

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



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In the Matter of the Application of San Diego Gas  
& Electric Company (U 902 E) for Authorization to  
Recover Unforeseen Liability Insurance Premium and  
Deductible Expense Increases as a Z-Factor  
Event.

Application 09-08-019  
(Filed August 31, 2009)

**SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E)  
RESPONSE TO "MOTION OF PETITIONER RUTH HENRICKS TO FILE  
AMENDMENT TO INTENT TO CLAIM INTERVENOR COMPENSATION"**

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April 21, 2010

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**I.  
INTRODUCTION**

In accordance with Rules 11.1 and 17.1(g) of the Rules of Practice and Procedure of the California Public Utilities Commission (the “Commission”),<sup>1/</sup> San Diego Gas & Electric Company (“SDG&E”) hereby responds to the motion (“Motion”) by Ruth Henricks<sup>2/</sup> seeking authority to file an “amendment” to an alleged notice of intent (“NOI”) to claim intervenor compensation. The Motion was submitted by Ms. Henricks through her attorney of record in this proceeding, Michael Aguirre, and seeks permission to cure several deficiencies in Ms. Henricks’ NOI.

As discussed in more detail below, no such NOI was timely filed by Ms. Henricks. A section of Henrick’s Protest dated September 17, 2009, contained some discussion of compensation, but none of the detail necessary to support an NOI.<sup>3/</sup> Thus,

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<sup>1/</sup> All references to “Rules” set forth herein are to the Commission’s Rules of Practice and Procedure, unless otherwise noted.

<sup>2/</sup> Ms. Henricks has also been referred to by her counsel in various documents submitted in this proceeding as Ruth “Hendricks” (*see, e.g.* Protest filed September 17, 2009; direct testimony of Kevin Christensen submitted February 19, 2010) and “Hendrix” (*see* Motion served April 1, 2010, p. 2).

<sup>3/</sup> *See* “Protest of Ratepayer Ruth Hendricks to the Application of San Diego Gas & Electric Company (SDGE) for Authorization to Recover Liability Insurance Premium and Deductible Expense Increases” filed September 17, 2009 in A.09-08-019 (“Henricks Protest”), p. 11.

the Motion is properly viewed as a request for waiver of the NOI filing requirement to permit Ms. Henricks to submit her untimely NOI. Good cause does not exist in the instant case to excuse the failure to timely file the NOI. Allowing Ms. Henricks to late-file her NOI is clearly inconsistent with the relevant statutory authority and would also violate established Commission policy against waiving NOI filing requirements. Accordingly, the Motion should be denied. The procedural deficiencies of the NOI filing, as well as certain substantive concerns related to the NOI, are discussed below.

## **II. DISCUSSION**

As the Commission has explained, the intervenor compensation program, enacted by the Legislature in Pub. Util. Code §§ 1801-1812, requires that the following procedures and criteria be satisfied in order to obtain a compensation award:

1. The intervenor must satisfy certain procedural requirements including the filing of a sufficient notice of intent to claim compensation within 30 days of the PHC (or in special circumstances, at other appropriate times that we specify). (§ 1804(a))
2. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b))
3. The intervenor must demonstrate “significant financial hardship.” (§§ 1802(g), 1804(a)(2)(B))
4. The intervenor should file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c))
5. The intervenor’s presentation must have made a “substantial contribution” to the proceeding, through the adoption, in whole or in part, of the intervenor’s contention or recommendations by a Commission order or decision. (§§ 1802(i), 1803(a))

6. The claimed fees and costs are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services. (§ 1806)<sup>4/</sup>

With regard to the first of these requirements, the filing of the NOI, § 1804(a) provides that an intervenor *shall* file the NOI within 30 days of the prehearing conference (“PHC”), where a PHC is held.<sup>5/</sup> Rule 17.1(b) further specifies that an amended notice of intent may be filed within 15 days after the issuance of a scoping memo in the proceeding. This allows parties to respond where new issues are identified in the scoping memo.<sup>6/</sup> The NOI must present information regarding the nature and extent of planned participation in the proceeding and an itemized estimate of compensation that the customer expects to request.<sup>7/</sup> The NOI may also include the showing of “significant financial hardship” required by § 1804(a)(2)(B).<sup>8/</sup> Where the intervenor claims to be a “customer” under §§1802(b)(1) (A) or (B), Rule 17.1(d) requires that the NOI include “verification of the intervenor’s customer status.”

