



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to  
Consider Smart Grid Technologies  
Pursuant to Federal Legislation and on  
the Commission's own Motion to  
Actively Guide Policy in California's  
Development of a Smart Grid System.

Rulemaking 08-12-009  
(Filed December 18, 2008)

**COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES  
ON THE JULY 21, 2009 PROPOSED DECISION ESTABLISHING  
PROCESSES FOR REVIEW OF PROJECTS AND INVESTMENTS BY  
INVESTOR-OWNED UTILITIES SEEKING RECOVERY ACT  
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INVESTOR-OWNED UTILITIES SEEKING RECOVERY ACT FUNDING**

The Division of Ratepayer Advocates (DRA) hereby submits these comments in response to the July 21, 2009 proposed *Decision Establishing Commission Processes for Review of Projects and Investments by Investor-Owned Utilities Seeking Recovery Act Funding* (PD).

**I. SUMMARY OF DRA COMMENTS**

The PD proposes a means of coordinating the federal Department of Energy's (DOE) activities pursuant to the American Recovery and Reinvestment Act of 2009 (Recovery Act)<sup>1</sup> with this Commission's Smart Grid proceeding. DRA requests that the PD be revised to:

- Require IOUs to provide all Smart Grid information to DRA and Energy Division on an equal basis without pre-conditions;
- Remove the rebuttable presumption;
- Clarify that IOUs must make a complete showing of costs and benefits, regardless of what is submitted to the DOE;

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<sup>1</sup> Pub. L. 111-5 (H.R. 1), 123 Stat. 115.

- Clarify that if the DOE does not reward Recovery Act funding for an IOU project, the IOU cannot recover costs tracked in a memorandum account without presenting a formal application;
- Require that costs be separately tracked for each individual project in a memorandum account;
- Require any project that receives less than 25% Recovery Act funding to request additional funding through a formal application;
- Extend the protest period for the advice letter process to 60 days; and
- Clarify that an IOU seeking cost recovery for any project cost overruns must do so through an application.

## II. REPORTING REQUIREMENTS FOR IOUS SEEKING RECOVERY ACT FUNDING

DRA appreciates that the PD grants it access to all Smart Grid application information, including confidential information. However, the PD imposes a condition on DRA's access – that DRA request the information in writing. The requirement of a written request by DRA for IOU confidential information, while requiring the IOUs to provide the data to Energy Division without such a request draws a distinction between DRA and other Commission staff that the relevant statutes simply do not support. The Commission has long held that DRA has the same right to access utility records as any other Commission staff. D.06-06-066, mimeo., p. 7 ("We make clear that DRA staff shall have the same access to data as other Commission staff, which has always been our intent.").<sup>2</sup> This right of access is not just in case law, but is statutorily mandated, as the Commission explained in D.01-08-062:

Pursuant to Section 314, "...each officer and person employed by the commission may, at any time, inspect the accounts, books, papers and documents of any public utility. Section 314(b) makes this applicable to affiliates or holding companies of any public utility with respect to transactions between the affiliates, holding company and the utility that

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<sup>2</sup> See also *id.*, mimeo., p. 54 ("It is inappropriate to require Commission staff – including DRA – to enter into private contractual agreements with the entities we regulate or that otherwise come before us.")

might adversely affect the interests of the ratepayers of the utility. *ORA [now DRA] staff members remain fully employees of the Commission.*

Additionally, pursuant to Section 309.5, ORA may also rely on Section 309.5(e), which provides:

The division [DRA] may compel the production or disclosure of any information it deems necessary to perform its duties from entities regulated by the commission provided that any objections to any request for information shall be decided by the assigned commissioner or by the president of the commission if there is no assigned commissioner.” D.01-08-062, Ordering Paragraph 1 (emphasis added).

The sole basis for the PD’s distinction between DRA and Energy Division is SDG&E’s assertion – with no record support or other factual basis – that DRA should only receive confidential Smart Grid information on a need to know basis. Clearly, SDG&E and, thus, the PD misunderstand the statutory basis underlying DRA’s access to information. DRA’s need for data is irrelevant to its right to access; it, as Energy Division, need not disclose why it seeks data. Indeed, to require DRA to disclose its purpose in seeking data might require that it reveal its litigation strategy or other private information, potentially in violation of the attorney client and work product privileges.

