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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of Sierra Pacific Power Company (U903E) and California Pacific Electric Company, LLC for Transfer of Control and Additional Requests Relating to Proposed Transaction.	Application 09-10-028 (Filed October 16, 2009)
Joint Application of Sierra Pacific Power Company (U903E) and California Pacific Electric Company, LLC for Authority to Enter Into Two Agreements.	Application 10-04-032 (Filed April 30, 2010)

REPLY BRIEF OF SIERRA PACIFIC POWER COMPANY (U903E) AND CALIFORNIA PACIFIC ELECTRIC COMPANY, LLC

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Joint Applicants submit this Reply Brief pursuant to Rule 13.11 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure. Joint Applicants have presented facts on the record demonstrating that the change of control requested will provide the customers of the California Utility with a "seamless transition" to a new owner. The Transaction includes enforceable commitments to maintain service and reliability at least at current levels, offers the potential for various benefits associated with CalPeco's "local focus," and, most importantly, satisfies the § 854(a)[1] requirements that the Transaction "not be adverse to ratepayers." The proposed Transaction is supported by Sierra's current employees and by every representative of a customer group or other local constituency who participated in this proceeding.[2]

[1] All references are to the Public Utilities Code unless otherwise indicated.

[2] These groups supporting the Transaction are identified in Joint Applicants Brief, at 1-2.

Section 854(a) and this Commission's precedents warrant approval of the Transaction "absent [some] compelling reason."[3] The Division of Ratepayer Advocates ("DRA"), the lone opponent of the Transaction, has failed to present any facts that raise any valid reason for the Commission to reject the Transaction; it has most certainly failed to present a "compelling reason" to require this Commission's rejection of the Transaction.[4]

The DRA Brief intimates for the first time that it may consider dropping its opposition if the Commission adopts certain conditions. From a procedural perspective, DRA's proposed "conditions" should be stricken. By proposing them only after the evidentiary hearings, DRA has deprived Joint Applicants of the opportunity to cross-examine or present testimony with relation to these newly-proposed conditions. DRA's last minute, unsubstantiated, and unprecedented demand for a 3-year "rate stay out,"[5] is particularly egregious. Through a stay out, DRA asks this Commission to arbitrarily deny CalPeco recovery of a reasonable level of return of and on its investment and of prudent expenditures in the millions of dollars, which would reduce CalPeco's earnings to levels that would be both confiscatory and unlawful.

Joint Applicants have already volunteered to accept a substantial and complete set of Regulatory Commitments[6] designed to ensure that customers are protected against any potential

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[3] *Application of PacifiCorp (U-901-E) and MidAmerican Energy Holdings Company for Exemption Under Section 853 (b) from the Approval Requirements of § 854(a) of the Public Utilities Code with Respect to the Acquisition of PacifiCorp by MidAmerican*, D.06-02-033, mimeo at 36 (Feb. 16, 2006).

[4] D.06-02-033, mimeo at 36; Joint Applicants Brief, at 8-11.

[5] In addition to the "rate stay out," the DRA Brief also introduces the demand that Algonquin and Emera be named as "formal applicants" and that Joint Applicants provide a non-consolidation opinion to "demonstrate" the adequacy of the ring fencing provisions proposed. DRA Brief, at 7-8, 23.

[6] The original Regulatory Commitments are designated as the "Regulatory Approval Plan" and are set forth in Exhibit 7.9(b) to the Purchase Agreement. The original Regulatory Commitments are also contained in Ex. F to Ex. 1, Joint Reply. These original commitments have been

harm resulting from the Transaction. Joint Applicants urge the Commission to approve the Transaction and accept that the Regulatory Commitments in Appendix A more than adequately protect the interests of the customers, employees, and local communities. DRA's last minute conditions are unsupported, unnecessary, likely harmful,[7] and should be summarily rejected.

I. OVERVIEW OF REPLY TO THE DRA BRIEF

The DRA Brief underscores the incongruity inherent in and lack of evidence supporting DRA's demand that the Commission reject the proposed Transaction. Normally in a Commission proceeding, the parties each present facts, challenge the other parties' factual assertions by presenting competing facts, and then each party presents arguments showing how their version of the facts support the policy and legal positions that they are advocating. DRA presented almost no facts or any competent evidence. Its primary ground to oppose the Transaction—"bigger is always better"—is not a fact; it is a general economic theory,[8] the

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reviewed and expanded throughout these proceedings. The revised Regulatory Commitments are contained in Appendix A to Joint Applicants Brief. The revised Regulatory Commitments will be referenced in this Reply Brief as the "Regulatory Commitments" unless such reference is otherwise expressly stated to be to the "original" or "initial" Regulatory Commitments.

[7] As will be explained, *infra* at Section IV.B.3.b.5, the Commission rejected DRA's demand for a *one year* rate stay out in granting § 854(a) authority in *In the Matter of the Application of California-American Water Company (U-210-W), a California Corporation, RWE Aktiengesellschaft, a Corporation Organized Under the Laws of the Federal Republic of Germany, Thames Water Aqua Holdings GmbH, a Corporation Organized Under the Laws of the Federal Republic of Germany, and American Water Works Company, Inc. for an Order Authorizing the Sale by Thames GmbH of up to 100% of the Common Stock of American Water Works Company, Resulting in a Change of Control of California-American Water Company and For Such Related Relief as May be Necessary to Effectuate Such Transaction,* D.07-05-031, mimeo at 26-27 (May 3, 2007). Among the reasons the Commission rejected even this less punitive DRA proposal was that it could "result in rate shock to the ratepayers … when the authorized but delayed rates go into effect." D.07-05-031, mimeo at 27.

[8] DRA's only factual support for its "bigger is always better" bias is that a Sierra witness "agreed, as a *general principle*, the more goods and services one orders from a third party vendor, the better the price." *See* DRA Brief, at 17 (citation omitted) (emphasis added).

application of which is completely dependent on the particular facts and circumstances. In contrast, Joint Applicants have demonstrated with facts, directly applicable to the legal and policy issues presented, that the competing economic principles that (i) companies should be allowed to divest assets to be better able to concentrate on their "core" business; and (ii) smaller companies, offering greater "local" focus and customer service and the ability to introduce new services, can provide greater customer benefit and value.

The lack of facts supporting DRA's arguments has been a consistent theme throughout this proceeding and by necessity will remain the recurrent focus of this Reply Brief. An expression by DRA of "concern"[9] or that "DRA is not confident"[10] constitutes neither a fact nor is capable of refuting actual facts. For instance, Joint Applicants presented substantial oral and written testimony demonstrating Emera's consistent record of being a long term and active participant in utility companies in circumstances when it holds an indirect and minority ownership position. DRA conspicuously presented no facts to contradict this evidence (i.e., DRA advanced no actual instance to corroborate its accusations that Emera intends to subject the customers of the California Utility to "corporate abandonment" and "cut and run" abuses). Instead, DRA urges the *per se* rejection of the undisputed evidence, largely because the facts in the record are incompatible with the unsupported concerns DRA has expressed.[11]

Compounding the deficiencies of DRA's resort to elevate "concerns" and "beliefs" into substantive evidence is DRA's consistent pattern to ignore and disregard the factual evidence

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[9] Joint Applicants counted approximately 20 instances in which DRA resorted to the word "concern" as its substitute for presenting facts.

[10] DRA's conclusion that the detriments of the Transaction "far outweigh [its] minor benefits" is predicated largely on the non-factual assertion that "DRA is not confident that the service quality will be improved if CalPeco is the new owner." DRA Brief, at 11.

[11] *See* Joint Applicants Brief, at 27-29; DRA/Phan, R.T. June 16, 2010, at 115.

presented. For instance, the International Brotherhood of Electrical Workers ("IBEW") Local 1245, the union that represents most of the employees of the California Utility, fully supports the Transaction; yet DRA's "concerns" regarding two hypothetical "situations" affecting less than a handful of employees[12] causes it to "urge" the rejection of the Transaction.[13] DRA similarly asserts that "CalPeco cannot or will not assure that it will offer employment to all current Sierra employees."[14] DRA's lingering concern notwithstanding, the facts are that CalPeco is committed to offer employment to all Sierra employees responsible for California operations.[15]

Another irrelevant theme permeating DRA's pleadings is the incessant insistence for "studies and analysis." The absence of a "study" is not a basis to reject the testimony of a competent witness. DRA's myopia that facts and competent opinions must be disregarded absent a supporting study is epitomized by its resistance to the proposed reopening of the customer service counter in South Lake Tahoe:

> Joint Applicants have not provided any details as to the kinds of services that will be offered, the number of employees that will be serving, or how the cost of operating the customer service counter will impact future rates … Also, Applicants have not provided any indication as to when the local office will open or how long CalPeco plans to maintain this local office.[16]

DRA's obsession for studies aside, a § 854(a) applicant has no obligation or need to present a study on the minutia of operating details, such as the services to be provided at a

[12] DRA Brief, at 25.

[13] DRA Brief, at 25-26.

[14] DRA Brief, at 26.

[15] *See, infra* at Section IV.E.

[16] DRA Brief, at 9 (citations omitted).

customer service counter or the hours it will operate.[17] More disturbing, is DRA's continued demand that the Transaction be rejected due to the lack of cost studies regarding reopening the service counter even *after* Mr. Robertson presented CalPeco's analysis that this enhancement of customer service will impose "little, if any, incremental cost."[18] It must be reiterated that a § 854(a) proceeding is not a general rate case[19]– to the extent that CalPeco believes that continued operations at the South Lake Tahoe customer service counter warrants ratepayer funding, it would be required to demonstrate the reasonableness and prudence of that expenditure in its 2012 general rate case ("2012 GRC").

Joint Applicants have supported their request by reference to numerous § 854(a) proceedings in which the Commission approved the proposed transaction, explaining the relevance of their facts, and explaining how their legal and policy standards are presently applicable.[20] DRA rejects each of these precedents, contending that each is "not entirely on point."[21] Again, acceptance of DRA's arguments would impose an impossible burden on any § 854(a) applicant. The absence of a § 854(a) proceeding which involves the identical circumstances and facts does not, as DRA intimates, negate the precedential value of these prior § 854 approvals that the Commission has granted. With respect to precedents, the DRA Brief is

[17] Similarly as will be discussed, *infra* at Section IV.F, DRA insists that the Commission find the Transaction harmful to local communities, primarily on the basis that "Joint Applicants did not perform any studies or [analysis] on the effect this divestiture would have on the ratepayers or the local communities." DRA Brief, at 27 (citation omitted).

[18] Joint Applicants/Robertson, R.T. June 16, 2010, at 72-73 *compare with* DRA Brief, at 10.

[19] In rejecting a DRA proposed condition regarding rates in granting § 854(a) authority, the Commission appropriately reiterated: "General rate proceedings [and not section § 854(a) proceedings] are the proper forum to address recovery of reasonable and prudent business costs." D.07-05-031, mimeo at 20.

[20] *See, e.g.,* D.07-05-031, D.06-02-033; *Re Avista Corporation Application and Southwest Gas Corporation for Authority to Sell Interests in Utility* Property, D.05-03-010 (Mar. 15, 2005).

[21] *See* DRA Brief, at 6.

conspicuously devoid of any precedent of the Commission rejecting a transaction on any grounds, let alone any basis that DRA raises. More conspicuously, despite its new demand for a *three year* "rate stay out," DRA refrained from disclosing two recent Commission precedents which rejected DRA's demand for a *one-year* rate stay out."[22]

The DRA Brief suffers from yet another deficiency. It chastises CalPeco for failing to present future costs with a rate case line-item degree of specificity, and urges that this "failure" supports a finding that CalPeco's costs will necessarily be greater than the comparable Sierra costs. Yet, DRA has presented no "studies or analysis" or other evidence of future Sierra or CalPeco costs. Apparently, DRA simply assumes that in the California Utility's 2012 GRC, Sierra would request the same level of rate recovery as the Commission authorized in the Sierra 2008 GRC.[23] This type of "one-sided" comparison disregards the evidence in the record, ignores reality and past experiences, and thus offers no assistance in deciding whether to grant the § 854(a) authority requested.

II. STANDARD OF REVIEW

A. "No Harm to Ratepayers" Is the Applicable § 854(a) Standard of Review

DRA continues to urge the Commission to stray from well-established precedent and apply the more stringent "positive benefits" test to the proposed Transaction rather than the controlling "no harm" standard.[24] DRA suggests that the Commission "engage in the utmost scrutiny of the"[25] Joint Application based on DRA's perspective that the Transaction does not involve a typical merger of companies and will result in the creation of a new, "small," stand-

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[22] *See* discussion of Commission's rejection of these rate stay outs in *MidAmerican* and *Cal-Am Water*, *infra* at Section IV.B.3.b.5.

[23] *See, e.g.,* DRA's reference to costs approved for Sierra in the 2008 GRC. DRA Brief, at 17.

[24] DRA Brief, at 4-7.

[25] DRA Brief, at 7.

alone utility.[26] DRA's new "higher level of scrutiny"[27] (whatever it may be) is foremost without any legal or statutory basis and should be summarily rejected for that reason alone. In any event, the level of "scrutiny" applied does not alter the controlling legal standards.

Joint Applicants have repeatedly explained the reasons this Commission has consistently determined that the "no harm" standard is the applicable standard of review under § 854(a).[28] Nothing in the DRA Brief supports any deviation from application of the "no harm to ratepayers" standard. In the Scoping Ruling, the Assigned Commissioner held that this Transaction is reviewable under § 854(a), not under §§ 854(b) and (c):

> Subsections (b) and (c) of § 854 require additional scrutiny when any party to the transaction has gross annual California revenues of more than $500 million. Joint Applicants report that Sierra's 2008 annual California revenues were approximately $72 million and CalPeco had no California revenues. (Application at 19.) Though some parties argue that the Commission has discretion to apply §§ 854(b) and (c) to this application, they cannot establish that it must. Moreover, the pleadings filed to date fail to make a persuasive case that review of the proposed transaction under § 854(a) is inadequate to protect the public interest.[29]

When applying § 854(a), the Commission has consistently ruled that the correct standard of review is no harm to ratepayers:

> The primary standard used by the Commission to determine if a transaction should be authorized under § 854(a) is whether the transaction will adversely affect the public interest.[30]

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[26] DRA Brief, at 5-6.

[27] DRA Brief, at 5-6.

[28] Joint Applicants Brief, at 8-11.

[29] Scoping Ruling, at 9.