**A. Henricks’ Motion to Submit the NOI Should be Denied as Untimely**

While Ms. Henricks seeks to characterize the April NOI filing as an “amendment” to an earlier timely filing, it is clear that this is a misstatement of fact. No such NOI was timely filed; a section of Henricks’ Protest dated September 17, 2009 contained a cursory discussion related to seeking compensation, but did not include the above-described detail necessary to support an NOI or the verification required under the Commission’s

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<sup>4/</sup> See D.04-08-009, *mimeo*, p. 3.

<sup>5/</sup> See also Rule 17.1(a)(1) (“In a proceeding in which a prehearing conference is held, [a notice of intent to claim compensation may be filed] any time after the start of the proceeding until 30 days after the prehearing conference.”).

<sup>6/</sup> See, e.g. D.03-05-06, 2001 Cal. PUC LEXIS 1201, p. \*8.

<sup>7/</sup> See Rule 17.1(c); D.00-04-026, 2000 Cal. PUC LEXIS 203, p. \*3.

<sup>8/</sup> Section 1804(a)(2)(B). Alternatively, this showing may be made at the time the intervenor submits its request for compensation. *Id.*

rules.<sup>9/</sup> Indeed, the Scoping Memo issued in this proceeding reflects the fact that Henricks' brief discussion of intervenor compensation was not considered by the Commission to be a formal NOI – the Scoping Memo clearly notes that the Utility Consumers Action Network (“UCAN”) filed its NOI, but makes no mention of Henricks doing so.<sup>10/</sup>

In addition to the failure to file a sufficient and timely NOI, the Motion misrepresents the date of the prehearing conference in this proceeding. The Motion, which is verified by Mr. Aguirre, states that “[t]he PHC for this proceeding was held on January 30, 2007.”<sup>11/</sup> The PHC, however, was held on December 14, 2009. Thus, an NOI could have been filed any time between August 31, 2009, and January 14, 2010. Ms. Henrick's request missed this five month statutory window and is now approximately three months late.

The Motion asserts that the proposed “amendment” to the NOI should be granted because “[t]he Administrative Law Judge has authority to permit this Amendment . . . consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission.”<sup>12/</sup> It is clear, however, that good cause does not exist in the instant case to permit deviation from the requirements related to timely and complete filing of the NOI.<sup>13/</sup> Allowing Ms. Henricks to ignore the

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<sup>9/</sup> See Rule 17.1(d).

<sup>10/</sup> See “Scoping Memo and Ruling of Assigned Commissioner” issued January 29, 2010, p. 2, fn. 1.

<sup>11/</sup> Motion, p 7.

<sup>12/</sup> *Id.* at p 8.

<sup>13/</sup> See Rule 1.2.

express terms of the law is clearly inconsistent with statutory authority and, as discussed below, would also violate the stated policy of the Commission to view such waiver requests with disfavor.

In D.98-04-059, the Commission emphasized the importance of the NOI to the intervenor compensation request process. It noted that “[t]he intervenor compensation program is intended to encourage the participation of all customers in Commission proceedings by helping them overcome the cost barriers to effective and efficient participation,” but that “we must qualify this statement to reflect the intent of the statute that only those particular customer interests that would otherwise be underrepresented should be compensated.”<sup>14/</sup> It observed that the NOI plays a key role in allowing the assigned Administrative Law Judge (“ALJ”) to perform “a more critical preliminary assessment of whether an intervenor will represent customer interests that would otherwise be underrepresented.”<sup>15/</sup>

