

Decision 06-06-071

June 29, 2006

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

Order Instituting Rulemaking to  
Promote Policy and Integration in  
Electric Utility Resource Planning.

Rulemaking 04-04-003  
(Filed April 1, 2004)

**ORDER DENYING REHEARING OF DECISION 06-02-032****I. INTRODUCTION**

In this Order we dispose of the applications for rehearing of Decision (D.) 06-02-032 (“Decision”) filed by Southern California Edison Company (“SCE”) and the Alliance for Retail Energy Markets (“AREM”). We also dismiss the motion to intervene and application for rehearing filed by the Center for Energy and Economic Development (“CEED”) because CEED lacks standing to apply for rehearing.

In D.06-02-032, we adopted a policy stating our intent to develop a load-based cap<sup>1</sup> on greenhouse gas (“GHG”) emissions for Pacific Gas & Electric Company (“PG&E”), San Diego Gas & Electric Company, SCE, and non-utility load-serving entities (“LSEs”)<sup>2</sup> that provide electric power to customers within these utilities’ service territories. We directed that GHG emissions allowances associated with the load-based cap be in the form of “tons of carbon-dioxide equivalent.” In addition, we directed that evaluation and determination regarding a number of implementation issues be left to a subsequent phase of R.04-04-003 or successor proceeding. These implementation issues

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<sup>1</sup> As opposed to a location/source-based cap, a load-based cap applies to the emissions associated with the entire portfolio of electric generation resources, either utility/ESP owned or purchased.

<sup>2</sup> For purposes of this Order, non-utility LSEs are electric service providers (“ESPs”) and community choice aggregators (“CCAs”).

include, but are not limited to: GHG emissions baselines; adjustments to GHG emission reduction requirements (and associated caps) over time, relative to those baselines; allocation of emissions allowances; flexible compliance mechanisms; potential penalties; requirements for registration with the California Climate Action Registry (“CCAR”); continuation of the GHG or carbon adder adopted in D.04-12-048;<sup>3</sup> and treatment of GHG emissions from the provision of natural gas for purposes other than electricity generation.

Timely applications for rehearing were filed by CEED, SCE and AReM. CEED challenges the Decision on the grounds that: (1) it lacks an evidentiary record to establish a GHG emissions cap; (2) the Commission does not have jurisdiction to regulate GHG emissions; (3) the load-based cap violates the Interstate Commerce Clause; (4) it interferes with federal foreign policy; and (5) the Commission denied due process by failing to provide adequate notice and opportunity to be heard.

SCE challenges the Decision on the grounds that: (1) the load-based cap violates the Interstate Commerce Clause; and (2) it interferes with federal foreign policy and issues under the exclusive jurisdiction of the Federal Energy Regulatory Commission (“FERC”).

AReM challenges the Decision on the grounds that: (1) the Commission does not have jurisdiction to regulate the GHG emissions of electric service providers (“ESPs”); (2) the issue of GHG emissions caps for ESPs is beyond the noticed scope of the proceeding; (3) it denies due process by failing to hold evidentiary hearings; (4) it is not supported by findings of fact on all material issues as required by Public Utilities Code Section 1705;<sup>4</sup> (5) it is not supported by sufficient evidence; and (6) the GHG emissions reduction program discriminates against ESPs.

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<sup>3</sup> *Opinion Adopting Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company’s Long-Term Procurement Plan (“Long-Term Planning Decision”)* [D.04-12-048] (2004) \_\_ Cal.P.U.C.3d \_\_.

<sup>4</sup> All other Section references are to the Public Utilities Code, unless otherwise stated.

The Natural Resources Defense Council (“NRDC”) filed a response to the applications for rehearing regarding the issues of Commission jurisdiction, the Interstate Commerce Clause, and due process.

We have carefully considered each and every argument raised in the applications for rehearing and are of the opinion that good cause does not exist to grant rehearing. Accordingly, the applications for rehearing of D.06-02-032 filed by SCE and AReM are denied.

## **II. DISCUSSION**

### **A. CEED Standing to File an Application for Rehearing**

In March 2006, CEED filed a motion to intervene in the proceeding for purposes of filing its application for rehearing. In April 2006, CEED filed a supplemental affidavit in support of its motion to intervene. CEED states that it is an organization comprised of coal-fueled electric utilities and associated supply chain industries including coal-producing and coal-transporting companies that sell electric power to California utilities. (CEED Rhg. App., p. 2; CEED Supplemental Affidavit, p. 3.)

Section 1731(b) governs standing to file an application for rehearing and provides in pertinent part:

After any order or decision has been made by the Commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing... (Pub. Util. Code, § 1731, subd. (b).)