[30] D.07-05-031, mimeo at 3 *citing* D.00-06-079; s*ee also Joint Application of Lodi Gas Storage, L.L.C. (U-912-G), Lodi Holdings, L.L.C., WHP Acquisition, L.L.C., WHP Acquisition II, L.L.C., Buckeye Gas Storage LLC, and Buckeye Partners, L.P. For Expedited Ex Parte Authorization to Transfer Control of Lodi Gas Storage, L.L.C. to Buckeye Gas Storage LLC Through the Sale of*

DRA acknowledged that in reviewing transfer of control applications under § 854(a), "the Commission has articulated a standard of whether the transaction will be adverse to the public interest."[31] Nonetheless, DRA persists that the Commission should apply the "positive benefits" standard that §§ 854(b) and (c) impose. DRA inexplicably refuses to acknowledge that § 854(a) – the only statutory provision under which the Transaction will be reviewed according to the Scoping Memo – does not impose a "positive benefits" standard.

DRA attempts to justify the higher §§ 854(b) and (c) standards of review by mischaracterizing two Commission's decisions. DRA's reliance on D.01-09-057, an application involving the transfer of water companies, is misplaced. In that proceeding, § 2720 was also applicable and requires applicants seeking to transfer control of a water utility to demonstrate an improvement in (i) water system reliability, (ii) compliance with health and safety regulations, and (iii) efficiencies and economies of scale. Thus, D.01-09-057 provides no precedent for the sale of a small electric utility that is reviewed under § 854(a).

Similarly, DRA erroneously relies on D.06-02-033 ("*MidAmerican*") as support that § 854(a) obligates that applicants seeking transfer of control demonstrate positive ratepayer benefits. On the contrary, in *MidAmerican*, the Commission reaffirmed that transactions "subject to § 854(a) should be approved absent a compelling reason to the contrary."[32]

Furthermore, in reaffirming its approval of a change of control under § 854(a), the Commission in D.07-03-047 specifically rejected the argument DRA now advances, confirming that the "public interest" standard under § 854(a) requires a showing of no harm:

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the 100% Interest of Lodi Holdings, L.L.C. in Lodi Gas Storage, L.L.C., Pursuant to Public Utilities Code § 854(a), D.08-01-018, mimeo at 19-20 (Jan. 10, 2008).

[31] DRA Protest, at 3.

[32] D.06-02-033, mimeo at 36.

> …[The party challenging our approval under § 854(a) of the transaction] argues that D.06-11-019 [our initial approval decision] mistakenly applies the "adverse to the public interest" standard, and cites Commission decisions wherein the standard applied was whether such transfer of control would be "in the public interest." [citations omitted] This claim lacks merit.[33]

Thus, the "no harm" standard is the applicable standard of review for the proposed Transaction under § 854 and DRA's claims for a showing of "positive benefits" and its introduction of "utmost scrutiny" should be rejected. Joint Applicants and DRA agree that the proposed Transaction does not involve a merger, and thus is not predicated on quantifiable economic "savings" derived from operational or administrative "synergies."[34] Moreover, Joint Applicants have demonstrated that CalPeco will preserve the "business as usual" status quo.[35] They have carefully structured the Operating Agreements and Regulatory Commitments to ensure that the proposed Transaction will impose no adverse effects on the affected electric consumers and the community. Thus, on this showing alone, the Commission should approve the proposed Transaction.

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[33] *Joint Application of Wild Goose Storage Inc., EnCana Corp., Carlyle/Riverstone Global Energy and Power Fund III, L.P., Carlyle/Riverstone Global Energy and Power Fund II, L.P. and Nisaka Gas Storage US, LLC for Review under Public Utilities Code Section 854 of the Transfer of Control of Wild Goose Storage Inc. from EnCana Corporation to Nisaka Gas Storage, US, LLC and for Approval of Financing under Public Utilities Code Section 851,* D.07-03-047, mimeo at 4 (Mar. 15, 2007).

[34] Joint Applicants Brief, at 10.

[35] *See In the Matter of the Joint Application of California-American Water Company (U-210-W), a California corporation, RWE Aktiengesellschaft, a corporation organized under the laws of the Federal Republic of Germany, Thames Water Aqua Holdings GmbH, a corporation organized under the laws of the Federal Republic of Germany, Thames Water Plc, a corporation organized under the laws of the United Kingdom and Wales, and Apollo Acquisition Company, a Delaware Corporation, for an order Authorizing Apollo Acquisition Company to merge with and into American Water Works Company, Inc. resulting in a change of control of California-American Water Company, and for such related relief as may be necessary to effectuate such transaction,* D.02-12-068, mimeo at 54 (Findings of Fact 6) (Dec. 19, 2002) (the Commission held that the purchasing utility provided benefits to ratepayers by committing to operate the acquired utility or a "business as usual" basis.).

B. The Transaction Will Provide Positive Benefits in Addition to Meeting the "No Harm to Ratepayers" Standard

DRA contends that the Commission must find "positive benefits," that Joint Applicants have failed to present any "positive benefits," and thus the Transaction must be rejected. Even if the Commission determines a showing of positive benefits is necessary, Joint Applicants' evidence demonstrates more than sufficient positive benefits.

Importantly, the Commission has determined that the demonstration of "positive benefits" does not have to be quantifiable, and a study need not be conducted to demonstrate their existence. In *MidAmerican*, the Commission further emphasized that to be "positive", the benefits of a proposed change in control can be *modest*:

> We are not persuaded [by DRA's argument that MidAmerican's purchase of PacifiCorp's California assets provides only "meager benefits]. The transaction provides *modest but concrete benefits* to ratepayers and the communities served by [the present utility], and there will be no harm to ratepayers or others with the conditions adopted by today's Decision. This is enough for the proposed transaction to garner our approval under § 854(a).[36]

CalPeco has demonstrated that the Proposed Transaction will result in significant, concrete benefits to its electric customers, its employees, and the communities to be served by CalPeco.[37] The unanimous support of the Transaction by every local constituency and IBEW Local 1245 demonstrate the existence of positive benefits. Those benefits include, without limitation, the following:

(1) Increased customer service, through:

(a) Re-opening of the South Lake Tahoe customer service counter;[38]

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[36] D.06-02-033, mimeo at 36 (emphasis added).

[37] *See* D.06-02-033, mimeo at 36.

[38] Joint Applicants Brief, at 34-35.

(b) Commitment over time to introduce electronic billing capabilities[39] and, consequently, the ability for some customers to eliminate or reduce costly third party billing services;[40]

(c) Commitment over time to enhance online communication (e.g., initiating service, scheduling service calls) between the California Utility and its customers;[41]

(d) Location of senior management in the service territory;[42]

(e) Singular focus on matters of particular importance to the service territory of the California Utility and the Lake Tahoe Basin communities;[43]

(2) Improved quality of electric service, through:

(a) Commitment to strive to improve the high quality of service standards that Sierra currently provides its customers;[44]

(b) Increased reliability in Loyalton and Portola through incremental line crew services;[45]

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[39] Joint Applicants Brief, at 35.

[40] Joint Applicants Brief, at 35.

[41] Joint Applicants Brief, at 35. *See* D.02-12-068, mimeo at 17.

[42] Appendix A to Joint Applicants Brief, Regulatory Commitment 4(b); s*ee also* D.05-03-010, mimeo at 9 (stating that "Avista's customers will be served by a much larger *local* staff and this is likely to improve customer service and emergency response.") (emphasis added).

[43] Joint Applicants Brief, at 34-36; *see also* Ex. G, IBEW Local 1245 Letter to Ex. 1, Joint Reply.

[44] Appendix A to Joint Applicants Brief, Regulatory Commitment 3(g).

[45] *See* Ex. C, Aligned Protestants Withdrawal Notice to Ex. 1, Joint Reply.

(3) Increased and more localized focus on renewable energy initiatives, through participation in the Lake Tahoe Green Energy District[46] and the ability to develop smaller renewable projects;

(4) Enhanced business climate for California utilities because incremental utility investment in California allows California residents to reap "enormous benefits" provided by public utilities;[47]

(5) Financial benefits associated with commitment for increased level of equity investment;[48]

(6) Replacement of ownership no longer interested in providing service to the California Utility's customers with a new owner who is eager to serve such customers;[49] and

(7) Commitment to preserve "business as usual" through no material change in the operation of the California Utility concerning all core functions, including,

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[46] Joint Applicants Brief, at 35-36.

[47] D.06-02-033, mimeo at 36 (stating that "it is in the public interest to foster a business climate in California that is hospitable to utility investment.")

[48] Appendix A to Joint Applicants Brief, Regulatory Commitment 1(g); s*ee, e.g.*, D.07-05-031, mimeo at 20 (stating that "DRA . . . believes that … ratepayers will benefit through lower debt cost because [DRA's] proposal [requiring an equity investment of 50% resulting in a capital structure of 50% equity and 50% debt] will strengthen the capital structure and credit ratings ….").

[49] *See* D.07-05-031, mimeo at 13 (stating DRA's position that it is "not in the public interest to require a foreign entity that does not wish to have ownership to continue" to do business in California). *See also* D.07-05-031, mimeo at 29 (stating that "[r]atepayers . . . will benefit from the replacement of ownership no longer interested in providing service to them.").

without limitation, power delivery, management, employees, and system operation and maintenance activities.[50]

Thus, even if the Commission finds that CalPeco must show "positive benefits" in order to approve the proposed Transaction, CalPeco has far exceeded any valid requirement for a showing of positive benefits.

C. Section 854(d) Is Not Applicable

DRA continues to argue that the Commission must apply § 854(d) and engage in an evaluation of alternatives to the proposed Transaction.[51] DRA insists § 854(d) applies notwithstanding the fact that no party, including DRA, has presented any facts to warrant the Commission's consideration under § 854(d) of any "reasonable options" to the Transaction.

Section 854(d) is no longer applicable. The TDPUD Settlement and PSREC Settlement have effectively removed any "reasonable options" for the Commission to consider under § 854(d).[52] Moreover, even if the Commission were to accept DRA's request that it consider a "reject the proposed Transaction" as a reasonable alternative, under § 854(d), DRA's argument fails for two critical reasons.

First, the Scoping Memo directs that the burden of introducing facts necessary to demonstrate a reasonable "alternative" under § 854(d) is on the party seeking to propose such alternative, in this case DRA.[53] To date, DRA has made no showing whatsoever to carry this burden. In the DRA Brief, DRA purports to bootstrap its allegations regarding "loss of

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[50] Appendix A to Joint Applicants Brief, Regulatory Commitment 3(b); s*ee also* D.07-05-031, mimeo at 29 (concluding that ratepayers will benefit from "no change in the . . . management, terms of condition of service, or employees"); D.02-12-068, mimeo at 54 (Findings of Fact 6).

[51] DRA Brief, at 27-29.

[52] Joint Applicants Brief, at 11-12.

[53] Joint Applicants Brief, at 11.

economies of scale," "increased rates," "concerns of unfairness to the current employees of Sierra" and others as "evidence" in support of its "reject the proposed Transaction" alternative.[54] While the Commission retains the option of denying the Transaction, the question of whether to approve the Transaction, deny it, or approve it with conditions is exactly the analysis the Commission must perform under § 854(a). Thus, DRA's concerns and beliefs fail under § 854(d) for the same reasons that they fail under § 854(a) analysis. DRA has not carried its burden to demonstrate the applicability of § 854(d).

Second, DRA fails to assess or even consider the consequences to the customers, employees, and neighboring utilities of the California Utility should the Commission adopt DRA's "reject the proposed Transaction" alternative. IBEW Local 1245, TDPUD, PSREC, Loyalton, Portola, Sierra County, and Plumas County (representing every local and employee group participating in this proceeding) have each expressed their affirmative support for the proposed Transaction.[55] Moreover, Sierra has expressed its desire to withdraw from the California utility business to enable it to focus exclusively on its growing Nevada utility operations.[56]

Rejection of the Transaction would subject Sierra's current employees, despite their support for the proposed Transaction, to remaining employees of an employer who wishes to cease doing business in California, and further subject the employees to yet additional uncertainty[57], as such employees might expect that Sierra will attempt to sell the California

[54] DRA Brief, at 28-29.

[55] Ex.1, Joint Reply, at 9.

[56] Ex.1, Joint Reply, at 9.

[57] Among the reasons prompting IBEW Local 1245 as long ago as November 2009 to request that this Commission grant timely approval of the Transaction was that:

Utility to another purchaser given its stated strategic objectives. Rejection of the Transaction would also negate the electric reliability benefits that the communities of Loyalton, Portola, Sierra County and Plumas County have achieved by their participation in this proceeding and maintain the status quo that they claim is unacceptable.[58] Thus, the "no action" alternative DRA advances under § 854(d) must also fail – the detriments of rejecting the Transaction far outweigh the detriment of approving the Transaction, even accepting DRA's concerns.

III. JOINT APPLICANTS AND REASONS FOR THE TRANSACTION

A. Sierra's Reasons for Selling the California Utility

B. Sierra's Sale Process Identified the Most Qualified Purchaser for the California Utility

C. CalPeco's Reasons for Pursuing the Transaction

DRA does not dispute the reasons Sierra gave to sell the California Utility.[59] Similarly, DRA does not dispute that Sierra's sale process identified the most qualified purchaser for the California Utility.[60] Finally, DRA does not challenge CalPeco's reasons for seeking to purchase the California Utility.[61] Therefore, the Commission should accept Joint Applicants' undisputed presentation of these issues.

> A prolonged regulated process extends the awkward period in which our members are subjected to the distracting uncertainty of now knowing who exactly will be signing our paychecks in the days, weeks, or months ahead.

Ex. G to Ex. 1, Joint Reply, at 2.

[58] Ex. 1, Joint Reply, at 10.

[59] *See* Joint Applicants Brief, at 13-15.

[60] *See* Joint Applicants Brief, at 15-17.

[61] *See* Joint Applicants Brief, at 21.

D. Algonquin, Emera, and CPUV Do Not Need to Be Formal Applicants as DRA Contends

DRA asserts, for the *first* time in this 9-month proceeding, that Algonquin, Algonquin Power Fund (America) Inc., Emera, Emera US Holdings, Inc., and California Pacific Utility Ventures, LLC ("CPUV") must be made "applicants" to enable the Commission to enforce the Regulatory Commitments to which Algonquin and Emera have committed.[62] DRA's last-minute claim that the necessary parties are not before the Commission must be rejected. The demand is untimely, is outside the scope of issues the Scoping Memo has identified for this proceeding, and misinterprets the requirements of § 854(a). Moreover, such action is not necessary for the Commission to enforce the Regulatory Commitments made by Algonquin and Emera.

First, Algonquin and Emera have been active participants from the first day of this proceeding through the present. DRA fails to explain the objective of its demand that they now become "formal applicants." Had DRA timely raised its concern, Joint Applicants and the Commission would likely have been able to address any legitimate DRA "concern" – but now it is simply not timely.

The deadline for any demand that an entity become a "formal applicant" should have been in an initial filing so that such a fundamental issue regarding "necessary parties" could be resolved at the prehearing conference. Injecting such a fundamental, but necessarily preliminary, issue after the issuance of the Scoping Memo identifying the parties and issues, and after the filing of testimony and evidentiary hearings, can serve no possible purpose other than delay or obfuscation given DRA's "concerns." DRA's tardiness or confusion, whether purposeful or not, should not be allowed to further prolong this already extended proceeding.