The Commission further noted that the information furnished in the NOI is essential as it enables the Commission to determine “at the outset of a proceeding, whether the participation of . . . ‘third-party’ customers, separate and apart from their representation through [the Division of Ratepayer Advocates or the Consumer Protection and Safety Division] is necessary, both in terms of nonduplication and in terms of a fair determination of the proceeding.”<sup>16/</sup> The Commission observed:

The information filed in the [NOI] should provide a basis for a more critical preliminary assessment of whether the participation of third-party customers is necessary. The nature and extent of the customer's planned participation, in combination with the scope of the proceeding

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<sup>14/</sup> D.98-04-059, 1998 Cal. PUC LEXIS 429, p. \*42.

<sup>15/</sup> *Id.* at p. \*47.

<sup>16/</sup> *Id.* at pp. \*55-56.

as detailed in the scoping memo ruling, should enable the ALJ to make a preliminary assessment.<sup>17/</sup>

Subsequent to its adoption of D.98-04-059, the Commission made clear that it views belated NOI filings with disfavor. In D.00-03-044, for example, it denied an intervenor compensation award to The Utility Reform Network (“TURN”) where the NOI was filed nine months after the statutory deadline. The Commission rejected the notion that the NOI was a mere a formality,<sup>18/</sup> observing that “[w]hile at one time we *occasionally* excused a belated NOI filing, in 1998 we issued a decision placing great importance on the NOI as a tool to ensure intervenor accountability.”<sup>19/</sup>

The Commission declared that “[w]hile D.98-04-059 did not hold that exceptions to the NOI filing requirement would never be granted . . . [w]e later made clear that applicants failing to meet the NOI requirement subsequent to April 23, 1998, when D.98-04-059 was effective, would face an uphill battle in establishing eligibility for compensation.”<sup>20/</sup> The Commission pointed out that “the NOI is a *statutory* requirement,” and that “while we have occasionally waived this requirement despite the statute’s mandatory language, we indicated in D.98-04-059 that we would be reluctant to do so in the future.”<sup>21/</sup> The Commission noted “[e]ven if we do have discretion to accept a new or revised NOI in some cases,” the circumstances giving rise to the untimely NOI filing in that case – inadvertent error by the attorney – did not constitute good cause for doing so. To further illustrate the Commission’s expectations regarding careful adherence to NOI filing deadlines, the Commission declared in a Conclusion of Law

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<sup>17/</sup> *Id.* at p. \*56.

<sup>18/</sup> D.00-03-044, 2000 Cal. PUC LEXIS 168, p. \*3.

<sup>19/</sup> *Id.* at p. \*1 (emphasis added).

<sup>20/</sup> *Id.* at pp. \*3-5.

<sup>21/</sup> *Id.* at p. \*6 (emphasis in original).

included in the decision that “[t]his decision should be made effective immediately to reemphasize the importance of timely filing of the NOI.”<sup>22/</sup>

In D.04-08-009, the Commission, again, denied an intervenor compensation award sought by TURN where the related NOI was not timely filed. It reasoned that TURN’s untimely filing could not be excused where “TURN is an experienced practitioner before this Commission, not a new intervenor unfamiliar with Commission rules and practices.”<sup>23/</sup> Similarly, in D.04-05-004, the Commission denied an intervenor compensation award sought by Greenlining Institute (“Greenlining”) where the NOI was filed two months after the PHC held in the proceeding. As in D.00-03-044 and D.04-05-004, the Commission found the failure to timely file the NOI to be inexcusable given Greenlining’s status as an “experienced practitioner” and reiterated that applicants failing to meet the NOI requirement would face an “uphill battle” in attempting to establish eligibility for intervenor compensation.<sup>24/</sup>

The Commission has, in certain limited instances, excused the failure by an intervenor to timely file a NOI. In D.08-07-019, for example, the Commission determined that a customer intervenor who timely served its NOI, but did not file it until twelve days later, could nevertheless receive a compensation award where the filing error was “inadvertent and non-prejudicial,” and where “[w]e have occasionally excused late filings where the intervenor is new or if the NOI is only a few days late.”<sup>25/</sup> Likewise, in D.10-02-010 the Commission granted a motion by TURN to late-file its NOI where TURN had timely filed NOIs in two closely-related proceedings and no party objected to

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<sup>22/</sup> *Id.* at p. \*8.

