

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



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Order Instituting Rulemaking to Consider Refinements
to and Further Development of the Commission's
Resource Adequacy Requirements Program.

Rulemaking 05-12-013
(Filed December 15, 2005)

**COMMENTS OF THE INDEPENDENT ENERGY PRODUCERS
ASSOCIATION ON THE PROPOSED DECISION ON A
PREFERRED POLICY FOR RESOURCE ADEQUACY**

**INDEPENDENT ENERGY PRODUCERS
ASSOCIATION**

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

**GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP**

Brian T. Cragg
505 Sansome Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: bcragg@goodinmacbride.com

Attorneys for the Independent Energy Producers
Association

Date: December 2, 2009

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Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, the Independent Energy Producers Association (IEP) submits its comments on the Proposed Decision (PD) of Administrative Law Judge Mark Wetzell on the adoption of a preferred policy on Resource Adequacy (RA), issued on November 3, 2009.

IEP supported the creation of a centralized capacity market (CCM) as an important element of a market-based approach to assuring resource adequacy in California. The PD does not adopt the CCM model, but it also does not and should not foreclose the possible future development of a CCM in California. IEP continues to support a CCM as a significant component of the overall market design that the Commission should pursue, but IEP also recognizes that the PD's preferred option can serve as a transitional step to a market structure that includes a CCM. Accordingly, IEP views the PD's preferred option as a bridge to its desired market structure and will focus its comments on recommending improvements to the bilateral contract model recommended by the PD.

I. INTRODUCTION

The structure of the PD begins with critique of the performance of the existing RA program, which relies on the short-term (frequently one-year) procurement of RA capacity through bilateral agreements. The PD assesses the performance of the existing program on several key dimensions and identifies many of the problems with the existing RA procurement regime. In particular, the PD recognizes that although the existing approach has helped ensure the availability of existing resources, “it does not foster investment in new generation.”¹

The PD then moves to a consideration of which of the proposals best addresses the identified shortcomings of the current approach and concludes that a bilateral contract approach coupled with a multi-year forward commitment provides the best choice for improving the current RA program.

In the following comments, IEP will discuss how the PD either does not consider how its preferred option fails to address some of the most obvious shortcomings of the current RA approach or is unduly optimistic about certain elements of the preferred option. IEP’s review suggests that two mechanisms that appear to be central to the PD’s preferred option—the electronic bulletin board (EBB) to promote greater transparency and a standard capacity product to facilitate transactions of RA capacity—may not function as well as the PD assumes. IEP offers these comments with the intent of improving the preferred option and enhancing the overall performance of the RA program.

II. PRICE DISCRIMINATION

The PD in several passages acknowledges that the existing bilateral RA program allows and to some extent promotes price discrimination between existing and new generation

¹ PD, p. 2.

resources. For example, the PD notes with some skepticism the estimate of the Bilateral Trading Group (BTG) that price discrimination between existing and new generating resources could save ratepayers up to \$1 billion annually.² The PD correctly concludes that it would not be possible to sustain that type of price discrimination over time and that endorsing price discrimination “would be at odds with our primary objective to achieve investment needed for reliability,” because “[i]n a bilateral trading regime, owners of existing capacity will attempt to compensate for the prospect of reduced capacity payments by adjusting their bids accordingly,” and because third-party intermediaries will attempt to garner a portion of the assumed consumer surplus.³

The PD also recognizes that new generation resources quickly become existing resources, and “[a] policy of promoting price discrimination between new and existing could thus dampen incentives for new investment and/or cause increased bids,” and could lead to the premature retirement of economic existing units.⁴

Despite the structural problems created by price discrimination between existing and new generation resources, however, the PD’s preferred option continues the bilateral contract model that, as the PD candidly concedes, “may not be the most transparent market structure that could be adopted.”⁵ The only remedies that the PD proposes for the problems of price discrimination are a multi-year forward commitment requirement⁶ and “greater price transparency and symmetry of information available to market participants.”⁷

² PD, p. 37.

³ PD, p. 37

⁴ PD, p. 38.

⁵ PD, p. 75.

⁶ PD, p. 34.

⁷ PD, p. 38.

Only experience will tell whether the multi-year commitment will lessen price discrimination, but IEP agrees with the PD that greater transparency and access to information is essential to countering the bilateral model's tendency to engender an opaque market and asymmetrical access to information. After endorsing the need for greater transparency, however, the PD offers little detail on what degree of transparency is required to correct the distortions of the bilateral approach. The PD notes that an EBB is "a needed improvement to facilitate bilateral trading" and states the intention to explore the Commission's role in developing and instituting a EBB.⁸ It remains unclear, however, whether an EBB will in fact provide sufficient information to combat the price discrimination that exists in the current bilateral market or that is inherent in the PD's preferred, bilateral option.