Perhaps more importantly for current purposes, however, is DRA’s obvious need for the information, including confidential information. As DRA’s participation in this proceeding makes clear, DRA is interested in reviewing and commenting upon IOU proposals for Smart Grid funding. Without such data, DRA cannot fully conduct this review, which is its statutory mandate under Section 309.5. While it should not have to prove need in order to have access to data – for the reasons set forth above – it clearly “needs” the information here.

DRA’s principal concern with the language of the PD is that it creates rules for DRA that differ from those applicable to other Commission staff. Such rules are unlawful, and one limitation – regardless of how minor – could lead to utility requests for more substantial limitations in the future. It is vital that the Commission nip in the bud

any such limitation on DRA’s authority at the earliest possible opportunity. The PD should be revised to require IOUs to provide all Smart Grid information to DRA and Energy Division on an equal basis and without pre-conditions.

### **III. REGULATORY PROCESS FOR ADDRESSING IOU CONTRIBUTIONS TO RECOVERY ACT-FUNDED ACTIVITIES**

#### **A. The PD Does Not Have a Legal Basis to Create a Rebuttable Presumption**

In concluding that the rebuttable presumption approach is lawful, the PD cites Public Utilities Code Section 454(b) and looks at past practices where the Commission has granted rebuttable presumptions in different situations and in the management of cases.<sup>3</sup> Section 454(b) allows the Commission to adopt rules regarding the showing to be made in support of rate cases. At the same time, it is well settled that proponents of rate increases have the burden of proof to show that those costs are reasonable. The power to “manage” a proceeding granted in Section 454(b) is a grant of procedural flexibility, and does not include the power for the Commission to shift the burden of proof from the applicant to ratepayers. In adopting a rebuttable presumption of reasonableness for the cost and benefit information the IOUs submit to DOE in support of their Smart Grid applications, the PD purposely shifts the burden of proof to ratepayers and in fact requires ratepayers to prove a negative – something that may be difficult or even impossible for them to do. This is far from “management” of a proceeding; it is a due process violation that reads Section 451 out of existence.

#### **1. The Applicants Traditionally Bear the Burden of Proof in Ratemaking Proceedings**

“Burden of proof” means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact. Under the substantive law, where a fact is essential to the plaintiff’s claim for relief, the burden of pleading and proof of that fact is on the plaintiff. 1 Witkin Cal. Evid. *Burden* § 10; *See also* Cal Evid Code § 500. In

Commission proceedings, the burden of proof falls on the utilities when seeking proposed rate changes: “[t]here is a natural litigation advantage enjoyed by utilities, and the Commission has long recognized this fact in articulating the relevant burden of proof. SDG&E has the sole obligation to provide a convincing and sufficient showing to meet the burden of proof, and any active participation of other parties can never change that obligation.”<sup>4</sup> In D.00-02-046, the Commission stated in a decision concerning PG&E’s General Rate Case application, “the fact that we must rely in significant part on their experts, combine to reinforce the importance of placing the burden of proof in ratemaking applications on the applicant utilities.”<sup>5</sup> More recently, citing its obligations set forth in Sections 451 and 454, the Commission has stated:

The Commission is charged with the responsibility of ensuring that all rates demanded or received by a public utility are just and reasonable: "no public utility shall change any rate ... except upon a showing before the Commission, and a finding by the Commission that the new rate is justified." As the applicant, SCE must meet the burden of proving that it is entitled to the relief it is seeking in this proceeding. SCE has the burden of affirmatively establishing the reasonableness of all aspects of its application. Other parties do not have the burden of proving the unreasonableness of SCE's showing. As the applicant in this rate case, SCE has the burden of proving that each of its proposals is reasonable.<sup>6</sup>

Under California law, rebuttable presumptions only arise in two situations. First, the Legislature may create the presumption in a statute, as it did in the intervener compensation statute cited in the PD.<sup>7</sup> *See* 1 Witkin Cal. Evid. *Burden* § 103; *Albonico*

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(continued from previous page)

<sup>3</sup> PD at 25.