[62] DRA Brief, at 8.

Second, the Scoping Memo did not include as an issue to be decided in this proceeding whether any additional entities had to become parties. DRA may not expand the scope of the proceeding in the DRA Brief.

Third, DRA misinterprets § 854(a). The "either directly or indirectly" clause that DRA cites in § 854(a) is intended to cover transactions in which the jurisdictional utility is not being sold, but rather the company that owns the utility is sold. Such a sale of an upstream owner constitutes an indirect change of control, and the "either directly or indirectly" statutory language ensures that such indirect change remains subject to Commission review. For example, if NV Energy, Inc. were to be acquired, the purchaser would only "indirectly" acquire Sierra's Nevada and California utility operations as part of the transaction. Such an "indirect" purchaser of NV Energy's California utility operations would thus be obligated to obtain this Commission's prior approval in accordance with § 854(a). However, § 854(a) does not require every single entity in the chain of ownership above the purchasing entity to become a formal applicant to a § 854(a) proceeding. CalPeco is purchasing the California Utility. It is the correct and only necessary purchasing applicant under § 854(a).

Finally, there is no substantive reason for any additional entities to be made formal applicants. Algonquin and Emera are long-established, respected, publicly-traded companies which are highly regulated in a variety of jurisdictions. They each, in addition to CalPeco, have represented to this Commission that they will comply with the respective Regulatory Commitments. In making those Regulatory Commitments, both companies acknowledge the Commission's authority to enforce them. In addition, Mr. Robertson and Mr. Tedesco testified under oath as representative of Algonquin and Emera, respectively.[63] The Commission has the authority to enforce its own orders, including the Regulatory Commitments.[64]

The request by Joint Applicants that the Commission approve the Transaction and adopt the Regulatory Commitments as conditions is sufficient to address any "enforcement" issue DRA intimates.

IV. THE TRANSFER OF CONTROL IS IN THE PUBLIC INTEREST

A. The Proposed Transaction Will Maintain or Improve the Quality and Reliability of Service for Customers

1. The Proposed Transaction Will Maintain the Quality of Service for Customers

DRA's only response regarding the quality of service is to quote a CalPeco obligation in the Purchase Agreement to "conduct business in the same or similar manner as it has under [Sierra]'s ownership" as "evidence" that CalPeco will purposely "cap" the quality of service it will provide to the existing Sierra levels.[65] The evidence contravenes DRA's contention.

The Purchase Agreement obligates CalPeco to maintain the same services and facilities *at a minimum* at the same level as Sierra for the purpose of providing customers and the

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[63] *See* Ex. 2, Qualifications. *See also* Joint Applicants/Robertson and Tedesco, R.T., June 17, 2010, at 208-212 (Mr. Robertson and Mr. Tedesco each confirmed in response to questions by ALJ Vieth that the Commission would have sufficient access to the books and records of the companies upstream from CalPeco. ALJ Vieth's questions established a record in accordance with the Scoping Memo that the Commission would have sufficient access to such books and records. *See* Scoping Memo, at 16.

[64] *See Order Instituting Investigation whether Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and their respective holding companies, PG&E Corporation, Edison International, and Sempra Energy, respondents, have violated relevant statutes and Commission decisions, and whether changes should be made to rules, orders, and conditions pertaining to respondents' holding company systems,* D.02-01-037 (Jan. 9, 2002) (holding that the Commission has the authority to enforce commitments made by the holding companies of Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company).

[65] DRA Brief, at 10-11.

Commission the critical assurance that CalPeco is contractually prohibited from lowering its level of service as a means to increase profits (i.e., this provision is consistent with CalPeco's commitments not to lay off employees or shut facilities and offices).[66]

Moreover, CalPeco's testimony and the Regulatory Commitments demonstrate that CalPeco is committed and obligated to improving the quality of electric service through, among other initiatives: (a) the introduction of electronic billing and other online services, (b) the re-opening of the South Lake Tahoe customer service counter, (c) maintaining a local presence of management, and (d) focusing on issues of particular importance to the Lake Tahoe Basin Communities.[67]

DRA's responses to the evidence Joint Applicants presented regarding the maintenance of, and anticipated improvements to, the quality of service do not warrant rejection of the Transaction. First with regard to the reopening of the customer service counter in South Lake Tahoe, as discussed previously, DRA argues that the Commission should disregard this benefit because Joint Applicants "have provided no studies on what these costs [to reopen the service counter] would be" and "have not provided any indication as to when the local office will open …."[68] Mr. Robertson's testimony fully warrants a finding that the reopening of the South Lake Tahoe will be beneficial and at little or no incremental cost:

> We believe that there will be little, if any, incremental cost to reopen [the] customer service facility. The physical facility exists.
>
> As we transition this utility to be a utility which is focused and operated in the local area, it is our expectation that we will move people around. Some of the additional hires that we will be

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[66] Ex. 1, Joint Reply, at 52; Appendix A to Joint Applicants Opening Brief, Regulatory Commitments 3(b), 3(g), 4(a), and 4(c).

[67] Joint Applicants Brief, at 34-36, Appendix A, Regulatory Commitment 4(b).

[68] DRA Brief, at 9-10.

> undertaking to replace services that are now provided in Reno we will station in the South Tahoe office to allow us to provide customer service in the area at no incremental cost.… And so consequently, we have the ability to use that staff to provide customers service in the – in South Tahoe at little or no incremental cost.[69]

As stressed earlier, the fact that a formal "study" was not conducted and each operating protocol has yet to be established does not warrant rejection of Mr. Robertson's testimony. Does DRA really believe that this Commission's decision whether to grant the requested § 854(a) authority should turn on whether CalPeco decides to close the service counter at 4:30 p.m. rather than 5:00 p.m.?[70]

Similarly, DRA "refutes" Mr. Robertson's testimony confirming CalPeco's anticipated ability to introduce electronic billing on a cost-effective basis by demanding that the Commission just reject the testimony as "nonsense."[71] Mr. Robertson explained that it may not have made economic sense for NV Energy, in the context of its 1.1 million customers, to modify its existing electronic systems, designed for its Nevada-based tariffs, to enable these systems to accommodate the different California tariffs for 46,000 customers.[72] However, given the expertise and experience of Algonquin and Emera in providing electronic systems to small customer bases, Mr. Robertson testified that CalPeco should be able to introduce electronic billing to the California Utility cost-effectively:

[69] Joint Applicants/Robertson, R.T. June 16, 2010, at 72-73.

[70] Again, CalPeco is not seeking rate recovery for the reopening of the South Lake Tahoe service center in this proceeding. To the extent that CalPeco determines that the customer service counter is beneficial, it will make the necessary showing in its 2012 GRC.

[71] DRA Brief, at 10. DRA had the opportunity to demonstrate that Mr. Robertson's testimony was "nonsense" by further cross-examination.

[72] Joint Applicants/Robertson, R.T. June 16, 2010, at 74.

> [W]e are comfortable given [Algonquin's] experience of operating 19 small utilities that there will be no specific incremental costs of offering [electronic billing services]. …
>
> The smaller utility can take advantage of some of the [electronic billing] systems that Algonquin and Emera have that are extremely cost effective [for a utility] with 46,000 customers. [Algonquin offers] all of our water utility customers the ability to look at their bills online, to pay online at an extremely competitive cost. …[W]e are absolutely comfortable and confident that with [CalPeco's] focus on those 46,000 customers, they too can get the benefit that perhaps being part of 1.1 million customers they [the Sierra customers within California do not] get the benefit of.[73]

Mr. Robertson presented competent evidence; the fact that it refutes with actual facts DRA's logic that "bigger is always better" does not, as DRA insists, warrant the Commission to reject Mr. Robertson's testimony as "nonsense."[74]

Finally, DRA attempts to downplay the benefit of having senior management physically present in the California service territory, by noting that for the communities of Loyalton and Portola, "Sierra's current headquarters in Reno, NV, is actually closer to the towns of Loyalton and Portola [footnote omitted]" and so "[i]f benefits are to be measured in accordance with proximity to local headquarters, these communities will be worse off."[75]

DRA's presentation of "evidence" of certain physical distances (which Joint Applicants do not dispute) ignores the more important fact that these communities have all urged the Commission to approve the Transaction "to enable electric consumers in the Loyalton/Portola area to be provided enhanced electric service at the earliest possible time."[76] For customers

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[73] Joint Applicants/Robertson, R.T. June 16, 2010, at 73-74.

[74] Indeed, if DRA believed that Mr. Robertson was incompetent to testify on the subject of electronic billing and its associated costs, it should have moved to strike his response during the evidentiary hearing.

[75] DRA Brief, at 11.

[76] Ex. C to Ex. 1, Joint Reply, at 4.

physically closer to Tahoe Vista, DRA recognizes some tangible benefit, but dismisses it on the basis that it is "not measurable."[77] Yet, the Commission has approved analogous acquisitions, finding that the benefits of those transactions were similarly tangible though "presently unquantifiable."[78]

For these reasons and the other reasons described in the Joint Application[79] that DRA has not disputed, the Commission should find that the proposed Transaction will maintain or improve the quality of service for customers.

2. The Proposed Transaction Will Improve or Maintain the Reliability of Service for Customers

DRA has not challenged the evidence presented by Joint Applicants with regard to maintaining or improving the reliability of service for customers. Therefore, the Commission should find that the proposed Transaction will maintain or improve the reliability of service for customers.

B. The Proposed Transaction Will Not Increase Customer Rates or Total Revenues Collected from the Customers of the California Utility

1. The Total Revenues to be Paid by the Customers of the California Utility Will Remain at the Same Level After Closing

DRA has expressed no concern regarding the revenue requirement and rate levels on the day after Closing.[80] It is undisputed that the Commission should find that the total revenues to be paid by the customers of the California Utility will remain at the same level after Closing.

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[77] DRA Brief, at 11.

[78] D.02-12-068, mimeo at 16.

[79] Joint Application, at 26-29.

[80] DRA/Phan, R.T. June 16, 2010, at 102.

2. The Minor Adjustment to the ECAC Tariff CalPeco Requests Is Warranted to Prevent Cost Shifting Among Customers

DRA has raised no issue relating, or any objection, to the rate reallocation and the minor change in the ECAC tariff that Joint Applicants request.[81] The Commission should accordingly grant CalPeco authority to make the requested, minor adjustments to the ECAC tariff.

3. CalPeco's Costs Will Remain Comparable to the Costs Sierra Would Be Expected to Request in the 2012 GRC; There Is No Potential For Rate Shock at the Next GRC for Ratepayers with CalPeco Any More Than There Would Be with Sierra

DRA again argues that in the 2012 GRC, the "revenue requirement and rates for the California Utility are *guaranteed* to increase," and that the increase will be "incremental and in addition to basic labor and non-labor increases typically requested in a GRC application."[82]

Joint Applicants demonstrated that any difference in rates which the Commission would grant Sierra or CalPeco in its 2012 GRC are likely marginal, and the Transaction does not expose ratepayers to a risk of "unacceptable rate shock" either at Closing, in the 2012 GRC, or thereafter.[83]

DRA disputes Joint Applicants' position that DRA must demonstrate that the Transaction exposes ratepayers to the risk of an unacceptable level of rate shock in the 2012 GRC to warrant the Commission rejecting the Transaction. DRA apparently contends that its allegation that CalPeco's 2012 GRC are "guaranteed" to result "increased rates that would be burdensome" is sufficient to warrant rejection of the Transaction.[84]

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[81] *See* Joint Applicants Brief, at 37.

[82] DRA Brief, at 12 (emphasis added).

[83] Joint Applicants Brief, at 3-4, 38-39.

[84] DRA Brief, at 12.

a. DRA Fails to Present Evidence to Support Its Argument that CalPeco's Ownership Will Require a "Burdensome" Rate Increase

We need not argue the applicable standard to apply to the rates to be authorized in the 2012 GRC. The most salient points are that (i) DRA purposely refrains from quantifying its supposed legal standard of a "burdensome" rate increase (although its arguments proceed on the basis that any possibility of any rate increase, regardless of how remote the risk or *de minimis* the possible amount *per se* sustains DRA's "burdensome" standard); and (ii) DRA fails to provide evidence to refute CalPeco's showing that the rates it will request in the 2012 GRC are comparable to the rate authorization Sierra would seek.

DRA's conclusion that CalPeco's rates will be necessarily higher is devoid of any evidence comparing the rates DRA would project either Sierra or CalPeco to request. DRA did not assess the cost recovery that Sierra would request if it retained the California Utility.[85] The only pseudo-evidence that DRA presents regarding CalPeco's 2012 GRC rate requests are again comprised of DRA's "concerns."

Moreover, acceptance of DRA's "burdensome" rate increase standard (i.e., a 100% guarantee that the revenue requirement for the new owner would not be one penny higher than that requested by the old owner at the next GRC) would require as a condition of the Commission granting § 854(a) approval that the incumbent and prospective owner each present a hypothetical rate case showing the rate levels they would each request. Then, only if the two amounts were determined to be exactly the same would the application be approved. This would present an impossible hurdle for any applicant.

[85] DRA/Phan, R.T. June 16, 2010, at 116.

b. DRA Presents No "Incremental Costs" that Are Appropriately Attributable to the Transaction

DRA bases its claim of "burdensome" costs on the grounds that (i) the PSREC Settlement "has generated $1.4 million in additional incremental costs that would not otherwise exist, for the 2012 GRC;[86] (ii) exclusion of Valmy generation from the resource portfolio with which Sierra currently serves its California customers will increase rates by almost 10% or approximately $7.6 million; [87] and (iii) DRA's unquantified and unsubstantiated "concern" that the losses of economies of scale due to CalPeco's status "as a small utility" will result in higher "general office expenses" for CalPeco.[88]

Of the $9 million of incremental costs that DRA attributes to the Transaction, not one dollar results from the Transaction. The only DRA claims of possible cost increase attributable to the Transaction would be any supposed, increased costs that DRA could demonstrate would be associated with DRA's unsupported "concerns" relating to the loss of economies of scale. Significantly, DRA presents neither any facts demonstrating that this loss of economies of scale will cause any rate increase nor any quantification of the amount of rate increases it fears.

Joint Applicants have demonstrated that even if CalPeco has significantly underestimated the cost consequences of any supposed loss of economies of scale on which DRA bases its "concern," the potential impact to ratepayers in customer rates would likely be 1% of the total $75-80 million annual revenue requirement.[89] Joint Applicants believe that this worst-case scenario will not eventuate. However, in all events; the remote risk of a rate differential of 1%

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[86] DRA Brief, at 15.

[87] DRA Brief, at 16.

[88] *See* DRA Brief, at 16-17.

[89] Joint Applicants Brief, at 38-41.

does not justify rejection of the Transaction under DRA's "burdensome" standard, Joint Applicants' "unacceptable level of rate shock standard," or under any other standard.