Moreover, the PD does not appear to recognize the related actions the Commission must take to achieve the necessary degree of transparency and to counter price discrimination. As discussed below, the Commission's existing rules on confidentiality allow very little access to information for parties classified as market participants, yet the PD seems to assume that market participants will have symmetrical access to such information as part of a more transparent market structure.

In addition, in the procurement context the Commission has tolerated and even encouraged unwarranted discrimination between existing and new generating resources. When parties in the last procurement proceeding challenged the practice of excluding bids from existing resources in competitive solicitations, for example,⁹ the Commission stated that it was "in full agreement" with utility contentions that ratepayers benefit from limiting competitive

⁸ PD, p. 79.

⁹ See D.07-12-052, p. 143.

solicitations to new or repowered generation.¹⁰ Thus, the Commission’s procurement policies will also have to be reformed if unjustified price discrimination between new and existing resources is to be eliminated, or even lessened.

The PD’s recognition of the problems created by price discrimination between new and existing resources needs to be transformed into a commitment by the Commission to address the conditions and regulatory policies that allow unwarranted price discrimination to persist. In its present form, the PD offers no concrete proposal for actions the Commission can take to address the issue of price discrimination.

III. SUPPORTING INVESTMENT IN NEW RESOURCES

The PD is blunt in its assessment of the current RA program’s support for investment in new resources:

The resource development that California has seen in recent years cannot be attributed to significant merchant investment that was prompted by the RA program.¹¹

* * *

[W]e find that the RA program has not been meeting the primary reliability objective of facilitating investment in new generation.¹²

The PD also acknowledges that “this Commission has been leaning heavily on the IOUs [investor-owned utilities] and the LTPP [long-term procurement proceeding] process to ensure that sufficient resources are being developed for future needs.”¹³ That reliance, however, focuses on the Commission’s jurisdiction over the IOUs and does not treat IOUs and other load-

¹⁰ D.07-12-052, p. 148.

¹¹ PD, p. 32.

¹² PD, p. 33.

¹³ PD, p. 32.

serving entities (LSEs) alike, in conflict with Public Utilities Code section 380's direction to implement and enforce RA requirements in a nondiscriminatory manner.¹⁴

The PD's solution to this problem is to impose a multi-year forward commitment obligation on *all* LSEs. The multi-year forward commitment obligation is a positive and important step that *may* lead to investment in new California generation. To this extent, the PD is consistent with some of the leading proposals for a CCM, which also call for a multi-year forward commitment.

While IEP supports the PD's recommended multi-year forward commitment obligation, IEP notes that the PD does not squarely address two issues that flow directly from this recommendation. First, the PD does not address, and cannot currently resolve, whether a multi-year forward commitment is *sufficient* to stimulate new investment. While a multi-year forward commitment is a step forward from the current annual commitment, it may not be a big enough step to improve the RA program's historical inability to attract investment. The Commission should monitor investment trends to see if the multi-year commitment has the desired effect of stimulating investment in new generation.

Second, the PD lacks a clear and effective mechanism for LSEs, especially the smaller LSEs, to adjust their RA commitments as the delivery year approaches and their load varies from forecasts. Smaller LSEs, in particular, are subject to wide variations in served load, and they may be reluctant to make commitments five years out if they have no feasible way to sell unneeded RA capacity (or to acquire needed RA capacity at a reasonable price if their served load increases unexpectedly). The PD places an optimistic reliance on increased transparency and the success of the proposed EBB to match sellers and buyers of RA capacity and on the

¹⁴ PD, pp. 32-33.

commercial feasibility of a Standard Capacity Product (SCP) to facilitate RA capacity transactions. IEP's concerns about these elements of the PD's recommendation are discussed below.

A. Transparency

The PD correctly finds that “the RA capacity market would better promote investment, and do so more cost-effectively, if greater price transparency and symmetry of information were available to market participants.”¹⁵ The PD concludes that “an electronic bulletin board with appropriate public disclosure of price and trading information is the *minimum* improvement necessary to facilitate trading and promote greater liquidity.”¹⁶

IEP agrees with this conclusion but notes that achieving the needed level of transparency will require modifications to the Commission's current approach to confidentiality and market participants' access to these data. Unless market participants have reasonable access to key data, the benefits of an electronic bulletin board will be negligible at best. The Commission has not supported this degree of transparency in the broader procurement context, and D.06-06-066 declares the type of “price and trading information” described in the PD to be “market-sensitive information” that is denied to market participants. The PD's failure to acknowledge the conflict between its recommended policies and the actions the Commission has taken previously on access to this sort of basic market information raises questions about whether the Commission will ever require the degree of transparency needed for an effective EBB.

¹⁵ PD, p. 36.

¹⁶ PD, p. 37 (emphasis added).

The degree of transparency associated with the EBB will determine whether the PD's vision of the RA market structure will achieve any improvement over the current RA program. For that reason, the details of the EBB should be given priority in the implementation proceeding proposed in the PD. IEP urges the Commission to go beyond disclosure of the "minimum" price and trading information and to fashion an EBB that yields accurate price signals and facilitates the trading of RA capacity. The EBB should disclose information about the price, quantity, term (duration), and delivery point of offers to sell, offers to purchase, and consummated transactions. As discussed in the next section, transacting through the EBB will become much more practical if the Standard Capacity Product is refined to become a practical vehicle for commercial transactions.

