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

Order Instituting Rulemaking to Continue
Implementation and Administration of California
Renewables Portfolio Standard Program.

Rulemaking 08-08-009
(Filed August 21, 2008)

**BRIEF OF THE COGENERATION ASSOCIATION OF CALIFORNIA
REGARDING PRICING OPTIONS FOR AN EXPANDED FEED-IN TARIFF**

Michael Alcantar
Rod Aoki
Alcantar & Kahl LLP
1300 SW Fifth Avenue,
Suite 1750
Portland, OR 97201
503-402-8702 office
503-402-8882 fax
mpa@a-klaw.com
deb@a-klaw.com

Counsel to the
Cogeneration Association of California

June 18, 2009

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Pursuant to ALJ Mattson's Ruling dated May 28, 2009, the Cogeneration Association of California (CAC)¹ submits this brief on pricing options for an expanded Feed-In Tariff (FIT). Of paramount significance in this proceeding, the Commission is considering the scope of its authority to set pricing for an expanded renewable FIT. This consideration extends beyond the impact a FIT may have on how and when the state meets its renewable procurement goals. The determination of the Commission's authority to set pricing here may also impact procurement from combined heat and power (CHP) facilities.²

While guided by Federal Energy Regulatory Commission (FERC) jurisdiction, the Commission has flexible options for market-based or cost-based

¹ CAC represents the combined heat and power generation and cogeneration operation interests of the following entities: Coalinga Cogeneration Company, Mid-Set Cogeneration Company, Kern River Cogeneration Company, Sycamore Cogeneration Company, Sargent Canyon Cogeneration Company, Salinas River Cogeneration Company, Midway Sunset Cogeneration Company and Watson Cogeneration Company. CAC is a party to this proceeding.

² CHP resources, like renewable resources, are needed to achieve California's required greenhouse gas emissions reductions. See CARB Adopted Scoping Plan (available online at: http://www.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf); see also D.08-10-037 (recognizing CHP as an emissions reductions measure). In A.08-06-024, SCE and PG&E have also challenged the Commission's ability to set pricing for the AB 1613 program for small CHP. See SCE Comments, dated June 1, 2009 in A.08-06-024, at 2 (asserting that the Commission is limited to an avoided cost price for QF CHP or the CAISO "market" price); see also PG&E Comments, dated June 1, 2009 in A.08-06-024, at 2-4 (reiterating SCE's arguments).

expanded FIT pricing for renewable resources. This flexibility and the pricing concepts discussed herein should extend to CHP procurement options as well as the renewable portfolio standard.

I. INTRODUCTION

In this proceeding, the Commission is implementing legislated changes to existing FIT programs. Pacific Gas and Electric (PG&E), San Diego Gas & Electric (SDG&E) and Southern California Edison (SCE) (collectively, IOUs) have FITs for water, wastewater and renewable facilities up to 1.5 MW. The FITs are mandated by Public Utilities Code § 399.20 and implemented by Decision 07-07-027. The current FIT “market price” is the Commission’s avoided cost estimate for a new Greenfield, gas-fired combined cycle power plant reflected by the adopted Market Price Referent (MPR). Senate Bill 380 (SB 380), adopted in September 2008, amended §399.20 to increase the statewide procurement cap from 250 MW to 500 MW for such FIT resources.

The Commission is also considering expanding the eligibility for the FIT programs to larger generators. The Energy Division proposes expanding the IOUs’ FIT programs to all eligible renewable generators sized up to 10 MW with an incremental cap of 1,000 MW. In this context of an expanded FIT program, the Commission is considering various bases for pricing an expanded FIT.

II. FERC JURISDICTION STRONGLY INFLUENCES THE COMMISSION'S OPTIONS, BUT A REASONABLE RANGE IS AVAILABLE, INCLUDING MARKET-BASED AND COST-BASED PRICING.

In considering an expanded FIT price, the Commission may choose to set a “market-based” or “cost-based” FIT rate. SCE’s statement that FERC has authority over wholesale power sales rates is correct.³ But SCE’s position that the Commission can only set an expanded FIT rate based on the utility’s avoided costs is not sustainable. SCE asserts, “*An expanded FIT program will encroach on the jurisdiction of FERC in violation of the FPA to the extent it requires the IOUs to purchase wholesale power from certain eligible facilities and sets a rate for those purchases that exceeds avoided costs.*”⁴ This allegation unreasonably limits the Commission’s authority over procurement by its jurisdictional utilities, in this case with regard to renewable resources. As FERC once ruled in response to a complaint by SCE:

*[W]e acknowledge California's ability under its authorities over the electric utilities subject to its jurisdiction to favor particular generation technologies over others. We respect the fact that resource planning and resource decisions are the prerogative of state commissions and that states may wish to diversify their generation mix to meet environmental goals in a variety of ways. ... [U]nder state authority, a state may choose to require a utility to construct generation capacity of a preferred technology or to purchase power from the supplier of a particular type of resource.*⁵

³ See SCE Comments, at 10-11 (citing *Barton Village Inc.*, 100 FERC P 61,244 (2002)).

⁴ *Id.*, at 11

⁵ So. *Cal Edison*, 159 P.U.R.4th 381, 70 FERC ¶61215, Docket No. EL95-16-000, February 23, 1995.

This flexibility in regulating procurement decisions extends to pricing. As explained by FERC, available pricing regimes are not limited to rates for QFs based on the utilities' avoided costs.

[W]e note that renewable generators do not have to be QFs. Also they can apply for exempt wholesale generator (EWG) status under the Energy Policy Act of 1992 ... (internal citations omitted). Their rates for wholesale sales in interstate commerce will be considered by the [Federal Energy Regulatory] Commission on a cost-of-service or market basis.⁶

Thus the scope of the Commission's authority to establish an expanded FIT price level is indeed guided by FERC jurisdiction.⁷ In the exercise of that jurisdiction, FERC regulations offer the Commission significant flexibility in setting an expanded FIT price. FERC-regulated wholesale rates traditionally were set on a cost basis; now wholesale rates can also be set on a market basis.⁸ This means that an application can be made to FERC to set a cost of service based rate for such facilities in addition to a process methodology to establish market based rates. Exempt Wholesale Generator (EWG) rates can be approved by FERC on either basis.

⁶ So. Cal. Edison Company, San Diego Gas & Electric Company, 71 FERC P 61,269, (1995) 1995 WL 32768 (F.E.R.C.) (citing *Richmond Power Enterprise, L.P.* 62 FERC P 61,157 (1993); see also So. Cal. Edison, 70 FERC P 61,215, (1995) 1995 WL 169000 (F.E.R.C.).

⁷ See Federal Power Act of 1935, 16 U.S.C. § 796 et seq; see also Public Utilities Regulatory Policies Act of 1935 (PURPA), 16 U.S.C. §§ 824 a-3, et seq; see also Public Utility Holding Company Act of 1935, as amended (PUHCA), 16 U.S.C. §§ 79, et seq; see also Energy Policy Act of 1992; see also Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

⁸ See Federal Power Act of 1935; see also *Richmond Power Enterprise*, 62 FERC P 61,157 (1993) 1993 WL 43875 (F.E.R.C.); see also Energy Policy Act of 1992 (FERC may permit EWGs to charge market-based rates).

III. FERC HAS JURISDICTION OVER WHOLESALE MARKETS; THIS MEANS THAT A SELLER MUST BE EITHER A QF OR EWG.

PURPA gives the Commission explicit and direct authority to set avoided cost rates for QF purchases.⁹ The Commission's legal authority to set an expanded FIT price under PURPA is not in dispute.¹⁰ QF avoided cost pricing, however, probably is not the preferred approach here for two reasons. First, the RPS statute is based on the premise that renewables participating in the program are not QFs.¹¹

Second, any potential termination of PURPA's mandatory purchase obligation might complicate the continued enforcement of a requirement under PURPA. Under Section 210(m) added by the Energy Policy Act of 2005,¹² a utility may petition FERC to terminate the mandatory purchase obligation if certain market conditions exist. Even if such a petition is granted,¹³ it would not terminate the mandatory purchase obligation for any QFs for whom contracts or obligations were under consideration prior to the adoption of Section 210(m). But the Commission must consider the potential cloud such a petition may place on programs based on mandatory obligations under PURPA. Thus, although the Commission could determine a FIT rate that reflects the utilities' avoided cost

⁹ 16 U.S.C. §824(a)-3 et seq. Notably, QFs can self-certify pursuant to 18 C.F.R. § 292.207(a).

¹⁰ See, e.g., SCE Comments, at 11 ("*What the Commission has authority to do, under PURPA, is to set prices for QFs at the utility's avoided costs.*")

¹¹ See Pub. Util. Code §399.15(d).

¹² 16 U.S.C. §824a-3(m).

¹³ CAC asserts that such a petition for termination under Sec. 210(m) would be unsuccessful as the requisite market conditions do not exist in California.

pursuant to PURPA and require QF status for FIT projects, this is not the only option available to the Commission.

The use of EWG status appears to be a preferable policy choice.¹⁴ EWGs produce electricity to be sold only in wholesale transactions, not directly to retail customers.¹⁵ FERC will approve EWG wholesale rates calculated either on a market or cost basis.¹⁶ Seeking FERC approval of the wholesale rate would overcome any objection to the Commission's jurisdiction over this program. The Commission may require FIT projects to self-certify as EWGs with FERC.¹⁷ Consequently, the Commission should look at options from the standpoint of EWGs.

