



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

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Order Instituting Rulemaking Regarding Policies
and Protocols for Demand Response Load Impact
Estimates, Cost-Effectiveness Methodologies,
Megawatt Goals and Alignment with California
Independent System Operator Market Design
Protocols

Rulemaking 07-01-041
(Filed January 25, 2007)

REPLY BRIEF OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E)

JENNIFER T. SHIGEKAWA
JANET S. COMBS

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (626) 302-1524
Facsimile: (626) 302-7740
E-mail: janet.combs@sce.com

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I. INTRODUCTION

Pursuant to the December 29, 2009 Administrative Law Judge's Ruling Memorializing Schedule Modifications in the Direct Participation Phase of Rulemaking 07-01-041, Southern California Edison Company (SCE) respectfully submits its reply brief on the California Public Utilities Commission's (Commission) jurisdiction over consumer protection for retail electric customers who participate in programs of Demand Response (DR) service providers that directly bid into the California Independent System Operator (CAISO) wholesale markets.

SCE received opening briefs from Pacific Gas and Electric Company (PG&E), Division of Ratepayer Advocates (DRA), Alliance for Retail Energy Markets (AREM), and jointly from EnerNOC, Inc, EnergyConnect, Inc., and CPower, Inc. (Joint Parties). SCE replies to select arguments of these parties, below.

II. DISCUSSION

A. AReM and the Joint Parties Err in Concluding the Commission Has No Jurisdiction over Third-Party DR Aggregators for Consumer Protections

The Joint Parties argue that the Commission has no jurisdiction over third-party DR aggregators for any purpose, including consumer protections. While acknowledging that the Commission *has already found* that it has specific (limited) jurisdiction for consumer protections over electric service providers (ESPs) like aggregators, brokers and marketers,¹ the Joint Parties maintain that such jurisdiction ends at load-serving entities (LSEs). AReM advances a similar argument.² SCE disagrees.

Nothing in the P.U. Code states that the Commission's jurisdiction over ESPs for consumer protections applies *only if and to the extent* ESPs are LSEs. While it is true that many ESPs are LSEs, the statutory definition of an ESP is *on its face* not limited to LSEs.³ Moreover, as SCE noted in its opening brief, the Commission has expressly found aggregators, marketers and brokers (as defined in Section 331 of the Code) to be ESPs and subject to the Commission's jurisdiction for consumer protections.⁴ The definitions of aggregator, marketer, and broker in Section 331 of the P.U. Code are not limited to LSEs, either.⁵

Neither AReM nor the Joint Parties offer any Commission decision or case law that *expressly limits* an ESP within the meaning of Section 394 of the P.U. Code to an LSE. They point to cases that discuss a particular and common type of ESP – an LSE offering direct access to retail end-use customers. However, none of these cases interpret the statutory definition of an ESP to be limited to LSEs.

¹ See Opening Brief of Joint Parties, pp. 14-15, acknowledging that in D.97-02-021, the Commission found that while it does not have jurisdiction over aggregators, brokers and marketers as public utilities, it does have jurisdiction over them as ESPs for consumer protection purposes; *also* pp. 15, 17-18, discussing D.01-12-018, in which the Commission asserted jurisdiction for consumer protections over gas marketers and brokers in retail transactions.

² See Opening Brief of AReM, pp. 4-6.

³ See P.U. Code Section 394, defining ESPs to include unregulated affiliates and subsidiaries of an electrical corporation. Affiliates or subsidiaries of an electrical corporation are not necessarily LSEs.

⁴ See Opening Brief of SCE, pp. 7-8, citing D.97-02-021.

⁵ See *id.*, pp. 8-9.

The Commission should reject the Joint Parties’ assertion that Section 394 of the P.U. Code does not apply to third-party DR aggregators because they began operating in the California market *after* the statute was enacted. That a certain type of ESP did not operate in the California market at the time Assembly Bill 117’s consumer protection provisions (in P.U. Code Section 394 *et seq.*) were enacted does not mean that the Legislature intended to *exclude* those entities from the Commission’s jurisdiction for consumer protection purposes. Rather, the broad definition of an ESP in P.U. Code Section 394 suggests otherwise.⁶

The Legislature mandated that the Commission ensure consumer protections in the context of ESP services, and established minimum protections in P.U. Code Section 394 *et seq.* It is important that the Commission not disclaim its jurisdiction over ESPs for consumer protection purposes, for concerns of a competitive marketplace or otherwise. Hindering the development of a competitive market is a common concern with regulation; yet addressing that concern *does not require* the Commission to find that it *cannot* exert jurisdiction for consumer protections. Rather, it necessitates a critical examination of the *appropriate level of regulation* for consumer protections, given the competitiveness of the market and other relevant considerations.