B. Standard Capacity Product

The PD's preferred option is based on PG&E's bilateral proposal, a "key feature" of which is "a standardized, tradable capacity product."¹⁷ The PD appears to conclude that the combination of a multi-year forward commitment, greater transparency in the form of an EBB, and a Standard Capacity Product will facilitate RA transactions and meet some of the goals proposed for the CCM. The SCP that arose out of the Commission's RA proceedings and has now been incorporated into the tariffs of the California Independent System Operator (CAISO), however, has not lived up to its initial promise of serving as a vehicle for facilitating liquid transactions of RA capacity.

In its comments on the Order commencing R.09-10-032, The Utility Reform Network (TURN) explained why the current RA counting rules result in an SCP that cannot serve as a basis for fungible RA transactions:

¹⁷ PD, p. 44.

[I]t is time to revisit the “replacement rule” for units subject to scheduled outages under the RA counting rules. The replacement rule currently provides that a resource *cannot be counted* as RA capacity if it has a scheduled outage of greater than a certain number of days in a particular month, and *an LSE that has contracted with a resource* subject to such an outage has “an obligation to procure replacement RA capacity.” . . . [A] truly fungible and tradable SCP **cannot exist** if an LSE is subject to losing the “countability” of that resource for RA purposes when the resource schedules an outage. The whole notion of the SCP is that it creates a generic “RA tag” that can be freely purchased and sold, and ultimately counted by an LSE for RA compliance. The purchase of a sufficient number of such tags for a given month is supposed to assure the LSE that it has met its RA compliance obligation. But the replacement rule confounds this objective, because an LSE holding a tag for a given unit would, under the replacement rule, be subject to a *continuing obligation* to monitor (somehow!) the status of the unit to make sure that it does not have a scheduled outage in a particular month. And if it were fortunate enough to discover such a planned outage for a unit whose RA tag it holds, the LSE would be required to purchase replacement (*i.e.*, duplicate) capacity.¹⁸

Thus, one crucial issue for the implementation phase contemplated by the PD is how the SCP or counting rules can be modified so that the SCP can serve as a fungible and tradable unit of RA capacity. In the absence of an ability to freely buy or sell small quantities of RA capacity, smaller LSEs will seek to minimize the level of their multi-year forward commitments. As a result, a disproportionate obligation will fall on the IOUs to procure the RA capacity needed to maintain the reliable operation of the grid, because the IOUs have the ability to shift some of the costs of RA capacity needed by the system to the customers of non-IOU LSEs through the Cost Allocation Mechanism adopted in D.06-07-029. This result replicates the

¹⁸ *Preliminary Comments of The Utility Reform Network on Scope and Schedule and Request for Party Status*, R.09-10-032, Nov. 9, 2009, pp. 2-3 (emphasis in original, footnote omitted). See also *Initial Comments of Calpine Corporation*, R.09-10-032, Nov. 13, 2009, p. 2.

existing framework, which “relies too heavily on IOU-based procurement to ensure that investment in non-renewable resources needed for long-term reliability occurs.”¹⁹

IV. MAINTAINING THE OPTION FOR A CCM

IEP understands that the Commission may not want to commit to a CCM at this point. On the other hand, a CCM may prove to be an inviting option for the Commission to consider in the future. To keep open the possibility of adopting a CCM in the future, the PD should maintain the CCM as an available option and should not prematurely or unintentionally close the door to later development of a CCM.

The PD bases its choice of the preferred option on two considerations—maintaining the Commission’s jurisdiction over RA and ensuring that California can effectively pursue its policy choices. However, for each of these considerations, the PD appears to misunderstand how a CCM can be compatible with these goals. While the choice of a path forward is admittedly difficult, the reasons the PD offers to justify its choice of a bilateral contract approach could have the unintended and undesirable effect of limiting the Commission’s future consideration of other approaches.

A. Jurisdiction

The PD bases its endorsement of its preferred option in large part on a desire to maintain the Commission’s jurisdiction over the RA program. In this respect, the PD becomes confused by an admittedly confusing jurisdictional landscape.

The respective jurisdictions of the Commission and the Federal Energy Regulatory Commission (FERC) are established by the United States and California Constitutions, federal and state statutes, and court opinions interpreting those foundational

¹⁹ PD, p. 86 (Finding of Fact No. 11).

documents. The jurisdictions of the Commission and FERC are *not* determined by the actions or inactions of the Commission or by whether the Commission chooses a bilateral contract approach or a CCM. The fact that FERC *currently* has jurisdiction over wholesale power transactions (*i.e.*, bilateral transactions), for example, has not noticeably affected the Commission's ability or jurisdiction to carry out the existing RA program.

