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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Examine the Commission's Energy Efficiency Risk/Reward Incentive Mechanism. **U 39 M**	**R.09-01-019** **(Issued January 29, 2009)**

JOINT RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E), SOUTHERN CALIFORNIA GAS COMPANY (U 904-G), SAN DIEGO GAS & ELECTRIC COMPANY (U 902-M) AND PACIFIC GAS AND ELECTRIC COMPANY (U 39 M) TO TURN/DRA'S JOINT APPLICATION FOR REHEARING OF DECISION 10-12-049

STEVEN D. PATRICK
San Diego Gas & Electric Company And
Southern California Gas Company
555 W. Fifth Street, Suite 1400
Los Angeles, CA 90013-1046
Phone: (213) 244-2954
Fax: (213 629-9620
E-Mail: SDPatrick@semprautilities.com

Attorney for
SAN DIEGO GAS & ELECTRIC COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY

JENNIFER TSAO SHIGEKAWA
LARRY R. COPE
Southern California Edison Company
2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (626) 302-2570
Facsimile: (626) 302-7740
E-mail: larry.cope@sce.com

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

ANN H. KIM
MICHAEL R. KLOTZ
Pacific Gas and Electric Company
77 Beale Street, B30A
San Francisco, CA 94105
Telephone: (415) 973-7565
Facsimile: (415) 973-0516
E-Mail: m1ke@pge.com

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

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I. INTRODUCTION

In accordance with California Public Utilities Commission (Commission) Rule of Practice and Procedure 16.1, Southern California Edison Company (U 338-E) (SCE), Southern California Gas Company (U 904-G) and San Diego Gas & Electric Company (U 902-M) (the Sempra Utilities) and Pacific Gas and Electric Company (U 39 M) (PG&E) (collectively referred to herein as the Joint IOUs) submit the following joint response in opposition to the *Application for Rehearing of Decision 10-12-049* filed jointly by The Utility Reform Network (TURN) and Division of Ratepayer Advocates (DRA) (collectively TURN/DRA).[1/]

The Commission must reject the TURN/DRA Application for Rehearing as it fails to demonstrate legal error in D.10-12-049. Contrary to TURN/DRA's contention, the Commission's decision to apply *ex ante* values for purposes of resolving the 2006-2008 Energy

1/ Women's Energy Matters (WEM) filed a separate Application for Rehearing that was rejected as untimely by the CPUC docket office. (*See* February 3, 2011 e-mail from Barbara George to the Parties in Rulemaking R.09-01-019.) As such, the Joint IOUs do not address WEM's Application in this Response.

Efficiency Risk/Reward Incentive Mechanism (RRIM) True-Up is well-reasoned, thorough, clearly supported by the record as a whole and does not constitute an abuse of discretion.

TURN/DRA fails to acknowledge the fundamental maxim that it is the role of the Commission—and not that of parties on rehearing—to weigh the entirety of the record evidence and reach findings.[2/] TURN/DRA purportedly base the premise of their Application for Rehearing on the claim that the Commission disregarded material evidence—in particular, a 2007 Assigned Commissioner Ruling that restated the Commission's general policy in D.05-09-043 to true-up Net-to-Gross parameters. In the first instance, there is simply no legal requirement that every single piece of evidence considered by the Commission appear in a final decision.[3/] Nevertheless, it is clear that the Commission did reference and discuss D.05-09-043 and the very policy at issue in the 2007 ACR, but after consideration merely reached a different conclusion than TURN/DRA advocate. More importantly, the 2007 ACR supports the Commission's rationale in that it explicitly states the preliminary 2004-2005 information upon which TURN/DRA claim the Joint IOUs should have relied, "will not be used to true-up 2006-2008 portfolio savings for the purpose of the shareholder incentive mechanism."[4/]

It fits squarely within the Commission's discretion to reexamine and modify Commission policies based on its experience and judgment.[5/] With respect to the incentive mechanism in particular, such reevaluation and modification of Commission policy were expressly

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2/ *See* D.09-12-015; 2009 Cal. PUC LEXIS 756 at *25-26 ("Further, it's the Commission that weighs the evidence, not the parties, and the fact that we disagreed with [the opposition parties] does not constitute legal error."); D.09-07-024 ("It is for the Commission to weigh the evidence and come to a reasonable determination based on evidence in the record.") (citing *Eden Hospital Dist. v. Belshe* (1998) 65 Cal.App.4th 908 at 915); D.00-11-042; 2000 Cal. PUC LEXIS 930 at *8 ("The Commission's duty is to weigh the evidence and present a reasoned explanation for its consideration of the material facts. . . the Commission need not explain in minute detail why it credits some evidence and discredits others.")

3/ *See* D.09-07-024; 2009 Cal. PUC LEXIS 326 at *54 ("There is no legal requirement that every piece of evidence in the record be mentioned in the Decision.")

4/ *Assigned Commissioner's Ruling Addressing Net-To-Gross Ratio True-Up And Methodology For Lighting Programs In The 2006-2008 Energy Efficiency Portfolios* (Issued in R.06-04-010, October 5, 2007.)

5/ *See, e.g., Daggett Leasing Corporation, Harper Lake Company VIII, and HLC IX Company, Complainants, vs. Southwest Gas Corporation, Defendant*, 66 CPUC2d 785, July 3, 1996 (denying application for rehearing, holding that "Applicant challenges the reasoning of the Commission, but fails to note that it is within the discretion of the Commission to set policy and make policy decisions, including changes to policy.")

contemplated in the Order Instituting Rulemaking 09-01-019.[6/] Doing so in D.10-12-049 certainly does not constitute either an abuse of discretion or legal error.

In sum, TURN/DRA disagree with the conclusions reached and polices implemented by the Commission after its thorough consideration of the entire record. Therefore, they inappropriately use the Application for Rehearing as a proxy to reargue positions on various Commission policies, which the Commission has already heard, considered, and rejected. The Commission's decision represents a reasonable construction in light of the record as a whole and is therefore, final and not subject to attack for insufficiency.[7/] TURN/DRA's disagreement with the Commission's conclusions does not constitute legal error and is not a sufficient basis to grant an Application for Rehearing.[8/] Therefore, TURN/DRA's Application for Hearing should be denied.

II. STANDARD OF REVIEW

The Commission is a Constitutional, policy making body empowered by the State of California to, among other things, make and implement energy policy within its jurisdiction.[9/] "[The Commission's] authority derives not only from statute but from the California Constitution, which creates the agency and expressly gives it the power to fix rates for public

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6/ "We see a need to reconsider the RRIM earlier than in 2011 as anticipated in D.07-09-043. The controversies raised concerning the first Verification Report show that methodologies of the RRIM process are quite complex and are not as easily or as timely resolved as we had hoped. We believe it is necessary to consider a more transparent, more streamlined and less controversial RRIM program. This may require making small but significant changes to the existing RRIM, or may require wholesale adoption of a new incentive mechanism. Any new or revised RRIM must continue to provide incentives to utilities to provide the maximum verifiable and socially-desirable level of energy efficiency programs and services, while protecting ratepayers through necessary cost containment mechanisms."

(R.09-01-019 at pp. 4-5.)