The Joint Parties argue that they “have only been recruiting commercial, industrial and institutional customers, and, in general, the larger types of customers in these classes” and that “this is unlikely to change in the future.”⁷ These factors may be appropriate for consideration in determining the appropriate level of oversight for consumer protections; however, conditions in the markets can change over time, warranting more or less oversight. Asserting specific jurisdiction for consumer protections over market participants like third-party DR aggregators ensures that the Commission can impose appropriate protections, as necessary, as market conditions evolve.⁸

⁶ Moreover, under rules of statutory construction, a court should not create exceptions to a statute not specifically made by the Legislature therein. *See Stockton Theatres, Inc. v. Palermo*, 47 Cal. 2d 469, 476 (1956). When the statute itself specifies its exceptions, no other may be added under the guise of judicial construction. *See In Re De Neef*, 42 Cal.App.2d, 691, 694 (1941).

⁷ Opening Brief of Joint Parties, p. 18.

⁸ *See generally* D.01-12-018 (at “Consumer Protections”), in which the Commission had to “clarify” an earlier finding of no jurisdiction over non-utility gas marketers and brokers in retail transactions to exert appropriate jurisdiction over them for consumer protection purposes when it became clear that marketers and brokers “whom [the Commission had] previously declined to imposed consumer protection rules, may now turn their attention to the less-sophisticated, lower-volume customers.”

B. Even if the Commission Determines that Third-Party DR Aggregators are Not ESPs, SCE Agrees with PG&E that the Commission Still Has Authority to Set Appropriate Rules for Direct Participation of IOU Customers

PG&E argues that even if the Commission determines it has no jurisdiction over third-party DR aggregators, it still has the authority to establish the conditions under which such entities can incorporate retail end-use customers of the investor-owned utilities (IOUs) into CAISO wholesale products to be used to bid into the wholesale markets. PG&E specifically points to orders of the Federal Energy Regulatory Commission (FERC) prohibiting the participation of DR in a wholesale market if the state regulatory authority prohibits it.⁹ SCE agrees. As SCE stated in its opening brief:

To the extent the Commission finds that third-party DR aggregators are not ESPs . . . , the Commission can (and should) still require consumer protections in establishing the terms and conditions under which the IOUs can (or must) approve an IOU procurement customer’s participation in a direct bidding program of a DR service provider. The CAISO is expected to require all DR service providers to register a DR resource (*i.e.*, a customer service account) *and* seek the approval of the CAISO, the LSE and the utility distribution company (UDC) before the DR resource can be bid into the CAISO’s DR products. Therefore, the Commission can establish reasonable conditions (similar to those required of ESPs under Article 12) that must be satisfied by the DR service provider – in particular, the third-party DR aggregators if they are found not to be ESPs – before the IOU can approve the participation of a DR customer service account in such DR service provider’s direct bidding program.¹⁰

As PG&E notes, the direct participation in CAISO markets of retail-end use customers through third-party DR aggregators may affect the safety, reliability and maintenance of IOU service, requiring rules to govern the necessary interactions between the IOU and the ESP regarding

⁹ See Opening Brief of PG&E, pp. 5-6. See also DRA’s opening brief at p. 2, stating “FERC Order 719 permits DR aggregators to directly participate in an RTO/ISO’s wholesale market ‘unless the laws or regulations of the relevant electric regulatory authority do not permit a retail customer to participate.’”

¹⁰ See Opening Brief of SCE, pp. 9-10, citing CAISO Draft Final Proposal for the Design of Proxy Demand Resource (PDR), Revised on August 28, 2009 <http://www.caiso.com/241d/241da56c5950.pdf>.

such participation, and conditions for the IOU's approval of such direct participation by its procurement and distribution customers.¹¹ It will also require reasonable protections for customers in the IOU service territories offered the opportunity to directly bid their DR into the CAISO market as part of a third-party DR aggregator's program, including registration, demonstration of financial viability, and basic consumer protection policies in place for maintaining the confidentiality and/or privacy of customer information, providing for terms and conditions of service in writing, and addressing customer complaints.¹²

C. Even if the Commission Cannot Impose a Standard Contract on an ESP, It Can Direct the IOUs to Disallow Participation of their Procurement Customers in an ESP Direct Bidding Program Unless the ESP Agrees to Appropriate Rules and Requirements, and Can Disallow the Participation of ESP's Procurement Customers in an IOU's Direct Bidding Program

AReM in its opening brief argues that the Commission has no authority to impose a standard contract or standardized compensation formula on ESPs.¹³ While that may be the case, the Commission can authorize the IOUs to disallow the participation of IOU procurement customers in an ESP's direct bidding program if an ESP is unwilling to agree to reasonable terms and conditions, such as appropriate reimbursement to the IOU for "undercollections" resulting from such direct participation. Moreover, the Commission can disallow the participation of ESP procurement customers in an IOU direct bidding program if the ESP rejects reasonable, standardized terms and conditions to govern the necessary interactions between the IOU and the ESP regarding such participation. Therefore, it behooves parties to work together toward acceptable, standardized terms and conditions to facilitate direct participation of DR in the CAISO markets.

III. CONCLUSION

SCE appreciates the opportunity to submit this reply brief.

¹¹ See Opening Brief of PG&E, p. 6.

¹² See Opening Brief of SCE, p. 10.

¹³ See Opening Brief of AReM, p. 7.