<sup>23/</sup> D.04-08-009, *mimeo*, p. 5.

<sup>24/</sup> D.04-05-004, 2004 Cal. PUC LEXIS 226, pp. \*4-9.

<sup>25/</sup> D.08-07-019, 2008 Cal. PUC LEXIS 270, pp. \*5, 6.

the motion.<sup>26/</sup> In doing so, however, the Commission made clear that it took a dim view of TURN's procedural oversight, admonishing TURN "to take all necessary steps to avoid this same predicament in the future," and making clear that the precedent established in earlier cases such as D.00-03-044 and D.04-08-009 remains intact and that an intervenor who fails to timely file its NOI could be denied intervenor compensation.<sup>27/</sup>

It is clear in the instant case that good cause does not exist to excuse the untimely filing of Henricks' NOI. Ms. Henricks, or more accurately, her counsel, Mr. Aguirre, was well aware of the Commission's rules regarding filing of NOIs. Indeed, he correctly cites Rule 17.1 in Henricks' Protest, but then ignores entirely the requirements of that Rule. By his own account, Mr. Aguirre is a sophisticated practitioner with "decades" of litigation experience. Presumably he is capable of reading and comprehending the relevant statutory provision and Commission rules related to this relatively straightforward program.<sup>28/</sup> Indeed, he is obligated under Rule 1, as well as under the ethics rules of the State Bar of California, to respect the law and the Commission's rules, to competently represent his client, and where he "does not have sufficient learning and skill when the legal service is undertaken, . . . [to acquire] sufficient learning and skill before performance is required."<sup>29/</sup> Moreover, Mr. Aguirre previously represented Ms. Henricks before the Commission when she "was a lead party in legal actions and

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<sup>26/</sup> D.10-02-010, 2010 Cal. PUC LEXIS 30, p. \*2.

<sup>27/</sup> *Id.*

<sup>28/</sup> SDG&E notes that Mr. Aguirre's apparent ignorance of, or unwillingness to comply with, the Commission's rules is particularly offensive given his request for an hourly rate of \$400. That is, any attorney claiming they are worth \$400 per hour should be capable of absorbing and following the Commission's rules, and at that price should be expected to apply them professionally.

<sup>29/</sup> See Rule 3-110(C) of the Rules of Professional Conduct of the State Bar of California. Rule 3-110(A) provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline. (See Ames v. State Bar (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].)

proceedings before the PUC arising out of the manipulation of the California electricity market after deregulation in 2002.”<sup>30/</sup>

Thus, having claimed the mantle of expert practitioner, Mr. Aguirre cannot now legitimately claim to have been confused by or unable to comprehend the relevant statutory provisions or the Commission’s rules. To the contrary, Mr. Aguirre has demonstrated a clear pattern in this proceeding of willful ignorance of and deliberate disregard for the Commission’s rules. He has routinely failed to comply with the Commission’s rules regarding proper filing of pleadings and service on the service list, including repeatedly failing to serve the ALJ. He ignored relevant Commission rules concerning preparation of witness testimony, serving additional testimony without permission from the ALJ in plain violation of Rule 13.8. He disregarded the clear discussion in the rules of the inapplicability of technical rules of evidence in Commission proceedings and wasted significant time during discovery and in the hearing focusing on provisions of the Evidence Code. Worse, Mr. Aguirre attached a confidential document to a pleading in violation of a signed non-disclosure agreement and served it on parties who were not entitled to receive confidential documents. These failures to comport with standard practice have resulted in an undue waste of time and resources by the Commission, SDG&E and the other parties to this proceeding.