"It is our intent to adopt a new framework for the review of the remainder of 2006 through 2008 energy efficiency activities in a timeframe consistent with interim payments for 2008 no later than December 2009, and any final payments for 2006 through 2008 no later than December 2010." (*Id.* At p. 5)

7/ *Toward Utility Rate Normalization v. Public Utilities Com.*, (1978) 22 Cal.3d 529, 537.

8/ *See* FN1, *supra*.

9/ Cal. Const. art. XII, §§ 1, 6 (2009); Cal. Pub. Util. Code § 701 (2009). *See also Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781 at 792.

utilities.[10/] The Commission, as a policy-making body, has fulfilled its duty properly if there is substantial evidence in the record to support its decision.[11/]

Rule 16.1 of the Commission's Rules of Practice and Procedure requires Applications for Rehearing to "set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. The purpose of an application for rehearing is to alert the Commission to legal error, so that the Commission may correct it expeditiously." The fact that a party disagrees with a Commission's decision is not grounds for rehearing.[12/]

The standard for review by the courts set forth in Public Utilities Code Section 1757 "shall not extend further than to determine, on the basis of the entire record … whether any of the following occurred: (1) the commission acted without, or in excess of, its powers or jurisdiction; (2) the commission has not proceeded in the manner required by law; (3) the decision of the commission is not supported by the findings; (4) the findings in the decision of the commission are not supported by substantial evidence in light of the whole record; (5) the order or decision of the commission was procured by fraud or was an abuse of discretion; and (6) the order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution." There is "a strong presumption favoring the validity of a Commission decision."[13/] In addition, "findings of fact by the Commission are to be accorded the same weight that is given to jury verdicts and the findings are not open to attack for

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10/ Cal. Const., Art. XII, Sections 1, 6.

11/ *See* D.09-07-024 ("It is for the Commission to weigh the evidence and come to a reasonable determination based on evidence in the record.") (citing *Eden Hospital Dist. v. Belshe* (1998) 65 Cal.App.4th 908 at 915); *see also* D.08-06-023; 2008 Cal. PUC LEXIS 228 at *20, citing *TURN v. PUC, supra*, 22 Cal.3d at p. 538; *Solis v. Kirkwood Resort Company* (2001) 94 Cal.App.4th 354, 361 ("It is lawful for agencies to consider a breadth of relevant information in the record and weigh the evidence accordingly, and reach factual determinations based on their own expertise. It is also lawful to make findings based on inferences reasonably drawn from the record.").

12/ *Id*; *see* FN 2, *supra*.

13/ *Toward Utility Rate Normalization v. Public Utilities Com*. (1978) 22 Cal.3d 529, 537.

insufficiency if they are supported by any reasonable construction of the evidence."[14/] It is well settled that it is not the function of an appellate court to reweigh the evidence.[15/]

TURN/DRA allege that the Commission abused its discretion in issuing D.10-12-049, claiming that the Commission (1) failed to properly consider material evidence in reaching its findings; (2) improperly calculated Performance Earnings Basis (PEB); and (3) imposed rates that are not just and reasonable by authorizing incentives for non-cost-effective portfolios. None of these claims have factual or legal merit. In reality, these allegations reflect TURN/DRA's fundamental disagreement with the Commission's policy decision in this proceeding, and they do not amount to legal error sufficient to support rehearing.

III. TURN/DRA ERR IN CLAIMING THAT THE FINAL DECISION IGNORES MATERIAL EVIDENCE

TURN/DRA have failed to establish any legal error with respect to the Commission's consideration of the record evidence in reaching its final decision in D.10-12-049. TURN/DRA allege that the Commission ignored material evidence in applying *ex ante* values to resolve the 2006-2008 True-Up, but a review of the decision reveals that allegation to be baseless. The Commission's decision clearly represents a reasonable construction of the record evidence as a whole and is therefore, final and not subject to attack for insufficiency.[16/]

TURN/DRA claim that the Commission erred in concluding that it was "'unreasonable' to expect the Joint IOUs to modify their respective portfolios in response to changing market conditions 'given the timing of information available regarding these changes, the substantial controversy regarding their accuracy, and their magnitude."[17/] TURN/DRA argue that such conclusions "appear reasonable only because the Decision chooses to ignore *relevant and*

14/ *Id.*

15/ *Albaugh v. Mt. Shasta Power Corporation* (1937) 9 Cal.2d 751,773.

16/ *Toward Utility Rate Normalization v. Public Utilities Com.*, (1978) 22 Cal.3d 529, 537.

17/ TURN/DRA Application for Rehearing, p. 2 quoting D.10-12-049, p. 7.

uncontested historical facts that are contained in the record."[18] Contrary to TURN/DRA's argument, however, in reaching its finding as to whether such an initial expectation was reasonable, the Commission in D.10-12-049 considered multiple factors in light of the record as a whole.

At the outset, it should be noted that TURN/DRA's argument rests on a false premise—that the Commission failed to consider information available before net-to-gross (NTG) values were finalized in October of 2007.[19] To the contrary, the Commission acknowledged that preliminary information was available with respect to NTG values.[20] In fact, the Commission specifically noted and rejected TURN/DRA's very argument in D.10-12-049 stating:

> TURN correctly argues that concerns regarding factors like the NTG were expressed for many years. However, it is our judgment that these reservations or expressions of concern did not provide a sufficient basis for the utilities to modify their portfolios in a manner that would have allowed them to substantially avoid the adverse impacts driven by the purported changes in the underlying parameters.[21]

The Commission further explained the rationale for its finding that "the expectation that [the Utilities] should have dramatically modified their portfolios in a manner sufficient to avoid the adverse consequences under the incentive framework is unreasonable."[22]

> Until the review process has run its course and numbers are adopted as final, we do not think it is reasonable to, in effect, require the utilities to modify their portfolios as if preliminary assessments are, in fact, final. To do so undermines the purpose of the review, and it essentially prejudges the outcome of that process.[23]

18/ *Id.* at 16 (emphasis in original).

19/ TURN/DRA acknowledge that the "Decision is technically correct that updated NTG numbers based on the evaluations of 2004-2005 programs were not 'finalized' until October 2007 (TURN/DRA Application for Rehearing, p. 18.)

20/ D.10-12-049, p. 64.

21/ *Id.*

22/ *Id.* at p. 37.

23/ *Id.* at p. 36.

TURN/DRA make much of the fact that a single footnote in ALJ Pulsifer's Proposed Decision, does not appear in D.10-12-049.[24/] The footnote referenced a 2007 Assigned Commissioner Ruling for the proposition that as of 2005 the Joint IOUs were on notice of the Commission's general policy that *ex post* NTG values would be used to true up earnings claims.[25/] In the first instance, there is no legal requirement that every single piece of evidence considered by the Commission appear in a final decision.[26/] Nevertheless, TURN/DRA erroneously suggest that because this exact footnote does not appear in D.10-12-049, the Commission ignored "relevant and uncontested historical facts." That suggestion is contradicted by the text of the decision itself, which acknowledges the very point made in the referenced footnote: "[t]he Commission directed that NTG ratios used for planning purposes would be "further addressed through *ex post* true-up of these ratios in performance basis evaluation, consistent with our direction in D.05-04-051."[27/]

More importantly, the 2007 ACR supports the Commission's rationale in D.10-12-049. The 2007 ACR "recognize[d] that there are real concerns expressed by the utilities about the forecasting uncertainties they face with respect to "truing up" NTG ratios in particular"[28/] and explicitly states that the preliminary 2004-2005 information upon which TURN/DRA claim the Joint IOUs should have relied "will not be used to true-up 2006-2008 portfolio savings for the purpose of the shareholder incentive mechanism."[29/] The Commission has considered precisely the evidence TURN/DRA argue it disregarded, and simply reached a conclusion other than what TURN/DRA want. TURN/DRA's renewed disagreement with the Commission's rationale and policy does not establish legal error.