Respectfully submitted,

JENNIFER T. SHIGEKAWA
JANET S. COMBS

/s/ Janet S. Combs

By: Janet S. Combs

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (626) 302-1524
Facsimile: (626) 302-7740
E-mail:janet.combs@sce.com

January 29, 2010

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of REPLY BRIEF OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

Transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

Executed this **29th day of January, 2010**, at Rosemead, California.

/s/ Meraj Rizvi
MERAJ RIZVI
PROJECT ANALYST
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770



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Parties

SCOTT H. DEBROFF
 RHOADS & SINON LLP
 ONE SOUTH MARKET SQUARE, PO BOX 1146
 HARRISBURG, PA 17108-1146
 FOR: ELSTER INTEGRATED SOLUTIONS;
 CELLNET & TRILLIANT NETWORKS, INC.;
 CONSUMER POWERLINE AND ANCILLIARY
 SERVICES COALITION.

KEITH R. MCCREA
 ATTORNEY AT LAW
 SUTHERLAND, ASBILL & BRENNAN, LLP
 1275 PENNSYLVANIA AVE., N.W.
 WASHINGTON, DC 20004-2415
 FOR: CA MANUFACTURERS & TECHNOLOGY ASSN.

KEN SKINNER
 VICE PRESIDENT, COO
 INTEGRAL ANALYTICS, INC
 312 WALNUT STREET, SUITE 1600
 CINCINNATI, OH 45202

JAMES R. METTLING
 BLUE POINT ENERGY LLC
 20 INDUSTRIAL PARKWAY
 CARSON CITY, NV 89706
 FOR: BLUE POINT ENERGY

STEVEN D. PATRICK
 ATTORNEY AT LAW
 SEMBRA ENERGY
 555 WEST FIFTH STREET, STE 1400
 LOS ANGELES, CA 90013-1011
 FOR: SAN DIEGO GAS & ELECTRIC

GREGORY KLATT
 ATTORNEY AT LAW
 DOUGLASS & LIDDELL
 411 E. HUNTINGTON DRIVE, STE. 107-356
 ARCADIA, CA 91006
 FOR: DIRECT ACCESS CUSTOMER COALITION

DANIEL W. DOUGLASS
 ATTORNEY AT LAW
 DOUGLASS & LIDDELL
 21700 OXNARD STREET, SUITE 1030
 WOODLAND HILLS, CA 91367
 FOR: ALLIANCE FOR RETAIL ENERGY
 MARKETS/WESTERN POWER TRADING FORUM

JANET COMBS
 SOUTHERN CALIFORNIA EDISON COMPANY
 2244 WALNUT GROVE AVENUE
 ROSEMEAD, CA 91770
 FOR: SOUTHERN CALIFORNIA EDISON COMPANY

DONALD C. LIDDELL
 ATTORNEY AT LAW
 DOUGLASS & LIDDELL
 2928 2ND AVENUE
 SAN DIEGO, CA 92103
 FOR: WAL-MART STORES, INC./ICE
 ENERGY/KINDER MORGAN / CALIF. ENERGY
 STORAGE ALLIANCE

DOUGLAS A. AMES
 ATTORNEY AT LAW
 TRANSPHASE SYSTEMS, INC.
 4971 LOS PATOS AVENUE
 HUNTINGTON BEACH, CA 92649
 FOR: TRANSPHASE

NORA SHERIFF
 ALCANTAR & KAHL, LLP
 33 NEW MONTGOMERY STREET, SUITE 1850
 SAN FRANCISCO, CA 94015
 FOR: ENERGY PRODUCERS & USERS COALITION

JACK ELLIS
 PRINCIPAL CONSULTANT
 RESERO CONSULTING
 490 RAQUEL COURT
 LOS ALTOS, CA 94022
 FOR: ENERGY CONNECT, INC.

PETER MALTBAEK
 VICE PRESIDENT
 CPOWER, INC.
 1185 ELENA PRIVADA
 MOUNTAIN VIEW, CA 94040
 FOR: CONSUMER POWELINE

LISA-MARIE SALVACION
 CALIF PUBLIC UTILITIES COMMISSION
 LEGAL DIVISION
 ROOM 4107
 505 VAN NESS AVENUE
 SAN FRANCISCO, CA 94102-3214
 FOR: DIVISION OF RATEPAYERS ADVOCATES

MARCEL HAWIGER
 ENERGY ATTORNEY
 THE UTILITY REFORM NETWORK
 115 SANSOME STREET, SUITE 900
 SAN FRANCISCO, CA 94104
 FOR: TURN

MICHEL PETER FLORIO
 ATTORNEY AT LAW
 THE UTILITY REFORM NETWORK
 115 SANSOME STREET, SUITE 900
 SAN FRANCISCO, CA 94104
 FOR: TURN

RICHARD H. COUNIHAN
 SR. DIRECTOR CORPORATE DEVELOPMENT
 ENERNOC, INC.
 500 HOWARD ST., SUITE 400
 SAN FRANCISCO, CA 94105
 FOR: ENERNOC, INC.