Sorting out the jurisdictional boundaries between the Commission and FERC will never be easy, but that difficulty will exist no matter which approach the Commission selects. FERC's jurisdiction over wholesale transactions, transmission, and the CAISO has required and will continue to require close coordination and cooperation between the Commission, the CAISO, and FERC to carry out *any* effective RA program. The PD's presumption that the Commission's jurisdiction will be affected by its choice of the vehicle for implementing its RA program fails to recognize the complexity of the *existing* jurisdictional situation and accordingly arrives at an unnecessarily restrictive justification for its choice of the bilateral approach.²⁰

B. Specialized Resource Procurement

The PD rejects the CCM in part because it concludes that a CCM would not facilitate "the development of the specialized types of resources that are most appropriate for California's needs,"²¹ such as the Renewables Portfolio Standard (RPS) or Greenhouse Gas (GHG) emissions reduction efforts.

²⁰ A similar confusion is reflected in the PD's discussion in footnote 19 of the requirements of Public Utilities Code section 380 and the Commission's oversight of procurement under Public Utilities Code section 454.5. The PD first suggests but then rejects the interpretation that section 380(i) authorizes a transfer of responsibility for the RA program to the CAISO, on the basis that the specificity of the Commission's obligations under section 454.5 preclude such an interpretation. In fact, the Commission will continue to have jurisdiction of the IOUs' procurement requirements and policies, regardless of whether a CCM or bilateral approach is adopted. The Commission will continue to establish the IOUs' need for additional resources and to set the policies that govern IOU procurement.

²¹ PD, p. 75.

A CCM could provide an efficient forum for transactions involving a specific product—capacity, and particularly RA capacity. The Commission’s ability to enforce the IOUs’ obligations to procure other electricity “products,” such as RPS-eligible energy or low-GHG power, however, is unaffected by the form of capacity procurement. At present, IOUs have obligations to procure several separate electricity products, including RA capacity, local RA capacity, RPS energy, low-GHG electricity, and sufficient energy to meet their customers’ demand. Electricity markets have evolved in recent years to recognize and value separate products in what was formerly considered a undifferentiated commodity. The development of a particular type of market for one product (*e.g.*, RA capacity) does not necessarily affect the market for another product (*e.g.*, RPS energy, Renewable Energy Credits, GGH allowances).

In short, there is nothing inherent in a CCM that would limit the Commission’s ability to adopt and implement current or future procurement and environmental policies.

V. CONCLUSION

At the beginning of the passage where the PD evaluates how the various options meet the identified program objectives, the PD states:

Each of the options before us, including the status quo, has a particular set of strengths and weaknesses, and no one option simultaneously improves upon achievement of each of the RA program objectives will equal success.²²

IEP appreciates the effort the PD has undertaken to arrive at a preferred option that it believes best balances the various objectives. Although IEP continues to find that the balance favors a CCM, it has in these comments attempted to identify ways in which the PD’s preferred option could be improved, so that the overall functioning of the RA program is also improved. In

²² PD, p. 61.

furtherance of that intent, IEP attaches proposed findings of fact and conclusions of law and respectfully urges the Commission to modify the PD to:

- commit to taking concrete actions to address the price discrimination between new and existing resources that has been tolerated and even fostered by the Commission's previous policies.
- implement the transparency needed for the preferred option to function properly and revise the Commission's confidentiality rules and procurement policies to allow greater price transparency and symmetry of information among market participants.
- establish an electronic bulletin board that yields accurate price signals and facilitates the trading of RA capacity by disclosing information about the price, quantity, term (duration), and delivery point of offers to sell, offers to purchase, and consummated transactions.
- continue development of a standard capacity product that can serve as a fungible and tradable unit of RA capacity.
- revise the PD to clarify that future development of a CCM is not foreclosed by the Commission's current decision to adopt a bilateral approach.

Most importantly, the Commission should proceed expeditiously to the implementation phase, so that the details of the adopted policy preference can be discussed and refined and the new framework put into effect as soon as possible.

Respectfully submitted this 2nd day of December, 2009 at San Francisco,
California.

GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP
Brian T. Cragg
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321

By /s/ Brian T. Cragg
Brian T. Cragg

Attorneys for the Independent Energy
Producers Association

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PROPOSED FINDINGS AND CONCLUSIONS

Findings of Fact

* * *

12. ~~By maintaining~~ The Commission's jurisdiction with respect to LSE-based procurement, ~~the bilateral approach~~ ensures that the Commission is authorized to ensure that environmental policies are being met.

* * *

~~14. Even if the RA program succeeds in bringing about new generation that provides generic capacity needed for reliability, perhaps even local reliability, there could be a need for additional, duplicate investment in renewable generation in California if the program fails to account for the need for renewable generation.~~

14. Developers of renewable generation facilities will sell RA capacity from their facilities according to the applicable counting rules and will also sell RPS-eligible energy.