IV. ASSUMING AN EWG APPROACH, TWO GENERAL TYPES OF PRICING OPTIONS ARE AVAILABLE: MARKET-BASED AND COST-BASED

As noted, FERC permits both market-based and cost-based EWG pricing. Under a market-based approach, the Commission could utilize either a competitive solicitation, such as an RFO,¹⁸ or a market proxy, such as a modified MPR. A cost-based approach for an EWG FIT rate could use publicly available information for various renewable technologies to set the rate.

¹⁴ See Energy Policy Act of 2005 (affirming developers' ability to obtain EWG status as provided in the Energy Policy Act of 1992)

¹⁵ See 18 C.F.R. §366.1 (defining an exempt wholesale generator as an entity that sells exclusively at wholesale).

¹⁶ See 71 FERC P 61,269, 62080.

¹⁷ 18 C.F.R. § 366.7 details the self certification process for EWGs.

¹⁸ This would require an RFO process tailored to the particular operating characteristics and financial circumstances of the target resource.

A. The Commission Can Develop Market-based Options.

1. An RPS-style competitive solicitation

The Commission could develop a market-based expanded FIT rate building on the established competitive bidding process used in the RPS. This approach could be modified to incorporate an initial auction with different tranches for the different technologies. This approach, however, may not work for an expanded FIT since it would be cumbersome for small producers to bid into and contract under a solicitation. Indeed, unnecessary bidding and solicitation burdens placed on such small producers by an RFO-like process could doom an expanded FIT program. Simply put, there is a lack of efficiency and no ease of deployment where the price is not set “upfront.” As proven by the European models, the benefits of a FIT result in large part from its simplicity and ease of deployment.

2. Market price proxy based on market alternatives

The Commission could consider various market alternatives as the basis for a market-based FIT price under an EWG regime. The current FIT price is the MPR. Although it provides a necessary, transparent price benchmark for RPS purposes and renewable projects above 20 MW, the MPR model may not capture all of the quantifiable values of and costs avoided by renewable projects under 20 MW. For example, the value of distributed generation as a “hedge” against transmission risk and the avoided transmission and distribution costs may not be adequately reflected in the current MPR price.

Moreover, a re-examination of the “market” in terms of pricing for procurement under an expanded renewable FIT is warranted. That is, from what “other source” would the utility procure the needed electric energy or capacity or both. The utility would not procure a natural gas or fossil-fuel fired resource in the context of an expanded renewable FIT to meet RPS goals. Rather, the resource market would be a renewable one. In this context, the Commission should recognize that the concept of a single market or a single market price proxy (here, a natural gas fired proxy generating facility) does not represent the actual market or alternative market resources. It simply fails to reflect the reality of the multiple procurement markets that now exist in California.

Accordingly, the Commission should consider using other forms of market price proxies. Alternative market price proxies that may be considered by the Commission in establishing a market-based FIT rate for EWG projects include, but may not be limited to, the following:

- ✓ The prior year’s RPS solicitation results, averaged and adjusted for smaller project size and by technology;
- ✓ A modified MPR that captures additional values and costs of smaller project sizes; or
- ✓ Utility or power purchase agreement costs of utility-proposed renewable programs (such as SCE’s Solar PV Program, PG&E’s Solar Energy Program or SDG&E’s Solar Energy Project).

Another possible method available to the Commission for establishment of an EWG FIT price is to establish cost-based rates for these resource types.

B. The Commission Can Develop Cost-based Options.

As the costs of renewable resources vary widely by technology, expanded FIT rates that are cost-based for EWGs could be differentiated by technology.

As with the market-based option, greater granularity can and should be achieved in determining the cost-based rates for the various types of resources: larger, smaller, solar PV, solar thermal, wind, biomass, geothermal. Each type has its own distinct needs and potential FIT pricing. It is important for the Commission to adequately reflect in the determination of the FIT pricing the differing pricing and operational attributes of the multiple types of FIT resources.

The California Energy Commission (CEC), as part of its 2009 Integrated Energy Policy Report, commissioned a report that recommends development of a FIT rate based on the seller's cost of service.¹⁹ The Commission may use multiple sources of publicly available information to determine "generic" EWG costs to establish cost-of-service based EWG FIT rates to bring to FERC. As one example, the Commission could look to the CEC's 2009 IEPR cost of generation study being performed this summer as a basis for the various types of EWG costs.²⁰ This study is compiling generation costs for multiple renewable resource technologies, including wind, hydro, solar PV, solar thermal, wave, and biomass.

C. Whether Market-based or Cost-based, FERC Approval Must Be Sought Once the Proposal Has Been Developed.

Under the EWG option, the Commission would seek FERC authorization for the expanded FIT prices for the EWGs. The Commission's legal authority to

¹⁹ See CEC-300-2008-009F, at 67; see also *State Clean Energy Policies Analysis (SCEPA) Project: An Analysis of Renewable Energy Feed-In Tariffs in the United States*, Coulture & Cory, NREL (May 2009) (available online: <http://www.nrel.gov/docs/fy09osti/45551.pdf>)

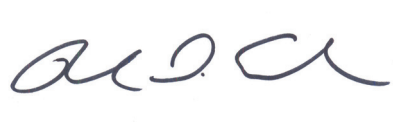
²⁰ See, e.g., *CEC Comparative Costs of California Central Station Generation Technologies* (available online at: <http://www.energy.ca.gov/2007publications/CEC-200-2007-011/CEC-200-2007-011-SF-APB.PDF>).

propose FIT rates for EWGs and seek FERC approval of those EWG rates is grounded in federal law and FERC precedent.²¹ Seeking FERC approval of the EWG rate would remove the possibility of a utility challenge of pre-emption and lack of Commission authority to set an expanded FIT rate.

V. CONCLUSION

Development of an EWG FIT rate, using either the market-based or cost-based options, provides the Commission needed flexibility to meet California's critical policy goals. Notably, the multiple options available to the Commission for an expanded renewable FIT pricing scheme as FERC regulated EWG projects are also applicable in concept to CHP procurement. This Commission has multiple legal tools at its disposal to implement procurement programs deemed desirable by state policy objectives. The Commission must not be cowed by utility threats over supposed federal pre-emption where such barriers to entry do not exist and are not reflected by FERC holdings. The Commission should proceed with a state based procurement program related to FIT resources and other procurement objectives consistent with the points raised in this filing.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Michael Alcantar", is positioned above the printed name.

Michael Alcantar
Rod Aoki
Counsel to
The Cogeneration Association of California

June 18, 200

²¹ See So. Cal. Edison, 71 FERC P 61,269, 62,080.

VERIFICATION

I am the attorney for the Cogeneration Association of California (CAC) in this matter. CAC is an *ad hoc* association. The members' facilities are located throughout California and are absent from the City and County of San Francisco, where my office is located. Under Rule 1.11(d) of the Commission's Rules of Practice and Procedure, I am submitting this verification on behalf of CAC for that reason. I have read the attached "Brief of the Cogeneration Association of California Regarding Pricing Options for an Expanded Feed-In Tariff" dated June 18, 2009. I am informed and believe, and on that ground allege, that the matters stated in this document are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of June, 2009, at San Francisco, California.

A handwritten signature in dark ink, appearing to read "Rod Aoki", is written over a light blue horizontal line.

Rod Aoki

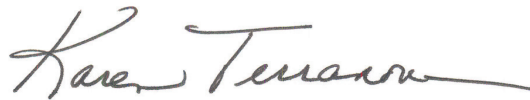
Alcantar & Kahl LLP
33 New Montgomery Street,
Suite 1850
San Francisco, CA 94105
415-421-4143 office
415-989-1263 fax

Counsel to
the Cogeneration Association of California

CERTIFICATE OF SERVICE

I, Karen Terranova hereby certify that I have on this date caused the attached **Brief of the Cogeneration Association of California Regarding Pricing Options for an Expanded Feed-In Tariff** in R.08-08-009 to be served to all known parties by either United States mail or electronic mail, to each party named in the official attached service list obtained from the Commission's website, attached hereto, and pursuant to the Commission's Rules of Practice and Procedure.

Dated June 18, 2009, at San Francisco, California.

A handwritten signature in dark ink, appearing to read "Karen Terranova", with a long horizontal flourish extending to the right.