<sup>4</sup> Decision 05-12-003, p. 9.

<sup>5</sup> 2000 Cal. PUC LEXIS 239.

<sup>6</sup> 2009 Cal. PUC LEXIS 165 (Cal. PUC 2009), Decision 09-03-025, mimeo at 11.

<sup>7</sup> PD at 25.

*v. Madera Irr. Dist.*, 53 Cal.2d 735. In the PD’s example of a rebuttable presumption used in cases for intervener compensation,<sup>8</sup> the use of a presumption is proper because Section 1804(b)(1) directs the Commission to do so. This situation is easily distinguished from the case at hand. Section 451 requires utilities to prove they are entitled to a rate increase. Section 451 says nothing about a rebuttable presumption that shifts the burden of proof to ratepayers. Thus, cases imposing a statutorily created rebuttable presumption are irrelevant here.

The second situation in which a presumption arises occurs under narrow circumstances. While California courts refuse to apply the designation of rebuttable presumptions not listed in a statute, exceptions may occur when a presumption is found to be well established under common law. *See Yaeger v. City Council of Fullerton*, 231 Cal. App. 2d 557, 562 (Cal. App. 4th Dist. 1965); 1 Witkin Cal. Evid. *Burden* § 10. However, common law provides no basis for the Commission to give cost information provided to DOE a rebuttable presumption of reasonableness in its own proceedings.

**2. Commission Past Practices Cited by the PD are Irrelevant and Do Not Provide A Legal Basis For a Rebuttable Presumption**

The PD cites D.00-05-022, which addresses weather-related electric service outages, where the Commission adopted a measurement standard that generates a “rebuttable presumption of reasonableness.”<sup>9</sup> This decision is distinguishable from the instant case because the 2000 decision did not involve creating a rebuttable presumption based on evaluations conducted by an external agency. In any event, there is no evidence that the parties challenged the creation of a rebuttable presumption in that case, despite the fact that the presumption was not in the statute. The Commission thus never addressed the circumstances under which it is appropriate to create such a presumption, but simply assumed it could do so. Thus, the case has no precedential value here because

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<sup>8</sup> PD at 25.

<sup>9</sup> *Id.*

the issue was not considered. Here, by contrast, several parties dispute the Assigned Commissioner's creation of a rebuttable presumption.

The PD also cites D.06-11-018, which created a rebuttable presumption in a CPCN proceeding based on the findings by the California Independent System Operator (CAISO).<sup>10</sup> There, the Commission established general principles and criteria for the economic analysis (including the utilization of a standardized cost benefit methodology), set up a process for evaluation which provided for public participation, and specified the form and content of the Final Evaluation (needs to include reasoned responses to all public comments).<sup>11</sup> This case is distinguishable because the Commission worked in concert with the CAISO to establish criteria in which to base the economic evaluations, and the Commission did not defer to CAISO its own requirement to determine the reasonableness of costs for a transmission project. Here, no such relationship between the Commission and DOE exist. It is unreasonable for the Commission to establish a presumption when the DOE is not bound (nor does it intend) to approve a project on the applicant's cost-benefit information, nor is DOE legally obligated to establish findings on the cost-benefit information provided.

By affording a rebuttable presumption to the reasonableness of information filed with DOE, the PD also attempts to delegate Commission jurisdiction to the DOE in contradiction to its obligation under Section 451 to ensure just and reasonable rates. (*See* D.03-05-038, p. 12, where the Commission held "adopting the [CA]ISO's need assessment without conducting an independent review cannot substitute for our mandate to consider need for the project under Section 1001.") In D06-11-018, the Commission stated its deference to the CAISO findings do not rise to the level of abdication of its authority because "[this decision] provided certain safeguards to protect the public

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<sup>10</sup> PD at 26.