SHIRLEY WOO
 ATTORNEY AT LAW
 PACIFIC GAS AND ELECTRIC COMPANY
 77 BEALE STREET, B30A
 SAN FRANCISCO, CA 94105
 FOR: PACIFIC GAS AND ELECTRIC

JEFFREY P. GRAY
 ATTORNEY AT LAW
 DAVIS WRIGHT TREMAINE, LLP
 505 MONTGOMERY STREET, SUITE 800
 SAN FRANCISCO, CA 94111-6533
 FOR: SOUTH SAN JOAQUIN IRRIGATION
 DISTRICT

IRENE K. MOOSEN
 ATTORNEY AT LAW
 CITY AND COUNTY OF SAN FRANCISCO
 53 SANTA YNEZ AVE.
 SAN FRANCISCO, CA 94112
 FOR: CITY AND COUNTY OF SAN FRANCISCO

SARA STECK MYERS
 ATTORNEY AT LAW
 122 28TH AVENUE
 SAN FRANCISCO, CA 94121
 FOR: JOINT PARTIES

WILLIAM H. BOOTH
 ATTORNEY AT LAW
 LAW OFFICES OF WILLIAM H. BOOTH
 67 CARR DRIVE
 MORAGA, CA 94556
 FOR: CLECA

AVIS KOWALEWSKI
 CALPINE CORPORATION
 4160 DUBLIN BLVD, SUITE 100
 DUBLIN, CA 94568
 FOR: CALPINE CORPORATION

ERIC C. WOYCHIK
 STRATEGY INTEGRATION LLC
 9901 CALODEN LANE
 OAKLAND, CA 94605
 FOR: COMVERGE, INC.

JAMES BOOTHE
 THE ENERGY COALITION
 9 REBELO LANE
 NOVATO, CA 94947
 FOR: THE ENERGY COALITION

RICH QUATTRINI
 VICE PRESIDENT - WESTERN REGION
 ENERGYCONNECT, INC.
 51 E. CAMPBELL AVENUE, SUITE 145
 CAMPBELL, CA 95008
 FOR: ENERGY CONNECT, INC.

BOB HINES
 ENERGY PROGRAMS
 SILICON VALLEY LEADERSHIP GROUP
 224 AIRPORT PARKWAY, SUITE 620
 SAN JOSE, CA 95110
 FOR: SILICON VALLEY LEADERSHIP GROUP

BARBARA R. BARKOVICH
 BARKOVICH & YAP, INC.
 44810 ROSEWOOD TERRACE
 MENDOCINO, CA 95460
 FOR: CALIFORNIA LARGE ENERGY CONSUMERS
 ASSOCIATION

MARTIN HOMECA
 ATTORNEY AT LAW
 CALIFORNIANS FOR RENEWABLE ENERGY, INC.
 PO BOX 4471
 DAVIS, CA 95617
 FOR: CALIFORNIA FOR RENEWABLE ENERGY,
 INC.

BALDASSARO DI CAPO
 COUNSEL
 CALIFORNIA INDEPENDENT SYSTEM OPERATOR
 151 BLUE RAVINE ROAD
 FOLSOM, CA 95630
 FOR: CALIFORNIA INDEPENDENT SYSTEM
 OPERATOR

LAUREN NAVARRO
ATTORNEY
ENVIRONMENTAL DEFENSE FUND
1107 9TH STREET, SUITE 540
SACRAMENTO, CA 95814
FOR: ENVIRONMENTAL DEFENSE FUND

KAREN N. MILLS
ATTORNEY AT LAW
CALIFORNIA FARM BUREAU FEDERATION
2300 RIVER PLAZA DRIVE
SACRAMENTO, CA 95833
FOR: CALIFORNIA FARM BUREAU FEDERATION

Information Only

EDWARD VINE
LAWRENCE BERKELEY NATIONAL LABORATORY
EMAIL ONLY
EMAIL ONLY, CA 00000

CLARK E. PIERCE
LANDIS & GYR
246 WINDING WAY
STRATFORD, NJ 08084

NICHOLAS J. PLANSON
CONSUMER POWERLINE
17 STATE STREET, SUITE 1910
NEW YORK, NY 10004
FOR: CONSUMER POWERLINE

GLEN E. SMITH
PRESIDENT AND CEO
ENERGY CURTAILMENT SPECIALISTS, INC.
PO BOX 610
CHEEKTOWAGA, NY 14225-0610

ALICIA R. PETERSEN
RHODAS & SINON LLP
ONE SOUTH MARKET SQUARE, PO BOX 1146
HARRISBURG, PA 17108

MONICA S. IINO
RHODAS & SINON LLP
M&T BUILDING
ONE SOUTH MARKET SQUARE, PO BOX 1146
HARRISBURG, PA 17108

CLINTON COLE
CURRENT GROUP, LLC
20420 CENTURY BOULEVARD
GERMANTOWN, MD 20874

GRAYSON HEFFNER
15525 AMBIANCE DRIVE
N. POTOMAC, MD 20878

STEPHEN D. BAKER
SR. REG. ANALYST, FELLOW-MCCORD AND ASS.
CONSTELLATION NEW ENERGY-GAS DIVISION
9960 CORPORATE CAMPUS DRIVE, SUITE 2500
LOUISVILLE, KY 40223