* * *

~~17. RA program options that involve a centralized auction administered by the CAISO would place a significant portion of the RA program under the jurisdiction of FERC, and under those options the Commission would not have direct authority to order refinements to the program or specific remedies.~~

17. FERC's jurisdiction over wholesale transactions, transmission, and the CAISO has required close coordination and cooperation between the Commission, the CAISO, and FERC to carry out an effective RA program.

~~18. A centralized auction would tend to promote investment in, and development of, generic RA capacity without significant regard to the locational, environmental, and operational aspects of the resource.~~

* * *

20. ~~Compared to~~ Both a centralized auction, and a bilateral trading regime ~~is more~~ can be designed to be conducive to development of specialized resources that meet California's environmental objectives, and avoidance of development of excess capacity.

* * *

Conclusions of Law

* * *

7. ~~In light of the overriding importance of maintaining the Commission's current scope of jurisdiction over the RA program,~~ Under the current circumstances, a bilateral trading approach combined with a multi-year forward commitment ~~will better~~ is the preferred way to meet the objectives for the RA program.

8. Under the current circumstances, PG&E's bilateral proposal represents the best choice among the options before us for improving the RA program.

* * *

CERTIFICATE OF SERVICE

I, Lisa Vieland, certify that I have on this 2nd day of December 2009 caused a copy of the foregoing

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RESOURCE ADEQUACY**

to be served on all known parties to R.05-12-013 listed on the most recently updated service list available on the California Public Utilities Commission website, via email to those listed with email and via U.S. mail to those without email service. I also caused courtesy copies to be hand-delivered as follows:

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

ALJ Mark S. Wetzell
California Public Utilities Commission
Executive Division
505 Van Ness Avenue, Room 5009
San Francisco, CA 94102

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

Executed this 2nd day of December 2009 at San Francisco, California.