CEED claims that it is entitled to party status under the statute based on its attendance at the Commission March 2005 Procurement Incentive Framework workshops, as well as its participation in California Energy Commission (“CEC”) public hearings on climate and clean coal technology issues. (CEED Rhg. App., p. 4, para. 7; CEED Supplemental Affidavit, p. 2.) As explained below, CEED does not qualify for standing to file an application for rehearing.

CEED was previously denied standing to file comments on the Draft Opinion on Procurement Incentives Framework (“Draft Opinion”). We found that CEED failed to submit timely motions to intervene in this proceeding and thus, failed to acquire party status. (D.06-02-032, p. 54, fn. 37.) The record supports this conclusion, revealing that CEED had ample time and opportunity to intervene as a party on a timely basis, but did not do so.

In April 2004, we issued the Order Instituting Rulemaking<sup>5</sup> for this proceeding which among other things, notified entities of the forthcoming workshops regarding emissions cap-and-trade principles (*April 2004 OIR*, p. 16; also see Appendix B), and directed parties to file comments in their prehearing conference (“PHC”) statements. (*Id.*, p. 26 [Ordering Paragraph 8.]) The *April 2004 OIR* clearly explained the process to become a party, as well as the rights of a party versus a non-party to the proceeding.<sup>6</sup> (*Id.*, Appendix A, p. 1.)

Then in 2005, the assigned ALJ issued two rulings which memorialized the workshop dates and agenda (ALJ Rulings on Scope and Agenda for Procurement Incentive Framework Workshops, dated March 2, 2005, and March 10, 2005), and another ruling soliciting comments on the workshop report.<sup>7</sup> (ALJ Ruling Soliciting Post-Workshop Comments on Procurement Incentive Framework, dated April 4, 2005.) Finally, on January 13, 2006, the Draft Opinion was issued for comment.

At no time during the two years from the inception of the *April 2004 OIR* to issuance of the Draft Opinion in January 2006, did CEED file a motion to intervene, or

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<sup>5</sup> *Order Instituting Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning* (“*April 2004 OIR*”), issued April 6, 2004.

<sup>6</sup> See *April 2004 OIR*, Appendix A, p. 1 stating in pertinent part: “[F]or example, a party has the right to participate in evidentiary hearings, file comments on a proposed decision, and appeal a final decision...[N]on-parties do not have these rights, even though they are included on the service list for the proceeding and receive copies of some or all documents.”

<sup>7</sup> Parties were also invited to brief the Commission on legal issues related to an incentive framework that includes a greenhouse gas limitation component. (ALJ Ruling Soliciting Post-Workshop Comments on Procurement Incentive Framework, dated April 4, 2005, p. 5.)

file comments in response to the above described solicitations for comment. Mere attendance at a CPUC workshop and/or attendance at the events of another agency is not sufficient to acquire party status pursuant to the process outlined in the *April 2004 OIR*.<sup>8</sup>

CEED does not claim to be a stockholder or bondholder for purposes of qualifying under Section 1731. However, CEED does claim to be “pecuniarily interested” in the affected utilities. CEED reasons that any reduced demand for coal-fueled electricity as a result of the Decision will render the services of its member companies less competitive, thus resulting in financial loss. (CEED Rhg. App., p. 3, para 3, p. 4, para 6, 8.) CEED claims that this in turn establishes its members as “persons aggrieved by the action” which qualifies them for party status pursuant to *Consumers Lobby Against Monopolies v. Public Utilities Commission* (“CLAM”) (1979) 25 Cal.3d 891, 904; 1979 Cal. LEXIS 349. CEED’s reliance on this case is flawed.

*CLAM* is not relevant because the case does not speak to standing for purposes of qualifying under Section 1731, or establish that any person alleged to be aggrieved by a Commission action is therefore “pecuniarily interested” for purposes of Section 1731.

Further, the nature of financial loss alleged by CEED is not sufficient to achieve standing under Section 1731. We have repeatedly found that the statutory standard of being “pecuniarily interested” is not satisfied merely by the existence of financial harm as a competitor, ratepayer, or beneficiary of a utility program.<sup>2</sup>

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<sup>8</sup> Also see *Application of Pacific Gas and Electric Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of the Northeast San Jose Transmission Reinforcement Project* [D.02-03-061] (2002) 1999 Cal.P.U.C. LEXIS 942, \*\* 3-4, in which we concluded that although McCarthy had previously participated in the proceeding’s CEQA process for purposes of CPCN approval, and although McCarthy subsequently became a party during hearings on cost issues, McCarthy was not a party at the time of the CPCN decision and thus lacked standing to file for rehearing of that decision.