While, as noted above, the Commission has in some instances excused inadvertent failures of parties to comply with its rules, particularly where the party is relatively unsophisticated and not familiar with administrative process, affording this treatment to Mr. Aguirre would merely enable and further encourage his egregious conduct. The Motion attempts to establish the existence of good cause for excusing the

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<sup>30/</sup> Henricks Protest, p. 12.

failure to timely file the NOI, however the showing is wholly inadequate. The Motion ignores the obvious statutory inconsistency and the existence of Commission policy disfavoring waiver of NOI filing requirements, and claims that the untimely NOI filing should be accepted because SDG&E was “put on notice” of an intent to claim intervenor compensation.

Plainly, whether SDG&E was or was not notified of any such intent is entirely irrelevant to the question of whether the Commission should enforce the relevant statutory requirements in accordance with its stated policy. It is clear that Mr. Aguirre’s failure to timely submit his client’s NOI is inexcusable given his status as an experienced practitioner and in light of the Commission’s clear indication to intervenors that deviation from the requirements will rarely be tolerated. Accordingly, the Motion should be denied.

**B. Henricks’ NOI Raises Substantive Concerns**

The Motion is unclear as to whether the NOI is intended to make the requisite showing of financial hardship in accordance with § 1804(a)(2)(B). The Motion includes a section entitled “Customer Participation in the Hearing Proceeding would Pose Significant Financial Hardship,” and sets forth a brief discussion regarding Ms. Henricks’ involvement in a non-profit organization and the sources of funding of such organization, as well as the claim that Ms. Henricks “represents an interest that would otherwise be unrepresented.”<sup>31/</sup> It is clear, however, that the showing included in the Motion does not satisfy the standard for demonstrating financial hardship established by the Commission.

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<sup>31/</sup> Motion, p. 7.

The Commission established in D.86-05-007 that Category 1 customers must demonstrate inability “to pay the costs of effective participation, including advocate’s fees, expert witness fees, and other reasonable costs of participation . . .” through detailed financial documentation that discloses, for example, gross and net monthly income, monthly expenses, cash and assets, including equity in real estate.<sup>32/</sup> The Commission has made clear that “the intervenor bears the burden of proof on financial hardship and must submit clear financial statements.” It has observed further that “[w]e will not rest decisions of financial hardship upon inference or supposition. Clear proof is the requisite. When intervenors are represented by counsel in seeking eligibility, we expect counsel to carefully scrutinize the financial data provided us to ensure it complies with this Commission’s standards for completeness and clarity.”<sup>33/</sup> Plainly, the NOI fails to meet this standard where it includes no financial documentation whatsoever.

In addition, the NOI’s claim that Ms. Henricks represents an interest that would otherwise be unrepresented is questionable, at best. As noted above, the NOI is intended to be used by the ALJ to assess whether a particular intervenor will represent customer interests that would otherwise be underrepresented, or whether participation of such intervenor is instead duplicative. It appears from the Commission’s intervenor compensation form completed by Ms. Henricks and submitted concurrently with the Motion that Ms. Henricks claims to be a “Category 1” customer – *i.e.*, acting in her

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<sup>32/</sup> D.86-05-007, 1986 Cal. PUC LEXIS 287, pp. \*16-17; *see also* D.91-11-014, 1991 Cal. PUC LEXIS 728, pp. \*6-8.

<sup>33/</sup> D.92-04-030, 1992 Cal. PUC LEXIS 337, p. \*12; *see also* D.09-04-010, 2009 Cal. PUC LEXIS 188, pp. \*39-40 (“It is the duty of an intervenor to establish eligibility, including customer status and significant financial hardship, rather than offer unsupported statements and inferences from which the Commission is to derive rather specific elements of qualification.”).

capacity as a residential and/or small commercial customer.<sup>34/</sup> The Motion includes a perfunctory statement to the effect that Ms. Henricks “represents an interest that would otherwise be unrepresented.”<sup>35/</sup> The Motion, however, provides no support for this claim and includes no further discussion on this point.