Karen Terranova

DANIEL V. GULINO
RIDGEWOOD POWER MANAGEMENT,
LLC
947 LINWOOD AVENUE
RIDGEWOOD, NJ 07450
dgulino@ridgewoodpower.com

RHONE RESCH
SOLAR ENERGY INDUSTRIES
ASSOCIATION
805 FIFTEENTH STREET, N.W., SUITE
510
WASHINGTON, DC 20005
rresch@seia.org

KEVIN BOUDREAUX
CALPINE POWERAMERICA CA, LLC
717 TEXAS AVENUE, SUITE 1000
HOUSTON, TX 77002
kevin.boudreaux@calpine.com

RASHA PRINCE
SOUTHERN CALIFORNIA GAS COMPANY
555 WEST 5TH STREET, GT14D6
LOS ANGELES, CA 90013
rprince@semprautilities.com

MICHAEL MAZUR
3 PHASES RENEWABLES, LLC
2100 SEPULVEDA BLVD, SUITE 37
MANHATTAN BEACH, CA 90266
mmazur@3PhasesRenewables.com

ELIZABETH WRIGHT
OCCIDENTAL POWER SERVICES, INC.
111 WEST OCEAN BOULEVARD
LONG BEACH, CA 90802
ej_wright@oxy.com

PAUL DELANEY
AMERICAN UTILITY NETWORK (A.U.N.)
10705 DEER CANYON DRIVE
ALTA LOMA, CA 91737
pssed@adelphia.net

WILLIAM V. WALSH
SOUTHERN CALIFORNIA EDISON
COMPANY
2244 WALNUT GROVE AVE.
ROSEMEAD, CA 91770
william.v.walsh@sce.com

CHERYL PONDS
OFFICE OF THE CITY ATTORNEY
276 FOURTH AVENUE
CHULA VISTA, CA 91910
cponds@ci.chula-vista.ca.us

KIM F. HASSAN
SAN DIEGO GAS & ELECTRIC COMPANY
101 ASH STREET, HQ-12
SAN DIEGO, CA 92101
khassan@sempra.com

RICK C. NOGER
PRAXAIR PLAINFIELD, INC.
2711 CENTERVILLE ROAD, SUITE 400
WILMINGTON, DE 19808
rick_noger@praxair.com

GARSON KNAPP
FPL ENERGY, LLC
770 UNIVERSE BLVD.
JUNO BEACH, FL 33408
garson_knapp@fpl.com

JENNIFER CHAMBERLIN
DIRECT ENERGY
12 GREENWAY PLAZA, SUITE 600
HOUSTON, TX 77046
jennifer.chamberlin@directenergy.com

RANDALL W. KEEN
MANATT PHELPS & PHILLIPS, LLP
11355 WEST OLYMPIC BLVD.
LOS ANGELES, CA 90064
rkeen@manatt.com

3 PHASES RENEWABLES LLC
2100 SEPULVEDA BLVD, SUITE 37
MANHATTAN BEACH, CA 90266

GREGORY S. G. KLATT
DOUGLASS & LIDDELL
411 E. HUNTINGTON DRIVE, NO 107-356
ARCADIA, CA 91006-8102
klatt@energyattorney.com

CATHY A. KARLSTAD
SOUTHERN CALIFORNIA EDISON
COMPANY
2244 WALNUT GROVE AVE.
ROSEMEAD, CA 91770
cathy.karlstad@sce.com

RONALD MOORE
GOLDEN STATE WATER/BEAR VALLEY
ELECTRIC
630 EAST FOOTHILL BOULEVARD
SAN DIMAS, CA 91773
rkmoore@gswater.com

MICHAEL MEACHAM
CITY OF CHULA VISTA
276 FOURTH AVENUE
CHULA VISTA, CA 91910

THEODORE E. ROBERTS
SEMPRA GENERATION
101 ASH STREET, HQ 12B
SAN DIEGO, CA 92101-3017
troberts@sempra.com

KEITH MCCREA
SUTHERLAND, ASBILL & BRENNAN
1275 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20004-2415
keith.mccrea@sablaw.com

STEVEN SIEGEL
CENTER FOR BIOLOGICAL DIVERSITY
3421 PARK PLACE
EVANSTON, IL 60201
ssiegel@biologicaldiversity.org

DAVID SAUL
PACIFIC SOLAR & POWER
CORPORATION
2850 W. HORIZON RIDGE PKWY, SUITE
200
HENDERSON, NV 89052
dsaul@pacificsolar.net

NORMAN A. PEDERSEN
HANNA AND MORTON LLP
444 S FLOWER ST., SUITE 1500
LOS ANGELES, CA 90071-2916
npedersen@hanmor.com

SUSAN MUNVES
CITY OF SANTA MONICA
1212 5TH STREET, FIRST FLOOR
SANTA MONICA, CA 90401
susan.munves@smgov.net

DANIEL W. DOUGLASS
DOUGLASS & LIDDELL
21700 OXNARD STREET, SUITE 1030
WOODLAND HILLS, CA 91367
douglass@energyattorney.com

MICHAEL D. MONTOYA
SOUTHERN CALIFORNIA EDISON
COMPANY
2244 WALNUT GROVE AVENUE, PO BOX
800
ROSEMEAD, CA 91770
mike.montoya@sce.com

SOCAL WATER/BEAR VALLEY ELECTRIC
630 EAST FOOTHILL BLVD.
SAN DIMAS, CA 91773
kswitzer@gswater.com

FREDERICK M. ORTLIEB
CITY OF SAN DIEGO
1200 THIRD AVENUE, SUITE 1200
SAN DIEGO, CA 92101
fortlieb@sandiego.gov

SEMPRA ENERGY SOLUTIONS
101 ASH STREET, HQ09
SAN DIEGO, CA 92101-3017
email@semprasolutions.com

CARRIE DOWNEY
LAW OFFICES OF CARRIE ANNE
DOWNEY
1313 YNEZ PLACE
CORONADO, CA 92118
cadowney@cadowneylaw.com

THOMAS R. DARTON
PILOT POWER SERVICES, INC.
8910 UNIVERSITY CENTER LANE, SUITE
520
SAN DIEGO, CA 92122
tdarton@pilotpowergroup.com

COMMERCE ENERGY, INC.
600 ANTON BLVD., SUITE 2000
COSTA MESA, CA 92626

PHILLIP REESE
C/O REESE-CHAMBERS SYSTEMS
CONSULTANTS,
3379 SOMIS ROAD
SOMIS, CA 93066
phil@reesechambers.com

DAVID ORTH
SAN JOAQUIN VALLEY POWER
AUTHORITY
4886 EAST JENSEN AVENUE
FRESNO, CA 93725
dorth@krcd.org

JANIS C. PEPPER
CLEAN POWER MARKETS, INC.
PO BOX 3206
LOS ALTOS, CA 94024
pepper@cleanpowermarkets.com

Noel Obiora
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
nao@cpuc.ca.gov

JEANNE MCKINNEY
FARELLA BRAUN & MARTEL LLP
235 MONTGOMERY STREET
SAN FRANCISCO, CA 94104
JMcKinney@fbm.com

EDWARD V. KURZ
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE ST., B30A
SAN FRANCISCO, CA 94105
evk1@pge.com

ADAM BROWNING
THE VOTE SOLAR INITIATIVE
300 BRANNAN STREET, SUITE 609
SAN FRANCISCO, CA 94107
abrowning@votesolar.org

MARCIE MILNER
4445 EASTGATE MALL, SUITE 100
SAN DIEGO, CA 92121
marcie.milner@shell.com

GLORIA BRITTON
ANZA ELECTRIC COOPERATIVE, INC.
PO BOX 391909
ANZA, CA 92539
GloriaB@anzaelectric.org

WILL PLAXICO
HELIOS ENERGY, LLC
31897 DEL OBISPO ST. SUITE 220
SAN JUAN CAPISTRANO, CA 92675
wplaxico@heliosenergy.us

TAMLYN M. HUNT
COMMUNITY ENVIRONMENTAL
COUNCIL
26 W. ANAPAMU ST., 2ND FLOOR
SANTA BARBARA, CA 93101
thunt@cecmail.org

EVELYN KAHL
ALCANTAR & KAHL, LLP
33 NEW MONTGOMERY STREET, SUITE
1850
SAN FRANCISCO, CA 94015
ek@a-klaw.com

BRUCE FOSTER
SOUTHERN CALIFORNIA EDISON
COMPANY
601 VAN NESS AVENUE, STE. 2040
SAN FRANCISCO, CA 94102
bruce.foster@sce.com

STEPHEN A.S. MORRISON
CITY AND COUNTY OF SAN FRANCISCO
1 DR. CARLTON B. GOODLETT PLACE,
RM 234
SAN FRANCISCO, CA 94102-4682
stephen.morrison@sfgov.org

CRAIG LEWIS
GREENVOLTS
50 FIRST STREET, SUITE 507
SAN FRANCISCO, CA 94105
craig.lewis@greenvolts.com

EVELYN C. LEE
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, MC B30A
SAN FRANCISCO, CA 94105
ecl8@pge.com

ARNO HARRIS
RECURRENT ENERGY, INC.
1700 MONTGOMERY ST., SUITE 251
SAN FRANCISCO, CA 94111
arno@recurrentenergy.com

REID WINTHROP
PILOT POWER GROUP, INC.
8910 UNIVERSITY CENTER LANE, SUITE
520
SAN DIEGO, CA 92122
rwinthrop@pilotpowergroup.com

LYNELLE LUND
COMMERCE ENERGY, INC.
600 ANTON BLVD., SUITE 2000
COSTA MESA, CA 92626
llund@commerceenergy.com

KERRY EDEN
CITY OF CORONA DEPT. OF WATER &
POWER
730 CORPORATION YARD WAY
CORONA, CA 92880
kerry.eden@ci.corona.ca.us

JOSEPH LANGENBERG
CENTRAL CALIFORNIA POWER
5125 NORTH MARTY AVENUE, NO.324
FRESNO, CA 93711
Joe.Langenberg@gmail.com

ROD AOKI
ALCANTAR & KAHL, LLP
33 NEW MONTGOMERY STREET, SUITE
1850
SAN FRANCISCO, CA 94015
rsa@a-klaw.com

MARCEL HAWIGER
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102
marcel@turn.org

CHARLES MIDDLEKAUFF
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE ST., MC B30A
SAN FRANCISCO, CA 94103
crmd@pge.com