24/ TURN/DRA Application for Rehearing, p. 17.

25/ Proposed Decision of ALJ Pulsifer, FN 39, p.53.

26/ *See*, D.09-07-024; 2009 Cal. PUC LEXIS 326 at *54 ("There is no legal requirement that every piece of evidence in the record be mentioned in the Decision.")

27/ D.10-12-049, p. 38.

28/ *Assigned Commissioner's Ruling Addressing Net-To-Gross Ratio True-Up And Methodology For Lighting Programs In The 2006-2008 Energy Efficiency Portfolios,* at p. 4 (Issued in R.06-04-010, October 5, 2007.)

29/ *Id.* at p.4-5.

In addition to the Commission's clearly reasoned and articulated policy as to the time when the Commission considers available data to be final and actionable, the Commission also noted that the magnitude of the modifications called for by the final updated values far exceeded the scope of the Commission's initial expectations in implementing the original incentive mechanism in D.07-09-043.[30/] TURN/DRA's references to what Commissioners and/or parties may have expected in 2005 regarding the Joint IOUs' ability to modify programs misses the entire point of the Commission's decision—that those expectations ultimately proved to be unreasonable given the timing and availability of information and the magnitude of the modifications that would ultimately be required. In other words, the basis for the Commission's and the parties' expectations regarding the extent of program modifications required to "substantially avoid the adverse impacts driven by the purported changes in the underlying parameters" was faulty. The Commission discussed that while it originally contemplated a potential upward range of 30% reduction resulting from updated assumptions, the reductions proved to be more than 100%.[31/] This precise concern was actually borne out in practice in this proceeding. As the Commission noted, SCE made certain modifications to its NTG values based on preliminary data.[32/] Notwithstanding those modifications, SCE would still have been subject to substantial reductions in savings estimates based on application of updated parameters.

Thus, in reaching its conclusion that it was ultimately unreasonable to expect the Joint IOUs to modify their programs as initially contemplated—in such a manner that the Joint IOUs could substantially avoid the adverse impacts driven by the purported changes in the underlying parameters—the Commission considered a comprehensive set of factors including the timing of availability of data, the quality and action-ability of that data, and the magnitude of the response

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30/ "The Commission itself failed to reasonably anticipate the magnitude of the dramatic changes to the parameters underlying its assessment of energy efficiency program performance and the huge swings this would cause in the incentive calculations." D.10-12-049, p. 39.

31/ D.10-12-049, p. 38.

32/ *See* D.09-12-045, p.3, FoF 32; *see also* D.10-12-049, p.16, FoF 20, OP 4.

required compared to initial expectations. In doing so, the Commission reached a broad finding regarding the fairness of such an expectation in light of the record as a whole:

> The forgoing review establishes that one of the fundamental premises on which the incentive mechanism adopted in D.07-09-043 was based was fundamentally flawed. Specifically, it was/is unreasonable to expect the utilities to anticipate the very substantial changes in a number of the key parameters over the three year cycle that drive their energy efficiency program results. Furthermore, given the after-the-fact timing of Energy Division's updates to these parameters, we find that the IOUs did not have the opportunity to modify their portfolios on the basis of this updated information in a way that would allow them to substantially avoid the adverse impacts of those updated assumptions on estimated program performance. Irrespective of the accuracy of the updates adopted by Energy Division, we find that the incentive mechanism as implemented was/is unfair to the utilities, in that it bases its results on assumptions the utilities cannot be reasonably expected to anticipate; and further, when those changed assumptions come to light, cannot be reasonably expected to respond to in a way that enables them to substantially avoid the adverse impacts on the estimated performance of their programs.

TURN/DRA's Application for Rehearing is deficient as it is simply a restatement of their disagreement with the Commission's policy and does not establish the existence of legal error or an abuse of discretion. The Commission's broad finding regarding the inherent reasonableness of its initial expectations in light of the factors discussed above is well-supported by the record and well-reasoned in the discussion in D.10-12-049. The Commission's decision is a reasonable construction of the evidence in light of the record as a whole and as such, it is final and not subject to attack for insufficiency.[33/]

For the foregoing reasons, TURN/DRA's claim that D.10-12-049 is not supported by substantial evidence in violation of Public Utilities Code Section 1757 is without merit. Accordingly, the Joint IOUs respectfully request that the Commission reject TURN/DRA's Application for Rehearing on this point.

33/ *Toward Utility Rate Normalization v. Public Utilities Com.,* (1978) 22 Cal.3d 529, 537.

IV. THE COMMISSION HAS ALREADY CONSIDERED AND REJECTED TURN/DRA'S POSITION THAT INTERIM INCENTIVES SHOULD BE INCLUDED IN THE PERFORMANCE EARNINGS BASIS

TURN/DRA have failed to establish legal error to warrant rehearing with respect to the calculation of the Performance Earnings Basis (PEB). Despite the fact that the Commission has considered and rejected this argument on two previous occasions, TURN/DRA reargue their position that incentives should be included as program costs when calculating the PEB.[34/] The Commission's initial rejection of this argument was not based on some hypothetical uncertainty regarding the total amount of incentives in light of the existence of claw-back as TURN/DRA again claims. In fact, as is the case today, even if a claw-back had remained in place, the Joint IOUs would have still been eligible to receive additional incentives in the True-Up, over and above their interim earnings, which would not have been counted as PEB costs pursuant to D.07-09-043. Nor is the inclusion of the incentive amounts themselves as costs in PEB calculations required by any of the statutes TURN/DRA references.[35/] Rather, in rejecting this argument, the Commission described it as "nonsensical" and "circular" stating that, "[i]t is akin to saying that we will share a quarter of a pie with you, but before we slice it into 4 pieces, we will first remove a quarter."[36/]

The Commission rejected this very argument again in D.10-12-049:

> In addition, TURN argues that should the Commission adopt the Peevey alternate proposed decision, the scenario-template combination selected should be modified from Scenario 3 – Template 1 to Scenario 3 – Template 6. Template 6 includes in the calculation of the PEB, the costs of the interim payments already awarded to the utilities of $143 million,thereby reducing the base against which the alternate proposed decision's 7% shared savings rate applies. This would reduce the total incentives for the 2006-2008 period by approximately $10 million. TURN argues that this

34/ TURN/DRA Application for Rehearing, p.22. TURN also raised this argument in *Comments Of The Utility Reform Network On Proposed Decision Of Commissioner Peevey Regarding The Energy Efficiency Incentive True-Up For 2006-2008* at pp. 5-7.

35/ Neither P.U. Code § 381(b)(1) nor §890 discuss or address PEB calculations.

36/ D.07-09-043, p. 154.