<sup>11</sup> D.06-11-018, pp. 22-23

interest and our statutory mandates are met.”<sup>12</sup> Here, the PD cannot make the same assertion: the PD does not provide similar “safeguards” by establishing a close inter-agency relationship with the DOE to establish common goals and criteria, nor does the PD explain how the presumption meets the Commission’s statutory mandate under Sections 451 and 454. Essentially, for this rebuttable presumption to arise, a utility applicant who receives DOE funding needs only to produce the cost-benefit information submitted with its DOE application. Not only will no finding of reasonableness have been made by DOE, as discussed below, this information will likely be inadequate for Commission review.

### **3. It Is Unclear How the Commission Can Rely on the Cost Benefit Information Submitted to the DOE**

In addition to the legal error that will be committed if the Commission shifts the burden of proof (discussed above), there is a high probability that the cost benefit information provided to the DOE will be insufficient to allow the Commission to make findings as to the reasonableness of the utilities’ proposals. Even though the PD proposes a rebuttable presumption “limited to the accuracy of the costs and benefits provided by a successful applicant for DOE funding,”<sup>13</sup> review of the DOE-issued Funding Opportunity Announcements (FOAs) shows the cost benefit information required for application is extremely limited. It is unlikely that there will be enough information related to a DOE project application to allow the Commission to apply a rebuttable presumption, much less fulfill the IOUs “responsibility to demonstrate that the proposed rate increases are reasonable and consistent with California policy.”<sup>14</sup> Therefore, it is error to give the information provided to DOE a rebuttable presumption of reasonableness since the PD also states that the IOUs must provide the Commission with information adequate to

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<sup>12</sup> D06-11-018, p. 23.

<sup>13</sup> PD at 23.

<sup>14</sup> PD at 24.

demonstrate that the proposed rate increases are reasonable and consistent with California policy.<sup>15</sup>

The FOAs for both the Smart Grid Demonstration Program (SGDP) and the Smart Grid Investment Grant (SGIG) place an emphasis on the providing a baseline of conditions and methodology for collecting data for analysis after project completion, rather than a showing of costs and benefits prior to project acceptance. And, any showing of costs and benefits will not be necessarily be complete at the time of application, as both FOAs state that the DOE will work with grant recipients after project acceptance to finalize the types of costs and benefits the recipient anticipates from its project, as well as the specific cost and benefit information it will provide the DOE in order to calculate overall and net benefits.<sup>16</sup>

Actual cost benefit information requested for application, and analysis thereof, seems more an afterthought than actual determining criterion. The FOA for the SGDP requires that the application “must discuss potential benefits,”<sup>17</sup> and includes in the merit criteria for review the “degree of proposed estimates of project benefits,” “anticipated . . . cost savings of the proposed application over current practices,” and “[v]iability and practicality of the proposed technology to meet the needs of the target market in a cost effective manner.”<sup>18</sup> However, the only part of the application specifying where to include any cost benefit information is in the one-page Project Summary/Abstract which must identify the “potential impact of the project (i.e., benefits, outcomes).”<sup>19</sup> Thus, it is not clear from these requirements how much actual cost benefit information will be provided for SGDP, and unlikely that any actual cost benefit analysis will be developed.

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<sup>15</sup> PD at 24.

<sup>16</sup> R.08-12-009, Sullivan Ruling Attachment A, at 30; and R.08-12-009, Sullivan Ruling Attachment B, at 34.

<sup>17</sup> *Id.*, Attachment B, at 13.

<sup>18</sup> *Id.* at 42.

<sup>19</sup> *Id.* at 26.