(1) The PSREC Settlement Will Not Increase Rates

DRA reiterates its false contention that "[b]ased on the [PSREC] Settlement Agreement alone, this transaction has generated a total of $1.4 million in additional incremental costs that would not otherwise exist, for the 2012 GRC."[90] DRA's interpretation of the PSREC Settlement is contradicted by the actual terms of the settlement. First and foremost, no request is presently before the Commission[91] with respect to any costs associated with the PSREC Settlement and may never come before the Commission at any point. The new assertion in the DRA Brief that Joint Applicants' repeated representations regarding their responsibility for the $250,000 payment to be made to PSREC is "only a front,"[92] does not warrant a further response.[93]

DRA asserts that "one look" at the Line Crew Agreement demonstrates that CalPeco's claim that all costs associated with the Line Crew Agreement prior to possible Commission approval in the 2012 GRC will not be recovered from ratepayers is "misleading."[94] The simple response is that DRA's "one look" does not alter the terms of the PSREC Settlement or, more importantly, the representations CalPeco has repeatedly made and reaffirmed:

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[90] DRA Brief, at 15.

[91] The Scoping Memo sets forth the issues to be decided presently. Possible rate recovery for PSREC Settlement costs is not identified as an issue.

[92] DRA Brief, at 14.

[93] DRA persists that the PSREC Settlement exposes ratepayers *unconditionally* to reimburse Joint Applicants for the $250,000 to be paid to PSREC shortly after Closing. DRA/Phan, R.T. June 16, 2010, at 125-126, 196-197 *compare with* Joint Reply at 40, fn. 110. Joint Applicants added Section 3(f) to the Regulatory Commitments in Appendix A to Joint Applicants Brief, to negate any possible doubt regarding the $250,000 payment.

[94] DRA Brief, at 14.

> Joint Applicants themselves have the exclusive responsibility for any current obligations, financial [or] otherwise, to PSREC and the other members of the Aligned Protestants coalition. With respect to possible payment obligations to be made after the effective date of CalPeco's 2012 GRC, no dollar will be paid by a CalPeco customer, absent the Commission first specifically finding the expense reasonable and cost effective and [it] then approving the expenditure and associated rate recovery.[95]

Second, DRA's fundamental point that the Transaction has triggered the possible need to incur costs related to reliability concerns is wrong. The reliability concerns that PSREC, Loyalton, Portola, Sierra County, and Plumas County have voiced arose under Sierra's ownership; DRA's argument that these reliability issues will be resolved by the Commission rejecting the Transaction is wrong and misleading.[96]

Similarly, there remains no need presently for CalPeco to respond to DRA's argument regarding the Herlong Transmission Project.[97] If CalPeco decides in the future to request authority to invest $1 million in the project, it will support any such request with showings that the facilities will benefit CalPeco's customers and that the costs of the investment are reasonable and prudent.[98] Accordingly, the Commission will then decide the merits of such a request.

[95] Ex. 1, Joint Reply, at 39.

[96] *See* Joint Applicants Brief, at 43-44.

[97] The inference that DRA argues from Mr. Robertson's statement that CalPeco "may track" the costs of the Herlong Project in a "memorandum account" should be rejected. The obvious need to account for costs incurred does not prove DRA's point that CalPeco has yet another "secret agenda" to seek to recover this $250,000 in all events. In fact, in the same answer that DRA quotes, Mr. Robertson again set forth the specific conditions precedent which must be satisfied before CalPeco will make any such rate request. *See* DRA Brief, at 14; *see also* Joint Applicants/Robertson, R.T. June 16, 2010, at 68-69.

[98] Joint Applicants/Robertson, R.T. June 16, 2010, at 67.

(2) Any Costs Associated with Compliance with the Commission's GHG EPS Requirements Are Not Attributable to the Transaction

As explained *infra,* two of DRA's fundamental arguments—that the approval of Transaction will impose a $7.6 million rate increase and that by rejecting the Transaction, the Commission can enable the avoidance of these supposed "costs"—are wrong and misleading. Despite DRA's apparent efforts to make GHG EPS compliance a "wedge" issue associated with the Transaction, it is not. Whatever costs are incurred in complying with the GHG EPS, whether resulting from installation of certain facilities or the exclusion of certain power sources, these costs should and will be borne by customers benefitting from the emission reductions and without regard to the identity of the owner of the utility. DRA would wrongly have the Commission rule that responsibility for GHG compliance and the resulting costs can be "arbitraged" based on the identity of the owner of the California Utility.

Rejection of the Transaction will not "save" the customers of the California Utility one nickel of GHG compliance costs. Approval of the Transaction will not increase any cost of GHG compliance. This Commission has the authority and ongoing responsibility to decide whether to exclude Valmy power from being sold into California independent of this Transaction.

Joint Applicants also believe that any decision that this Commission may make presently, or may make in the future, that Valmy power may no longer be sold into California would be based on it finding that the overall benefits of excluding Valmy power outweigh the benefits of allowing it to continue to be "sold" into California. DRA's argument that such a decision by the Commission would serve only to increase costs and provide no benefits and therefore the Transaction must be rejected, is wrong. There is no basis to attribute compliance with GHG requirements as "incremental costs" which "but for" the Transaction will not be incurred.

(3) DRA's Speculation of Losses of Economies of Scale Is Not Supported

DRA's "concern" that the transition from Sierra to CalPeco ownership will precipitate a loss of economies of scale is limited to "general office" or "O&M" expenses CalPeco will incur.[99] Joint Applicants have demonstrated that DRA's "concerns" regarding economies of scale are both unsubstantiated and provide no basis for a finding of increased rates because: (i) DRA's concern is based exclusively on its inapplicable and unsubstantiated logic that "bigger is always better;"(ii) CalPeco demonstrated its O&M costs will be comparable to the O&M costs that Sierra would be requesting; (iii) the Transition Services Agreement allows CalPeco the opportunity to continue to have Sierra provide these O&M services at current costs; and (iv) in all events, even if CalPeco's cost estimates are understated, the exposure to any rate differential resulting from a CalPeco as compared to a Sierra 2012 GRC is negligible.[100]

DRA seeks to buttress its "bigger is always better" theory (i) by reference to the fact that Sierra has been cost-effective in its procurement of certain equipment and services; (ii) arguing that these cost efficiencies result exclusively from Sierra's size; and (iii) concluding that these efficiencies will therefore necessarily be lost under CalPeco ownership. Sierra's ability to achieve cost efficiencies in certain areas does not establish DRA's claim that "bigger is always better" is applicable to every situation. The "savings" attributable to the merger of Sierra and Nevada Power is not a function of the larger size *per se*, but rather that the merger allowed "all kinds of functions [to be] consolidated to eliminate redundancies" (e.g., reducing head count and closing facilities).[101] Conversely, even accepting DRA's logic that Sierra has achieved

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[99] DRA Brief, at 16-19.

[100] Joint Applicants Brief, at 39-41.

[101] Joint Applicants/Bethel, R.T. June 16, 2010, at 13.

efficiencies exclusively due to its size does not conversely establish DRA's principle that CalPeco's smaller size *per se* deprives it of the opportunity to be as, if not more, cost-effective.

As described previously, CalPeco's testimony refuted DRA's conviction that "bigger is always better" is necessarily applicable to the Transaction.[102] Ironically, DRA continues to chastise Joint Applicants for their supposed failure to present "any evidence in the form of cost studies or analysis" of the savings which may be realized by the fact that CalPeco is a "smaller utility" and that its owners have great experience in operating such smaller utilities.[103] Contrary to the views of DRA, the written testimony by CalPeco, the testimony CalPeco presented at the hearing, and the evidence in the Joint Reply demonstrating the potential benefits of CalPeco's smaller size and California-specific focus constitute both analysis and evidence.[104] When applied to the facts and circumstances of the proposed Transaction, there is no valid basis to apply DRA's "bigger is always better" claim as a uniform rule.

Moreover, and even accepting DRA's premise that "bigger is always better," its claim that any loss of economies of scale will impose "burdensome" rate increases is deficient in at least two respects. Sierra presented an analysis that projects that the *minimum* amount of rate recovery that it would be requesting in its 2012 GRC for O&M expenses would be $8.8 million.

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[102] *See, supra* at Section IV.A.1, regarding CalPeco's anticipated ability to introduce electronic billing and DRA's attempted refutation.

[103] DRA Brief, at 11.

[104] Moreover, as Mr. Robertson explained several times, until CalPeco has the actual experience operating the California Utility its ability to conduct detailed studies will be limited:

> "We obviously … don't operate the utility right now[;] in order to make that statement, we obviously have to have looked at the costs of operating the utility, looked at the number of people we'll be hiring, looked at the services those individuals perform, and build our own cost structure up from the bottom up.

Joint Applicants/Robertson, R.T. June 16, 2010, at 55; *see also Id.*, at 56, 70-71.

It further expects that its O&M costs would exceed that amount.[105] Mr. Robertson then testified in response to DRA's cross-examination that:

> [A]s [CalPeco looks] at the 2012 GRC . . . sitting here today there is nothing in evidence from our perspective that would lead us to believe that there would be any cost increase arising from administration or operating costs that wouldn't be present if Sierra continued to own [the California Utility].[106]

Moreover, even if Mr. Robertson's analysis has significantly underestimated the cost increases that would be attributable to any supposed loss of economies of scale, the amount of increase would be 1% -- the remote *possibility* of a rate increase of this level does not constitute a "burdensome" increase and, more importantly, no basis to reject the Transaction.[107]

(4) The Transition Services Agreement Facilitates the Seamless Transition and Decreases Any Possibility of Any Adverse Rate Consequence

Two important points must be made with respect to DRA's continued "concerns" relating to the Transition Services Agreement. First, any normal, operating costs to be incurred under the Transition Services Agreement will be O&M costs and thus a subset of the O&M costs discussed in the preceding section. In other words, even assuming a significant underestimation of the costs of the Transition Services Agreement, the potential risk to customers is already accounted for in the "worst case" scenario of an escalation in O&M expenses and the possible exposure to a less than 1% overall rate increase.

Second, contrary to DRA's unfounded concerns, the Transition Services Agreement poses no cost risk to customers: (i) all normal, operating costs CalPeco incurs prior to the 2012 GRC under the Transition Services Agreement are already built into current rate levels, which

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[105] Joint Applicants Brief, at 40; Ex. 1, Joint Reply, at 48-51.

[106] Joint Applicants/Robertson, R.T. June 16, 2010, at 59.

[107] The calculation of this extreme "worst case" risk of a 1% rate differential is set forth in the Joint Reply, at 48-51.

will not change; and (ii) in the period following the effectiveness of the 2012 GRC, CalPeco will recover in rates only those normal, operating costs which this Commission authorizes it to incur in the 2012 GRC pursuant to the Transition Services Agreement.[108]

The importance of this latter point needs to be reemphasized – originally, CalPeco suggested in this proceeding that the Commission approve rate recovery for all costs that it would incur under the Transition Services Agreement, including those which it may incur after the 2012 GRC. In response to DRA's concerns, CalPeco has restricted the authority it is presently requesting to the (i) authority to perform under the Transition Services Agreement; and (ii) the right to seek rate recovery in its 2012 GRC for costs it will incur in the post-2012 GRC period.[109]

Nonetheless, DRA maintains its inexplicable assault on the Transition Services Agreement based on its "concern" that "details" are lacking.[110] DRA does inject a new argument, suggesting costs for services under the Transition Services Agreement will necessarily increase because a "middleman [is] inserted."[111] DRA's resort to yet another supposed economic maxim that "a middleman always come at a cost" is again refuted by the facts.[112] The Transition Services Agreement imposes a specific contractual obligation on Sierra to provide services on an "at cost" basis. Mr. Tomchuk reaffirmed that the costs that Sierra will charge CalPeco under the

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[108] Joint Applicants Brief, at 42-43, fn. 178.

[109] Joint Applicants Brief, at 42-43, fn. 178.

[110] The Transition Services Agreement provides the necessary level of detail – CalPeco may obligate Sierra to provide "all services currently provided" CalPeco selects and to do so at its cost. Joint Applicants Brief, at 41-42.

[111] DRA Brief, at 9.

[112] DRA Brief, at 9.

Transition Services Agreement will not include any "profit" component.[113] Moreover, the Commission itself will review and authorize the costs that CalPeco will pay to Sierra for any services under the Transition Services Agreement in the 2012 GRC, and CalPeco will have the burden to demonstrate the reasonableness of any cost recovery it will be seeking.

(5) DRA's Request for a Three-Year Rate Stay Out Condition is Untimely, Unwarranted, and Would Set Rates at Confiscatory Levels and Must Be Rejected

In the DRA Brief, for the first time, DRA recommends that if the Commission approves the Transaction, that it should also defer the filing of CalPeco's first general rate case from the current 2012 GRC (consistent with Sierra's established rate case cycle) until "2014 for a Test Year 2015." The totality of DRA's support for this extended "stay out" demand is two separate sentences:

> [The three-year "stay out" provision] will allow an opportunity to track costs associated with the T[ransition] S[services] [A]greement and also allow CalPeco to develop a record of costs associated with obtaining services on its own once the T[ransition] S[ervices] A[greement] expires.[114]
>
> DRA recommends deferring CalPeco's GRC by one cycle so that CalPeco can begin to track costs associated with procuring services on its own.[115]

The Commission must reject this belated, confiscatory, unprecedented, and unlawful demand for a three-year, or any other, "rate stay out" condition. First, DRA has not previously raised this demand. The demand thus constitutes impermissible additional testimony by DRA, and on that basis alone, should be stricken from the record and disregarded.

[113] Joint Applicants/Tomchuk, R.T. June 16, 2010, at 76.

[114] DRA Brief, at 18-19.

[115] DRA Brief, at 34.

Introducing this demand at such a late juncture violates Rule 13.8(b)[116] and denies Joint Applicants the ability to present evidence of the extremely, deleterious effects of such a Draconian and unprecedented stay out provision. It also denies Joint Applicants the opportunity to cross-examine the sponsor of the proposal. Such cross-examination would be focused on the need for the three-year rate stay out to accomplish DRA's stated objective to "have a record of costs" with respect to CalPeco's requests for recovery of its O&M costs in the first CalPeco general rate case.[117]

Second, the arbitrary denial of cost recovery inherent in any rate stay out would harm both CalPeco and its electric consumers more than any supposed benefits that DRA's desired "tracking" of costs could possibly provide. DRA's demand for a three-year CalPeco rate stay out ignores the fact that even if the Commission were to reject the Transaction, the rates for the customers of the California Utility under continued ownership by Sierra would be subject to some upward change in a Sierra 2012 GRC.