> modification would be "consistent with Commission policy and is necessary to reflect the cost-effectiveness of the programs." While the incentives are a true economic cost of the program, that fact does not require, as TURN argues, that we recursively include, in the calculation of the PEB, and, by extension, the calculation of any incentive rewards, the value of the incentive payments themselves. Nor are we convinced by TURN's arguments that because the interim payments are sunk economic costs that they should be included as a cost in the calculation of the PEB for purposes of the final claim.[37/]

TURN/DRA's continual and repeated advocacy of this position does not establish the existence of legal error or abuse of discretion and therefore, is not a sufficient basis for rehearing of D.10-12-049. Accordingly, the Joint IOUs request that the Commission reject TURN/DRA's Application for Rehearing on this point.

V. TURN/DRA ERR IN ARGUING THAT THE COMMISSION'S AUTHORIZATION OF INCENTIVES IS NOT JUST AND REASONABLE

TURN/DRA contend that the authorization of incentives to SoCalGas and to SDG&E respectively, constitutes legal error as they claim those respective portfolios are not cost-effective.[38/] This argument is without merit and represents nothing more than another petition by TURN/DRA to apply the Energy Division's 2006-2008 Energy Efficiency Evaluation Report (EE Evaluation Report) to the True-Up—a position which the Commission has already considered and rejected.

The Commission's discussion of the contention and uncertainty surrounding the EE Evaluation Report's findings and its ultimate decision not to apply the EE Evaluation Report is well-supported in the record. Among other things, the Joint IOUs have submitted hundreds of pages of comments on this issue into the record in this proceeding.[39/] Despite the extensive

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37/ D.10-12-049, p. 65.

38/ TURN/DRA Application for Rehearing, p. 22, 23.

39/ *See e.g.,* Comments Of Pacific Gas And Electric Company (U 39 M) And Southern California Edison Company(U 338-E) On The Assigned Commissioner's Ruling Providing Energy Division Report And Soliciting Comments On Scenario Runs (Public Version) (filed in R.09-01-019, May 18, 2010) attaching Southern California Edison Company's (U 338-E) Comments On The Energy Division's Draft 2006-2008 Energy Efficiency Evaluation Report and Comments Of Pacific Gas And Electric Company On The Draft 2006-2008 Energy Efficiency Evaluation Report; see also Comments Of San Diego Gas & Electric Company (U 902 M) And Southern California Gas Company (U 904 G) On The Assigned Commissioner's

discussion of this issue in the decision and the express Commission finding that the EE Evaluation Report findings would not be used, TURN/DRA continue to base their cost-effectiveness analysis on numbers from the EE Evaluation Report and advocate for its application.[40/]

TURN/DRA rely on Public Utilities Code Sections 381(b)(1), 381.2, 454.5(b)(9)(C) and 890 to support their argument that the Commission violated its responsibility to ensure "just and reasonable" rates.[41/] However, none of the statutes cited by TURN/DRA require that cost-effectiveness be calculated using a contentious and unreliable EE Evaluation Report, which the Commission considered, but chose not to apply. TURN/DRA are simply rearguing their preference that the Commission should apply the EE Evaluation Report, as opposed to *ex ante* parameters, and even go so far as to plea for its application to future incentive claims.[42/] TURN/DRA's continuing disagreement with the Commission's rejection of the EE Evaluation Report for incentive purposes does not constitute legal error. The Commission's decision not to rely on the findings of the EE Evaluation Report represents a rational, reasonable construction of the record evidence as a whole, and is therefore not subject to attack for insufficiency or reasonableness. For these reasons, TURN/DRA's claim that the Commission's authorization of True-Up earnings for SoCalGas and SDG&E is not just and reasonable is therefore, without merit and must be rejected.

Ruling Providing Energy Division Report And Soliciting Comments On Scenario Runs attaching San Diego Gas & Electric Company Southern California Gas Company Comments On The April 15, 2010 "Draft 2006-2008 Energy Efficiency Evaluation Report."

40/ TURN/DRA Application for Rehearing, p. 22, citing to the 2006-2008 Energy Efficiency Evaluation Report, July 2010, T. 32, p. 126.

41/ *Id.* at pp.24-25 FN, 86, 91, 95.

42/ "Finally, any incentives awarded for the 2009 program year should be based on the energy savings results verified in the Energy Division's 2009 Energy Efficiency Evaluation Report." (TURN/DRA Application for Rehearing, p. 28).

VI. THE COMMISSION'S DECISION IN D.10-12-049 WAS A SOUND EXERCISE OF ITS DISCRETION

TURN/DRA have failed to establish any abuse of the Commission's discretion in issuing D.10-12-049. An abuse of discretion is established if: (1) the agency did not proceed in the manner required by law; (2) the order or decision is not supported by the findings; or (3) the findings are not supported by the evidence.[43/] TURN/DRA's claims that the Commission failed to properly acknowledge material evidence, that the Commission was required to include interim incentive amounts in calculating PEB, or that the Commission was required to apply the rejected numbers from the EE Evaluation Report in calculating cost-effectiveness are factually and legally deficient.[44/] In contrast, as discussed above, the Commission's decision to apply *ex ante* parameters for purposes of the 2006-08 True-Up clearly represents a reasonable construction of the record evidence as a whole and therefore, is not subject to attack for insufficiency. TURN/DRA have failed to establish that the Commission's Decision 10-12-049 was anything other than a sound exercise of the Commission's discretion, which is well-supported and well-reasoned given the record as a whole. While TURN/DRA may disagree with the Commission's decision, such disagreement does not constitute legal error, abuse of discretion or a basis for rehearing.

VII. CONCLUSION

For the reasons set forth herein, TURN/DRA failed to establish any legal error to support their Application for Rehearing. The Application for Rehearing represents no more than an improper re-assertion of TURN/DRA's fundamental disagreement with the Commission's well-supported and clearly explained policies. As such, the Commission must reject TURN/DRA's Application for Rehearing. Counsel for SCE, SDG&E, and SoCalGas have authorized counsel for PG&E to file this Joint Response on their behalf.

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43/ *Davis v. Civil Serv. Com*, 55 Cal. App. 4th 677, 686-87 (1997).

44/ *See* Sections III, IV, and V, *supra*.

Respectfully submitted,

STEVEN D. PATRICK

By: /s/
STEVEN D. PATRICK

San Diego Gas & Electric Company And Southern California Gas Company
555 W. Fifth Street, Suite 1400
Los Angeles, CA 90013-1046
Phone: (213) 244-2954
Fax: (213 629-9620
E-Mail: SDPatrick@semprautilities.com

Attorney for
SAN DIEGO GAS & ELECTRIC COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY

MICHAEL R. KLOTZ

By: /s/
MICHAEL R. KLOTZ

Pacific Gas and Electric Company
77 Beale Street
San Francisco, CA 94105
Telephone: (415) 973-7565
Facsimile: (415) 973-0516
E-Mail: m1ke@pge.com

Attorney for
PACIFIC GAS AND ELECTRIC COMPANY

LARRY R. COPE

By: /s/
LARRY R. COPE

JENNIFER TSAO SHIGEKAWA
LARRY R. COPE
Southern California Edison Company
2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (626) 302-2570
Facsimile: (626) 302-7740
E-Mail: larry.cope@sce.com

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

February 10, 2011

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is 77 Beale Street, San Francisco, California 94105.