TRENT A. CARLSON
RRI ENERGY, INC.
1000 MAIN STREET
HOUSTON, TX 77001

DANIEL M. VIOLETTE
SUMMIT BLUE CONSULTING
1722 14TH STREET, SUITE 230
BOULDER, CO 80302

KEVIN COONEY
PRINCIPAL/CEO
SUMMIT BLUE CORPORATION
1722 14TH STREET, SUITE 230
BOULDER, CO 80302

STUART SCHARE
SUMMIT BLUE CONSULTING
1722, 14TH STREET, SUITE 230
BOULDER, CO 80302
FOR: SUMMIT BLUE CONSULTING

LARRY B. BARRETT
CONSULTING ASSOCIATES, INC.
PO BOX 60429
COLORADO SPRINGS, CO 80960

WILLIAM D. ROSS
CONSTELLATION NEW ENERGY
520 SO. GRAND AVENUE SUITE 3800
LOS ANGELES, CA 90071-2610
FOR: CONSTELLATION NEW ENERGY

DAVID NEMTZOW
NEMTZOW & ASSOCIATES
1254 9TH STREET, NO. 6
SANTA MONICA, CA 90401

JAY LUBOFF
JAY LUBOFF CONSULTING SERVICES
1329 19TH ST, APT D
SANTA MONICA, CA 90404-1946

DAVID REED
SOUTHERN CALIFORNIA EDISON
6060 IRWINDALE AVE., STE. J
IRWINDALE, CA 91702

JOYCE LEUNG
SOUTHERN CALIFORNIA EDISON COMPANY
6060 J IRWINDALE AVE.
IRWINDALE, CA 91702

MARIAN BROWN
SOUTHERN CALIFORNIA EDISON
6040A IRWINDALE AVE.
IRWINDALE, CA 91702

MARK S. MARTINEZ
SOUTHERN CALIFORNIA EDISON
6060 IRWINDALE AVE., SUITE J
IRWINDALE, CA 91702

ANDREA HORWATT
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

CARL SILSBEE
SOUTHERN CALIFORNIA EDISON
GO1, RP&A
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

CASE ADMINISTRATION
SOUTHERN CALIFORNIA EDISON COMPANY
LAW DEPARTMENT, ROOM 370
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

JENNIFER TSAO SHIGEKAWA
ATTORNEY AT LAW
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770
FOR: SOUTHERN CALIFORNIA EDISON COMPANY

KA-WING MAGGIE POON
GO1, QUAD 2B
2244 WALNUT GROVE AVE.
ROSEMEAD, CA 91770

LARRY R. COPE
ATTORNEY AT LAW
SOUTHERN CALIFORNIA EDISON
PO BOX 800, 2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770
FOR: SOUTHERN CALIFORNIA EDISON

RUSS GARWACRD
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE
ROSEMEAD, CA 91770

DON WOOD
PACIFIC ENERGY POLICY CENTER
4539 LEE AVENUE
LA MESA, CA 91941

CARLOS F. PENA
SEMPRA ENERGY
101 ASH STREET, HQ12
SAN DIEGO, CA 92101

JOHN LAUN
APOGEE INTERACTIVE, INC.
1220 ROSECRANS ST., SUITE 308
SAN DIEGO, CA 92106

DAVID BARKER
SAN DIEGO GAS & ELECTRIC COMPANY
8306 CENTURY PARK COURT
SAN DIEGO, CA 92123

JOY C. YAMAGATA
SAN DIEGO GAS & ELECTRIC/SOCALGAS
8330 CENTURY PARK COURT, CP 32 D
SAN DIEGO, CA 92123

KATHRYN SMITH
ANALYST
SAN DIEGO GAS AND ELECTRIC COMPANY
8306 CENTURY PARK COURT
SAN DIEGO, CA 92123

LISA DAVIDSON
SAN DIEGO GAS AND ELECTRIC COMPANY
8330 CENTURY PARK COURT, CP32A
SAN DIEGO, CA 92123

CENTRAL FILES
REGULATORY AFFAIRS
SAN DIEGO GAS & ELECTRIC CO.
8330 CENTURY PARK COURT-CP31E
SAN DIEGO, CA 92123-1530

LINDA WRAZEN
REGULATORY CASE ADMINISTRATOR
SAN DIEGO GAS & ELECTRIC COMPANY
8330 CENTURY PARK COURT, CP32D
SAN DIEGO, CA 92123-1530