/s/ Lisa Vieland
Lisa Vieland

Service List R.05-12-013
Last Updated 12/1/09

JAMES MCMAHON
jmcmahon@crai.com

KATHRYN WIG
Kathryn.Wig@nrgenergy.com

KEITH MCCREA
keith.mccrea@sablau.com

MICHAEL A. YUFFEE
myuffee@mwe.com

BONNIE S. BLAIR
bblair@thompsoncoburn.com

MARGARET E. MCNAUL
mmcnaul@thompsoncoburn.com

CYNTHIA A. FONNER
Cynthia.A.Fonner@constellation.com

GRETCHEN SCHOTT
gschott@rrienergy.com

JASON ARMENTA
jarmenta@calpine.com

JOSEPH PAUL
joe.paul@dynegy.com

KEVIN BOUDREAUX
CALPINE CORPORATION
717 TEXAS AVENUE SUITE 1000
HOUSTON, TX 77002

CARLA BANKS
cbanks@complete-energy.com

RANDALL PRESCOTT
BP ENERGY COMPANY
501 WESTLAKE PARK BLVD, 4-242A
HOUSTON, TX 77079-2604

STEVE ISSER
sisser@goodcompanyassociates.com

CHRISTOPHER A. HILEN
chilen@sppc.com

CURTIS KEBLER
curtis.kebler@gs.com

DENNIS M.P. EHLING
dehling@kling.com

MICHAEL MAZUR
mmazur@3PhasesRenewables.com

MIKE KASABA
QUIET ENERGY
3311 VAN ALLEN PLACE
TOPANGA, CA 90290

E.J. WRIGHT
ej_wright@oxy.com
GREGORY S.G. KLATT
klatt@energyattorney.com

DANIEL W. DOUGLASS
douglass@energyattorney.com

FRANK ANNUNZIATO
allwazeready@aol.com

AKBAR JAZAYEIRI
akbar.jazayeri@sce.com

LAURA GENAO
laura.genao@sce.com

WILLIAM V. WALSH
william.v.walsh@sce.com

RONALD MOORE
rkmoore@gswater.com

KEITH SWITZER
kswitzer@gswater.com

KEITH RICHARDS
Keith.richards@nrgenergy.com

DANIEL A. KING
daking@sempra.com

DON P. GARBER
DGarber@sempra.com

STEPHEN KEEHN
skeehn@sempra.com

THOMAS CORR
tcorr@sempraglobal.com

TOM BILL
tbrill@sempra.com

TOM BRILL
tbrill@sempra.com

DONALD C. LIDDELL
liddell@energyattorney.com

REID A. WINTHROP
rwinthrop@pilotpowergroup.com

THOMAS DARTON
tdarton@pilotpowergroup.com

DESPINA NIEHAUS
dpapapostolou@semprautilities.com

DAVID J. COYLE
GENERAL MANAGER
ANZA ELECTRIC CO-OPERATIVE, INC
(909)
PO BOX 391908 / 58470 HWY 371
ANZA, CA 92539-1909

CRYSTAL NEEDHAM
cneedham@edisonmission.com

ANDREA MORRISON
andrea.morrison@directenergy.com

EVELYN KAHL
ek@a-klaw.com

ROD AOKI
rsa@a-klaw.com

MARC D. JOSEPH
mdjoseph@adamsbroadwell.com

THERESA L. MUELLER
theresa.mueller@sfgov.org

Charlyn A. Hook
chh@cpuc.ca.gov

Karen P. Paull
kpp@cpuc.ca.gov

JIM HENDRY
jhendry@sfgwater.org

MICHEL PETER FLORIO
mflorio@turn.org

MARK R. HUFFMAN
mrh2@pge.com

SEEMA SRINIVASAN
sls@a-klaw.com

BRIAN T. CRAGG
bcragg@gmssr.com

JAMES D. SQUERI
jsqueri@gmssr.com

JEANNE B. ARMSTRONG
jarmstrong@goodinmacbride.com

LISA A. COTTLE
lcottle@winston.com

MICHAEL B. DAY
mday@goodinmacbride.com

EDWARD W. O'NEILL
edwardoneill@dwt.com

JEFFREY P. GRAY
jeffgray@dwt.com

IRENE K. MOOSEN
irene@igc.org

JENNIFER CHAMBERLIN
jennifer.chamberlin@directenergy.com

JOHN DUTCHER
ralf1241a@cs.com

RICK C. NOGER
rick_noger@praxair.com

PHILLIP J. MULLER
philm@scdenenergy.com

L. JAN REID
janreid@coastecon.com

BARRY F. MCCARTHY
bmcc@mccarthylaw.com

JOY A. WARREN
joyw@mid.org

JOHN R. REDDING
johnredding@earthlink.net

JAMES WEIL
jweil@aglet.org

CATALIN MICSA
cmicsa@caiso.com

CYNTHIA HINMAN
CHinman@caiso.com

WAYNE AMER
wamer@kirkwood.com

MARY LYNCH
mary.lynych@constellation.com

CAROLYN KEHREIN
cmkehrein@ems-ca.com

BRUCE MCLAUGHLIN
mclaughlin@braunlegal.com

C. ANTHONY BRAUN
braun@braunlegal.com

DAVID A. SANDINO
dsandino@water.ca.gov

JANE E. LUCKHARDT
jluckhardt@downeybrand.com

KEVIN WOODRUFF
kdw@woodruff-expert-services.com

ANDREW B. BROWN
abb@eslawfirm.com

JEDEDIAH GIBSON
jig@eslawfirm.com

JEFFERY D. HARRIS
jdh@eslawfirm.com

LEE TERRY
lterry@water.ca.gov

MICHAEL WERNER
hcronin@water.ca.gov

DAN SILVERIA
dansvec@hdo.net

JESSICA NELSON
jnelson@psrec.coop

DONALD BROOKHYSER
deb@a-klaw.com

JORDAN WHITE
jordan.white@pacificcorp.com

JEFF LAM