On February 10, 2011, I served a true copy of:

JOINT RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E), SOUTHERN CALIFORNIA GAS COMPANY (U 904-G), SAN DIEGO GAS & ELECTRIC COMPANY (U 902-M) AND PACIFIC GAS AND ELECTRIC COMPANY (U 39 M) TO TURN/DRA'S JOINT APPLICATION FOR REHEARING OF DECISION 10-12-049 – R. 09-01-019

[**XX**] By Electronic Mail – serving the enclosed via e-mail transmission to each of the parties listed on the official service lists for R. 09-01-019 with an e-mail address.

[**XX**] By U.S. Mail – by placing the enclosed for collection and mailing, in the course of ordinary business practice, with other correspondence of Pacific Gas and Electric Company, enclosed in a sealed envelope, with postage fully prepaid, addressed to those parties listed on the official service lists for R. 09-01-019 without an e-mail address.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 10th day of February, 2011, at San Francisco, California.

/s/

PAMELA J. DAWSON-SMITH

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
EMAIL SERVICE LIST

Last updated: February 8, 2011

CPUC DOCKET NO. R0901019

ABesa@SempraUtilities.com;achang@efficiencycouncil.org;aeo@cpuc.ca.gov;Allen.Lee@cadmusgroup.com;bdille@jmpsecurities.com;bfinkelstein@turn.org;bill@jbsenergy.com;bob.ramirez@itron.com;brbarkovich@earthlink.net;cadickerson@cadconsulting.biz;case.admin@sce.com;cassandra.sweet@dowjones.com;CBE@cpuc.ca.gov;cem@newsdata.com;CentralFiles@SempraUtilities.com;cf1@cpuc.ca.gov;CJN3@pge.com;cln@cpuc.ca.gov;CPUCCases@pge.com;cu2@cpuc.ca.gov;cxc@cpuc.ca.gov;Cynthiakmitchell@gmail.com;darren.hanway@sce.com;david@nemtzow.com;ddavis@cecmail.org;dgilligan@naesco.org;dil@cpuc.ca.gov;dmano@enalasys.com;don.arambula@sce.com;dwang@nrdc.org;efm2@pge.com;EGrizard@deweysquare.com;erik@erikpage.com;filings@a-klaw.com;FSmith@sfwater.org;gandhi.nikhil@verizon.net;ghamilton@gepllc.com;grover@portland.econw.com;hprince@rsgrp.com;J4LR@pge.com;jak@gepllc.com;jared@efficiencyfirst.org;jchou@nrdc.org;jeanne.sole@sfgov.org;Jeff.Hirsch@DOE2.com;jennifer.shigekawa@sce.com;JL2@cpuc.ca.gov;jnc@cpuc.ca.gov;john.stoops@rlw.com;jskromer@qmail.com;jst@cpuc.ca.gov;JYamagata@SempraUtilities.com;keh@cpuc.ca.gov;kmb@cpuc.ca.gov;kmills@cfbf.com;kwz@cpuc.ca.gov;larry.cope@sce.com;lettenson@nrdc.org;lhj2@pge.com;liddell@energyattorney.com;lmh@eslawfirm.com;lp1@cpuc.ca.gov;M1ke@pge.com;marcel@turn.org;matt.mccaffree@opower.com;mgb@cpuc.ca.gov;Michael.Rufo@itron.com;michael.sachse@opower.com;mjaske@energy.state.ca.us;mkh@cpuc.ca.gov;mmw@cpuc.ca.gov;mmyers@vandelaw.com;mokeefe@efficiencycouncil.org;monica.ghattas@sce.com;mramirez@sfwater.org;mrw@mrwassoc.com;MWT@cpuc.ca.gov;nes@a-klaw.com;nlong@nrdc.org;pcf@cpuc.ca.gov;pmiller@nrdc.org;ppl@cpuc.ca.gov;PVillegas@SempraUtilities.com;rachel.murray@kema.com;RegRelCPUCCases@pge.com;rhh@cpuc.ca.gov;rsridge@comcast.net;sberlin@mccarthylaw.com;Scott.Dimetrosky@cadmusgroup.com;sdhilton@stoel.com;SDPatrick@SempraUtilities.com;seb@cpuc.ca.gov;sephra.ninow@energycenter.org;slda@pge.com;sls@a-klaw.com;smartinez@nrdc.org;SRH1@pge.com;srm@cpuc.ca.gov;SRRd@pge.com;sschiller@efficiencycouncil.org;tam.hunt@gmail.com;tburke@sfwater.org;tcr@cpuc.ca.gov;tcx@cpuc.ca.gov;tory.weber@sce.com;trp@cpuc.ca.gov;wbooth@booth-law.com;wem@igc.org;yxg4@pge.com;zap@cpuc.ca.gov;ztc@cpuc.ca.gov;

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA SERVICE LIST

Last Updated: February 10, 2011

CPUC DOCKET NO. R0901019

Total number of addressees: 112

CASE COORDINATION
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE ST., PO BOX 770000 MC B9A
SAN FRANCISCO CA 94105
Email: RegRelCPUCCases@pge.com
Status: INFORMATION

REGULATORY FILE ROOM
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442
SAN FRANCISCO CA 94120
Email: CPUCCases@pge.com
Status: INFORMATION

STEVEN R. HAERTLE
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE ST, MC B9A
SAN FRANCISCO CA 94105
Email: SRH1@pge.com
Status: INFORMATION

SANDY LOWRIE
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE ST; MC B9A
SAN FRANCISCO CA 94177
Email: slda@pge.com
Status: INFORMATION

SHILPA RAMAIYA
PACIFIC GAS & ELECTRIC COMPANY
245 MARKET ST, MAIL CODE N3C
SAN FRANCISCO CA 94105
Email: SRRd@pge.com
Status: INFORMATION

MICHAEL R. KLOTZ
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE ST, MS B30A, RM 3105B
SAN FRANCISCO CA 94120
FOR: Pacific Gas and Electric Company
Email: M1ke@pge.com
Status: PARTY

CARMEN BEST
CALIFORNIA PUBLIC UTILITIES COMMISSION
EMAIL ONLY
EMAIL ONLY CA 0
Email: CBE@cpuc.ca.gov
Status: STATE-SERVICE

EILEEN COTRONEO
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE ST, MC B9A
SAN FRANCISCO CA 94105
Email: efm2@pge.com
Status: INFORMATION

JENNY GLUZGOLD
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE ST MCB9A
SAN FRANCISCO CA 94105
Email: yxg4@pge.com
Status: INFORMATION

JANET LIU
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000; MC B9A
SAN FRANCISCO CA 94177
Email: J4LR@pge.com
Status: INFORMATION

CHONDA J. NWAMU
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE ST, B30A
SAN FRANCISCO CA 94177
Email: CJN3@pge.com
Status: INFORMATION

LISE H. JORDAN, ESQ.
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE ST, B30A. RM 3151
SAN FRANCISCO CA 94105
FOR: Pacific Gas and Electric Company
Email: lhj2@pge.com
Status: PARTY

Simon Baker
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
505 VAN NESS AVE AREA 4-A
SAN FRANCISCO CA 94102-3214
Email: seb@cpuc.ca.gov
Status: STATE-SERVICE