An important and critical function of a general rate case is to enable the utility to place new assets which are providing customers service into rate base and enable the utility to begin to recover its investment in these new facilities. Sierra currently is using distribution plant facilities to provide service, but the costs for certain of these facilities are not reflected in Sierra's current rates. In its next GRC, Sierra would be seeking rates that provide a return on and of this incremental capital investment. So even apart from this Transaction, there would be some rate

[116] Rule 13.8(b) states "[d]irect testimony in addition to the prepared testimony previously served, other than the correction of minor typographical or wording errors that do not alter the substance of the prepared testimony, will not be accepted into evidence unless the sponsoring party shows good cause why the additional testimony could not have been served with the prepared testimony or should otherwise be admitted."

[117] *See, e.g.,* D.06-02-033, D.07-05-031 (in both these cases the Applicants were able to present evidence regarding the consequences of a stay out provision).

impact stemming from incremental capital investment in utility assets. Thus at a minimum, the rate stay out would, until at least 2015, arbitrarily deprive CalPeco of any compensation on this investment in these facilities which are currently and will continue to be used to provide service to the customers of the California Utility.

Moreover, the stay out would also effectively "freeze" recovery for O&M expenses at the level Sierra agreed to in its 2009 GRC settlement [118] Sierra itself presented testimony that it projects that if it retained ownership, it would be requesting in its 2012 GRC O&M expenses of at least $ 1million more annually.[119] Operating costs for the California Utility are hence already higher than the level reflected in the current Sierra rates and would be subject to adjustment in any 2012 GRC even absent this Transaction. Thus, the rate stay out will just arbitrarily deprive CalPeco the opportunity to request cost recovery for the level of the O&M costs it will likely be incurring for each of the years 2012, 2013, and 2014.

The stay out provision would hence deny CalPeco the right to recover an estimated $400,000 annually in costs that would be associated with the normal and expected increases in labor costs to be incurred in the operation of the California Utility irrespective of ownership.[120]

The arbitrary deprivation of the ability to request in the 2012 GRC rate recovery during 2012, 2013, and 2014 for the amount of its investment in facilities which provide customers utility services and for the amounts that it will incur for O&M and labor costs would likely

[118] DRA Brief, at 17 (citation omitted).

[119] Ex. 1, Joint Reply, at 49.

[120] The $400,000 figure represents an estimate of increases in salary only based on Sierra's last Collective Bargaining Agreement. This level does not include costs associated with non-salary benefits, nor is it necessarily indicative of the salary increases that will result from either the current Collective Bargaining Agreement negotiations or what CalPeco will negotiate with the union.

reduce the return that CalPeco would have the opportunity to earn in each year to confiscatory and likely unlawful levels.

Not surprisingly, despite demanding a three-year rate stay out, DRA fails to disclose that in both the California-American Water decision[121] ("*Cal-Am Water*") and *MidAmerican*, DRA proposed a one-year stay out and in each instance the Commission rejected the proposal as unfair and not necessary. The Commission's rejection of the one-year stay out in *Cal-Am Water* is particularly instructive. The Commission first reports that, as directly analogous to this case:

> DRA provides no analysis to substantiate that its proposed [deferral of rate increases and next general rate case for one year] will actually benefit ratepayers.[122]

The Commission citing the *Bluefield* and *Hope* cases[123] found that DRA's demand for deferral of its next general rate case and rate increases for one year would "unfairly preclude Cal-Am from earning a reasonable return on its investment."[124] Besides this recognition that a rate stay out would result in confiscatory and thus unlawful rates, the Commission further recognized that while the proposal for a rate stay out and deferral of rate increases for one year "may appear to provide a short-term benefit to ratepayers," that "any short-term benefit will be offset by long-term harm" to ratepayers.[125] Among other ratepayer harms, the Commission recognized that the revenue loss could increase the cost of debt. The Commission further highlighted DRA's own

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[121] D.02-12-068.

[122] D.07-05-031, mimeo at 26.

[123] D.07-05-031, mimeo at 27 *citing Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1944) and *Bluefield Water Works & Improvement Company v. Public Service Commission of the State of Virginia*, 262 U.S. 679 (1923).

[124] D.07-05-031, mimeo at 27.

[125] D.07-05-031, mimeo at 27.

"acknowledgement" that the one year rate stay out "may result in rate shock to the ratepayers … when the authorized but delayed rates go into effect."[126]

DRA's demand for a three-year rate stay out will exponentially increase the unfairness and risks to both CalPeco and its customers. Perhaps most significantly, DRA's purported justification for the three-year stay out ("allow[ing] CalPeco to develop a record of costs associated with obtaining services") is unnecessary and provides no benefit.

If the Commission approves the Transaction, in the 2012 GRC, CalPeco will project the O&M expenses it will incur and provide evidence to support the reasonableness of those expenses. Conversely, if the Commission rejects the Transaction, in its 2012 GRC, Sierra will project the O&M expenses it will incur and provide evidence to support the reasonableness of those expenses. In either instance, the Commission can determine what costs are fair and reasonable, and therefore recoverable in rates.

This Commission has decades of experience and expertise in assessing requests in general rate cases for recovery of this same variety of O&M costs based on the utility's projected costs. The proposed Transaction does not warrant any deviation from the Commission's normal practice and no evidence (beyond DRA's untimely request) has been introduced to suggest it is necessary. Moreover, it should be reiterated that Joint Applicants have demonstrated that even under a scenario in which CalPeco's O&M costs dramatically increase by 15% over Sierra's projected levels, the impact on total rate levels would be less than 1%.[127]

DRA's desire for a better "record of costs" does not justify DRA's demand for the imposition of a punitive condition whose only support is two very general sentences presented in

[126] D. 07-05-31, mimeo at 26-27.

[127] Ex. 1, Joint Reply, at 49-50.

an opening brief, would set rates at confiscatory and unlawful rates, and in the long run expose ratepayers to rate shock and likely other harm.

C. The Proposed Transaction Will Maintain the Financial Condition of the California Utility

DRA continues its assertions that the Transaction will harm the financial integrity of the California Utility because:

1. two-way ring fencing wrongfully "protects" Algonquin and Emera;
2. the absence of any guarantee by Algonquin and Emera of the debt of CalPeco; and
3. Algonquin and Emera oppose imposition of a "first priority condition."[128]

While characterizing its objections in several guises, DRA's "concerns" relating to the financial condition post-Closing of the California Utility remain singularly the alleged failure by Algonquin and Emera to make the necessary "financial commitment" to CalPeco and the "substantial risk" DRA postulates such failure imposes on customers.

As demonstrated in the Joint Applicants Brief,[129] other than DRA's "concern" and the understandable inability to provide 100% "guarantees" regarding future events, there is no basis to expect that CalPeco will be confronted with such a financial exigency and correspondingly also no factual or legal basis to warrant the imposition of impractical financial conditions DRA is proposing.

It need first be reiterated that DRA's concerns that CalPeco will need emergency "rainy day" funding are based on a need for "contingency planning" and not on any expectation that CalPeco in fact will be confronted with financial or operational problems. DRA has no basis to challenge Joint Applicants' representations that CalPeco will have funds sufficient to cover

[128] DRA Brief, at 23.

[129] Joint Applicants Brief, at 44-52.

operations, maintenance, capital expenditures and debt service costs. Ms. Phan also acknowledges that DRA has no concern about Emera and Algonquin's access to capital – DRA's concern is expressly limited to "the 'what if' in the event that CalPeco incurs financial problems."[130]

Nonetheless, acknowledging the need for contingency planning and to provide DRA even further comfort, Algonquin and Emera clarified and supplemented their commitments to CalPeco. This revision in Regulatory Commitment 1(g) should satisfy any legitimate concern by DRA for a "financial commitment":

> Emera and Algonquin will provide sufficient initial equity to fund fifty percent (50%) of the purchase price for CalPeco. CalPeco shall seek to obtain the balance of the required capital necessary for the purchase price through stand-alone debt issued by CalPeco. Algonquin and Emera are prepared to make this initial equity investment and invest any additional equity in CalPeco based on their understanding that the Commission shall grant CalPeco timely recovery in rates (i) for the reasonable expenses it will make or undertake, respectively, to provide electric service; and (ii) for CalPeco to earn a reasonable return of and on CalPeco's investment in rate base. On this basis Emera and Algonquin are committed to ensure that CalPeco maintains sufficient funds to operate and has sufficient capital available for necessary capital investments. CalPeco, Algonquin and Emera acknowledge that dividends or similar distributions by CalPeco may be restricted as necessary to maintain minimum equity levels that are reasonable in relation to any equity ratio requirements.

1. The Ring Fencing Provisions Appropriately "Wall Off" CalPeco from Its Upstream Owners

DRA repeats its attack that the ring-fencing provisions are deficient. The challenge remains largely based solely on DRA's novel criticism that the provisions are "two-way" and thus inappropriately designed to "protect" the upstream owners.[131] The legal facts and

[130] Ex. 15, DRA Response to Joint Applicants Data Request 12(d).

[131] DRA asserts that Joint Applicants made a "misleading claim" that the "singular purpose" of the ring fencing provisions is to protect the operating utility. DRA Brief, at 23. There is nothing

commercial reality remain that (i) ring-fencing must be "two-way" to effectively accomplish the purpose of ring fencing to "wall off" the operating utility from any financial difficulties confronting its upstream owners and affiliates; and (ii) the singular purpose of ring fencing is to protect the operating utility; the incidental, but legally inevitable, consequence of "walling" off separate legal entities is that the upstream owners are correspondingly and necessarily walled off from the operating utility.

Joint Applicants believed that DRA would drop, or at least soften, its attack on ring fencing as at the hearing Ms. Phan (i) acknowledged that if Algonquin and Emera made the appropriate financial commitments to CalPeco, DRA would drop its objections to the ring fencing provisions; and (ii) conceded that the ring fencing provisions CalPeco proposes are effective to accomplish the intended purpose of insulating CalPeco from financial problems other Algonquin and Emera affiliates may experience.[132]

Surprisingly, and unfairly, for the first time in this proceeding, DRA now asserts that CalPeco has failed to demonstrate that "the ring fencing measures around CalPeco are sufficient to prevent it from being pulled into a bankruptcy of any entity above it in the business organization." On such basis, DRA recommends that the Commission should require "Joint

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untrue, deceptive, or otherwise "misleading" about the statement that the "singular purpose" of the ring fencing provisions is to protect CalPeco – but for the intent to protect CalPeco, there would be no need for any ring fencing provisions. DRA's claims are based solely on its interpretation of a response to a DRA data request that questioned "is 'ring-fencing' two-way or one-way?" Joint Applicants responded that "ring fencing is two-way." Ex. 9, Joint Applicants Response to DRA Data Request 4-3b. This answer does not support DRA's extrapolation that CalPeco surreptitiously designed the ring fencing provisions to "protect" Algonquin and Emera.

[132] DRA/Phan, R.T. June 16, 2010, at 135-136.

Applicants" to "provide a non-consolidation opinion demonstrating that the ring fencing measures are sufficient in this respect."[133]

As with the other conditions DRA is proposing for the first time, the demand for a non-consolidation opinion should be stricken from the record. DRA failed to propose such a condition in the DRA Report or even at the hearing. It has also failed, even in the DRA Brief, to identify any deficiency in the substantive protections the ring fencing provisions provide to CalPeco.

This belated demand is particularly egregious. DRA has consistently represented, as reflected in Ms. Phan's testimony, that the ring fencing provisions sufficiently protect CalPeco from the financial affairs of its upstream affiliates.[134] Instead, even when questioned by ALJ Vieth to identify any deficiencies DRA perceived in the ring fencing provisions and any remedies it would propose, Ms. Phan's lone response related to a "financial commitment."[135]

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[133] DRA Brief, at 23. It should also be noted that in addition to the numerous ring-fencing provisions set forth in the original Regulatory Commitments, two ring-fencing provisions have been added to the Regulatory Commitments. They prohibit CalPeco from (i) transferring any physical assets used to provide services to its customers to either Algonquin or Emera or any of their respective affiliates without first obtaining the necessary approvals from the Commission and (ii) requesting approval to transfer any physical assets if such transfer would impair CalPeco's ability to fulfill its public utility obligations to serve, or to operate in a prudent and efficient manner. *See* Appendix A to Joint Applicants Brief, Regulatory Commitment 1(f).

[134] DRA/Phan, R.T. June 16, 2010, at 136.

[135] DRA/Phan, R.T. June 16, 2010, at 138:

> ALJ Vieth: … [H]ow would you have the Commission alter the ring-fencing proposal to mitigate the problem which you perceive?
>
> Ms. Phan: As stated in my testimony, the Commission could order the parent company to infuse money into CalPeco if there's future financial hardship.

See also Appendix A to Joint Applicants Brief, Regulatory Commitment 1(g).

Had DRA ever specifically alleged how CalPeco's ring fencing protections were inadequate, CalPeco would, as it has responded to every legitimate concern DRA (and any other party) has raised, taken actions to address the shortcoming or incompleteness alleged[136] or presented evidence demonstrating that DRA's concerns are misplaced. Even at this late date, CalPeco remains amenable to "correcting" any deficiency DRA may perceive in its ring fencing provisions – but DRA's conclusory, unsupported, and contradictory claim of "no demonstration of adequacy" fails to disclose any problem that warrants remedying and does not warrant imposition of an undefined non-consolidation opinion.

2. DRA Has Failed to Establish Any Need for Algonquin and Emera to Guarantee CalPeco's Debt

DRA appears to have changed the grounds on which it demands that Algonquin and Emera guarantee the debt of CalPeco. Initially, DRA argued that:

> [The absence of a parental guarantee of CalPeco's debt] poses great risks for CalPeco and its customers. Should CalPeco fail, there will be no safety net for [CalPeco and its customers].[137]

In response, Joint Applicants demonstrated (i) the absence of the need for any such parental guarantee, and (ii) the requirement of a parental guarantee will serve only to provide CalPeco's lenders unnecessarily favorable terms and will not provide the customers of the California Utility the desired "safety net." DRA's concern now appears to be yet another permutation of its" bigger is always better" refrain: "smaller utilities" are "riskier" and therefore the cost of debt will be higher.[138]

Whatever may be DRA's argument, it has made no showing that the absence of a parental guarantee will cause CalPeco's cost of debt to increase. It has also presented no credible

[136] *See, e.g.,* Ex. 1, Joint Reply, at 16.

[137] Ex. 50, DRA Report, at 8; Joint Applicants Brief, at 47-49.

[138] DRA Brief, at 19.

testimony that CalPeco's cost of debt would be higher than Sierra's. Conspicuously, Ms. Phan's limited knowledge of financing costs obligated her to only answer "I don't know what banks look at" when questioned whether banks lend money based on the value of the assets versus the amount of the loan. Nonetheless, the DRA Brief now advances her as an *expert witness* of the cost of debt.