The FOA for the SGIG indicates even less cost benefit information than the FOA for the SGDP, requiring only “a *brief* discussion that includes quantitative estimates of the expected impact of their project on the areas of benefit (all that apply) listed in Table 6” (emphasis added).<sup>20</sup> It is stated in the SGIG FOA’s merit review criteria that the evaluation of projects “will also consider the applicant’s estimates of project benefits.”<sup>21</sup> Therefore, this information indicates that hardly any cost benefit information will be submitted. This lack of information is further clarified in the FOA’s FAQ, which states that the “DOE is not requiring a detailed analysis [of estimates of the type and size of benefit that are anticipated] in the application, but a higher-level assessment that provides credible and defensible information on the *magnitude* of expected project benefits” (emphasis added).<sup>22</sup> This is especially disconcerting given that the SGIG involves considerably larger amounts of money than SGDP. Specifically, federal funds for SGIG range up to \$200 million<sup>23</sup> for the federal share of project costs while federal funds for SGDP range up to \$100 million for the federal share of project costs (and many of the project category award sizes for SGDP are anticipated as less than \$100 million).<sup>24</sup> Given the apparently scant cost benefit estimates that will be provided in DOE applications, it is unclear what the purpose is for allowing a rebuttable presumption. The shift in the burden of proof is a clear departure from Commission precedent in ratemaking proceedings. Cost-benefit information must undergo a thorough review at the Commission, and the utilities are better equipped to provide such information when presenting their case for a rate increase. The PD should clarify that IOUs must make a complete showing of costs and benefits, regardless of what is submitted to DOE.

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<sup>20</sup> *Id.*, Attachment A, at 28.

<sup>21</sup> *Id.* at 45.

<sup>22</sup> *Id.*, Attachment C, at 7.

<sup>23</sup> *Id.*, Attachment A, at 14.

<sup>24</sup> *Id.*, Attachment B, at 23.

**B. Proposed Process for Review of Project Co-Funding When an IOU Seeks Contingent Approval by the Commission in Advance of Securing DOE Approval**

Unlike balancing accounts, many of which are routinely recoverable through rates, memorandum accounts may or may not be recoverable through rates and are subject to further scrutiny by the Commission. The Commission should thus clearly specify that, in the case where DOE does not award Recovery Act funding for an IOU project, the IOU cannot recover the costs tracked in that project's memorandum account (either in a General Rate Case or stand-alone application proceeding) without presenting thorough project cost-benefit estimates in a formal application and having that application vetted through the Commission's normal process for reviewing applications.

Furthermore, to obviate the confusion where certain projects fail to receive Recovery Act funding, or disparate levels of Recovery Act funding, the Commission should specifically direct the IOUs to track costs separately for each individual project, either through multiple memorandum accounts or separate sub-accounts. This way, the Commission will be able to parse out a project's costs that need further CPUC review because of an insufficient level of DOE funding for that particular project.

The PD also states:

If, however, the DOE fails to fund a project at the level upon which Commission approval is contingent and the utility wants to increase its contribution to the project and recover the additional contribution through rates, then it will be necessary for the project's proponents to provide new facts to the Commission and seek to demonstrate that a larger commitment of ratepayer funds is reasonable.

While it may be practical for CPUC to provide contingent approval based on an expected level of DOE contribution, the Commission should in this rulemaking limit to this proceeding all IOU projects that are receive a minimum percentage level of DOE funding. Thus, DRA recommends that if an IOU project receives less than 25 percent DOE funding, the IOU should request additional ratepayer funding in a formal ratesetting application proceeding.

### **C. The Protest Period and Advice Letter Processes Need to be Amended**

The PD allows IOUs to seek approval of ratepayer funding by advice letter or application. For advice letters, the protest period remains at the usual 20 days for typical advice letters reviewed at the CPUC. To the contrary, the protest period for advice letters should be extended to 60 days, especially if the burden of proof is shifted from the IOU to the intervener, as proposed in the PD as written. If the protest period is not extended, the PD should provide a process for discovery and submission of additional material, in order to allow for adequate due process by parties. This is crucial, because for an advice letter the protest period is the only chance for evidentiary review. Additionally, the PD should clarify that the advice letter process is only for projects that are seeking matching funds. It should specify that recovery of cost overruns must be submitted through an application.

The PD reduces the protest period for applications from 30 days to 15 days. There is no request for, or discussion of, such reduction proposed in any of the comments submitted by parties to this proceeding or anywhere else on the record. Provided that DRA and other parties still maintain the right to conduct evidentiary discovery and prepare testimony, it may not be as necessary to extend the protest period as for the advice letter.

