY  
WKeilani@SempraUtilities.com

MRW & ASSOCIATES, LLC  
mrw@mrwassoc.com

AIMEE M. SMITH  
SAN DIEGO GAS & ELECTRIC  
COMPANY  
AMSmith@SempraUtilities.com

SUE MARA  
RTO ADVISORS, LLC.  
sue.mara@rtoadvisors.com

DON LIDDELL  
DOUGLASS & LIDDELL  
liddell@EnergyAttorney.com

CENTRAL FILES  
SDG&E AND SOCALGAS  
CentralFiles@SempraUtilities.com

DIANE I. FELLMAN  
NRG WEST & SOLAR  
Diane.Fellman@nrgenergy.com

KEVIN WOODRUFF  
WOODRUFF EXPERT SERVICES  
kdw@woodruff-expert-services.com

Amy C. Yip-Kikugawa  
CALIF PUBLIC UTILITIES  
COMMISSION  
ayk@cpuc.ca.gov

Claire Eustace  
CALIF PUBLIC UTILITIES  
COMMISSION  
cce@cpuc.ca.gov

David Peck  
CALIF PUBLIC UTILITIES  
COMMISSION  
dbp@cpuc.ca.gov

Karl Meeusen  
CALIF PUBLIC UTILITIES  
COMMISSION  
kkm@cpuc.ca.gov

Mitchell Shapson  
CALIF PUBLIC UTILITIES  
COMMISSION  
sha@cpuc.ca.gov

PUC/X126478.v1

**Service List – R.10-05-006  
(Updated February 8, 2011)**

ANDREW B. BROWN  
abb@eslawfirm.com

ALEX BECK  
abeck@cpv.com

ABRAHAM SILVERMAN  
abraham.silverman@nrgenergy.com

ADAM BROWNING  
abrowning@votesolar.org

AUDREY CHANG  
achang@efficiencycouncil.org

ANNE GILLETTE  
AEG@cpuc.ca.gov

ANNE GILLETTE  
AEG@cpuc.ca.gov

LINDA AGERTER  
agerterlinda@gmail.com

AMBER DEAN WYATT  
amber.wyatt@sce.com

AIMEE M. SMITH  
AMSmith@SempraUtilities.com

ANDRA PLIGAVKO  
apligavko@firstsolar.com

ARTHUR O'DONNELL  
arthur@resource-solutions.org

ANN L. TROWBRIDGE  
atrowbridge@daycartermurphy.com

ALICE GONG  
AxL3@pge.com

BO BUCHYNSKY  
b.buchynsky@dgc-us.com

MATTHEW BARMACK  
barmackm@calpine.com

Bishu Chatterjee  
bbc@cpuc.ca.gov

BRIAN T. CRAGG  
bcragg@goodinmacbride.com

BETH VAUGHAN  
beth@beth411.com

WILLIAM B. MARCUS  
bill@jbsenergy.com

SCOTT BLAISING  
blaising@braunlegal.com

BARRY F. MCCARTHY  
bmcc@mccarthyllaw.com

BRUCE PERLSTEIN, PH.D  
bperlste@pacbell.net

BARBARA R. BARKOVICH  
brbarkovich@earthlink.net

BRIAN THEAKER  
brian.theaker@dynegy.com

ROBERT E. BURTT  
burtt@macnexus.org

CHRISTINE MUNCE  
C4MU@pge.com

CAROL SCHMID-FRAZEE  
carol.schmidfrazee@sce.com

CASE ADMINISTRATION  
case.admin@sce.com

Claire Eustace  
cce@cpuc.ca.gov

CAITLIN COLLINS LIOTIRIS  
ccollins@energystrat.com

CALIFORNIA ENERGY MARKETS  
cem@newsdata.com

Charlyn A. Hook  
chh@cpuc.ca.gov

Lily Chow  
cho@cpuc.ca.gov

CLARE LAUFENBER GALLARDO  
claufenb@energy.state.ca.us

CONNIE LENI  
cleni@energy.state.ca.us

Chloe Lukins  
clu@cpuc.ca.gov

CAROLYN M. KEHREIN  
cmkehrein@ems-ca.com

CHERYL LEE  
CNL@cpuc.ca.gov

REGULATORY FILE ROOM  
CPUCCases@pge.com

DOCKET COORDINATOR  
cpucdockets@keyesandfox.com

CHARLES R. MIDDLEKAUFF  
CRMd@pge.com

CYNTHIA BRADY  
cynthia.brady@constellation.com

CYNTHIA K. MITCHELL  
Cynthiakmitchell@gmail.com

DANIEL A. KING  
DAKing@SempraGeneration.com

DANIEL KIM  
daniel.h.kim@me.com

DANIELLE OSBORN MILLS  
Danielle@ceert.org

DAVID MILLER  
david@ceert.org

DEBORAH N. BEHLES  
dbehles@ggu.edu

David Peck  
dbp@cpuc.ca.gov

DOUGLAS DAVIE  
ddavie@wellhead.com