DAVE HANNA
ITRON INC
11236 EL CAMINO REAL
SAN DEIGO, CA 92130-2650

GEOFF AYRES
THE ENERGY COALITION
15615 ALTON PARKWAY, SUITE 245
IRVINE, CA 92618

WARREN MITCHELL
THE ENERGY COALITION
15615 ALTON PARKWAY, SUITE 245
IRVINE, CA 92618

DAVID M. WYLIE, PE
ASW ENGINEERING
2512 CHAMBERS ROAD, SUITE 103
TUSTIN, CA 92780

JOEL M. HVIDSTEN
KINDER MORGAN ENERGY FORECASTER
1100 TOWN & COUNTRY ROAD, SUITE 700
ORANGE, CA 92868

SHAWN COX
KINDER MORGAN ENERGY FORECASTER
1100 TOWN & COUNTRY ROAD, SUITE 700
ORANGE, CA 92868

MONA TIERNEY-LLOYD
SENIOR MANAGER WESTERN REG. AFFAIRS
ENERNOC, INC.
PO BOX 378
CAYUCOS, CA 93430

PAUL KERKORIAN
UTILITY COST MANAGEMENT LLC
6475 N. PALM AVENUE, SUITE 105
FRESNO, CA 93704

CHRIS KING
EMETER CORPORATION
2215 BRIDGEPOINTE PARKWAY, SUITE 300
SAN MATEO, CA 94044

SUE MARA
RTO ADVISORS, LLC.
164 SPRINGDALE WAY
REDWOOD CITY, CA 94062

PAUL KARR
TRILLIANT NETWORKS, INC.
1100 ISLAND DRIVE, SUITE 103
REDWOOD CITY, CA 94065

SHARON TALBOTT
EMETER CORPORATION
ONE TWIN DOLPHIN DRIVE
REDWOOD CITY, CA 94065

THERESA MUELLER
DEPUTY CITY ATTORNEY
CITY AND COUNTY OF SAN FRANCISCO
CITY HALL, ROOM 234
SAN FRANCISCO, CA 94102

MASSIS GALESTAN
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

THOMAS ROBERTS
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRA
ROOM 4104
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SANDRA ROVETTI
REGULATORY AFFAIRS MANAGER
SAN FRANCISCO PUC
1155 MARKET STREET, 4TH FLOOR
SAN FRANCISCO, CA 94103

THERESA BURKE
REGULATORY AFFAIRS ANALYST
SAN FRANCISCO PUC
1155 MARKET STREET, 4TH FLOOR
SAN FRANCISCO, CA 94103

DANIEL C. ENGEL
SENIOR CONSULTANT
FREEMAN, SULLIVAN & CO.
101 MONTGOMERY STREET, 15TH FLOOR
SAN FRANCISCO, CA 94104

ELAINE S. KWEI
PIPER JAFFRAY & CO
345 CALIFORNIA ST. SUITE 2300
SAN FRANCISCO, CA 94104

SNULLER PRICE
ENERGY AND ENVIRONMENTAL ECONOMICS
101 MONTGOMERY, SUITE 1600
SAN FRANCISCO, CA 94104

STEVE GEORGE
GSC GROUP
101 MONTGOMERY STREET, 15TH FLOOR
SAN FRANCISCO, CA 94104

BRUCE PERLSTEIN
PACIFIC GAS AND ELECTRIC COMPANY
245 MARKET STREET
SAN FRANCISCO, CA 94105

JOSEPHINE WU
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, MC B9A
SAN FRANCISCO, CA 94105

KAREN TERRANOVA
ALCANTAR & KAHL, LLP
33 NEW MONTGOMERY STREET, SUITE 1850
SAN FRANCISCO, CA 94105

KEN ABREN
245 MARKET STREET
SAN FRANCISCO, CA 94105

LISE H. JORDAN
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, B30A
SAN FRANCISCO, CA 94105

MARY A. GANDESBERY
ATTORNEY AT LAW
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442, 77 BEALE B30A
SAN FRANCISCO, CA 94105

MICHAEL P. ALCANTAR
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
33 NEW MONTGOMERY STREET, SUITE 1850
SAN FRANCISCO, CA 94105

REGULATORY FILE ROOM
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, B30A
SAN FRANCISCO, CA 94105

STEVEN R. HAERTLE
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, MC B9A
SAN FRANCISCO, CA 94105

ALICE LIDDELL
ICF INTERNATIONAL
620 FOLSOM STREET, STE, 200
SAN FRANCISCO, CA 94107

STEVEN MOSS
SAN FRANCISCO COMMUNITY POWER
2325 THIRD STREET, STE 344
SAN FRANCISCO, CA 94107

AHMAD FARUQUI
THE BRATTLE GROUP
353 SACRAMENTO STREET, SUITE 1140
SAN FRANCISCO, CA 94111

BRAD MANUILOW
AMERICAN TECHNOLOGY RESEARCH
450 SANSOME ST., SUITE 1000
SAN FRANCISCO, CA 94111

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

FOR: NORTH AMERICA POWER PARTNERS LLC

BRYCE DILLE
 CLEAN TECHNOLOGY RESEARCH
 JMP SECURITIES
 600 MONTGOMERY ST. SUITE 1100
 SAN FRANCISCO, CA 94111

J. JOSHUA DAVIDSON
 ATTORNEY AT LAW
 DAVIS WRIGHT TREMAINE, LLP
 505 MONTGOMERY STREET, SUITE 800
 SAN FRANCISCO, CA 94111