Ms. Phan's testimony that smaller utilities have higher debt costs is not competent evidence – it is simply another incantation of DRA's first level assessment that "smaller entities" *per se* must have higher costs of debt. Ms. Phan's assertion purporting to compare the CalPeco and Sierra debt costs also contrary to commercial reality.[139] Once again, while purporting to make a comparison, DRA has no projection of the cost of debt for which Sierra may request rate recovery.[140] Second, DRA's smaller size/higher debt syllogism is belied by Ms. Phan's own testimony that the cost of debt analysis is anything but one-dimensional (i.e., "smaller size equals higher debt cost"), but it is rather based on a multiplicity of variables, including (i) the amount of debt relative to the value of the asset; (ii) the equity/debt ratio, with the greater percentage of equity, the more attractive the terms of the financing for the utility borrower; (iii) the quality of the regulatory commission; and (iv) the amount and sanctity of the revenue stream.[141]

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[139] For instance, the Commission can take judicial notice that a borrower purchasing a house appraised at $125,000 for $100,000 and putting 30% down will more readily be able to obtain a loan than a borrower purchasing a house appraised at $2 million for $2 million and putting only 10% down.

[140] DRA/Phan, R.T. June 16, 2010, at 116.

[141] DRA/Phan, R. T. June 17, 2010, at 200-202; Joint Applicants Brief, at 48. Ms. Phan's concession that the cost of debt is based on numerous factors is consistent with prior acknowledgements by DRA in § 854(a) proceedings with respect to utility credit ratings:

> DRA acknowledges that debt ratings [for utilities] can change anytime due to factors not under the control of a company such as regulatory environment, market structure, competition, environmental conditions, litigation, geographic location, and customer demographics. D.07-05-031, mimeo at 19, 34 (Findings of Fact 30).

DRA's argument also again simply ignores the evidence refuting its theories regarding the cost of debt. Mr. Robertson testified that its smaller size notwithstanding, CalPeco expects that its cost of debt will be competitive with the cost of debt which is outstanding for NV Energy.[142] As a distribution-focused electric utility, CalPeco's debt should be expected to be competitive against the cost of debt for a combined transmission, distribution and generation utility, such as NV Energy.[143] DRA offers no response to Mr. Robertson's analysis.

Ms. Phan's testimony is also significant for ignoring positions DRA has advocated in prior § 854(a) applications regarding the correlation between the level of equity investment and cost of debt. For instance, DRA urged that California-American Water have a capital structure of 50% equity on the basis that this level of equity investment benefits ratepayers through "lower debt cost" by the "strengthen[ing of] the capital structure and credit ratings" of the entity seeking debt financing.[144] Algonquin and Emera have volunteered to initially invest 50% equity in CalPeco to provide for the 50%/50% equity/debt ratio that DRA has advocated as a means of lower the utility's cost of debt previously sought in an analogous circumstance.[145]

In that same decision the Commission observed that utility debt rating agencies also look at three quantitative measurements: the ratio of funds from operations to total debt; pretax coverage ratios, and total debt to total capital. D.07-05-031, mimeo at 18 (footnote omitted). Each of these drivers of debt costs is independent of the size of the utility.

[142] Joint Applicants/Robertson, R.T. June 16, 2010, at 91.

[143] Joint Applicants/Robertson, R.T. June 16, 2010, at 91; Joint Applicants Brief, at 48.

[144] D.07-05-031, mimeo at 20.

[145] *See* Appendix A to Joint Applicants Brief, Regulatory Commitment 1(g).

Finally, DRA has also failed to cite any Commission precedent in which the Commission required the upstream owners of a purchasing utility to guarantee the debt of that purchasing utility.[146]

3. Regulatory Commitment 1(g) Negates Any Possible or Theoretical Need for a First Priority Condition

CalPeco has demonstrated that there is no need for the imposition of an expansive first priority condition of the scope DRA continues to demand – dictating that CalPeco's upstream owners accord CalPeco "preference over all competing potential recipients of capital resources."[147]

DRA asserts that Joint Applicants' reliance on *Cal-Am Water*[148] to support the absence of the need for the imposition of a first priority condition is "*misleading*."[149] Contrary to DRA, there is nothing misleading about Joint Applicants' reliance on *Cal-Am Water*; in fact, the dismissal of DRA's position in *Cal-Am Water* underscores the absence of any need for the imposition of a first priority condition. The Commission acknowledges the appropriateness of the Cal-Am Water upstream owners to object to "prioritize Cal-Am to the exclusion of [their other regulated utilities];"— which is exactly the imperative legal ground on which CalPeco's owners are obligated to resist the imposition of DRA's first priority condition.[150]

Moreover, DRA acknowledges that the Commission in *Cal-Am Water* also refrained from imposing the first priority condition because the upstream owners had already made the

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[146] *See* Joint Application, at 48.

[147] DRA Brief, at 20 (citation omitted); *see* Joint Applicants Brief, at 49-51.

[148] D.02-12-068.

[149] DRA Brief, at 22 (emphasis added).

[150] D.02-12-068, mimeo at 31.

necessary commitments with respect to the funding of the utility.[151] Regulatory Commitment 1(g) sets forth Algonquin and Emera's commitment to ensure that CalPeco will maintain sufficient funds to operate and sufficient capital available for necessary capital investments. There is simply no need to impose an unnecessary, duplicative, and inappropriate first priority condition.

DRA's arguments regarding the lack of financial commitment also ignore Algonquin and Emera's commitment to fund CalPeco initially with 50% equity and their willingness, subject to Commission approval, to increase the percentage of their equity investment as set out in Regulatory Commitment 1(g).[152] In approving the commitment to an equity investment of between 45% to 55% (thus rejecting DRA's demand for a minimum 50% equity investment) in *Cal-Am Water*, the Commission highlighted the direct linkage between the amount of equity investment and the ability of the operating utility to fulfill its public utility obligations:

> [The level of equity investment] also must be sufficient to provide a *margin of safety* for payment of interest, reasonable dividends, and to retain some money in the business to fulfill public utility service obligations.[153]

The commitment to fund CalPeco with 50% equity initially by itself provides the necessary "margin of safety" and negates any possible legitimate concern regarding the "financial commitment" by Algonquin and Emera and the adequacy of funds available to CalPeco. Algonquin and Emera's willingness to increase that level of equity investment as necessary and in accordance with Commission approval and as otherwise set forth in Regulatory Commitment 1(g) further increases the margin of safety.

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[151] D.02-12-068, mimeo at 31.

[152] Appendix A to Joint Applicants Brief, Regulatory Commitment 1(g).

[153] D.07-05-031, mimeo at 21 (emphasis added).

The DRA Brief added a new argument to justify a first priority condition. It now incredulously claims that "Emera and Algonquin's [non-CalPeco] business ventures may expose CalPeco's ratepayers to increased business and financial risk."[154] Of course, DRA ignores that Ms. Phan has already testified that CalPeco's ring fencing provisions fully protect CalPeco from the business risks associated with Algonquin and Emera's other business ventures.[155] The first priority condition is not necessary or commercially reasonable, regardless of how many different grounds DRA may advance.

D. The Proposed Transaction Will Maintain or Improve the Quality of Management of the California Utility

Joint Applicants demonstrated that Algonquin and Emera's ownership will maintain or improve the quality of management for the California Utility.[156] DRA's sole response is a function of its "Emera abandonment" concern: "if Emera is limited to upstream ownership of CalPeco, it may not provide the same level of management support."[157] Such concern provides no basis to find any adverse impact on the management of the California Utility associated with the Transaction.

Joint Applicants have already responded to DRA's unfounded "Emera abandonment" theory and its related concerns. First, the Commission is being asked in the Joint Application to evaluate the current situation in which Emera has direct ownership in CalPeco; so at a minimum DRA's concerns are premature. Second, even if, whether through the granting of the request for the Internal Transfer Approval or by Emera submitting a § 854 application, Emera's participation in CalPeco were to transition to be an upstream and indirect owner, the evidence demonstrates

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[154] DRA Brief, at 20.

[155] DRA/Phan, R.T. June 16, 2010, at 138-140.

[156] Joint Applicants Brief, at 52.

[157] DRA Brief, at 23-24.

that CalPeco will be able to continue to benefit from Emera's financial strength, expertise in renewable resource development, and operating experience.[158]

DRA again defaults to its "no study" argument to urge dismissal of this undisputed and comprehensive evidence: "Emera was unable to articulate a specific plan for its management involvement in CalPeco… Emera was only able to discuss its involvement in other investments as examples, and state it would participate on the Algonquin board of directors."[159] Once again DRA's insistence for a study (particularly one about some possible future event, which may or may not happen) provides no basis to reject or discount the evidence presented. Further, Emera's actual operating and management history provides highly probative evidence negating DRA's "Emera abandonment" accusations.

DRA renews its claims that "Algonquin's lack of experience owning and operating an electric distribution utility may have a negative impact on the management of CalPeco."[160] DRA's "support" is limited to reiterating that Algonquin "has no demonstrated experience operating electrical distribution utilities" and Algonquin's experience "does not equal the experience Emera has in owning and operating electrical distribution facilities."[161]

Joint Applicants have specifically responded to both of these criticisms by DRA and need not repeat them presently.[162] However, it should be reiterated that Algonquin, by any objective

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[158] Ex. 3, First Update Letter, at 6; Joint Applicants Brief, at 27.

[159] DRA Brief, at 24 (citations omitted).

[160] DRA Brief, at 24.

[161] DRA Brief, at 24 (citations omitted).

[162] Joint Applicants Brief, at 23-29.

standard, has the precise experience and qualifications necessary to operate a small electric distribution utility, particularly in the context of this Transaction.[163]

E. The Proposed Transaction Will Be Fair and Reasonable to the Affected Utility Employees

Joint Applicants have demonstrated that the Transaction will be fair, reasonable, and not adverse to the current Sierra employees.[164] DRA's caption introducing its argument promises to show that the Transaction "will not be fair and reasonable to employees."[165] DRA offers no support for this assertion. DRA then immediately acknowledges that its argument is not based on any "actual harm," but rather reduced again to a DRA "concern" that "Sierra's current employees *may not be in the same position* with regard to either employment status or pension benefits."[166]

DRA's purported comparison of the employees' status before and after the Transaction suffers from a fundamental flaw– it offers no assessment of the current status of the Sierra employees on which to make the comparison. DRA wrongly assumes that Sierra has some obligation to retain the current workforce in exactly its current form. Sierra's employees have no guarantees of a specific term of employment. CalPeco's commitment to: "maintain the current level of employees for a period of at least 3 years," thus actually benefits Sierra's California employees by a commitment to maintain the current workforce at the current level for at least that period.[167]

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[163] Joint Applicants Brief, at 25.

[164] Joint Applicants Brief, at 52-53.

[165] DRA Brief, at 25.

[166] DRA Brief, at 25 (emphasis added).

[167] Appendix A to Joint Applicants Brief, Regulatory Commitment 1(h).

In any event, DRA's assertions do not establish any basis for either a finding of such unfairness or for rejection of the Transaction. The facts again demonstrate that the possible unfairness which DRA hypothesizes "may" exist, simply does not. First, DRA reiterates, yet again, that "it is not known what the employment status will be for these remaining 4 [Sierra] employees" that DRA believes CalPeco will not be hire.[168] Joint Applicants represented to this Commission on at least five different occasions and to IBEW Local 1245 that CalPeco will offer employment to *all* of Sierra's regular, full-time employees currently working in California. First, the original Regulatory Commitments in the Purchase Agreement state:

> *Buyer intends to offer each of Seller's current administration and operations employees located within the service territory employment with Buyer at the same locations with responsibilities and remuneration consistent with each of their existing roles.* Accordingly, Buyer shall make no material changes in the nature of the employment roles of the [California Utility] fulfilled by individuals located within the service territory and intends, to the extent practical, to recruit within the California Utility service territory any additional operations staff necessary to replace functions currently performed by staff of Seller located in Nevada.[169]

The Joint Applicants reaffirmed this "full employment" commitment in the Joint Application:

> *CalPeco intends to offer employment to Sierra's regular, full-time employees currently working in California,* including those currently represented by IBEW Local 1245.[170]

Joint Applicants repeated in the Joint Reply:

> Additionally, CalPeco has made a number of Regulatory Commitments with regard to the employees of the California Utility, *including a commitment to offer employment to Sierra's*

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[168] DRA Brief, at 25.

[169] *See* Ex. F to Ex. 1, Joint Reply, Exhibit 7.9(b), Regulatory Commitment 4(c) (emphasis added).

[170] Joint Application, at 43 (emphasis added).

> *regular, full-time employees currently working in California,* including those currently represented by Local 1245.[171]

In response to a DRA discovery request, Joint Applicants yet again represented:

> CalPeco has agreed in Exhibit 7.9(b), Regulatory Commitment 4(c) of the Asset Purchase Agreement that "it intends to offer each of Seller's current administration and operations employees located within the service territory employment with Buyer at the same locations with responsibilities and remuneration consistent with each of their existing roles."[172]

Finally, in Joint Applicants Brief, Joint Applicants state:

> The Regulatory Commitments assure that the Transaction will be fair to the current employees of the California Utility, and include a commitment to offer employment to Sierra's regular, full-time employees currently working in California, including those currently represented by Local 1245.[173]

Lastly, this unambiguous, direct commitment to offer employment to all Sierra California employees is yet again confirmed in the Regulatory Commitments.[174] Nonetheless, consistent with its pattern to accept its "concerns" as "facts" and to correspondingly disregard the actual facts, DRA demands that the Commission accept DRA's concerns that CalPeco has some "undisclosed agenda" to refuse to offer employment to four Sierra employees.

DRA argues that the Joint Reply did not specifically dispute DRA's contention that it had "indicated in its Report that the four employees that would not be offered employment were the same employees that have less than five years of service with Sierra and are not vested for pension purposes," and that this omission supports DRA's specter of the possible displacement of these four employees.[175] Contrary to DRA's argument, Joint Applicants' decision not to

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[171] Ex. 1, Joint Reply, at 53 (footnote omitted)(emphasis added).

[172] Ex. 8, Joint Applicants' Response to DRA Data Request 4, Question 19.

[173] Joint Applicants Brief, at 52-53 (citation omitted).

[174] Appendix A to Joint Applicants Brief, Regulatory Commitment 4(c).

[175] DRA Brief, at 25 (citation omitted).

refute each and every factual misstatement by DRA does not constitute such an "admission." Moreover, as set forth above, CalPeco's representations that it will offer employment to the current employees does directly refute DRA's fundamental premise that there may be four employees that may not be offered employment.[176] This ongoing commitment to offer employment to all of Sierra's regular, full-time employees currently working in California should resolve any rational concern about the status of the four employees.

DRA's second employee "concern" relates to "the effect vesting periods for pensions may have on employees."[177] The DRA Brief reiterates its unsupported belief that "a current Sierra employee may 'lose out' on years of service for vesting purposes."[178] DRA seeks to rationalize this "concern" on the basis that "[b]ecause CalPeco …cannot or will not assure that all service years will be recognized for pension purposes, this transaction cannot be said to be fair and reasonable to Sierra's current employees."[179] This "concern" is, first, not relevant and moreover cannot be presently resolved. DRA's attempted justification underscores its lack of understanding of the collective bargaining process, besides, of course again ignoring that IBEW Local 1245, as the current representative of the employees, fully supports the proposed Transaction.[180]

As explained previously, vesting periods are governed by the collective bargaining process. DRA acknowledges that the rights of any Sierra employee who accepts CalPeco

[176] In fact, there was nothing further to rebut.