<sup>2</sup> See *In the Matter of the Application of AT&T Communications of California, Inc., a Corporation, for Authority to Increase Rates and Charges Applicable to Telecommunications Services Furnished Within the State of California* [D.88-08-066] (1988) 29 Cal.P.U.C.2d 177, 1988 Cal.PUC Lexis 583, \*\* 1-2; *Application of Pacific Gas and Electric Company for Authorization to Sell Certain Generating Plants and Related Assets Pursuant to Public Utilities Code Section 851* [D.99-06-064] (1999) 1999 Cal.PUC LEXIS 321, \* 1.

CEED also claims to have standing pursuant to *Lujan v. Defenders of Wildlife* (“*Lujan*”) (1992) 504 U.S. 555, 561-562; 1992 U.S. LEXIS 3543, on the basis that its members are “an object of the action (or foregone action) at issue.” Like *CLAM*, *Lujan* is not relevant because it does not establish or address the criteria to qualify for standing under Section 1731. Instead, it addresses federal principles under a federal statutory scheme. Even if the criteria under *Lujan* were applicable for purposes of Section 1731, CEED fails to demonstrate that its member companies are the objects of the action. The Decision specifically identifies the objects of its action as PG&E, SCE, SDG&E and non-utility LSEs that provide electric power to customers within these utilities’ service territories. (D.06-02-032, p. 2.) While out-of-state entities such as those represented by CEED may inevitably be affected by a GHG emissions cap by virtue of their transactions with the respective regulated entities, they are not the object of the action or regulation.

For these reasons, we dismiss CEED’s motion to intervene and application for rehearing because CEED has failed to establish standing for purposes of rehearing of D.06-02-032. That said, it should be noted that CEED’s substantive challenges will in fact be addressed because each of the legal challenges raised in their application for rehearing is subsumed in the applications for rehearing filed by SCE and AREM.

## **B. Interstate Commerce Clause**

SCE contends that imposition of a load-based cap on GHG emissions has an impermissible extraterritorial reach and thus, the Decision violates the Commerce Clause of the U.S. Constitution. (SCE Rhg. App., pp. 2-3.)

SCE’s application for rehearing does no more than propose a standard of review and recite general Commerce Clause principles, accompanied by case citations, to allege D.06-02-032 is unlawful. SCE offers no case analysis, nor does it specify how the Decision acts to violate any or all of the stated principles. For that reason, SCE’s argument could be rejected because SCE failed to meet its burden under Section 1732 which provides in pertinent part: “[T]he application for rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order

to be unlawful....” (Pub. Util. Code, § 1732.) Nevertheless, as explained below, SCE’s assertions are without merit.

According to SCE, “the critical inquiry [in determining a violation of the Commerce Clause] is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” (citing to *Healy v. The Beer Institute* (“*Healy v. Beer*”) (1989) 491 U.S. 324, 336; 1989 U.S. LEXIS 3041.) SCE notes this test is predominantly applied in the context of price/economic regulation cases, but it nonetheless argues the test is appropriate here because it has been given broader application pursuant to *National Solid Wastes Management Association v. Meyer* (“*Nat’l Solid Wastes Mgmt*”) (7<sup>th</sup> Cir. 1995) 63 F.2d 652, 661; 1995 U.S. LEXIS 24128.<sup>10</sup> (SCE Rhg. App., pp. 2-3.)

SCE’s reliance on these cases is flawed because D.06-02-032 does not adopt a rule or regulation which operates in a manner prohibited by these cases. In both cases, the courts struck down state laws because each one operated in an identical fashion to directly and facially discriminate against out-of-state entities in a manner which favored in-state economic interests, amounting to economic protectionism. Moreover, the laws operated to control out-of-state entities even when they engaged in business wholly outside the state which promulgated the law. The laws did not regulate evenhandedly as to both in-state and out-of-state entities, and the courts could find no legitimate state interest which acted as a neutral, valid factor unrelated to economic protectionism, to justify the laws.

A load-based GHG emissions cap requirement would not operate in a manner similar to the laws in the two cases SCE cites. Our Decision does not involve price regulation, and it does not control conduct beyond California’s borders by directly, or on its face, discriminating against interstate commerce in a manner to favor in-state economic interests. It does not control the conduct of out-of-state electric generators

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<sup>10</sup> Also citing to *NCAA v. Miller* (9<sup>th</sup> Cir. 1993) 10 F.3d 663; 1993 U.S. App. LEXIS 30119.

engaging in transactions which take place wholly outside California. The emissions cap is to be imposed only upon the procurement portfolios of the respective regulated California electric utilities, and the LSEs that provide electric power to customers in their service territories. While the emissions cap may inevitably have some indirect effect on out-of-state generators conducting business with the California utilities and LSEs, that effect is permissible under *Healy v. Beer* and its progeny because it evenhandedly treats out-of-state generators doing business in California in the same manner as it treats in-state generators.