ROBERT GEX
 DAVIS WRIGHT TREMAINE LLP
 505 MONTGOMERY STREET, SUITE 800
 SAN FRANCISCO, CA 94111

SETH D. HILTON
 STOEL RIVES, LLP
 555 MONTGOMERY ST., SUITE 1288
 SAN FRANCISCO, CA 94111

SALLE E. YOO
 ATTORNEY AT LAW
 DAVIS WRIGHT TREMAINE
 505 MONTGOMERY STREET, SUITE 800
 SAN FRANCISCO, CA 94111-6533

CALIFORNIA ENERGY MARKETS
 425 DIVISADERO STREET, SUITE 303
 SAN FRANCISCO, CA 94117

CHARLES MIDDLEKAUFF
 ATTORNEY AT LAW
 PACIFIC GAS AND ELECTRIC COMPANY
 PO BOX 7442
 SAN FRANCISCO, CA 94120
 FOR: PACIFIC GAS AND ELECTRIC COMPANY

CASE ADMINISTRATION
 PACIFIC GAS & ELECTRIC COMPANY
 PO BOX 770000; MC B9A
 SAN FRANCISCO, CA 94177

MARK HUFFMAN
 ATTORNEY AT LAW
 PACIFIC GAS AND ELECTRIC COMPANY
 MC B30A PO BOX 770000
 SAN FRANCISCO, CA 94177
 FOR: PACIFIC GAS AND ELECTRIC COMPANY

HELEN ARRICK
 BUSINESS ENERGY COALITION
 MC B8R, PGE
 PO BOX 770000
 SAN FRANCISCO, CA 94177-0001

ROBIN J. WALTHER, PH.D.
 1380 OAK CREEK DRIVE., 316
 PALO ALTO, CA 94305

MICHAEL ROCHMAN
 MANAGING DIRECTOR
 SPURR
 1430 WILLOW PASS ROAD, SUITE 240
 CONCORD, CA 94520

JOE PRIJYANONDA
 GLOBAL ENERGY PARTNERS, LLC
 3569 MT. DIABLE BLVD., SUITE 200
 LAFAYETTE, CA 94549

SEAN P. BEATTY
 SR. MGR. EXTERNAL & REGULATORY AFFAIRS
 MIRANT CALIFORNIA, LLC
 696 WEST 10TH ST., PO BOX 192
 PITTSBURG, CA 94565

MARK J. SMITH
 CALPINE CORPORATION
 4160 DUBLIN BLVD., SUITE 100
 DUBLIN, CA 94568

PHILIPPE AUCLAIR
 11 RUSSELL COURT
 WALNUT CREEK, CA 94598

ALEX KANG
 ITRON, INC.
 1111 BROADWAY, STE. 1800
 OAKLAND, CA 94607

JODY S. LONDON
 JODY LONDON CONSULTING
 PO BOX 3629
 OAKLAND, CA 94609

TED POPE
 PRESIDENT
 ENERGY SOLUTIONS
 1610 HARRISON STREET
 OAKLAND, CA 94612

MRW & ASSOCIATES, INC.
 1814 FRANKLIN STREET, SUITE 720
 OAKLAND, CA 94612

DOCKET COORDINATOR
 5727 KEITH ST.
 OAKLAND, CA 94618

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

STEVE KROMER
 3110 COLLEGE AVENUE, APT 12
 BERKELEY, CA 94705
 FOR: STEVE KROMER

GALEN BARBOSE
 LAWRENCE BERKELEY NATIONAL LAB
 MS 90-4000
 1 CYCLOTRON RD.
 BERKELEY, CA 94720

CARLOS LAMAS-BABBINI
COMVERGE, INC.
58 MT TALLAC CT
SAN RAFAEL, CA 94903

ALAN GARTNER
ENERGYCONNECT, INC.
51 E. CAMPBELL AVEUNE, 145
CAMPBELL, CA 95008

MAHLON ALDRIDGE
ECOLOGY ACTION
PO BOX 1188
SANTA CRUZ, CA 95061-1188

L. JAN REID
COAST ECONOMIC CONSULTING
3185 GROSS ROAD
SANTA CRUZ, CA 95062

ALAN GARTNER
1125 PHEASANT HILL WAY
SAN JOSE, CA 95120

JEFF SHIELDS
UTILITY SYSTEMS DIRECTOR
SOUTH SAN JOAQUIN IRRIGATION DISTRICT
11011 E. HWY 120
MANTECA, CA 95336

JOY A. WARREN
REGULATORY ADMINISTRATOR
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95354