[177] DRA Brief, at 25.

[178] DRA Brief, at 25.

[179] DRA Brief, at 26.

[180] *See* Ex. G, IBEW Local 1245 Letter attached to Ex. 1, Joint Reply.

employment should be fully protected by the collective bargaining process.[181] CalPeco simply cannot make a specific "guarantee" with regard to vesting periods until it and the bargaining representative have engaged in the give and take of the collective bargaining process, which would be premature at this time.[182]

Moreover, any "guarantee" CalPeco may make on any one component of the compensation package, such as shorter vesting periods, may mean either that some other benefit will be reduced to pay for the costs associated with shorter vesting periods or that the cost of the total compensation package will increase and ratepayers will pay more.[183] Again, these are exactly the kind of trade-offs which are negotiated between the employer and the employee's collective bargaining representative during the contract negotiation process.

There is no reason to believe that the collective bargaining process cannot be relied on to ensure the rights of the Sierra employees who accept employment with CalPeco.[184] The Commission should reject DRA's unsubstantiated arguments, and find that the Transaction is fair and reasonable to employees.

F. The Proposed Transaction Will Not Harm California or Communities Served by the California Utility

DRA states that "[t]his transaction will do nothing for the local communities and economies and should be rejected."[185] DRA further asserts that "[t]he factors listed as 'benefits' to the community [in] the [Joint] Application are merely recitations of the status quo." First,

[181] DRA/Phan, R.T. June 16, 2010, at 111; Joint Applicants Brief, at 53.

[182] Ex. 1, Joint Reply, at 53; Joint Applicants Brief, at 53.

[183] DRA's lack of understanding of how vesting periods relates to the cost ratepayers will ultimately pay for pensions was underscored by Ms. Phan's statement that she "[did not] know" whether "everything else being equal, a shorter vesting period for CalPeco employees will cost CalPeco more money." DRA/Phan, R.T. June 17, 2010, at 156.

[184] DRA/Phan, R.T. June 16, 2010, at 111.

[185] DRA Brief, at 27.

even if the Joint Applicants "only" maintain the status quo, by definition, the Transaction would not be harming California or the communities served by the California Utility.[186] Second, DRA misconstrues the status quo. Joint Applicants have identified numerous items that promise, by any objective measure, a positive change.[187]

DRA also ignores the simple fact that the local communities[188] and the union representing employees of the California Utility[189] both support the proposed Transaction and believe it will bring benefits. The record warrants that the Commission find that the Transaction will not harm California or communities served by the California Utility and offers benefits.

G. The Proposed Transaction Will Preserve the Jurisdiction of the Commission

DRA has not challenged the showings made by Joint Applicants. In fact, Administrative Law Judge ("ALJ") Vieth was able to clarify Algonquin and Emera's commitment to make the necessary books and records available to the Commission and this clarification is now memorialized in the Regulatory Commitments.[190] Therefore, the record warrants that the Commission find that the proposed Transaction will preserve the jurisdiction of the Commission.

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[186] In fact, in *MidAmerican*, DRA successfully argued that MidAmerican's acquisition would "do little more than maintain the status quo" within the local communities. Despite this finding, the Commission nonetheless approved the acquisition, based in part on the recognition that the transaction then proposed "will not harm California or the local communities served" by the utility. D.06-02-033, mimeo at 33.

[187] These include recruiting additional operations staff within the service territory necessary to replace functions currently performed by Sierra's staff located in Nevada, maintaining a local headquarters, reopening the customer counter, etc. *See* Joint Application, at 44-46.

[188] *See* Ex. C, PSREC Withdrawal Notice to Ex. 1, Joint Reply.

[189] *See* IBEW Local 1245 Letter, attached as Ex. G to Ex. 1, Joint Reply.

[190] ALJ Vieth, R.T. June 17, 2010, at 209; Appendix A to Joint Applicants Brief, Section 2 of Regulatory Commitments.

H. The Proposed Transaction Will Not Harm Competition

DRA has not challenged the facts the Joint Applicants presented. Therefore, it is undisputed that the Commission should find that the proposed Transaction will not harm competition.

V. POWER PURCHASE AND OTHER OPERATING AGREEMENTS

A. Power Purchase Agreement

DRA has not challenged any aspect of the Power Purchase Agreement (other than the Valmy issue discussed below). It is thus undisputed that the Commission should authorize CalPeco to enter into the Power Purchase Agreement, and find that the payment terms for the Power Purchase Agreement are reasonable and that the payments should be recoverable through the ECAC mechanism, subject only to ongoing Commission review of the reasonableness of CalPeco's administration of the agreement.

1. Approval of Joint Applicants' Request with respect to the Power Purchase Agreement and Valmy Preserves the Status Quo

DRA persists in its misleading argument that approval of the Transaction will be "uneconomical for the 46,000 ratepayers of the California Utility" because the Commission may rule that Sierra must exclude lower cost Valmy coal-generated power from the supply portfolio which it currently uses to supply California.[191]

Foremost, as stressed in Joint Applicants Brief, DRA is wrong in urging that rejection of the Transaction is necessary to preserve the status quo and thus "protect" ratepayers.[192] Approval of the Transaction and allowing Sierra to continue to include Valmy power as part of its supply portfolio to serve California customers preserves the current status quo for the

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[191] DRA Brief, at 16.

[192] Joint Applicants Brief, at 55-58.

customers of the California Utility – Valmy power flows into California and ratepayers benefit through its low cost (but also are subject to the disadvantages associated with its generation).

Joint Applicants recognize (and indeed highlighted this issue in the Joint Application)[193] that the transition of the manner in which Sierra supplies Valmy power to California associated with the Transaction (i.e., the transition from Sierra "owned-generation" to CalPeco "purchase power") highlights a policy issue as to whether the Commission should rule that the Interim Greenhouse Gas Emissions Performance Standard ("GHG EPS") rules mandate that, after Closing, Sierra exclude Valmy power from the California power supply. Such an exclusion by the Commission of Valmy power, now or at some future time, would cause rates to increase.

The Power Purchase Agreement could potentially be construed as a "new" contract in form, as there has been no commercial need for the Sierra Generation and Transmission departments to have a "contract" to supply the Sierra Distribution department power. However, in substance, the Power Purchase Agreement, by purpose and design, simply preserves the status quo – the same power is to be delivered at the same costs over the same facilities to the same customers. The Power Purchase Agreement thus need not be deemed a "new" long-term commitment contract with respect to the Interim GHG EPS.[194]

Joint Applicants have urged that the Commission allow Sierra to continue to "sell" Valmy power into California. Prohibiting the continued sale of Valmy power into California would not reduce (i) the level of Valmy generation; (ii) the quantities of Valmy power that physically flows into California; or (iii) the magnitude and environmental consequences

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[193] *See* Joint Application, at 52-54.

[194] This continued allowance of Valmy power to be sold into California will not contravene the policy purposes of the Commission's prohibition against "new long-term" contracts. No new coal plant will be financed or constructed and no incremental or new supply of coal generation will be delivered to California. Joint Applicants Brief, at 57-58.

associated with Valmy emissions that migrate into California.[195] The lone consequence of the Commission prohibiting Sierra from continuing to sell Valmy power into California would be a wealth transfer from California electric consumers to Nevada.

However, even if the Commission were to decide that Sierra may no longer supply Valmy power to California, that decision does not warrant the rejection of the Transaction. DRA essentially demands that the Commission's implementation of its GHG program should turn on the identity of the owner of the utility. According to DRA, California will be harmed by CalPeco becoming the owner because the Commission will impose a different GHG policy on, and increase costs for, CalPeco than it currently implements with respect to Sierra.

On the contrary, and as all parties agree, the GHG reduction programs and associated cost responsibility that this Commission requires the electric utilities to implement should be indifferent as to whether Sierra remains the serving utility or CalPeco is authorized to become the owner.[196]

Foremost, contrary to DRA's operative assumption, there is no guarantee that if the Commission rejects the Transaction, it will continue to allow Sierra to deliver Valmy power to California.[197] Thus, the rejection of the Transaction by this Commission will not resolve any GHG policy or cost allocation issues relating to the delivery of Valmy power to California.

2. The Commission Has the Legal Authority to Authorize Preservation of the Valmy Status Quo

The GHG EPS, adopted in D.07-01-039, requires that all new long-term commitments for baseload generation to serve California consumers be with power plants that have emissions no

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[195] Joint Applicants Brief, at 55-58.

[196] DRA/Phan, R.T. June 16, 2010, at 121.

[197] The Legislature could also act to preclude Sierra from "selling" Valmy power into California.

greater than 1,100 pounds of CO_2 per megawatt-hour.[198] It effectively bars new contract commitments of five years or longer to purchase power from coal-fired power plants.[199]

The Commission has the authority to interpret its own decisions and rules, including D.07-01-039 and the Interim GHG EPS Rules it adopted in that decision.[200]

The Commission made clear in adopting the GHG EPS in D.07-01-039:

> The objective of the interim EPS . . . is to ensure that there is no 'backsliding' as California transitions to a statewide GHG emissions cap.[201]

In rejecting the proposal of Constellation Energy Group, the Alliance for Retail Energy Markets and other individual electric service providers that all of a utility's retained baseload generation should be subject to the GHG EPS, the Commission reiterated that the "standard that is being developed [is] to prevent backsliding in LSE decisions made for *future investments* and avoid the additional financial and reliability risks that such backsliding would create."[202]

In adopting the GHG EPS, the Commission further explained:

> EPS compliance cannot be achieved in a manner that would yield a contrary result, i.e., that results in an increase in long-term commitments with high-emitting sources.[203]

The continued supply of Valmy power to the customers of the California utility is entirely consistent with the objectives of the GHG EPS; it preserves the status quo, is not a new

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198 Attachment 7, Adopted Interim EPS Rules, ("Interim Rules") to *Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies,* D.07-01-039 at Section 4 (Jan. 25, 2007).

199 Interim Rules, at Section 3(2).

200 *See* § 1708.

201 D.07-01-039, mimeo at 24.

202 D.07-01-039, mimeo at 44-45 (emphasis added).

203 D.07-01-039, mimeo at 11.

investment by the California Utility in Valmy, or any other coal facility, does not increase the GHG emissions of the California Utility's power portfolio, and does not result in an increase in long-term commitments by the California Utility with high-emitting sources.

Consistent with these objectives, the Power Purchase Agreement does not increase the use of Valmy by the California Utility. The Power Purchase Agreement merely memorializes the existing use of Valmy to serve a part of the California load. Maintenance of the status quo prevents the backsliding about which the Commission is concerned.

Functionally, the Power Purchase Agreement is not a "new" long-term commitment. It maintains the California Utility's current and long-standing reliance on the Valmy plant to serve retail load. Currently, Sierra delivers power from power plants it owns, including Valmy, to the California Utility, which it also owns.

In these unique circumstances, this Commission has the authority to allow the continued supply of power to the California Utility's customers in part from Valmy. Such action is entirely consistent with the GHG EPS.

3. Reducing the Term of the Power Purchase Agreement Should Resolve the Valmy Issue

On cross-examination, Ms. Phan responded to a question regarding whether DRA's concern relating to Valmy could be resolved if the Joint Applicants agreed to reduce the term of the Power Purchase Agreement to under five years:

> [If the term of the Power Purchase Agreement] is now changed to four and a half years and Valmy is included, the rates would be the same. So that [i.e., reducing the term of the Power Purchase Agreement to 4 ½ years] would alleviate that concern [i.e., an increase of rates associated with the possible exclusion of Valmy power] for DRA.[204]

[204] DRA/Phan, R.T. June 16, 2010, at 122-23.

Nonetheless, the DRA Brief effectively recants Ms. Phan's testimony. DRA now insists that shortening the term "does not mitigate the harm to ratepayers nor does it [i.e., a shorter term] resolve the GHG EPS Issue."[205] This reversal is predicated on another faulty interpretation. DRA contends that the "Commitment Letter"[206] that Sierra executed constitutes a "linked" contract such that in all events the Commission must consider the Power Purchase Agreement and the Commitment Letter as effectively one contract with a term in excess of five years and thus subject to the GHG EPS prohibition.[207]

DRA misconstrues the scope and purpose of the Commitment Letter. Foremost, its purpose is not to circumvent the GHG EPS rules by splitting a "ten-year contract" into two five-year agreements. Its purpose is to provide this Commission and the customers of the California Utility an even greater degree of protection against any possible adverse rate consequences associated with the change of ownership and, in particular, to:

> …ensure that the California customers continue to have access to reliable power supply at cost-effective rates after the [Closing] and beyond the initial [five-year] term of the P[ower] P[urchase] A[greement].[208]

More fundamentally, under the GHG EPS, "linkage" requires a combination of two or more contracts or contractual options:

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[205] DRA Brief, at 32.

[206] Ex. 61; s*ee also* Ex. 10, Amendment No. 1 to the Power Purchase Agreement, to Joint Application; Joint Application, at 49.

[207] DRA's delay in disclosing this "linkage" theory until its Opening Brief deprived Joint Applicants the opportunity to cross-examine Ms. Phan on this issue and to present evidence on this issue.

[208] Ex. 61, at 1.

> Accordingly, both binding contracts and contractual options should be analyzed to see whether they are "linked" and if so, whether their "term" is for five years or more. [209]

DRA's characterization of the Commitment Letter as "an option to extend" the Power Purchase Agreement[210] is incorrect. As explained in the Joint Application[211], in the event that CalPeco is not able to independently secure sufficient power at competitive prices after the Power Purchase Agreement expires, Sierra has committed to negotiate and "enter the necessary agreements"[212] to provide, for a period of up to five years. Sierra has also committed to charge CalPeco for any such power at rates based on Sierra's average system cost to provide the scope of service that CalPeco may request. Thus Sierra's commitment to negotiate and enter into a contract in the future in accordance with the principles set forth in the Commitment Letter in no way constitutes a "linked" contract or option that falls under the purview of the GHG EPS.

Moreover, as with many of DRA's concerns, there is no issue with respect to the Commitment Letter pending before the Commission. CalPeco requests no authority with respect to the Commitment Letter. Moreover, it is possible that CalPeco may ultimately decide that upon the expiration of the Power Purchase Agreement, it no longer will need to procure power from Sierra. In any event, if CalPeco decides to enter a new commercial arrangement with Sierra to purchase power upon expiration of the Power Purchase Agreement, a condition precedent to CalPeco performing under this new arrangement would be it requesting and receiving this Commission's authority to perform under the new arrangement. Thus, any issue which may arise with respect to any future power purchase agreement that CalPeco may enter with Sierra

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[209] D.07-01-039, mimeo at 181.