Jordana Cammarata
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
505 VAN NESS AVE AREA 4-A
SAN FRANCISCO CA 94102-3214
Email: jnc@cpuc.ca.gov
Status: STATE-SERVICE

Theresa Cho
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
505 VAN NESS AVE RM 5207
SAN FRANCISCO CA 94102-3214
Email: tcx@cpuc.ca.gov
Status: STATE-SERVICE

Tim G. Drew
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
505 VAN NESS AVE AREA 4-A
SAN FRANCISCO CA 94102-3214
Email: zap@cpuc.ca.gov
Status: STATE-SERVICE

Peter Franzese
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
505 VAN NESS AVE AREA 4-A
SAN FRANCISCO CA 94102-3214
Email: pcf@cpuc.ca.gov
Status: STATE-SERVICE

Mikhail Haramati
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
505 VAN NESS AVE AREA 4-A
SAN FRANCISCO CA 94102-3214
Email: mkh@cpuc.ca.gov
Status: STATE-SERVICE

Risa Hernandez
CALIF PUBLIC UTILITIES COMMISSION
COMMUNICATIONS POLICY BRANCH
505 VAN NESS AVE RM 4209
SAN FRANCISCO CA 94102-3214
Email: rhh@cpuc.ca.gov
Status: STATE-SERVICE

Suman Mathews
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
505 VAN NESS AVE AREA 4-A
SAN FRANCISCO CA 94102-3214
Email: srm@cpuc.ca.gov
Status: STATE-SERVICE

Lisa Paulo
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
505 VAN NESS AVE AREA 4-A
SAN FRANCISCO CA 94102-3214
Email: lp1@cpuc.ca.gov
Status: STATE-SERVICE

Jeanne Clinton
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
505 VAN NESS AVE RM 4008
SAN FRANCISCO CA 94102-3214
Email: cln@cpuc.ca.gov
Status: STATE-SERVICE

Cathleen A. Fogel
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
505 VAN NESS AVE AREA 4-A
SAN FRANCISCO CA 94102-3214
Email: cf1@cpuc.ca.gov
Status: STATE-SERVICE

Monisha Gangopadhyay
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRANCH
505 VAN NESS AVE RM 4104
SAN FRANCISCO CA 94102-3214
Email: mgb@cpuc.ca.gov
Status: STATE-SERVICE

Katherine Hardy
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
505 VAN NESS AVE AREA 4-A
SAN FRANCISCO CA 94102-3214
Email: keh@cpuc.ca.gov
Status: STATE-SERVICE

Peter Lai
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
320 West 4th St Ste 500
Los Angeles CA 90013
Email: ppl@cpuc.ca.gov
Status: STATE-SERVICE

Ayat E. Osman
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
505 VAN NESS AVE AREA 4-A
SAN FRANCISCO CA 94102-3214
Email: aeo@cpuc.ca.gov
Status: STATE-SERVICE

Thomas R. Pulsifer
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
505 VAN NESS AVE RM 5016
SAN FRANCISCO CA 94102-3214
Email: trp@cpuc.ca.gov
Status: STATE-SERVICE

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA SERVICE LIST

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Total number of addressees: 112

Jeorge S. Tagnipes
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
505 VAN NESS AVE AREA 4-A
SAN FRANCISCO CA 94102-3214
Email: jst@cpuc.ca.gov
Status: STATE-SERVICE

Zenaida G. Tapawan-Conway
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
505 VAN NESS AVE AREA 4-A
SAN FRANCISCO CA 94102-3214
Email: ztc@cpuc.ca.gov
Status: STATE-SERVICE

MATTHEW TISDALE
CALIFORNIA PUBLIC UTILITIES COMMISSION
EMAIL ONLY
EMAIL ONLY CA 0
Email: MWT@cpuc.ca.gov
Status: STATE-SERVICE

Chris Ungson
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRANCH
505 VAN NESS AVE RM 4104
SAN FRANCISCO CA 94102-3214
Email: cu2@cpuc.ca.gov
Status: STATE-SERVICE

Karen Camille Watts-Zagha
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRANCH
505 VAN NESS AVE RM 4104
SAN FRANCISCO CA 94102-3214
Email: kwz@cpuc.ca.gov
Status: STATE-SERVICE

Michael Wheeler
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
505 VAN NESS AVE RM 5206
SAN FRANCISCO CA 94102-3214
Email: mmw@cpuc.ca.gov
Status: STATE-SERVICE

NORA SHERIFF
ALCANTAR & KAHL
33 NEW MONTGOMERY ST, STE 1850
SAN FRANCISCO CA 94105
Email: nes@a-klaw.com
Status: INFORMATION

SEEMA SRINIVASAN
ALCANTAR & KAHL LLP
33 NEW MONTGOMERY ST, STE 1850
SAN FRANCISCO CA 94105
Email: sls@a-klaw.com
Status: INFORMATION

KAREN TERRANOVA
ALCANTAR & KAHL
33 NEW MONTGOMERY ST, STE 1850
SAN FRANCISCO CA 94105
Email: filings@a-klaw.com
Status: INFORMATION

BARBARA R. BARKOVICH
BARKOVICH & YAP, INC.
44810 ROSEWOOD TERRACE
MENDOCINO CA 95460
Email: brbarkovich@earthlink.net
Status: INFORMATION

AUDREY CHANG
CA ENERGY EFFICIENCY INDUSTRY COUNCIL
436 14TH ST, STE 1123
OAKLAND CA 94612
Email: achang@efficiencycouncil.org
Status: INFORMATION

STEVEN R. SCHILLER
CA ENERGY EFFICIENCY INDUSTRY COUNCIL
EMAIL ONLY
EMAIL ONLY CA 0
Email: sschiller@efficiencycouncil.org
Status: INFORMATION

CHRIS ANN DICKERSON
CAD CONSULTING
720B CANYON OAKS DRIVE
OAKLAND CA 94605
Email: cadickerson@cadconsulting.biz
Status: INFORMATION

MICHAEL O'KEEFE
CAL. ENERGY EFFICIENCY INDUSTRY COUNCIL
EMAIL ONLY
EMAIL ONLY CA 00000-0000
Email: mokeefe@efficiencycouncil.org
Status: INFORMATION

JEAN A. LAMMING
CALIFORNA PUBLIC UTILITIES COMMISSION
EMAIL ONLY
EMAIL ONLY CA 0
Email: JL2@cpuc.ca.gov
Status: STATE-SERVICE

CALIFORNIA ENERGY MARKETS
425 DIVISADERO ST, STE 303
SAN FRANCISCO CA 94131
Email: cem@newsdata.com
Status: INFORMATION

KAREN NORENE MILLS ATTORNEY
CALIFORNIA FARM BUREAU FEDERATION
EMAIL ONLY
EMAIL ONLY CA 0
Email: kmills@cfbf.com
Status: INFORMATION

JEANNE M. SOLE DEPUTY CITY ATTORNEY
CITY AND COUNTY OF SAN FRANCISCO
1 DR. CARLTON B. GOODLETT PLACE, RM. 375
SAN FRANCISCO CA 94102-4682
Email: jeanne.sole@sfgov.org
Status: INFORMATION