In fact, per § 309.5, the Commission’s Division of Ratepayer Advocates (“DRA”) also represents the interests of residential and small commercial customers and has been an active participant in the instant Z-factor application proceeding. In addition, the NOI timely submitted by UCAN, another active participant in the proceeding, states that UCAN represents residential and small commercial customers who receive bundled electric service from SDG&E.<sup>36/</sup> Thus, the claim in Henricks’ NOI that she represents an interest that would otherwise be unrepresented appears to lack merit.

SDG&E will wait until the appropriate time to address the specifics of the cost estimate provided by Mr. Aguirre, particularly where the deficiencies noted above in the NOI may obviate the need to do so. However, as a preliminary matter, SDG&E notes that the magnitude of Mr. Aguirre’s anticipated request for compensation is wholly out of line with the length and scope of this proceeding. For example, in SDG&E’s last general rate case (“GRC”), the participation of Disability Rights Advocates (“DIRA”) over the course of the entire multi-year proceeding, with dozens of issues and several weeks of evidentiary hearings earned compensation of approximately \$77,000.<sup>37/</sup> By way of contrast, the NOI anticipates a compensation award in the instant proceeding, which

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<sup>34/</sup> See “Notice of Intent to Claim Intervenor Compensation and, if Requested, ALJ Ruling on Showing of Significant Financial Hardship” served by Ruth Henricks in A.09-08-019 on April 9, 2010.

<sup>35/</sup> Motion, p. 7.

<sup>36/</sup> See “Notice of Intent to Claim Intervenor Compensation” filed by UCAN in A.09-08-019 on December 31, 2009.

<sup>37/</sup> D.09-03-018, *mimeo*, p.1.

involves a relatively limited set of issues and only three days of evidentiary hearings, of approximately \$135,000 (which includes \$10,000 in travel and “other” expenses, which seems extravagant for three nights in a hotel).

It is clear under § 1801 that claimed fees and costs must be reasonable. Likewise, § 1808 makes plain that the Commission “shall deny any award to any customer who attempts to delay or obstruct the orderly and timely fulfillment of the commission's responsibilities.” The Commission has declared that “[o]ur obligations to ratepayers, who ultimately provide the funds for compensation of intervenors, require us to be certain that funds only go to intervenors who can adequately demonstrate, through the filings required by the statute and our rules, that they both deserve and need compensation.”<sup>38/</sup> SDG&E will reserve, for now, more detailed comments on the actual amount of intervenor compensation sought by Mr. Aguirre, as well as on the extent to which his conduct in this proceeding should affect the compensation awarded, if any. Should the Commission grant the Motion and allow Henricks to late-file her NOI, SDG&E will closely review any compensation request made by Mr. Aguirre, including the documentation provided in support thereof, and will raise any and all objections it may have at that time.

### **III. CONCLUSION**

For the reasons set forth above, the Commission should deny the Motion. Good cause does not exist in the instant case to excuse the failure to timely file the NOI. Waiving the timely filing requirement would contravene the express provisions of the relevant statute and would violate established Commission policy. Moreover, the NOI

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<sup>38/</sup> D.86-05-007, *supra* note 32, p. \*20.

fails to establish the existence of financial hardship or that Ms. Henricks represents an interest that would otherwise be unrepresented.

Dated this 21<sup>st</sup> day of April, 2010 in San Diego, California

Respectfully Submitted,

/s/ Aimee M. Smith

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of **SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E) RESPONSE TO “MOTION OF PETITIONER RUTH HENRICKS TO FILE AMENDMENT TO INTENT TO CLAIM INTERVENOR COMPENSATION”** has been electronically mailed to each party of record of the service list in A.09-08-019. Any party on the service list who has not provided an electronic mail address was served by placing copies in properly addressed and sealed envelopes and by depositing such envelopes in the United States Mail with first-class postage prepaid.

Copies were also sent via Federal Express to Administrative Law Judge Maribeth A. Bushey and Commissioner Timothy Alan Simon.

Executed this 21<sup>st</sup> day of April, 2010 at San Diego, California.

                  /s/ JENIFER E. NICOLA  
Jenifer E. Nicola



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