CRAIG M. BUCHSBAUM
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, B30A
SAN FRANCISCO, CA 94105
cmb3@pge.com

SARA O'NEILL
CONSTELLATION NEWENERGY, INC.
ONE MARKET ST., SPEAR TOWER, 36TH
FLOOR
SAN FRANCISCO, CA 94105

BRIAN T. CRAGG
GOODIN, MACBRIDE, SQUERI, DAY &
LAMPREY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111
bcragg@goodinmacbride.com

JAMES D. SQUERI
GOODIN, MACBRIDE, SQUERI, DAY &
LAMPREY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111
jsqueri@gmssr.com

TODD EDMISTER
BINGHAM MCCUTCHEN
THREE EMBARCADERO CENTER
SAN FRANCISCO, CA 94111
todd.edmister@bingham.com

EDWARD W. O'NEILL
DAVIS WRIGHT TREMAINE LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533
edwardoneill@dwt.com

GABE PETLIN
3DEGREES
6 FUNSTON AVENUE
SAN FRANCISCO, CA 94129
gpetlin@3degreesinc.com

JOHN DUTCHER
MOUNTAIN UTILITIES
3210 CORTE VALENCIA
FAIRFIELD, CA 94534-7875
ralf1241a@cs.com

LINDA Y. SHERIF
CALPINE CORPORATION
3875 HOPYARD ROAD, SUITE 345
PLEASANTON, CA 94588
linda.sherif@calpine.com

ERIC LARSEN
RCM INTERNATIONAL
PO BOX 4716
BERKELEY, CA 94704
elarsen@rcmdigesters.com

NEAL DE SNOO
CITY OF BERKELEY
2180 MILVIA STREET, 2ND FLOOR
BERKELEY, CA 94704
ndesnoo@ci.berkeley.ca.us

NANCY RADER
CALIFORNIA WIND ENERGY
ASSOCIATION
2560 NINTH STREET, SUITE 213A
BERKELEY, CA 94710
nrader@calwea.org

JOHN R. REDDING
ARCTURUS ENERGY CONSULTING
44810 ROSEWOOD TERRACE
MENDOCINO, CA 95460
johnredding@earthlink.net

JEANNE B. ARMSTRONG
GOODIN MACBRIDE SQUERI DAY &
LAMPREY LLC
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111
jarmstrong@goodinmacbride.com

DAVID L. HUARD
MANATT, PHELPS & PHILLIPS, LLP
ONE EMBARCADERO CENTER, STE
2900
SAN FRANCISCO, CA 94111-3736
dhuard@manatt.com

JEFFREY P. GRAY
DAVIS WRIGHT TREMAINE, LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533
jeffgray@dwt.com

JANICE G. HAMRIN
CENTER FOR RESOURCE SOLUTIONS
PO BOX 29512
SAN FRANCISCO, CA 94129

SUE KATELEY
CALIFORNIA SOLAR ENERGY
INDUSTRIES ASSN
PO BOX 782
RIO VISTA, CA 94571
info@calseia.org

WILLIAM H. BOOTH
LAW OFFICE OF WILLIAM H. BOOTH
67 CARR DRIVE
MORAGA, CA 94596
wbooth@booth-law.com

GREGG MORRIS
GREEN POWER INSTITUTE
2039 SHATTUCK AVE., SUITE 402
BERKELEY, CA 94704
gmorris@emf.net

CLYDE MURLEY
CONSULTANT TO NRDC
1031 ORDWAY STREET
ALBANY, CA 94706
clyde.murley@comcast.net

R. THOMAS BEACH
CROSSBORDER ENERGY
2560 NINTH STREET, SUITE 213A
BERKELEY, CA 94710-2557
tomb@crossborderenergy.com

JAMES WEIL
AGLET CONSUMER ALLIANCE
PO BOX 1916
SEBASTOPOL, CA 95473
jweil@aglet.org

MICHAEL DAY
GOODIN MACBRIDE SQUERI DAY &
LAMPREY LLP
505 SANSOME STREET, STE. 900
SAN FRANCISCO, CA 94111
mday@goodinmacbride.com

JOSEPH M. KARP
WINSTON & STRAWN LLP
101 CALIFORNIA STREET, 39TH FLOOR
SAN FRANCISCO, CA 94111-5894
jkarp@winston.com

SARA STECK MYERS
ATTORNEY AT LAW
122 28TH AVE.
SAN FRANCISCO, CA 94121
ssmyers@att.net

MARK HUFFMAN
PACIFIC GAS AND ELECTRIC COMPANY
MC B30A PO BOX 770000
SAN FRANCISCO, CA 94177
mrh2@pge.com

AVIS KOWALEWSKI
CALPINE CORPORATION
3875 HOPYARD ROAD, SUITE 345
PLEASANTON, CA 94588
kowalewskia@calpine.com

JODY LONDON
JODY LONDON CONSULTING
PO BOX 3629
OAKLAND, CA 94609
jody_london_consulting@earthlink.net

LAURA WISLAND
UNION OF CONCERNED SCIENTISTS
2397 SHATTUCK AVE., SUITE 203
BERKELEY, CA 94704
lwisland@ucsusa.org

JP ROSS
SUNGEVITY
1625 SHATTUCK AVE., STE 210
BERKELEY, CA 94709
jpross@sungevity.com

L. JAN REID
COAST ECONOMIC CONSULTING
3185 GROSS ROAD
SANTA CRUZ, CA 95062
janreid@coastecon.com

MARTIN HOMEC
LAW OFFICE OF MARTIN HOMEC
PO BOX 4471
DAVIS, CA 95617
martinhomec@gmail.com

JUDITH SANDERS
CALIFORNIA ISO
151 BLUE RAVINE ROAD
FOLSOM, CA 95630
jsanders@caiso.com

JOHN DALESSI
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670-6078
jdalessi@navigantconsulting.com

DAN GEIS
THE DOLPHIN GROUP
925 L STREET, SUITE 800
SACRAMENTO, CA 95814
dgeis@dolphingroup.org

JAN MCFARLAND
CAEATFA
915 CAPITOL MALL, RM. 468
SACRAMENTO, CA 95814
jmcfarland@treasurer.ca.gov

CHRISTINE HENNING
LARGE-SCALE SOLAR ASSOCIATION
3572 HUNTSMAN DRIVE
SACRAMENTO, CA 95826
Christine@consciousventuresgroup.com

JORDAN WHITE
PACIFICORP
825 NE MULTNOMAH STREET, SUITE
1800
PORTLAND, OR 97232
jordan.white@pacificorp.com

NICHOLE FABRI ZANDOLI
CLEAR ENERGY BROKERAGE &
CONSULTING LLC
403 PARKSIDE AVENUE
BROOKLYN, NY 11226
nicole.fabri@clearenergybrokerage.com

KEVIN PORTER
EXETER ASSOCIATES, INC.
5565 STERRETT PLACE, SUITE 310
COLUMBIA, MD 21044
porter@exeterassociates.com

SAMARA M. RASSI
FELLON-MCCORD & ASSOCIATES
9960 CORPORATE CAMPUS DRIVE,
SUITE 2500
LOUISVILLE, KY 40223
srassi@fellonmccord.com

JASON ABIECUNAS
RENEWABLE ENERGY CONSULTANT
11401 LAMAR
OVERLAND PARK, KS 66211
abiecunasjp@bv.com

MOUNTAIN UTILITIES
PO BOX 1
KIRKWOOD, CA 95646

MEGAN MACNEIL MYERS
LAW OFFICES OF MEGAN MACNEIL
MYERS
1100 ROSEVILLE PKWY APT 924
ROSEVILLE, CA 95678-4108
meganmmyers@yahoo.com

DAN L. CARROLL
DOWNEY BRAND, LLP
621 CAPITOL MALL, 18TH FLOOR
SACRAMENTO, CA 95814
dcarroll@downeybrand.com

ANDREW B. BROWN
ELLISON SCHNEIDER & HARRIS, LLP
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CA 95816-5905
abb@eslawfirm.com

KAREN NORENE MILLS
CALIFORNIA FARM BUREAU
FEDERATION
2300 RIVER PLAZA DRIVE
SACRAMENTO, CA 95833
kmills@cfbf.com

THOMAS ELGIE
POWEREX CORPORATION
1400, 666 BURRAND ST
VANCOUVER, BC V6C 2X8
Tom.Elgie@powerex.com

RONALD M. CERNIGLIA
DIRECT ENERGY SERVICES, LLC
40 COLUMBINE DRIVE
GLENMONT, NY 12077-2966
ron.cerniglia@directenergy.com

TODD JAFFE
3420 KEYSER ROAD
BALTIMORE, MD 21208
tjaffe@energybusinessconsultants.com

CATHY S. WOOLLUMS
MIDAMERICAN ENERGY HOLDINGS
COMPANY
106 EAST SECOND STREET
DAVENPORT, IA 52801
cswoolllums@midamerican.com

TRENT A. CARLSON
RELIANT ENERGY
1000 MAIN STREET
HOUSTON, TX 77001
tcarlson@reliant.com

KIRBY DUSEL
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670
kdusel@navigantconsulting.com

CAROLYN KEHREIN
ENERGY MANAGEMENT SERVICES
2602 CELEBRATION WAY
WOODLAND, CA 95776
cmkehrein@ems-ca.com