jeff.lam@powerex.com

ROBERT STODDARD
RStoddard@crai.com

HARRY SINGH
harry.singh@bssempra.com

CHRISTOPHER C. O'HARA
chris.ohara@nrgenergy.com

ELIZABETH PARELLA
MERRILL LYNCH
4 WORLD FINANCIAL CENTER
NORTH TOWER, 19TH FLOOR
NEW YORK, NY 10080

STEVEN S. SCHLEIMER
steven.schleimer@barclayscapital.com

STEVEN HUHMANN
steven.huhmann@morganstanley.com

MICHAEL J. GERGEN
michael.gergen@lw.com

MARK L. PERLIS
perlism@dicksteinshapiro.com

JAMES MAYHEW
jim.mayhew@mirant.com

BILL KEY
bill.c.key@fpl.com

TIM DRENNAN
tim.drennan@fpl.com

DOUGLAS MCFARLAN
dmcfarlan@mwgen.com

JAMES ROSS
jimross@r-c-s-inc.com

KEVIN GRESHAM
kgresham@rrienergy.com

TRENT CARLSON
tcarlson@rrienergy.com

HUGH TARPLEY
htarpley@complete-energy.com

PETER TELLEGEN
ptellegen@complete-energy.com

JULIE L. MARTIN
julie.martin@bp.com

WAYNE TOMLINSON
william.tomlinson@elpaso.com

KATHLEEN ESPOSITO
CRESTED BUTTE CATALYSTS LLC
PO BOX 668
CRESTED BUTTE, CO 81224

KEVIN J. SIMONSEN
kjsimonsen@ems-ca.com

MARIO VILLAR
mvillar@nevpc.com

ELENA MELLO
emello@sppc.com

TREVOR DILLARD
tdillard@sppc.com

GURCHARAN BAWA
gbawa@cityofpasadena.net

HSI BANG TANG
btang@ci.azusa.ca.us

MICHAEL TEN EYCK
MtenEyck@ci.rancho-cucamonga.ca.us

CASE ADMINISTRATION
Case.Admin@sce.com

KAREN LEE
karen.lee@sce.com

DAVID LLOYD
david.lloyd@nrgenergy.com

MIKE C. TIERNEY
mike.tierney@nrgenergy.com

GREG BASS
GBass@SempraSolutions.com

MICHAEL SHAMES
mshames@ucan.org

KIMBERLY KIENER
kмкиener@cox.net

MARCIE MILNER
marcie.milner@shell.com

MIKE EVANS
michael.evans@shell.com

CENTRAL FILES
CentralFiles@semprautilities.com

PAMELA J. MILLS
pmills@semprautilities.com

RANDY NICHOLSON
RNicholson@Semprautilities.com

CENTRAL FILES
SAN DIEGO GAS & ELECTRIC
COMPANY
centralfiles@semprautilities.com

JOHN W. LESLIE
jleslie@luce.com

FRED MASON
fmason@ci.banning.ca.us

PETER T. PEARSON
peter.pearson@bves.com

TRACEY DRABANT
traceydrabant@bves.com

JEANNETTE OLKO
jolko@ci.colton.ca.us

LEEANNE UHLER
luhler@riversideca.gov

DAVID X. KOLK
dkolk@compenergy.com

LAWRENCE KOSTRZEWA
lkostrzewa@edisonmission.com

PHILIP HERRINGTON
pherrington@edisonmission.com

STEPHEN HESS
shess@edisonmission.com

STEPHEN J. SCIORTINO
ssciortino@anaheim.net

JOEL M. HVIDSTEN
hvidstenj@kindermorgan.com

SHAWN COX
shawn_cox@kindermorgan.com

MONA TIERNEY-LLOYD
mtierney-lloyd@enernoc.com

SUE MARA
sue.mara@rtoadvisors.com

DIANE I. FELLMAN
Diane.Fellman@nexteraenergy.com

MANUEL RAMIREZ
mramirez@swater.org

NOAH LONG
nlong@nrdc.org

KAREN TERRANOVA
filings@a-klaw.com

RICHARD H. COUNIHAN
rcounihan@enernoc.com

TIM LINDL
tjl@a-klaw.com

VALERIE WINN
vfw3@pge.com

WILLIAM MITCHELL
will.mitchell@cpv.com

CARMEN BASKETTE
cbaskette@enernoc.com

JANINE L. SCANCARELLI
jscancarelli@flk.com

ROBERT GEX
bobgex@dwt.com

SETH D. HILTON
sdhilton@stoel.com

JUDY PAU
judypau@dwt.com

CALIFORNIA ENERGY MARKETS
cem@newsdata.com

LISA WEINZIMER
lisa_weinzimer@platts.com

CHARLES R. MIDDLEKAUFF
crmd@pge.com

ANDREW L. HARRIS
alho@pge.com

BRIAN K. CHERRY
bkc7@pge.com

CASE COORDINATION
RegRelCPUCCases@pge.com

ED LUCHA
ELL5@pge.com

GRACE LIVINGSTON-NUNLEY
GXL2@pge.com

PATRICIA GIDEON
pcg8@pge.com

SEBASTIEN CSAPO
sscb@pge.com

SHAUN HALVERSON
SEHC@pge.com

SOUMYA SASTRY
svs6@pge.com

DEBRA LLOYD
debra.lloyd@cityofpaloalto.org

ROBIN J. WALTHER, PH.D.
rwalther@pacbell.net

CLAUDIA GREIF
c.greif@comcast.net

KENNETH E. ABREU
k.abreu@sbcglobal.net

BARRY R. FLYNN
brflynn@flynnrci.com

BETH VAUGHAN
beth@beth411.com

KERRY HATTEVIK
kerry.hattevik@nexteraenergy.com

SEAN P. BEATTY
sean.beatty@mirant.com

AUDRA HARTMANN
Audra.Hartmann@Dynergy.com

AVIS KOWALEWSKI
kowalewskia@calpine.com

CRAIG MARTIN
cmartin@calpine.com