Diana L. Lee
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
505 VAN NESS AVE RM 4107
SAN FRANCISCO CA 94102-3214
FOR: Division of Ratepayer Advocates
Email: dil@cpuc.ca.gov
Status: PARTY

Thomas Roberts
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRANCH
505 VAN NESS AVE RM 4104
SAN FRANCISCO CA 94102-3214
FOR: Division of Ratepayer Advocates
Email: tcr@cpuc.ca.gov
Status: STATE-SERVICE

CASSANDRA SWEET
DOW JONES NEWSWIRES
EMAIL ONLY
EMAIL ONLY CA 0
Email: cassandra.sweet@dowjones.com
Status: INFORMATION

SEPHRA A. NINOW
CALIFORNIA CENTER FOR SUSTAINABLE ENERGY
EMAIL ONLY
EMAIL ONLY CA 00000-0000
Email: sephra.ninow@energycenter.org
Status: INFORMATION

MIKE JASKE
CALIFORNIA ENERGY COMMISSION
1516 NINTH ST, MS-20
SACRAMENTO CA 95814
Email: mjaske@energy.state.ca.us
Status: INFORMATION

WILLIAM H. BOOTH
LAW OFFICES OF WILLIAM H. BOOTH
67 CARR DRIVE
MORAGA CA 94556
FOR: California Large Energy Consumers Association
Email: wbooth@booth-law.com
Status: PARTY

DAVE DAVIS
COMMUNITY ENVIRONMENTAL COUNCIL
26 W ANAPAMU ST, 2ND FLR
SANTA BARBARA CA 93101
Email: ddavis@cecmail.org
Status: INFORMATION

Cheryl Cox
CALIF PUBLIC UTILITIES COMMISSION
DRA - ADMINISTRATIVE BRANCH
505 VAN NESS AVE RM 4101
SAN FRANCISCO CA 94102-3214
FOR: Division of Ratepayer Advocates
Email: cxc@cpuc.ca.gov
Status: STATE-SERVICE

DONALD C. LIDDELL
DOUGLASS & LIDDELL
EMAIL ONLY
EMAIL ONLY CA 0
Email: liddell@energyattorney.com
Status: INFORMATION

Kim Mahoney
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRANCH
505 VAN NESS AVE RM 4104
SAN FRANCISCO CA 94102-3214
FOR: DRA
Email: kmb@cpuc.ca.gov
Status: STATE-SERVICE

STEPHEN GROVER, PH.D.
ECONORTHWEST
222 SW COLUMBIA ST., STE. 1600
PORTLAND OR 97201-6616
Email: grover@portland.econw.com
Status: INFORMATION

DAVID P. MANOGUERRA
ENALASYS CORP.
250 AVENIDA CAMPILLO
CALEXICO CA 92231
Email: dmano@enalasys.com
Status: INFORMATION

ERIK PAGE
ERIK PAGE & ASSOCIATES
106 SPRUCE ROAD
FAIRFAX CA 94930-1517
Email: erik@erikpage.com
Status: INFORMATION

GERRY HAMILTON
GLOBAL ENERGY PARTNERS, LLC
500 YGNACIO VALLEY RD, STE 450
WALNUT CREEK CA 94596
Email: ghamilton@gepllc.com
Status: INFORMATION

TAM HUNT
HUNT CONSULTING
EMAIL ONLY
EMAIL ONLY CA 0
Email: tam.hunt@gmail.com
Status: INFORMATION

BOB RAMIREZ
ITRON, INC. (CONSULTING & ANALYSIS DIV.)
11236 EL CAMINO REAL
SAN DIEGO CA 92130
Email: bob.ramirez@itron.com
Status: INFORMATION

WILLIAM MARCUS
JBS ENERGY
311 D ST, STE A
W. SACRAMENTO CA 95605
Email: bill@jbsenergy.com
Status: INFORMATION

JARED ASCH
EFFICIENCY FIRST
70 ZOE ST., STE. 201
SAN FRANCISCO CA 94107
FOR: Efficiency First
Email: jared@efficiencyfirst.org
Status: INFORMATION

CYNTHIA K. MITCHELL
ENERGY ECONOMICS INC.
530 COLGATE COURT
RENO NV 89503
Email: Cynthiakmitchell@gmail.com
Status: INFORMATION

RICK RIDGE
3022 THOMPSON AVE.
ALAMEDA CA 94501
Email: rsridge@comcast.net
Status: INFORMATION

JOHN KOTOWSKI
GLOBAL ENERGY PARTNERS, LLC
500 YGNACIO VALLEY RD, STE 450
WALNUT CREEK CA 94596
Email: jak@gepllc.com
Status: INFORMATION

MICHAEL W. RUFO
ITRON INC.
1111 BROADWAY ST, STE 1800
OAKLAND CA 94607
Email: Michael.Rufo@itron.com
Status: INFORMATION

JEFF HIRSCH
JAMES J. HIRSCH & ASSOCIATES
12185 PRESILLA ROAD
CAMARILLO CA 93012-9243
Email: Jeff.Hirsch@DOE2.com
Status: INFORMATION

BRYCE DILLE CLEAN TECHNOLOGY RESEARCH
JMP SECURITIES
600 MONTGOMERY ST. STE 1100
SAN FRANCISCO CA 94111
Email: bdille@jmpsecurities.com
Status: INFORMATION

RACHEL MURRAY, P.E.
KEMA, INC.
EMAIL ONLY
EMAIL ONLY CA 00000-0000
Email: rachel.murray@kema.com
Status: INFORMATION

C. SUSIE BERLIN
MCCARTHY & BERLIN LLP
100 W. SAN FERNANDO ST., STE 501
SAN JOSE CA 95113
Email: sberlin@mccarthylaw.com
Status: INFORMATION

JAMES CHOU
NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER ST, 20TH FLR
SAN FRANCISCO CA 94104
Email: jchou@nrdc.org
Status: INFORMATION

NOAH LONG
NATURAL RESOURCES DEFENSE COUNCIL
EMAIL ONLY
EMAIL ONLY CA 0
Email: nlong@nrdc.org
Status: INFORMATION

PETER MILLER
NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER ST, 20TH FLR
SAN FRANCISCO CA 94104
Email: pmiller@nrdc.org
Status: INFORMATION

DEVRA WANG STAFF SCIENTIST
NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER ST, 20TH FLR
SAN FRANCISCO CA 95104
FOR: NRDC
Email: dwang@nrdc.org
Status: PARTY

MICHAEL SACHSE SR DIR - GOV'T AFFAIRS AND GEN COUNSEL
OPOWER
1515 N. COURTHOUSE RD., STE 610
ARLINGTON VA 22201
FOR: OPOWER
Email: michael.sachse@opower.com
Status: INFORMATION

JOHN STOOPS
KEMA, INC.
155 GRAND AVE, STE 500
OAKLAND CA 94612-3747
Email: john.stoops@rlw.com
Status: INFORMATION

MRW & ASSOCIATES, LLC
EMAIL ONLY
EMAIL ONLY CA 0
Email: mrw@mrwassoc.com
Status: INFORMATION

LARA ETTENSON
NATURAL RESOURCES DEFENSE COUNCIL
EMAIL ONLY
EMAIL ONLY CA 0
Email: lettenson@nrdc.org
Status: INFORMATION