Even if SCE could establish that the emissions cap would discriminate against interstate commerce, it is permissible and justified because it is tied to a legitimate state interest and valid factors unrelated to economic protectionism. GHG emission reduction is inherently tied to our legislatively mandated responsibility to implement requirements related to RAR and RPS.<sup>11</sup> In addition, the requirement is tied to effectuating California's climate action policies articulated in the Governor's Executive Order S-3-05, and the state's resource planning and energy procurement goals as expressed in the original Joint Agency Energy Action Plan ("EAP") and EAP II. The EAP and EAP II reflect the State's commitment to decreasing per capita energy use and reducing toxic emissions and gasses through increased conservation, efficiency, and renewable resources, expressed through an established "loading order."<sup>12</sup> The benefits of meeting these state goals exceed any indirect burden on interstate commerce. Moreover, these interests are valid as neutral factors, unrelated to economic protectionism.

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<sup>11</sup> See Public Utilities Code Sections 399.11 et seq. and 380, and the discussion under Section II. D. i) of this Order.

<sup>12</sup> The EAP sets guiding principles for IOU procurement and explicitly mentions the goal of minimizing climate change in establishing the following "loading order" of preferred resources: 1) energy efficiency; 2) demand response; 3) renewable resources (including distributed generation ("DG")); 3) clean fossil-fired DG; 5) clean central station generation. The "loading order" as well as the intent to establish annual limits on carbon-based energy procurement as a means to meet EAP goals was further memorialized in the Commission's *Long-Term Planning Decision, supra*, [D.04-12-048] (2004) p. 155 (slip op.) \_\_\_ Cal.P.U.C. 3d \_\_\_.

Despite the fact D.06-02-032 withstands the *Healy v. Beer* test, SCE proceeds to recite three general Commerce Clause principles, implying that the Decision runs afoul of each. The first principle provides that a state may not preclude or condition goods from another state as a means of changing out-of-state conduct, even if the state law is expressed as a limit on conduct by its own citizens.<sup>13</sup> Each of the cases SCE cites involve state laws which placed direct economic bans on the receipt of certain out-of-state products. Commerce Clause violations were found because the state laws did not apply in an evenhanded or neutral manner as to both in-state and out-of-state interests. The laws were found to clearly discriminate, on their face, based solely on the out-of-state origin of a commodity. These cases have no bearing on the validity of D.06-02-032. As discussed above, the portfolio-based GHG emissions cap requirement applies in an evenhanded and neutral manner as to any particular generation resource. There is no direct ban on any particular generation resource and the emissions cap requirement is indifferent as to point of origin.

The second principle SCE recites provides that a state regulation can be facially neutral and still be discriminatory if it, as a practical matter, favors in-state economic interests while burdening out-of-state interests.<sup>14</sup> The cases SCE cites are not persuasive and, in fact, demonstrate the court's effort to uphold even potentially discriminatory laws if they are otherwise justified by a legitimate state interest.

SCE offers no rationale to demonstrate that D.06-02-032 operates to economically protect in-state generators while burdening out-of-state generators, that it fails to operate in an evenhanded manner, or that it is not tied to a legitimate state interest. To the contrary, a portfolio-based cap on the regulated electric utilities and ESPs

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<sup>13</sup> Citing to *Hazardous Waste Treatment Council v. State of South Carolina* (“*Haz. Wastes Trtmt. Council*”) (4th Cir. 1991) 945 F.2d 781; 1991 U.S. App. LEXIS 22154; *Hardage v. Atkins* (“*Hardage*”) (10th Cir. 1980) 619 F.2d 871; 1980 U.S. App. LEXIS 18686; and *National Foreign Trade Council v. Natsios* (“*Nat’l. Foreign Trade Council*”) (1st Cir. 1999) 181 F.3d 38; 1999 U.S. App. LEXIS 13735.

<sup>14</sup> Citing to *Hunt v. Washington State Apple Advertising Commission* (“*Hunt v. Washington Apple*”) (1977) 432 U.S. 333; 1977 U.S. LEXIS 123; and *Philadelphia v. New Jersey* (1978) 437 U.S. 617; 1978 U.S. LEXIS 37.

affords these entities a great deal of flexibility in making procurement decisions, particularly when coupled with potential flexible compliance measures.