### **IV. CONCLUSION**

DRA requests that the *Proposed Decision* be revised to incorporate:

- Require IOUs to provide all Smart Grid information to DRA and Energy Division on an equal basis without pre-conditions
- Remove the rebuttable presumption
- Clarify that IOUs must make a complete showing of costs and benefits, regardless of what is submitted to the DOE
- Clarify that if the DOE does not reward Recovery Act funding for an IOU project, the IOU cannot recover costs tracked in a memorandum account without presenting a formal application

- Require that costs be separately tracked for each individual project in a memorandum account
- Require any project that receives less than 25% Recovery Act funding to request additional funding through a formal application
- Extend the protest period for the advice letter process to 60 days
- Clarify that an IOU seeking cost recovery for any project cost overruns must do so through an application

Respectfully submitted,

/s/ LISA-MARIE SALVACION

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August 10, 2009

## **Appendix A**

## Findings of Fact

5. It is reasonable to limit access to confidential and security-related information concerning the Smart Grid. Confidential and security-related information should be supplied only to the Commission. It is also reasonable to supply such information to DRA ~~whenever it requests such information~~ when it is supplied to the Energy Division. It may also be reasonable to supply such information to other interested parties upon the completion of appropriate non-disclosure agreements or after other measures that the Commission deems appropriate.

~~12. It is reasonable to grant a rebuttable presumption of accuracy to the cost-benefit information provided to the DOE for a project that has obtained DOE funding.~~

14. It is reasonable for the Commission to review through an application process those Smart Grid proposals that ~~involve any project cost overruns,~~ and either lack DOE approval, or, even with DOE approval, require a CEQA review, a CPCN, or a permit to construct.

~~16. It is reasonable to limit the protest period for applications filed pursuant to this decision to 15 days and to permit replies 7 days later.~~ It is reasonable to extend the protest period for advice letters filed pursuant to this decision to 60 days.

18. The DOE requires applicants for Smart Grid funds to submit ~~limited~~ information concerning the costs and benefits of the proposed projects. IOUs must submit additional information concerning the costs and benefits of the proposed projects to the Commission, in order to make an adequate showing of reasonableness.

~~19. It is reasonable for the Commission to set the expected level of DOE funding for a Smart Grid project at 25 percent.~~

## Conclusions of Law

~~6. Granting a rebuttable presumption of accuracy to the cost-benefit information contained in an IOU application that obtains DOE support is consistent with Commission practice and the authority granted to the Commission by § 454(b) of the Pub. Util. Code to determine the nature of the showing required to be made in support of proposed rate changes.~~

8. ~~Reducing~~ Extending the time for protesting ~~applications~~ advice letters filed pursuant to IOU efforts to obtain Commission approvals of Smart Grid projects seeking DOE funding is in the public interest and consistent with § ~~1701~~ 455 of

the Pub. Util. Code and the provisions of ~~Rule 2.6 of the Commission's Rules of Practice and Procedure~~ General Order 96-b.

9. The information on costs and benefits submitted to the DOE ~~can~~ may not be sufficient to provide a basis for initiating this Commission's review of a proposed Smart Grid project. In that case, IOUs must submit additional information concerning the costs and benefits of the proposed Smart Grid projects to the Commission, in order to make an adequate showing of reasonableness.

10. If a Smart Grid project application receives less than 25 percent funding by the DOE, the IOU may request additional ratepayer funding through a formal ratesetting proceeding.

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of “**COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON THE JULY 21, 2009 PROPOSED DECISION ESTABLISHING PROCESSES FOR REVIEW OF PROJECTS AND INVESTMENTS BY INVESTOR-OWNED UTILITIES SEEKING RECOVERY ACT FUNDING**” in **R0812009**, by using the following service:

**E-MAIL SERVICE:** sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided e-mail addresses.

**U.S. MAIL SERVICE:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed in San Francisco, California, on the **10th** day of **August, 2009.**

/s/ ANGELITA F. MARINDA  
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## **N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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