DAVID A. BISCHEL
CALIFORNIA FORESTRY ASSOCIATION
1215 K STREET, SUITE 1830
SACRAMENTO, CA 95814
davidb@cwo.com

LYNN M. HAUG
ELLISON, SCHNEIDER & HARRIS, LLP
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CA 95816-5905
lmh@eslawfirm.com

JESSICA NELSON
PLUMAS-SIERRA RURAL ELECTRIC CO-
OP
73233 STATE ROUTE 70, STE A
PORTOLA, CA 96122-7064
jnelson@psrec.coop

STEVEN S. SCHLEIMER
BARCLAYS BANK, PLC
200 PARK AVENUE, FIFTH FLOOR
NEW YORK, NY 10166
steven.schleimer@barclayscapital.com

VENKAT SURAVARAPU
CAMBRIDGE ENERGY RESEARCH
ASSOCIATES
1150 CONNECTICUT AVENUE NW, STE.
201
WASHINGTON, DC 20036
vsuravarapu@cera.com

RICHARD F. CHANDLER
BP SOLAR
630 SOLAREX COURT
FREDERICK, MA 21703
richard.chandler@bp.com

CYNTHIA A. FONNER
CONSTELLATION ENERGY GROUP INC
500 WEST WASHINGTON ST, STE 300
CHICAGO, IL 60661
Cynthia.A.Fonner@constellation.com

ED CHIANG
ELEMENT MARKETS, LLC
3555 TIMMONS LANE, STE. 900
HOUSTON, TX 77027-6453
echiang@elementmarkets.com

JONATHAN JACOBS
PA CONSULTING GROUP
1700 LINCOLN ST STE 4600
DENVER, CO 80203-4509
jon.jacobs@paconsulting.com

ELIZABETH BAKER
SUMMIT BLUE CONSULTING
1722 14TH STREET, SUITE 230
BOULDER, CO 80304
bbaker@summitblue.com

KEVIN J. SIMONSEN
ENERGY MANAGEMENT SERVICES
646 EAST THIRD AVENUE
DURANGO, CO 81301
kjsimonsen@ems-ca.com

JENINE SCHENK
APS ENERGY SERVICES
400 E. VAN BUREN STREET, SUITE 750
PHOENIX, AZ 85004
jenine.schenk@apses.com

LORRAINE A. PASKETT
FIRST SOLAR, INC.
350 WEST WASHINGTON STREET,
SUITE 600
TEMPE, AZ 85281
LPaskett@FirstSolar.com

ELENA MELLO
SIERRA PACIFIC POWER COMPANY
6100 NEIL ROAD
RENO, NV 89520
emello@sppc.com

TREVOR DILLARD
SIERRA PACIFIC POWER COMPANY
6100 NEIL ROAD, MS S4A50
RENO, NV 89520-0024
tdillard@sppc.com

JOE GRECO
TERRA-GEN POWER LLC
9590 PROTOTYPE COURT, SUITE 200
RENO, NV 89521
jgreco@terra-genpower.com

MARLA DICKERSON
LOS ANGELES TIMES
202 W. FIRST ST.
LOS ANGELES, CA 90012
Marla.Dickerson@latimes.com

HUGH YAO
SOUTHERN CALIFORNIA GAS COMPANY
555 W. 5TH ST, GT22G2
LOS ANGELES, CA 90013
HYao@SempraUtilities.com

CLAIRE E. TORCHIA
CHADBOURNE & PARKE LLP
350 SOUTH GRAND AVE., STE 3300
LOS ANGELES, CA 90071
ctorchia@chadbourne.com

HARVEY EDER
PUBLIC SOLAR POWER COALITION
1218 12TH ST., 25
SANTA MONICA, CA 90401
harveyederpspc@hotmail.com

DOUGLAS MCPHERSON
130 W. UNION STREET
PASADENA, CA 91103
Douglas@Idealab.com

STEVEN P. CHADIMA
ENERGY INNOVATIONS, INC.
130 WEST UNION STREET
PASADENA, CA 91103
steve@energyinnovations.com

FREEMAN S. HALL
SOLAR ELECTRIC SOLUTIONS, LLC
5353 TOPANGA CANYON BLVD, STE 300
WOODLAND HILLS, CA 91364
fhall@solarelectricsolutions.com

JACK MCNAMARA
MACK ENERGY COMPANY
PO BOX 1380
AGOURA HILLS, CA 91376-1380
jackmack@suesec.com

CASE ADMINISTRATION
SOUTHERN CALIFORNIA EDISON
COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770
case.admin@sce.com

GARY L. ALLEN
SOUTHERN CALIFORNIA EDISON
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770
gary.allen@sce.com

GEORGE WILTSEE
SOUTHERN CALIFORNIA EDISON
COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770
george.wiltsee@sce.com

JONI A. TEMPLETON
SOUTHERN CALIFORNIA EDISON
COMPANY
2244 WALNUT GROVE AVENUE, PO BOX
800
ROSEMEAD, CA 91770
Joni.Templeton@sce.com

KEITH SWITZER
GOLDEN STATE WATER COMPANY
630 EAST FOOTHILL BLVD.
SAN DIMAS, CA 91773-9016
kswitzer@gswater.com

JEFF COX
FUELCELL ENERGY
1557 MANDEVILLE PLACE
ESCONDIDO, CA 92029
Jcox@fce.com

MARY C. HOFFMAN
SOLUTIONS FOR UTILITIES, INC.
1192 SUNSET DRIVE
VISTA, CA 92081
mary@solutionsforutilities.com

AIMEE M. SMITH
SEMPRA ENERGY
101 ASH STREET HQ13
SAN DIEGO, CA 92101
amsmith@sempra.com

CURTIS KEBLER
SEMPRA GENERATION
101 ASH STREET, HQ14D
SAN DIEGO, CA 92101
ckebler@SempraGeneration.com

THOMAS P. CORR
SEMPRA ENERGY GLOBAL
ENTERPRISES
101 ASH STREET, HQ16C
SAN DIEGO, CA 92101
tcorr@sempra.com

YVONNE GROSS
SEMPRA GLOBAL
101 ASH STREET, HQ08C
SAN DIEGO, CA 92101
ygross@sempraglobal.com

TERRY FARRELLY
269 G AVENUE
CORONADO, CA 92118
farrellytc@earthlink.net

CENTRAL FILES
SAN DIEGO GAS & ELECTRIC
8330 CENTURY PARK COURT
SAN DIEGO, CA 92123
centralfiles@semprautilities.com

CHARLES MANZUK
SAN DIEGO GAS & ELECTRIC
8330 CENTURY PARK COURT, CP 32D
SAN DIEGO, CA 92123
cmanzuk@semprautilities.com

JENNIFER WRIGHT
SAN DIEGO GAS & ELECTRIC CO.
8330 CENTURY PARK CT
SAN DIEGO, CA 92123
jwright@semprautilities.com

NATE FRANKLIN
EDISON MISSION ENERGY
18101 VON KARMAN AVE, SUITE 1700
IRVINE, CA 92612
NFranklin@edisonmission.com

ROGER LEE
BAKER & HOSTETLER LLP
600 ANTON BLVD., SUITE 900
COSTA MESA, CA 92626
rblee@bakerlaw.com

HAROLD M. ROMANOWITZ
OAK CREEK ENERGY SYSTEMS, INC.
14633 WILLOW SPRINGS ROAD
MOJAVE, CA 93501
hal@rwitz.net

BILLY BLATTNER
SAN DIEGO GAS & ELECTRIC COMPANY
601 VAN NESS AVENUE, SUITE 2060
SAN FRANCISCO, CA 94102
wblattner@semprautilities.com

NINA SUETAKE
THE UTILITY REFORM NETWORK
711 VAN NESS AVE., STE. 350
SAN FRANCISCO, CA 94102
nsuetake@turn.org

MANUEL RAMIREZ
SAN FRANCISCO PUC
1155 MARKET STREET, 4TH FLOOR
SAN FRANCISCO, CA 94103
mramirez@sfgwater.org

THERESA BURKE
SAN FRANCISCO PUC
1155 MARKET STREET, 4TH FLOOR
SAN FRANCISCO, CA 94103
tburke@sfgwater.org

KAREN TERRANOVA
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, STE 2200
SAN FRANCISCO, CA 94104
filings@a-klaw.com

SEAN HAZLETT
MORGAN STANLEY
555 CALIFORNIA ST., SUITE 2200
SAN FRANCISCO, CA 94104
sean.hazlett@morganstanley.com

DESPINA NIEHAUS
SAN DIEGO GAS AND ELECTRIC
COMPANY
8330 CENTURY PARK COURT, CP32H
SAN DIEGO, CA 92123-1530
dniehaus@semprautilities.com

STEPHEN HESS
EDISON MISSION MARKETING &
TRADING INC.
18101 VON KARMAN AVE, STE. 1700
IRVINE, CA 92612-1046
shess@edisonmission.com

LEONARD LEICHNITZ
LUMOS POWER LP
1280 BISON B9-37
NEWPORT BEACH, CA 92660
lechnitz@lumospower.com

MARK STOUT
CLEANTECH AMERICA, INC.
1416 BROADWAY ST. SUITE B
FRESNO, CA 93721
m.stout@cleantechamerica.com

DIANE I. FELLMAN
NEXTERA ENERGY RESOURCES, LLC.
234 VAN NESS AVENUE
SAN FRANCISCO, CA 94102
Diane.Fellman@nexteraenergy.com