MATT BARMACK
barmackm@calpine.com

GARY M. IZING
garyi@enxco.com

MARK J. SMITH
smithmj@calpine.com

WILLIAM H. BOOTH
wbooth@booth-law.com

PHILIPPE AUCLAIR
philha@astound.net

DIRK A. VAN ULDEN
dirk.vanulden@ucop.edu

UNIVERSITY OF CALIFORNIA
george.getgen@ucop.edu

UNIVERSITY OF CALIFORNIA
matthew.stclair@ucop.edu

UNIVERSITY OF CALIFORNIA
john.rolle@ucop.edu

MRW & ASSOCIATES, INC.
mrw@mrwassoc.com

DAVID MARCUS
dmarcus2@sbcglobal.net

REED V. SCHMIDT
rschmidt@bartlewells.com

MATTHEW BARMACK
mbarmack@alum.mit.edu

CARLA PETERMAN
carla.peterman@gmail.com

SHMUEL S. OREN
oren@ieor.berkeley.edu

KEN SIMS
ksims@siliconvalleypower.com

SUSIE BERLIN
sberlin@mccarthylaw.com

THOMAS S KIMBALL
tomk@mid.org

ROGER VAN HOY
rogerv@mid.org

BARBARA R. BARKOVICH
brbarkovich@earthlink.net

DAVID E. MORSE
demorse@omsoft.com

ANNA MCKENNA
amckenna@caiso.com

ANTHONY J. IVANCOVICH
aivanovich@caiso.com

BETH ANN BURNS
bburns@caiso.com

BOB EMMERT
remmert@caiso.com

GRANT A. ROSENBLUM
grosenblum@caiso.com

JACQUELINE DEROSA
jderosa@ces-ltd.com

JOHN GOODIN
jgoodin@caiso.com

KEITH JOHNSON
kjohnson@caiso.com

KEONI ALMEIDA
kalmeida@caiso.com

LORENZO KRISTOV
Lkristov@caiso.com

MELANIE GILLETTE
mgillette@enernoc.com

PHILIP D. PETTINGILL
ppettingill@caiso.com

ROBIN SMUTNY-JONES
rsmutny-jones@caiso.com

SAEED FARROKHPAY
saeed.farrokhpay@ferc.gov

CALIFORNIA ISO
e-recipient@caiso.com

DENINIS DE CUIR
dennis@ddecuir.com

DAVID BRANCHCOMB
david@branchcomb.com

BRIAN THEAKER
brian.theaker@dynegy.com

KENNY SWAIN
kenneth.swain@navigantconsulting.com

KIRBY DUSEL
kdusel@navigantconsulting.com

PAUL D. MAXWELL
pmaxwell@navigantconsulting.com

SCOTT TOMASHEFSKY
scott.tomashefsky@ncpa.com

TONY ZIMMER
Tony.Zimmer@ncpa.com

ED CHANG
edchang@flynnrci.com

GARY DESHAZO
gdeshazo@caiso.com

DAN L. CARROLL
dcarroll@downeybrand.com

JUSTIN C. WYNNE
wynne@braunlegal.com

RYAN BERNARDO
bernardo@braunlegal.com

SCOTT BLAISING
blaising@braunlegal.com

STEVEN KELLY
steven@iepa.com

VICKI E. FERGUSON
ferguson@braunlegal.com

LYNN M. HAUG
lmh@eslawfirm.com

TIMOTHY N. TUTT
ttutt@smud.org

HOLLY B. CRONIN
hcronin@water.ca.gov

MOHAN NIROULA
mniroula@water.ca.gov

KATIE KAPLAN
katie@iesolutionsllc.net

KAREN A. LINDH
karen@klindh.com

WILLIAM W. WESTERFIELD III
wwester@smud.org

MARK TUCKER
californiadockets@pacificcorp.com

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

GIFFORD JUNG
gifford.jung@powerex.com

FRED MOBASHERI
fmobasheri@aol.com

Andrew Campbell
agc@cpuc.ca.gov

Aram Shumavon
sap@cpuc.ca.gov

Bishu Chatterjee
bbc@cpuc.ca.gov

Donald J. Brooks
dbr@cpuc.ca.gov

Donna J. Hines
djh@cpuc.ca.gov

Elizabeth Dorman
edd@cpuc.ca.gov

Elizabeth Stoltzfus
eks@cpuc.ca.gov

Farzad Ghazzagh
fxg@cpuc.ca.gov

Joe Como
joc@cpuc.ca.gov

Kathryn Auriemma
kdw@cpuc.ca.gov

Kevin R. Dudley
kd1@cpuc.ca.gov

Laurence Chaset
lau@cpuc.ca.gov

Mark S. Wetzell
msw@cpuc.ca.gov

Matthew Deal
mjd@cpuc.ca.gov

Melissa Semcer
unc@cpuc.ca.gov

Rahmon Momoh
rmm@cpuc.ca.gov

Robert L. Strauss
rls@cpuc.ca.gov

Simon Baker
seb@cpuc.ca.gov

Sudheer Gokhale
skg@cpuc.ca.gov

Traci Bone
tbo@cpuc.ca.gov

ANNA MCKENNA
amckenna@caiso.com

CONSTANCE PARR LENI
Cleni@energy.state.ca.us

JOHN PACHECO
jpacheco@water.ca.gov

LANA WONG
lwong@energy.state.ca.us

MARC PRYOR
mpryor@energy.state.ca.us

MIKE JASKE
mjaske@energy.state.ca.us

JIM WOODWARD
jwoodwar@energy.state.ca.us

LYNN MARSHALL
lmarshal@energy.state.ca.us

NANCY TRONAAS
CALIFORNIA ENERGY COMMISSION
1516 9TH ST. MS-20
SACRAMENTO, CA 95814-5512

CHARLES MEE
cmee@water.ca.gov

IRYNA KWASNY
iryna.kwasny@doj.ca.gov

JACQUELINE GEORGE
jgeorge@water.ca.gov

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