DONALD E. BROOKHYSER  
deb@a-klaw.com

DEVIN MCDONELL  
devin.mcdonell@bingham.com

DONALD GILLIGAN  
dgilligan@naesco.org

DIANE I. FELLMAN  
Diane.Fellman@nrgenergy.com

Diana L. Lee  
dil@cpuc.ca.gov

DANIEL JURIJEW  
djurijew@capitalpower.com

DAVID MARCUS  
dmarcus2@sbcglobal.net

DON VAWTER  
Don.Vawter@AES.com

DANIEL W. DOUGLASS  
douglass@energyattorney.com

GENE VARANINI  
drp.gene@sbcglobal.net

DIANA SANCHEZ  
dsanchez@daycartermurphy.com

DEVRA WANG  
dwang@nrdc.org

DONALD W. SCHOENBECK  
dws@r-c-s-inc.com

DAVIS WRIGHT TREMAINE LLP  
DWTCPUCDOCKETS@dwt.com

SHANNON EDDY  
eddyconsulting@gmail.com

EVELYN KAHL  
ek@a-klaw.com

ELIZABETH RASMUSSEN  
erasmussen@marinenergyauthority.org

CALIFORNIA ISO  
e-recipient@caiso.com

## Service List – R.10-05-006 (Updated February 8, 2011)

KAREN TERRANOVA  
filings@a-klaw.com

FRED MOBASHERI  
fmobasher@aol.com

GREG BASS  
GBass@SempraSolutions.com

GIFFORD JUNG  
gifford.jung@powerex.com

GLORIA D. SMITH  
Gloria.Smith@sierraclub.org

GREGG MORRIS  
gmorris@emf.net

GOPAL SHANKER  
gopal@recolteenergy.com

GRANT ROSENBLUM  
grosenblum@caiso.com

GEORGE ZAHARIUDAKIS  
GxZ5@pge.com

IVIN RHYNE  
irhyne@energy.state.ca.us

L. JAN REID  
janreid@coastecon.com

JASMIN ANSAR  
jansar@ucsusa.org

JASON ARMENTA  
jarmenta@calpine.com

JESSIE BAIRD  
jbaird@earthjustice.org

JERRY R. BLOOM  
jbloom@winston.com

JENNIFER CHAMBERLIN  
JChamberlin@LSPower.com

JEFFREY P. GRAY  
jeffreygray@dwt.com

JUSTIN FARR  
jfarr@Energystrat.com

JAMES L. FILIPPI  
jfilippi@nextlight.com

JIM METROPULOS  
jim.metropulos@sierraclub.org

JAMES P. WHITE  
jim\_p\_white@transcanada.com

JOHN W. LESLIE, ESQ.  
jleslie@luce.com

JOHN NIMMONS  
jna@speakeasy.org

JOHN DUNN  
john\_dunn@transcanada.com

JOSHUA ARCE  
josh@brightlinedefense.org

Jordan Parrillo  
jp6@cpuc.ca.gov

JOHN A. PACHECO  
JPacheco@SempraUtilities.com

JUDITH B. SANDERS  
jsanders@caiso.com

JAMES D. SQUERI, ESQ.  
jsqueri@goodinmacbride.com

JOSEPH F. WIEDMAN  
jwiedman@keyesandfox.com

JIM WOODWARD  
jwoodwar@energy.state.ca.us

KIMBERLY C. JONES  
Kcj5@pge.com

KEVIN WOODRUFF  
kdw@woodruff-expert-services.com

KELLY M. FOLEY  
kelly@votesolar.org

Ke Hao Ouyang  
kho@cpuc.ca.gov

KEVIN J. SIMONSEN  
kjsimonsen@ems-ca.com

Karl Meeusen  
kkm@cpuc.ca.gov

KAREN NORENE MILLS  
kmills@cfbf.com

AVIS KOWALEWSKI  
kowalewskia@calpine.com

Karen P. Paul  
kpp@cpuc.ca.gov

KRISTIN BURFORD  
kristin@consciousventuresgroup.com

KEVIN HIETBRINK  
KXHY@pge.com

LISA A. COTTLE  
lcottle@winston.com

LISA DECARLO  
ldecarlo@energy.state.ca.us

DONALD C. LIDDELL  
liddell@energyattorney.com

LUCAS WILLIAMS  
williams@ggu.edu

LAURA WISLAND  
lwisland@ucsusa.org

MARYBELLE C. ANG  
mang@turn.org

MARCEL HAWIGER  
marcel@turn.org

MARTIN HOMECC  
martinhomecc@gmail.com

MARY LYNCH  
mary.lynych@constellation.com

MARY C. HOFFMAN  
mary@solutionsforutilities.com

MATTHEW FREEDMAN  
matthew@turn.org

MARC D. JOSEPH  
mdjoseph@adamsbroadwell.com

MELISSA DORN  
mdorn@mwe.com

MELISSA HOVSEPIAN  