ROGER VAN HOY
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95354

THOMAS S. KIMBALL
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95354

JAMES WEIL
DIRECTOR
AGLET CONSUMER ALLIANCE
PO BOX 1916
SEBASTOPOL, CA 95473

CLARK BERNIER
RLW ANALYTICS
1055 BROADWAY, SUITE G
SONOMA, CA 95476

GAYATRI SCHILBERG
JBS ENERGY
311 D STREET, SUITE A
WEST SACRAMENTO, CA 95605
FOR: TURN

JEFF NAHIGIAN
JBS ENERGY, INC.
311 D STREET
WEST SACRAMENTO, CA 95605

DOUGLAS M. GRANDY, P.E.
CALIFORNIA ONSITE GENERATION
DG TECHNOLOGIES
1220 MACAULAY CIRCLE
CARMICHAEL, CA 95608

RICHARD MCCANN
M.CUBED
2655 PORTAGE BAY ROAD, SUITE 3
DAVIS, CA 95616

DAVID MORSE
1411 W. COVELL BLVD., STE. 106-292
DAVIS, CA 95616-5934

JOHN GOODIN
CALIFORNIA ISO
151 BLUE RAVINE RD.
FOLSOM, CA 95630

MELANIE GILLETTE
SR MGR WESTERN REG. AFFAIRS
ENERNOC, INC.
115 HAZELMERE DRIVE
FOLSOM, CA 95630

LEGAL AND REGULATORY DEPARTMENT
CALIFORNIA ISO
151 BLUE RAVINE ROAD
FOLSON, CA 95630

BRIAN THEAKER
DYNEGY, INC.
3161 KEN DEREK LANE
PLACERVILLE, CA 95667

LON W. HOUSE, PH.D
ASSOCIATION OF CAL WATER AGENCIES
4901 FLYING C RD.
CAMERON PARK, CA 95682

MARY LYNCH
VP - REGULATORY AND LEGISLATIVE AFFAIRS
CONSTELLATION ENERGY COMMODITIES GRP
5074 NAWAL DRIVE
EL DORADO HILLS, CA 95762

CAROLYN KEHREIN
ENERGY MANAGEMENT SERVICES
2602 CELEBRATION WAY
WOODLAND, CA 95776
FOR: ENERGY USERS FORUM

DAVID HUNGERFORD
CALIFORNIA ENERGY COMMISSION
DEMAND ANALYSIS OFFICE
1516 NINTH STREET, MS-22
SACRAMENTO, CA 95814

MARGARET SHERIDAN

RYAN BERNARDO

CALIFORNIA ENERGY COMMISSION
DEMAND ANALYSIS OFFICE
1516 NINTH STREET, MS-22
SACRAMENTO, CA 95814

BRAUN BLAISING MCLAUGHLIN, P.C.
915 L STREET, SUITE 1270
SACRAMENTO, CA 95814

ANDREW B. BROWN
ATTORNEY AT LAW
ELLISON SCHNEIDER & HARRIS, LLP (1359)
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CA 95816-5905

TIMOTHY N. TUTT
SACRAMENTO MUNICIPAL UTILITIES DISTRICT
6201 S. STREET, M.S. B404
SACRAMENTO, CA 95817-1899

VIKKI WOOD
SACRAMENTO MUNICIPAL UTILITY DISTRICT
6301 S STREET, MS A204
SACRAMENTO, CA 95817-1899

BARB BOICE
4309 NORWOOD AVENUE, APT. 160
SACRAMENTO, CA 95838

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

ROGER LEVY
LEVY AND ASSOCIATES
2805 HUNTINGTON ROAD
SACRAMENTO, CA 95864

ANNIE STANGE
ALCANTAR & KAHL
1300 SW FIFTH AVE., SUITE 1750
PORTLAND, OR 97201

BENJAMIN SCHUMAN
PACIFIC CREST SECURITIES
111 SW 5TH AVE, 42ND FLR
PORTLAND, OR 97204

LAURA ROOKE
SR. PROJECT MANAGER
PORTLAND GENERAL ELECTRIC
121 SW SALMON ST.,
PORTLAND, OR 97204

JENNIFER HOLMES
ENERGY MARKET INNOVATIONS INC.
83 COLUMBIA STREET, SUITE 303
SEATTLE, WA 98104

TYLER BERGAN
POWERIT SOLUTIONS
114 ALASKAN WAY SOUTH, NO. 201
SEATTLE, WA 98104

State Service

DENISE SERIO
ENERGY CURTAILMENT SPECIALISTS, INC.
4455 GENESEE STREET, BLDG. 6
NEW YORK, NY 14225

ALOKE GUPTA
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ANDREW CAMPBELL
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5203
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

BRUCE KANESHIRO
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

CHRISTOPHER CLAY
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4300
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

CHRISTOPHER R VILLARREAL
CALIF PUBLIC UTILITIES COMMISSION
POLICY & PLANNING DIVISION
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

DARWIN FARRAR
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 5041
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

DORRIS LAM
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ELIZABETH DORMAN
CALIF PUBLIC UTILITIES COMMISSION

HAZLYN FORTUNE
CALIF PUBLIC UTILITIES COMMISSION

LEGAL DIVISION
ROOM 4300
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JENNIFER CARON
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JESSICA T. HECHT
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 5113
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JOE COMO
CALIF PUBLIC UTILITIES COMMISSION
DRA - ADMINISTRATIVE BRANCH
ROOM 4101
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JOY MORGENSTERN
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

KARL MEEUSEN
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

MATTHEW DEAL
CALIF PUBLIC UTILITIES COMMISSION
POLICY & PLANNING DIVISION
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

PAMELA NATALONI
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5124
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

REBECCA TSAI-WEI LEE
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRA
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SUDHEER GOKHALE
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY PLANNING & POLICY BRANCH
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
FOR: DRA

TIMOTHY J. SULLIVAN
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 2106
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

YULIYA SHMIDT
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRA
ROOM 4104
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

CLARE LAUFENBERG
STRATEGIC TRANSMISSION INVESTMNT PROGRAM
CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET, MS 46
SACRAMENTO, CA 95814

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