SIERRA MARTINEZ
NATURAL RESOURCES DEFENSE COUNCIL
EMAIL ONLY
EMAIL ONLY CA 0
Email: smartinez@nrdc.org
Status: INFORMATION

DAVID NEMTZOW
NEMTZOW & ASSOCIATES
1254 9TH ST, NO. 6
SANTA MONICA CA 90401
Email: david@nemtzow.com
Status: INFORMATION

MATTHEW MCCAFFREE
OPOWER
1515 N. COURTHOUSE ROAD, STE 610
ARLINGTON VA 22201
FOR: OPOWER
Email: matt.mccaffree@opower.com
Status: INFORMATION

LYNN HAUG ATTORNEY
ELLISON, SCHNEIDER & HARRIS, LLP
2600 CAPITOL AVE, STE 400
SACRAMENTO CA 95816-5905
FOR: OPOWER
Email: lmh@eslawfirm.com
Status: PARTY

FRASER SMITH, D.PHIL.
SF PUBLIC UTILITIES COMMISSION
1155 MARKET ST, 4TH FLR
SAN FRANCISCO CA 94103
FOR: Power Enterprise
Email: FSmith@sfwater.org
Status: INFORMATION

STEVEN D. PATRICK
SAN DIEGO GAS AND ELECTRIC COMPANY
555 WEST FIFTH ST, STE 1400
LOS ANGELES CA 90013-1011
FOR: San Diego Gas & Electric / Southern California Gas Company
Email: SDPatrick@SempraUtilities.com
Status: PARTY

JOY C. YAMAGATA
SAN DIEGO GAS & ELECTRIC/SOCALGAS
8330 CENTURY PARK COURT, CP 32 D
SAN DIEGO CA 92123-1530
Email: JYamagata@SempraUtilities.com
Status: INFORMATION

MANUEL RAMIREZ
SAN FRANCISCO PUC - POWER ENTERPRISE
1155 MARKET ST, 4TH FLR
SAN FRANCISCO CA 94103
Email: mramirez@sfwater.org
Status: INFORMATION

ATHENA BESA
SEMPRA ENERGY UTILITIES
EMAIL ONLY
EMAIL ONLY CA 0
Email: ABesa@SempraUtilities.com
Status: INFORMATION

CASE ADMINISTRATION
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE. / PO BOX 800
ROSEMEAD CA 91770
Email: case.admin@sce.com
Status: INFORMATION

MONICA GHATTAS
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE
ROSEMEAD CA 91770
Email: monica.ghattas@sce.com
Status: INFORMATION

HEATHER PRINCE
RESOURCE SOLUTIONS GROUP
60 STONE PINE ROAD, STE 100
HALF MOON BAY CA 94019
Email: hprince@rsgrp.com
Status: INFORMATION

PEDRO VILLEGAS
SAN DIEGO GAS & ELECTRIC/ SO. CAL. GAS
EMAIL ONLY
EMAIL ONLY CA 0
Email: PVillegas@SempraUtilities.com
Status: INFORMATION

THERESA BURKE
SAN FRANCISCO PUC
1155 MARKET ST, 4TH FLR
SAN FRANCISCO CA 94103
Email: tburke@sfwater.org
Status: INFORMATION

CENTRAL FILES
SDG&E AND SOCALGAS
CP31-E
8330 CENTRUY PARK COURT
SAN DIEGO CA 92123
Email: CentralFiles@SempraUtilities.com
Status: INFORMATION

STEVE KROMER
SKEE
3110 COLLEGE AVE, APT 12
BERKELEY CA 94705
Email: jskromer@qmail.com
Status: INFORMATION

DON ARAMBULA
SOUTHERN CALIFORNIA EDISON
6042 N. IRWINDALE AVE, BLDG. A
IRWINDALE CA 91702
Email: don.arambula@sce.com
Status: INFORMATION

DARREN HANWAY
SOUTHERN CALIFORNIA EDISON COMPANY
6042 N. IRWINDALE AVE, BLDG. A
IRWINDALE CA 91702
Email: darren.hanway@sce.com
Status: INFORMATION

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA SERVICE LIST

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Total number of addressees: 112

JENNIFER TSAO SHIGEKAWA SR. ATTORNEY,
CUSTOMER & TARIFF LAW
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE. / PO BOX 800
ROSEMEAD CA 91770-3714
Email: jennifer.shigekawa@sce.com
Status: INFORMATION

LARRY R. COPE SR. ATTORNEY
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE. / PO BOX 800
ROSEMEAD CA 91770
FOR: Southern California Edison Co
Email: larry.cope@sce.com
Status: PARTY

NIKHIL GANDHI
STRATEGIC ENERGY TECHNOLOGIES, INC.
17 WILLIS HOLDEN DRIVE
ACTON MA 1720
Email: gandhi.nikhil@verizon.net
Status: INFORMATION

SCOTT DIMETROSKY
THE CADMUS GROUP, INC.
1470 WALNUT ST., STE 200
BOULDER CO 80302
Email: Scott.Dimetrosky@cadmusgroup.com
Status: INFORMATION

ERIN GRIZARD
THE DEWEY SQUARE GROUP
EMAIL ONLY
EMAIL ONLY CA 00000-0000
Email: EGrizard@deweysquare.com
Status: INFORMATION

ROBERT FINKELSTEIN
THE UTILITY REFORM NETWORK
115 SANSOME ST, STE 900
SAN FRANCISCO CA 94104
FOR: The Utility Reform Network
Email: bfinkelstein@turn.org
Status: PARTY

MEGAN MYERS
VASQUEZ ESTRADA & DUMONT LLP
1000 FOURTH ST, STE 700
SAN RAFAEL CA 94901
Email: mmyers@vandelaw.com
Status: INFORMATION

TORY WEBER
SOUTHERN CALIFORNIA EDISON
6042 N. IRWINDALE AVE, STE A
IRWINDALE CA 91702
Email: tory.weber@sce.com
Status: INFORMATION

SETH D. HILTON
STOEL RIVES, LLP
555 MONTGOMERY ST., STE 1288
SAN FRANCISCO CA 94111
Email: sdhilton@stoel.com
Status: INFORMATION

MIKE YIM
SUMMIT BLUE CONSULTING
1990 N CALIFORNIA BLVD., STE 700
WALNUT CREEK CA 94596-7258
Status: INFORMATION

ALLEN LEE
THE CADMUS GROUP, INC.
720 SW WASHINGTON, STE 400
PORTLAND OR 97205
Email: Allen.Lee@cadmusgroup.com
Status: INFORMATION

DONALD GILLIGAN
NATIONAL ASSC. OF ENERGY SVC. COMPANIES
EMAIL ONLY
EMAIL ONLY DC 00000-0000
FOR: The National Association of Energy Service Co.
Email: dgilligan@naesco.org
Status: PARTY

MARCEL HAWIGER ENERGY ATTY
THE UTILITY REFORM NETWORK
115 SANSOME ST, STE 900
SAN FRANCISCO CA 94104
FOR: The Utility Reform Network
Email: marcel@turn.org
Status: PARTY

BARBARA GEORGE
WOMEN'S ENERGY MATTERS
PO BOX 548
FAIRFAX CA 94978-0548
FOR: Women's Energy Matters
Email: wem@igc.org
Status: PARTY