Melissa.Hovsepian@sce.com

MELISSA SCHARY  
Melissa.Schary@sce.com

MEREDITH LAMEY  
meredith\_lamey@transcanada.com

MICHAEL E. BOYD  
michaelboyd@sbcglobal.net

MICHAEL JASKE  
mjaske@energy.state.ca.us

Mary Jo Stueve  
mjs@cpuc.ca.gov

MICHAEL NYBERG  
Mnyberg@energy.state.ca.us

MICHAEL O'KEEFE  
mokeefe@efficiencycouncil.org

MICHAEL P. ALCANTAR  
mpa@a-klaw.com

B. MARIE PIENIAZEK  
mpieniazek@drenergyconsulting.com

MARK ROTHLEDER  
mrothleder@caiso.com

MRW & ASSOCIATES, LLC  
mrw@mrwassoc.com

MONA TIERNEY-LLOYD  
mtierney-lloyd@enemroc.com

MICHAEL A. YUFFEE  
myuffee@mwe.com

**Service List – R.10-05-006  
(Updated February 8, 2011)**

Noel Obiora  
nao@cpuc.ca.gov

NOAH LONG  
nlong@nrdc.org

Nika Rogers  
nlr@cpuc.ca.gov

NANCY RADER  
nrader@calwea.org

Nathaniel Skinner  
nws@cpuc.ca.gov

PATRICK G. MCGUIRE  
patrickm@crossborderenergy.com

PAUL CORT  
pcort@earthjustice.org

PHILLIP MULLER  
philm@scdenergy.com

Peter Spencer  
phs@cpuc.ca.gov

Paul Douglas  
psd@cpuc.ca.gov

PUSHKAR WAGLE, PH.D.  
pushkarwagle@flynnrci.com

Peter V. Allen  
pva@cpuc.ca.gov

RAFI HASSAN  
rafi.hassan@sig.com

RAY PINGLE  
Ray\_Pingle@msn.com

RORY COX  
roox@pacificenvironment.org

CASE COORDINATION  
RegRelCPUCCases@pge.com

RICH METTLING  
rich.mettling@sce.com

Robert L. Strauss  
rls@cpuc.ca.gov

Rahmon Momoh  
rmm@cpuc.ca.gov

ROBERT GEX  
robertgex@dwt.com

REED V. SCHMIDT  
rschmidt@bartlewells.com

RYAN HEIDARI  
ryan.heidari@endimensions.com

KENNETH SAHM WHITE  
sahm@fitcoalition.com

Aram Shumavon  
sap@cpuc.ca.gov

ANNIE STANGE  
sas@a-klaw.com

Susannah Churchill  
sc1@cpuc.ca.gov

SEAN P. BEATTY  
Sean.Beatty@mirant.com

MICHAEL ROCHMAN  
service@spurr.org

SHANA LAZEROW  
slazerow@cbecal.org

SIERRA MARTINEZ  
smartinez@nrdc.org

SARA KAMINS  
SMK@cpuc.ca.gov

SARA STECK MYERS  
ssmyers@att.net

SKY C. STANFIELD  
sstanfield@keyesandfox.com

STEVEN A. WEILER  
steve.weiler@leonard.com

STEVEN F. GREENWALD  
stevegreenwald@dwt.com

STEVEN HUHMAN  
steven.huhman@morganstanley.com

STEVEN KELLY  
steven@iepa.com

SUE MARA  
sue.mara@rtoadvisors.com

Sean A. Simon  
svn@cpuc.ca.gov

STEPHANIE WANG  
swang@pacificenvironment.org

TAM HUNT  
tam.hunt@gmail.com

TIM LINDL  
tjl@a-klaw.com

TODD EDMISTER  
todd.edmister@bingham.com

R. THOMAS BEACH  
tomb@crossborderenergy.com

UDI HELMAN  
uhelman@caiso.com

VIDHYA PRABHAKARAN  
vidhyaprabhakaran@dwt.com

VICTORIA LAUTERBACH  
vlauterbach@mwe.com

Victoria S Kolakowski  
vsk@cpuc.ca.gov

WILLIAM H. BOOTH  
wbooth@booth-law.com

WILLIAM CHEN, ESQ.  
wchen@ecsgrid.com

BARBARA GEORGE  
wem@igc.org

BRAD WETSTONE  
wetstone@alamedamp.com

WILLIAM MITCHELL  
will.mitchell@cpv.com

WENDY KEILANI  
WKeilani@SempraUtilities.com

WILLIAM B. ROSTOV  
wrostov@earthjustice.org

Rebecca Tsai-Wei Lee  
wtr@cpuc.ca.gov

Yuliya Shmidt  
ys2@cpuc.ca.gov

SYDNEY MANHEIM DAVIES  
CALIFORNIA INDEPENDENT SYSTEM  
OPERATOR  
151 BLUE RAVINE ROAD  
FOLSOM, CA 95630

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