PAUL FENN
LOCAL POWER
35 GROVE STREET
SAN FRANCISCO, CA 94102
paulfenn@local.org

MICHAEL A. HYAMS
SAN FRANCISCO PUBLIC UTILITIES
COMM
1155 MARKET ST., 4TH FLOOR
SAN FRANCISCO, CA 94103
mhyams@sfgwater.org

BILL GOLOVE
CHEVRON ENERGY SOLUTIONS
345 CALIFORNIA STREET, 18TH FLOOR
SAN FRANCISCO, CA 94104
whgolove@chevron.com

MICHAEL E. CARBOY
SIGNAL HILL CAPITAL LLC
343 SANSOME STREET, SUITE 950
SAN FRANCISCO, CA 94104
mcarboy@signalhill.com

SNULLER PRICE
ENERGY AND ENVIRONMENTAL
ECONOMICS
101 MONTGOMERY, SUITE 1600
SAN FRANCISCO, CA 94104
snuller@ethree.com

JOHN W. LESLIE
LUCE, FORWARD, HAMILTON &
SCRIPPS, LLP
11988 EL CAMINO REAL, SUITE 200
SAN DIEGO, CA 92130-2592
jleslie@luce.com

CARL STEEN
BAKER & HOSTETLER LLP
600 ANTON BLVD., SUITE 900
COSTA MESA, CA 92626
csteen@bakerlaw.com

MICHAEL J. GILMORE
INLAND ENERGY
3501 JAMBOREE RD
NEWPORT BEACH, CA 92660
michaelgilmore@inlandenergy.com

MARC D. JOSEPH
ADAMS, BROADWELL, JOSEPH &
CARDOZO
601 GATEWAY BLVD., STE. 1000
SOUTH SAN FRANCISCO, CA 94080
mdjoseph@adamsbroadwell.com

MATTHEW FREEDMAN
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102
matthew@turn.org

DAN ADLER
CALIFORNIA CLEAN ENERGY FUND
5 THIRD STREET, SUITE 1125
SAN FRANCISCO, CA 94103
Dan.adler@calcef.org

SANDRA ROVETTI
SAN FRANCISCO PUC
1155 MARKET STREET, 4TH FLOOR
SAN FRANCISCO, CA 94103
srovetti@sfgwater.org

DOUGLAS E. COVER
ENVIRONMENTAL SCIENCE
ASSOCIATES
225 BUSH STREET, SUITE 1700
SAN FRANCISCO, CA 94104
dcover@esassoc.com

NICK ALLEN
MORGAN STANLEY RESEARCH
555 CALIFORNIA STREET STE 2200 21ST
FLR
SAN FRANCISCO, CA 94104
Nick.Allen@morganstanley.com

JASON YAN
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, MAIL CODE B13L
SAN FRANCISCO, CA 94105
jay2@pge.com

JOHN PAPPAS
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, N12E
SAN FRANCISCO, CA 94105
jsp5@pge.com

SEEMA SRINIVASAN
ALCANTAR & KAHL, LLP
33 NEW MONTGOMERY STREET, SUITE
1850
SAN FRANCISCO, CA 94105
sls@a-klaw.com

JANINE L. SCANCARELLI
FOLGER, LEVIN & KAHN, LLP
275 BATTERY STREET, 23RD FLOOR
SAN FRANCISCO, CA 94111
jscancarelli@flk.com

JUDY PAU
DAVIS WRIGHT TREMAINE LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533
judypau@dwt.com

CALIFORNIA ENERGY MARKETS
425 DIVISADERO ST. SUITE 303
SAN FRANCISCO, CA 94117-2242
cem@newsdata.com

LEIGH FAVRET
3DEGREES
6 FUNSTON AVENUE
SAN FRANCISCO, CA 94129
lfavret@3degreesinc.com

MAGGIE CHAN
PG&E
PO BOX 770000
SAN FRANCISCO, CA 94177
MMCL@pge.com

VALERIE J. WINN
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, PG&E MAIL CODE N12G
SAN FRANCISCO, CA 94177-0001
vjw3@pge.com

BETH VAUGHAN
CALIFORNIA COGENERATION COUNCIL
4391 NORTH MARSH ELDER CT.
CONCORD, CA 94521
beth@beth411.com

ANDREW J. VAN HORN
VAN HORN CONSULTING
12 LIND COURT
ORINDA, CA 94563
andy.vanhorn@vhcenergy.com

LAW DEPARTMENT FILE ROOM
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, B30A
SAN FRANCISCO, CA 94105
cpuccases@pge.com

CORY M. MASON
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, MC B30A
SAN FRANCISCO, CA 94105-1814
cmmw@pge.com

KARLEEN O'CONNOR
WINSTON & STRAWN LLP
101 CALIFORNIA STREET 39TH FLR
SAN FRANCISCO, CA 94111
koconnor@winston.com

ROBERT B. GEX
DAVIS WRIGHT TREMAINE LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533
bobgex@dwt.com

STANDISH O'GRADY
FRIENDS OF KIRKWOOD ASSOCIATION
31 PARKER AVENUE
SAN FRANCISCO, CA 94118
sho@ogrady.us

ED LUCHA
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, MAIL CODE B9A
SAN FRANCISCO, CA 94177
ELL5@pge.com

SHAUN HALVERSON
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000
SAN FRANCISCO, CA 94177
SEHC@pge.com

ROBIN J. WALTHER
1380 OAK CREEK DRIVE, NO. 316
PALO ALTO, CA 94304-2016
rwalt@pacbell.net

TONY CHEN
COOL EARTH SOLAR
7665 HAWTHORNE AVE
LIVERMORE, CA 94550

KEVIN DUGGAN
CALPINE CORPORATION
3875 HOPYARD ROAD, SUITE 345
PLEASANTON, CA 94588

NORA SHERIFF
ALCANTAR & KAHL
33 NEW MONTGOMERY STREET, SUITE
1850
SAN FRANCISCO, CA 94105
nes@a-klaw.com

NIELS KJELLUND
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, MAIL CODE B9A
SAN FRANCISCO, CA 94105-1814
nxk2@pge.com

DEREK DENNISTON
RENEWABLE ENERGY MARKETS
101 CALIFORNIA STREET, STE 2750
SAN FRANCISCO, CA 94111-5802
derek@evomarkets.com

CALIFORNIA ENERGY MARKETS
425 DIVISADERO ST.
SAN FRANCISCO, CA 94117
cem@newsdata.com

SARA BIRMINGHAM
SOLAR ALLIANCE
646 19TH AVE
SAN FRANCISCO, CA 94121
sara@solaralliance.org

GRACE LIVINGSTON-NUNLEY
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000 MAIL CODE B9A
SAN FRANCISCO, CA 94177
GXL2@pge.com

VALERIE WINN
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, MAIL CODE 12G
SAN FRANCISCO, CA 94177
vjw3@pge.com

BRAD WETSTONE
ALAMEDA POWER AND TELECOM
2000 GRANT STREET, PO BOX H
ALAMEDA, CA 94501-0263
wetstone@alamedapt.com

COOL EARTH SOLAR
4659 LAS POSITAS RD., SUITE C
LIVERMORE, CA 94551
mpr-ca@coolearthsolar.com

ROBERT T. BOYD
GE WIND ENERGY
6130 STONERIDGE MAIL ROAD, SUITE
300B
PLEASANTON, CA 94588-3287
robert.boyd@ps.ge.com

SARAH BESERRA
CALIFORNIA REPORTS.COM
39 CASTLE HILL COURT
VALLEJO, CA 94591
sbeserra@sbcglobal.net

PETER W. HANSCHEN
MORRISON & FOERSTER, LLP
101 YGNACIO VALLEY ROAD, SUITE 450
WALNUT CREEK, CA 94596
phansch@mofo.com

JENNIFER BARNES
SUMMIT BLUE CONSULTING, LLC
2920 CAMINO DIABLO, SUITE 210
WALNUT CREEK, CA 94597
jbarnes@summitblue.com

RYAN PLETKA
BLACK & VEATCH
2999 OAK ROAD, SUITE 490
WALNUT CREEK, CA 94597
pletkarj@bv.com

TIM MASON
BLACK & VEATCH CORP.
2999 OAK ROAD, SUITE 490
WALNUT CREEK, CA 94597
masont@bv.com

TIMEA ZENTAI
SUMMIT BLUE CONSULTING, LLC
2920 CAMINO DIABLO, SUITE 210
WALNUT CREEK, CA 94597
tzentai@summitblue.com

WILLIAM F. DIETRICH
DIETRICH LAW
2977 YGNACIO VALLEY ROAD, NO. 613
WALNUT CREEK, CA 94598-3535
dietrichlaw2@earthlink.net

ALEX KANG
ITRON, INC.
1111 BROADWAY, STE. 1800
OAKLAND, CA 94607
alex.kang@itron.com

NELLIE TONG
KEMA, INC.
492 NINTH STREET, SUITE 220
OAKLAND, CA 94607
nellie.tong@us.kema.com

RAMONA GONZALEZ
EAST BAY MUNICIPAL UTILITY DISTRICT
375 ELEVENTH STREET, M/S NO. 205
OAKLAND, CA 94607
ramonag@ebmud.com

BARRY H. EPSTEIN
FITZGERALD, ABBOTT & BEARDSLEY,
LLP
1221 BROADWAY, 21ST FLOOR
OAKLAND, CA 94612
bepstein@fablaw.com