[210] DRA Brief, at 32.

[211] *See* Joint Application at 52.

[212] Ex. 61, at 1.

pursuant to the Commitment Letter, with Sierra, independent of the Commitment Letter, or with a third party, can and should be resolved by the Commission at that time, based upon the facts presented in that proceeding, and upon the GHG rules and policies then in effect.

Joint Applicants believe that a Power Purchase Agreement with a term of 4 ½ or 5 years provides an adequate transition period; they structured the Commitment Letter to provide an extra level of "insurance" and at no cost to CalPeco or the customers of the California Utility, just in case more time proves desirable to best ensure that with respect to power procurement the transaction is "seamless."

In all events, the Commitment Letter is irrelevant to the issue of whether the Commission should allow Sierra to continue to serve California with generation from Valmy under the Power Purchase Agreement[213] and provides no basis to reject the Transaction.

B. Transition Services Agreement

Please refer to Section IV.B.3.b, *supra*.

C. Emergency Backup Services Agreement

DRA has offered no objection to the requests made by the Joint Applicants with regard to the Emergency Backup Services Agreement. Therefore, it is undisputed that the Commission should (i) approve the agreement; (ii) authorize CalPeco to include 100% of the net book value of Kings Beach, as of the Closing in its rate base; (iii) authorize CalPeco to account for the capacity and energy payments Sierra shall make as revenue offsets to CalPeco's cost of service; (iv) authorize CalPeco for ratemaking purposes to depreciate 50% of the capital costs associated

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[213] Again, CalPeco's requests in this proceeding relating to power procurement relate only to the Power Purchase Agreement. In the event that the Commission allows CalPeco, as requested, to continue to be able to serve California customers with power from Valmy in accordance with the Power Purchase Agreement, this Commission will still retain its full authority in the event that CalPeco would someday request its authority to purchase power from Sierra under a new agreement to decide in that proceeding whether or not Valmy power should be part of the supply portfolio.

with Kings Beach in accordance with Sierra's present 60-year depreciation schedule; and (v) authorize CalPeco to depreciate the remaining 50% of the capital cost associated with Kings Beach in accordance with the 20-year depreciation schedule on which Sierra's capacity payments are calculated.[214]

D. Distribution Capacity Agreement and Borderline Customer Agreement

DRA has offered no objection to the requests made by the Joint Applicants with regard to the Distribution Capacity Agreement and the Borderline Customer Agreement. Therefore, it is undisputed that the Commission should grant CalPeco the authority to provide distribution capacity services to Sierra in accordance with the terms and conditions, including rate methodology and resulting rates, in the Distribution Capacity Agreement. CalPeco also requests the authority to account for the Distribution Capacity Agreement revenues as an offset against its cost of service.[215]

Furthermore, it is undisputed that the Commission should (i) authorize CalPeco's performance under the Borderline Customer Agreement, both in its capacity of purchasing wholesale power from Sierra and in its corresponding role to sell wholesale power to Sierra; (ii) authorize CalPeco to recover in rates the payments it will make to Sierra for purchases under the Borderline Customer Agreement, subject only to ongoing Commission review of the reasonableness of CalPeco's administration of the agreement; and (iii) authorize CalPeco to account for any revenues it receives from Sierra as an offset against its ECAC purchase power costs.[216]

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[214] Joint Application, at 55-56.

[215] Joint Application, at 60-61, 76.

[216] Joint Application, at 59-60. As their respective sales to each other under the Borderline Customer Agreement are wholesale sales subject to FERC's jurisdiction, each CalPeco and Sierra on July 2, 2010, submitted its respective Section 205 application requesting FERC to

E. Interconnection Agreement and System Coordination Agreement

DRA has offered no objection to the requests made by the Joint Applicants with regard to the Interconnection Agreement and the System Coordination Agreement. Therefore, it is undisputed that the Commission should authorize CalPeco to recover any payments it may make to Sierra under the Interconnection Agreement, subject only to ongoing Commission review of the reasonableness of CalPeco's administration of the agreement. Similarly, it is undisputed that the Commission should grant CalPeco the authority to execute and perform under the terms of the System Coordination Agreement.

F. Fringe Agreement and Reliability Support Agreement

DRA has offered no objection to the requests made by the Joint Applicants with regard to the Fringe Agreement and the Reliability Support Agreement. Therefore, it is undisputed that the Commission should find (i) Sierra's execution of, and CalPeco's assumption of and performance under, the Fringe Agreement reasonable; (ii) CalPeco's execution of, and performance under, the Reliability Support Agreement reasonable, and (iii) with respect to the Fringe Agreement, authorize CalPeco to implement the ratemaking and accounting protocols requested.

G. CalPeco Request for Commission Assertion of Exclusive Jurisdiction Over the Distribution Capacity Agreement and Reliability Support Agreement

DRA has offered no objection to this request by the Joint Applicants.[217] Therefore, it is undisputed that the Commission should assert its exclusive jurisdiction over the Distribution Capacity Agreement and the Reliability Support Agreement.

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accept the Borderline Customer Agreement. CalPeco (FERC Docket No. ER10-1703-000); Sierra (FERC Docket No, ER10-1709-000).

[217] *See* Joint Application, at 60-61, 64, Appendix B.

H. CalPeco Request to Recover Costs Incurred With Respect to the Operating Agreements

DRA has offered no objection to this request by the Joint Applicants. Therefore, the Commission should grant CalPeco's recovery of its costs with respect to the Operating Agreements as requested.

VI. ADDITIONAL AUTHORIZATIONS SOUGHT

A. Minimum Hold Condition/Internal Transfer Approval

1. The Commission Should Not Impose a Minimum Hold Condition on Emera

DRA's position on CalPeco's request that the Commission refrain from imposing a Minimum Hold Condition on Emera is unclear. While DRA objects to the Transaction on the misguided basis that CalPeco has requested approval for the Internal Transfer Approval and has suggested that the absence of a Minimum Hold Condition is a reason to reject the Internal Transfer Approval, DRA's position regarding the need for the imposition of a Minimum Hold Condition in the event the Commission approves the Transaction but rejects the Internal Transfer Approval is unclear.

On the basis that DRA's arguments may suggest its intent to request imposition of a Minimum Hold Condition,[218] Joint Applicants provide the following response. DRA appears to advance two arguments to support its possible request for the imposition of a Minimum Hold Condition on Emera. First, DRA comes to the erroneous conclusion that without a minimum hold requirement "nothing would prevent Emera from withdrawing ownership from CalPeco immediately following Commission approval of this transaction."[219] Foremost, absent the Commission approving the Internal Transfer Approval, even DRA agrees that Emera would have

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[218] DRA cites no precedent in which the Commission imposed a minimum hold condition as a condition of it granting § 854(a) authority.

[219] DRA Brief, at 36.

to seek and obtain this Commission's approval under § 854(a) before selling down any portion of its ownership in CalPeco.[220] Thus, a Minimum Hold Condition is not necessary to prohibit Emera from unilaterally and "immediately" selling any portion of CalPeco.

Moreover, the record demonstrates Emera has no present intention of withdrawing its participation in CalPeco. Directly refuting DRA's accusation that "Emera has demonstrated that it was never committed to owning and operating the California Utility for the long-term,"[221] Mr. Tedesco testified:

> We think our track record demonstrates that [Emera] seek[s] to hold assets longer term, and [Emera] would not be participating in this particular transaction if we didn't think it made sense for us in the long term.[222]

DRA apparently believes that even in a potential scenario where Emera remains an upstream owner of CalPeco through its ownership in Algonquin (this scenario will be further described with regard to the Internal Transfer Approval *infra*), this too would amount to Emera having "cut and run." Thus for DRA, it appears that the possibility that such a scenario might occur is one further reason that drives DRA's belief that Emera remains uncommitted to owning and operating the California Utility for the long-term. DRA again reverts to reasoning on the basis of its "concerns about how Emera would remain active in the oversight of CalPeco" if Emera would be an upstream owner of CalPeco through its investment in Algonquin.

Incredibly, DRA dismisses Emera's recitation of its involvement in its many other similar "upstream" investments because "Joint Applicants have offered no specifics as to how it would

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[220] DRA/Phan, R.T. June 17, 2010, at 177.

[221] DRA Brief, at 37.

[222] Joint Applicants/Tedesco, R.T. June 16, 2010, at 87.

remain active in the management oversight of CalPeco."[223] DRA is being presented with a host of options of possible manners based on Emera's past experience with previous investments in which Emera could remain active in the management oversight of CalPeco depending on the future needs of CalPeco. Yet, DRA criticizes CalPeco's owners for not having arbitrarily selected one or more of those options now, at a time when CalPeco is not yet operating the California Utility. Furthermore, CalPeco will not fully know how it can best take advantage of the experience and expertise of Emera until it actually commences operation of the California Utility. Here Emera promises to make available to CalPeco its entire "toolbox" and DRA is criticizing it because Emera has not yet conducted a "study," with sufficient detail, to determine whether CalPeco needs a screwdriver or a hammer to tackle a problem that may not even exist yet.

The second argument that DRA advances, assuming it is in fact proposing a Minimum Hold Condition, is that such a condition is necessary to act as a complete deterrent to Emera engaging in "vexatious" § 854(a) requests:

> [The Commission] should consider the fact that Emera will likely come to the Commission with not only one, but perhaps multiple § 854 applications over time to transfer CalPeco assets between it and Algonquin.[224]

First in response to questioning by ALJ Vieth, Mr. Tedesco stated that Emera has no intent to "make frequent [§ 854(a)] filings if the Commission [rejected the Internal Transfer Approval and] required those filings."[225]

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[223] DRA Brief, at 37-38.

[224] DRA Brief, at 39.

[225] Joint Applicants/Tedesco, R.T. June 16, 2010, at 34.

Moreover, even assuming that DRA is correct that Emera would in fact abuse its rights under § 854(a) there is still no present need for the imposition of a Minimum Hold Condition. The Commission has the ability to restrict any applicant that it deems to be such a "vexatious litigant"— even if the unlikely situation were to actually occur. Instead, preemptively imposing a Minimum Hold Condition because of DRA's speculative concerns that Emera could possibly become a vexatious litigant is an inexcusable infringement on Emera's right to due process and to exercise rights granted under the Public Utilities Code— the coup de grâce of the litany of DRA's arguments questioning the veracity of Emera's written and oral evidence, and based on DRA's completely unsubstantiated and speculative "concerns."

2. The Commission Should Grant the Internal Transfer Approval

DRA believes that the Internal Transfer Approval is contrary to law. DRA further contends that that the mitigation conditions to the Internal Transfer Approval request proposed by Joint Applicants, which are now memorialized as part of the Regulatory Commitments,[226] "do not solve the problems associated with the Internal Transfer Approval" because the "Internal Transfer Approval … still circumvents the requirements of Sections 851 and 854 of the Public Utilities Code."[227] DRA's primary argument appears to be that the Internal Transfer Approval constitutes an attempt to "bind a future Commission in this regard to prevent it from exercising its police power and restricts its ability to review any such transaction to safeguard the public interest."[228]

Granting a pre-approval, or more accurately determining that an approval is not necessary in a particular limited circumstance and subject to very specific pre-conditions, does not prevent

[226] *See* Joint Applicants Brief, at 66-68, Appendix A.

[227] DRA Brief, at 39.

[228] DRA Brief, at 35 (citations omitted).

future Commissions from revising the Internal Transfer Approval or taking any other action.[229] The Joint Applicants do not suggest any measure that limits a future Commission's ability to rescind any approval that it currently makes of the Internal Transfer Approval.

DRA also asserts that "there has been no demonstration that this provision is for the benefit of CalPeco."[230] Contrarily, DRA describes in great length the possible transaction costs associated with any Commission proceedings necessary to approve myriad potential future internal transfers.[231] As noted in the preceding section, Joint Applicants do not agree with DRA's unfounded belief that CalPeco, or its owners, will become vexatious litigants without an Internal Transfer Approval process. However, the Joint Applicants do believe that the Internal Transfer Approval process should eliminate transaction costs for both CalPeco and the Commission associated with devoting their respective resources to a regulatory process that may be avoided. This is especially true given that in discharging its § 854(a) responsibilities currently to protect the public interest, the Commission, to a large degree, has inevitably assessed both Emera's and Algonquin's individual qualifications to own and operate the California Utility. Thus, in evaluating the Joint Application, the Commission will have thoroughly vetted Emera's and Algonquin's individual fitness to own and operate the California Utility. Thus, the Commission should grant the Internal Transfer Approval.

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[229] *See, e.g.,* D.07-01-039; *Order Instituting Rulemaking to Establish Policies and Rules to Ensure Reliable, Long-Term Supplies of Natural Gas to California,* D.04-09-022 (Sept. 2, 2004).

[230] DRA Brief, at 36.

[231] DRA Brief, at 39.

B. Other Authorizations

1. Transfer of CPCNs and Termination of Sierra Responsibility to Provide Public Utility Service in California

DRA has offered no objection to this request by the Joint Applicants. Therefore, the Commission should grant the undisputed requests that Sierra's certificates of public convenience and necessity be transferred to CalPeco and that Sierra be relieved of its public utility obligations within its current California service territory.[232]

2. CEQA Review is Unnecessary

DRA has offered no objection to this request by the Joint Applicants. Therefore, the Commission should grant the undisputed request that the Commission affirm the Scoping Memo's determination that no CEQA review is required for the Commission to approve the Transaction.[233]

3. Approval of CalPeco Encumbrances of the Assets of the California Utility Including Accounts Receivable for Purposes of Debt Financing

DRA has offered no objection to this request by the Joint Applicants. Therefore, the Commission should grant the undisputed request for authority for CalPeco to encumber the California Utility assets including accounts receivable in connection with the debt financing.[234]

VII. CONCLUSION

For the reasons described above, the Joint Applicants urge the Commission to grant all requested authority and to grant such authority as soon as practicable within the schedule the Scoping Memo establishes.[235]

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[232] Joint Application, at 68.

[233] Scoping Memo, at 10.

[234] *See* Joint Application, at 66-67. In Ex. 3, First Update Letter, CalPeco clarified its request to specifically include the authority to encumber its customer accounts payable in order to obtain its debt financing.

[235] Joint Applicants Brief, at 69-72.

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July 19, 2010

CERTIFICATE OF SERVICE

I, Judy Pau, certify:

I am employed in the City and County of San Francisco, California, am over eighteen years of age and am not a party to the within entitled cause. My business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111.

On July 19, 2010, I caused the following to be served:

REPLY BRIEF OF SIERRA PACIFIC POWER COMPANY (U903E) AND CALIFORNIA PACIFIC ELECTRIC COMPANY, LLC

enclosed in a sealed envelope, by first class mail on the attached service lists A.09-10-028/A.10-04-032.

/s/__________________
Judy Pau