MRW & ASSOCIATES, INC.
1814 FRANKLIN STREET, SUITE 720
OAKLAND, CA 94612
mrw@mrwassoc.com

DOCKET COORDINATOR
5727 KEITH ST.
OAKLAND, CA 94618
cpucdockets@keyesandfox.com

KEVIN FOX
KEYES & FOX LLP
5727 KEITH AVENUE
OAKLAND, CA 94618
kfox@keyesandfox.com

CYNTHIA WOOTEN
LUMENX CONSULTING, INC.
1126 DELAWARE STREET
BERKELEY, CA 94702
cwooten@lumenxconsulting.com

REED V. SCHMIDT
BARTLE WELLS ASSOCIATES
1889 ALCATRAZ AVENUE
BERKELEY, CA 94703-2714
rschmidt@bartlewells.com

GEOFF TEIGEN
RCM INTERNATIONAL, LLC
PO BOX 4716
BERKELEY, CA 94704
gteigen@rcmdigesters.com

JANICE LIN
STRATEGEN CONSULTING LLC
146 VICENTE ROAD
BERKELEY, CA 94705
janice@strategenconsulting.com

SEAN P. BEATTY
MIRANT CALIFORNIA, LLC
PO BOX 192
PITTSBURG, CA 94707
sean.beatty@mirant.com

CLIFF CHEN
UNION OF CONCERNED SCIENTISTS
2397 SHATTUCK AVENUE, STE 203
BERKELEY, CA 94708
cchen@ucsusa.org

BRENDA LEMAY
HORIZON WIND ENERGY
1600 SHATTUCK, SUITE 222
BERKELEY, CA 94709
brenda.lemay@horizonwind.com

RACHEL MCMAHON
SOLAR MILLENNIUM, LLC
1625 SHATTUCK AVE, SUITE 270
BERKELEY, CA 94709-1161
mcmahon@solarmillennium.com

SEAN GALLAGHER
STIRLING ENERGY SYSTEMS
2600 10TH STREET, SUITE 635
BERKELEY, CA 94710
sgallagher@stirlingenergy.com

EDWARD VINE
LAWRENCE BERKELEY NATIONAL
LABORATORY
BUILDING 90R4000
BERKELEY, CA 94720
elvine@lbl.gov

ED SMELOFF
SUNPOWER CORPORATION
1414 HARBOUR WAY SOUTH
RICHMOND, CA 94804
ed.smeloff@sunpowercorp.com

BRIAN C. FRECKMANN
C/O FOUNDATION PARTNERS
100 DRAKES LANDING ROAD, NO. 125
GREENBRAE, CA 94904
brian@banyansec.com

LYNN M. ALEXANDER
LMA CONSULTING
129 REDWOOD AVENUE
CORTE MADERA, CA 94925
lynn@lmaconsulting.com

TOM FAUST
REDWOOD RENEWABLES LLC
6 ENDEAVOR DRIVE
CORTE MADERA, CA 94925
tfaust@redwoodrenewables.com

JOE HAUMANN
HMH ENERGY RESOURCES, INC.
100 LARKSPUR LANDING CIRCLE, STE
213
LARKSPUR, CA 94939
joe@hmhresources.com

TIM ROSENFELD
MARIN ENERGY MANAGEMENT TEAM
131 CAMINO ALTO, SUITE D
MILL VALLEY, CA 94941
tim@marinemt.org

EDWARD A. MAINLAND
CNRCC SIERRA CLUB CALIFORNIA
1017 BEL MARIN KEYS BLVD.
NOVATO, CA 94949
ed.mainland@sierraclub.org

KEITH WHITE
312 KELLER ST
PETALUMA, CA 94952
keithwhite@earthlink.net

ERIC CHERNISS
SOLARGEN ENERGY
20400 STEVENS CREEK BLVD, SUITE
700
CUPERTINO, CA 95014
eric.cherniss@gmail.com

CARL PECHMAN
POWER ECONOMICS
901 CENTER STREET
SANTA CRUZ, CA 95060
cpechman@powereconomics.com

SUSAN M. O'BRIEN
MCCARTHY & BERLIN, LLP
100 W. SAN FERNANDO ST., SUITE 501
SAN JOSE, CA 95113
sobrien@mccarthyllaw.com

THOMAS J. VICTORINE
SAN JOSE WATER COMPANY
1221 S. BASCOM AVENUE
SAN JOSE, CA 95128
tom_victorine@sjwater.com

DAVID OLIVARES
MODESTO IRRIGATION DISTRICT
PO BOX 4060
MODESTO, CA 95352
davido@mid.org

JOY A. WARREN
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95354
joyw@mid.org

BARBARA R. BARKOVICH
BARKOVICH & YAP, INC.
44810 ROSEWOOD TERRACE
MENDOCINO, CA 95460
brbarkovich@earthlink.net

DOUGLAS M. GRANDY, P.E.
DG TECHNOLOGIES
1220 MACAULAY CIRCLE
CARMICHAEL, CA 95608
dgrandy@caonsitegen.com

RICHARD MCCANN
M.CUBED
2655 PORTAGE BAY ROAD, SUITE 3
DAVIS, CA 95616
rmccann@umich.edu

DAVID MORSE
1411 W. COVELL BLVD., SUITE 106-292
DAVIS, CA 95616-5934
demorse@omsoft.com

TOBIN RICHARDSON
RICHARDSON GROUP
1416 VIGO COURT
DAVIS, CA 95618
tobinjmr@sbcglobal.net

BALDASSARO DI CAPO
CALIFORNIA INDEPENDENT SYSTEM
OPERATOR
151 BLUE RAVINE ROAD
FOLSOM, CA 95630
bdicapo@caiso.com

SAEED FARROKHPAY
FEDERAL ENERGY REGULATORY
COMMISSION
110 BLUE RAVINE RD., SUITE 107
FOLSOM, CA 95630
saeed.farrokhpay@ferc.gov

CALIFORNIA ISO
151 BLUE RAVINE ROAD
FOLSOM, CA 95630
e-recipient@caiso.com

DENNIS W. DE CUIR
A LAW CORPORATION
2999 DOUGLAS BLVD., SUITE 325
ROSEVILLE, CA 95661
dennis@ddecuir.com

RICK A. LIND
SIERRA ECOSYSTEM ASSOCIATES
PO BOX 2260
PLACERVILLE, CA 95667
rick@sierraecos.com

DAVID OLIVER
NAVIGANT CONSULTING
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670
david.oliver@navigantconsulting.com

KENNY SWAIN
NAVIGANT CONSULTING
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670
kenneth.swain@navigantconsulting.com

ERIN RANSLOW
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670-6078
cpucrulings@navigantconsulting.com

LAURIE PARK
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670-6078
lpark@navigantconsulting.com

PAUL D. MAXWELL
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670-6078
pmaxwell@navigantconsulting.com

KARLY MCCRORY
SOLAR DEVELOPMENT INC.
5420 DOUGLAS BLVD. STE. F
GRANITE BAY, CA 95746-6253
karly@solardevelop.com

KEVIN DAVIES
SOLAR DEVELOPMENT INC.
5420 DOUGLAS BLVD. STE F
GRANITE BAY, CA 95746-6253
kevin@solardevelop.com

TOM POMALES
CALIFORNIA AIR RESOURCES BOARD
1001 I STREET
SACRAMENTO, CA 95812
tpomales@arb.ca.gov

AMBER RIESENHUBER
INDEPENDENT ENERGY PRODUCERS
ASSOC.
1215 K STREET, SUITE 900
SACRAMENTO, CA 95814
amber@iepa.com

BRUCE MCLAUGHLIN
BRAUN & BLAISING P.C.
915 L STREET, SUITE 1270
SACRAMENTO, CA 95814
mclaughlin@braunlegal.com

DANIELLE OSBORN MILLS
CEERT
1100 11TH STREET, SUITE 311
SACRAMENTO, CA 95814
danielle@ceert.org

JANE E. LUCKHARDT
DOWNEY BRAND LLP
621 CAPITOL MALL, 18TH FLOOR
SACRAMENTO, CA 95814
jluckhardt@downeybrand.com

JIM METROPULOS
SIERRA CLUB CALIFORNIA
801 K STREET, SUITE 2700
SACRAMENTO, CA 95814
jim.metropulos@sierraclub.org

MICHELLE GARCIA
CALIFORNIA AIR RESOURCES BOARD
1001 I STREET
SACRAMENTO, CA 95814
mgarcia@arb.ca.gov

PATRICK STONER
LOCAL GOVERNMENT COMMISSION
1303 J STREET, SUITE 250
SACRAMENTO, CA 95814
pstoner@lgc.org

RYAN BERNARDO
BRAUN BLAISING MCLAUGHLIN, P.C.
915 L STREET, SUITE 1270
SACRAMENTO, CA 95814
bernardo@braunlegal.com

SCOTT BLAISING
BRAUN & BLAISING MCLAUGHLIN, P.C.
915 L STREET, SUITE 1270
SACRAMENTO, CA 95814
blaising@braunlegal.com

STEVE BRINK
CALIFORNIA FORESTRY ASSOCIATION
1215 K STREET, SUITE 1830
SACRAMENTO, CA 95814
steveb@cwo.com

STEVEN KELLY
INDEPENDENT ENERGY PRODUCERS
1215 K STREET, SUITE 900
SACRAMENTO, CA 95814
steven@iepa.com

DANIELLE MATTHEWS SEPERAS
CALPINE CORPORATION
1215 K STREET, SUITE 2210
SACRAMENTO, CA 95814-3978
dseperas@calpine.com

BRIAN S. BIERING
ELLISON SCHNEIDER & HARRIS, LLP
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CA 95816-5905
bsb@eslawfirm.com

CHRISTOPHER T. ELLISON
ELLISON, SCHNEIDER & HARRIS, LLP
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CA 95816-5905
cte@eslawfirm.com

DOUGLAS K. KERNER
ELLISON, SCHNEIDER & HARRIS, LLP
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CA 95816-5905
dkk@eslawfirm.com

JEDEDIAH J. GIBSON
ELLISON SCHNEIDER & HARRIS LLP
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CA 95816-5905
jjg@eslawfirm.com

ROB ROTH
SACRAMENTO MUNICIPAL UTILITY
DISTRICT
6201 S STREET MS 75
SACRAMENTO, CA 95817
rroth@smud.org

WILLIAM W. WESTERFIELD III
SACRAMENTO MUNICIPAL UTILITY
DISTRICT
6201 S STREET
SACRAMENTO, CA 95817
wwester@smud.org

MICHAEL DEANGELIS
SACRAMENTO MUNICIPAL UTILITY
DISTRICT
6201 S STREET
SACRAMENTO, CA 95817-1899
mdeange@smud.org

VIKKI WOOD
SACRAMENTO MUNICIPAL UTILITY
DISTRICT
6301 S STREET, MS A204
SACRAMENTO, CA 95817-1899
vwood@smud.org

CAROL J. HURLOCK
CALIFORNIA DEPT. OF WATER
RESOURCES
3310 EL CAMINO AVE. RM 300
SACRAMENTO, CA 95821
hurlock@water.ca.gov

LEE TERRY
CALIFORNIA DEPARTMENT OF WATER
RESOURCES
3310 EL CAMINO AVENUE
SACRAMENTO, CA 95821
lterry@water.ca.gov

MOHAN NIROULA
CALIF DEPT OF WATER RESOURCES
3310 EL CAMINO AVENUE, STE 256
SACRAMENTO, CA 95821
mniroula@water.ca.gov

ART RIVERA
RENEWABLE TECHCOM
10243 ELLENWOOD AVE
SACRAMENTO, CA 95827
artrivera@comcast.net

RICH LAUCKHART
GLOBAL ENERGY
2379 GATEWAY OAKS DR.
SACRAMENTO, CA 95833
rlauckhart@globalenergy.com

RONALD LIEBERT
CALIFORNIA FARM BUREAU
FEDERATION
2300 RIVER PLAZA DRIVE
SACRAMENTO, CA 95833
rliebert@cfbf.com

KAREN LINDH
CALIFORNIA ONSITE GENERATION
7909 WALERGA ROAD, NO. 112, PMB
119
ANTELOPE, CA 95843
karen@klindh.com

ANN L. TROWBRIDGE
DAY CARTER & MURPHY LLP
3620 AMERICAN RIVER DRIVE, SUITE
205
SACRAMENTO, CA 95864
atrowbridge@daycartermurphy.com

JAMES L. BYARD PH.D.
206 SACRAMENTO STREET, SUITE 206
NEVADA CITY, CA 95959
DocToxics@aol.com

CHRISTIAN MENTZEL
CEM LLC
619 KUPULAU DR
KIHEI, HI 96753
c.mentzel@cleanenergymaui.com

KYLE DAVIS
PACIFICORP
825 NE MULNOMAH, SUITE 2000
PORTLAND, OR 97232
kyle.l.davis@pacificorp.com

MARK TUCKER
PACIFICORP
825 NE MULTNOMAH, SUITE 2000
PORTLAND, OR 97232
californiadockets@pacificorp.com

DONALD SCHOENBECK
RCS, INC.
900 WASHINGTON STREET, SUITE 780
VANCOUVER, WA 98660
dws@r-c-s-inc.com

TIMOTHY CASTILLE
LANDS ENERGY CONSULTING, INC.
18109 SE 42ND STREET
VANCOUVER, WA 98683
castille@landsenergy.com

INFINIA CORPORATION
6811 WEST OKANOGAN PLACE
KENNEWICK, WA 99336
dtownley@infiniacorp.com

Amy C. Baker
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
ab1@cpuc.ca.gov

Anne Gillette
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
aeg@cpuc.ca.gov

Cheryl Lee
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
cni@cpuc.ca.gov

David Peck
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
dbp@cpuc.ca.gov

Edward Howard
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
trh@cpuc.ca.gov

Gretchen T. Dumas
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
gtd@cpuc.ca.gov

Julie A. Fitch
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
jf2@cpuc.ca.gov

Keith D White
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
kwh@cpuc.ca.gov

Matthew Deal
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
mjd@cpuc.ca.gov

MONIQUE STEVENSON
SEA BREEZE PACIFIC REGIONAL
TRANSMISSION
333 SEYMOUR ST., SUITE 1400
VANCOUVER, BC V5B 5A6
MoniqueStevenson@SeaBreezePower.com

Andrew Schwartz
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
as2@cpuc.ca.gov

Brian D. Schumacher
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
bds@cpuc.ca.gov

Christopher Danforth
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
ctd@cpuc.ca.gov

Donald R. Smith
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
dsh@cpuc.ca.gov

Elizabeth Stoltzfus
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
eks@cpuc.ca.gov

Jaclyn Marks
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
jm3@cpuc.ca.gov

Julie Halligan
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
jmh@cpuc.ca.gov

Mark R. Loy
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
mrl@cpuc.ca.gov

Matthew Tisdale
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
mwt@cpuc.ca.gov

JAMES MCMAHON
CRA INTERNATIONAL
50 CHURCH ST.
CAMBRIDGE, MA 2138
jmcMahon@crai.com

Anne E. Simon
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
aes@cpuc.ca.gov

Burton Mattson
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
bwm@cpuc.ca.gov

Curtis Seymour
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
css@cpuc.ca.gov

Dorothy Duda
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
dot@cpuc.ca.gov

F. Jackson Stoddard
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
fjs@cpuc.ca.gov

Jane Whang
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
jjw@cpuc.ca.gov

Karin M. Hieta
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
kar@cpuc.ca.gov

Mary Jo Stueve
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
mjs@cpuc.ca.gov

Meri Levy
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
mjh@cpuc.ca.gov

Michael Colvin
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
mc3@cpuc.ca.gov

Mitchell Shapson
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
sha@cpuc.ca.gov

Nika Rogers
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
nlr@cpuc.ca.gov

Nilgun Atamturk
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
nil@cpuc.ca.gov

Paul Douglas
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
psd@cpuc.ca.gov

Rahmon Momoh
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
rmm@cpuc.ca.gov

Raj Naidu
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
rkn@cpuc.ca.gov

Sara M. Kamins
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
smk@cpuc.ca.gov

Sean A. Simon
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
svn@cpuc.ca.gov

Traci Bone
CALIF PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
tbo@cpuc.ca.gov

CLARE LAUFENBER GALLARDO
CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET, MS-46
SACRAMENTO, CA 95814
claufenb@energy.state.ca.us

CONSTANCE LENI
CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET
SACRAMENTO, CA 95814
cleni@energy.state.ca.us

Erin E. Grizard
CALIF PUBLIC UTILITIES COMMISSION
770 L STREET, SUITE 1230
SACRAMENTO, CA 95814
eeg@cpuc.ca.gov

HEATHER RAITT
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS 45
SACRAMENTO, CA 95814
hrait@energy.state.ca.us

JOSEPH FLESHMAN
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS-45
SACRAMENTO, CA 95814
jfleshma@energy.state.ca.us

KATE ZOCCHETTI
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS-45
SACRAMENTO, CA 95814
kzocchet@energy.state.ca.us

LORRAINE GONZALES
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET MS-45
SACRAMENTO, CA 95814
lgonzale@energy.state.ca.us

MARC PRYOR
CALIFORNIA ENERGY COMMISSION
1516 9TH ST, MS 20
SACRAMENTO, CA 95814
mpryor@energy.state.ca.us

Thomas Flynn
CALIF PUBLIC UTILITIES COMMISSION
770 L STREET, SUITE 1050
SACRAMENTO, CA 95814
trf@cpuc.ca.gov

CONNIE LENI
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET MS-20
SACRAMENTO, CA 95814-5512
cleni@energy.state.ca.us

DAVID VIDAVER
CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET, MS-20
SACRAMENTO, CA 95814-5512
dvidaver@energy.state.ca.us

JIM WOODWARD
CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET, MS 20
SACRAMENTO, CA 95814-5512
jwoodwar@energy.state.ca.us

MIKE RINGER
CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET, MS-20
SACRAMENTO, CA 95814-5512
mringer@energy.state.ca.us

HEATHER LOUIE
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS-45
SACRAMENTO, CA 95818
hlouie@energy.state.ca.us

HOLLY B. CRONIN
CALIFORNIA DEPARTMENT OF WATER
RESOURCES
3310 EL CAMINO AVE., LL-90
SACRAMENTO, CA 95821
hcronin@water.ca.gov

ROSS A. MILLER
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET MS 20
SACRAMENTO, CA 95814-5512
rmiller@energy.state.ca.us