The third principle SCE recites provides that discriminatory regulation cannot survive even if promulgated for environmental reasons.<sup>15</sup> Neither case SCE cites establishes any environmental regulation standard or prohibition, nor do the cases present any factual analogy to D.06-02-032.

Contrary to SCE's arguments, courts have accorded states a great deal of flexibility in promulgating laws. Courts have upheld the right of states to regulate matters of legitimate state concern even though such regulation may affect interstate commerce<sup>16</sup>, and courts have found that *per se* rules invalidating state action should not be "woodenly applied" just because the state law may favor in-state economic interests or burden out-of-state interests.<sup>17</sup>

Finally, SCE claims the Decision discriminates against out-of-state generators because it allows offsets only for in-state generators. This is incorrect. The Decision only goes so far as to note a staff proposal to allow limited offsets associated with utility-related activities within California, at least initially. (D.06-02-032, p. 43.) However, we defer the consideration and adoption of flexible compliance mechanisms including offsets to the future implementation phase" in order to further explore the pros and cons of alternate proposals." (D.06-02-032, p. 46.) For all these reasons, we correctly concluded that it presents no conflict with the Commerce Clause.

### **C. Conflict with Federal Jurisdiction**

SCE contends that the Decision errs because it interferes with powers reserved to the federal government. Thus, SCE claims the Commission's action in D.06-

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<sup>15</sup> Citing to *West Lynn Creamery Inc., v. Healy* ("West Lynn Creamery") (1994) 512 U.S. 186; 1994 U.S. LEXIS 4638; and *Commonwealth of Pennsylvania v. West Virginia* ("Pennsylvania v. West Virginia") (1923) 262 U.S. 553; 1923 U.S. LEXIS 2670.

<sup>16</sup> See *Guschke v. City of Oklahoma* (10<sup>th</sup> Cir. 1985) 763 F.2d 379; 1985 U.S. App. LEXIS 31562, \*\* 7-8.

<sup>17</sup> See *Harvey & Harvey v. Delaware Solid Waste Authority* ("Harvey v. Delaware") (D. Del. 1985) 600 F.Supp. 1369; 1985 U.S. Dist. LEXIS 23633, \* 16.

02-032 to adopt a GHG emissions cap is pre-empted by the Federal Energy Regulatory Commission (FERC) and by national foreign policy concerns. (SCE Rhg. App., pp. 3-4.)

As a general matter, pre-emption may be found to occur when: 1) there is an outright or actual conflict between federal and state law; 2) compliance with both federal and state law is in effect physically impossible; 3) there is implicit in federal law a barrier to state regulation; or 4) congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law.<sup>18</sup> As discussed below, SCE fails to demonstrate how D.06-02-032 runs afoul of any of these pre-emption criteria.

**i) FERC Jurisdiction**

SCE asserts that our action in D.06-02-032 is precluded by the Federal Power Act (FPA) and thus, is under the exclusive jurisdiction of FERC. (SCE Rhg. App., p. 4.)

With respect to the relevant pre-emption criteria, SCE does not identify any FPA provision which creates an actual conflict with, or implicit bar to, our adoption of a load-based GHG emissions cap. Further, SCE presents no cases which establish that FERC has yet taken any specific action to override any state GHG-related regulation.

Generally referencing a series of cases, SCE asserts the Decision contravenes three established legal principles: 1) that the powers of the federal government are paramount when the interests of several states are involved;<sup>19</sup> 2) that FERC's exclusive jurisdiction over electricity wholesale transactions precludes states from regulating, either directly or indirectly, such transactions;<sup>20</sup> and 3) that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.<sup>21</sup>

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<sup>18</sup> See *Louisiana Public Service Commission v. Federal Communications Commission* (“*Louisiana PUC v. FCC*”) (1986) 476 U.S. 355; 1986 U.S. LEXIS 74, \*13.

<sup>19</sup> Citing to *Appalachian Power Company v. Public Service Company of West Virginia* (“*Appalachian Power Co.*”) (4<sup>th</sup> Cir. 1987) 812 F.2d 898; 1987 U.S. App. LEXIS 2778; and *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.* (“*PUC v. Attleboro Steam*”) (1927) 273 U.S. 83; 1927 U.S. LEXIS 684.

<sup>20</sup> Citing to *Nantahala Power & Light Co. v. Thornburg* (“*Nantahala Power & Light*”) (1986) 476 U.S.

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While these are valid principles generally speaking, SCE ignores that the underlying facts of the cited cases are distinguishable from our action in D.06-02-032. In all but two cases SCE cites (*CPUC v. FERC, supra*, and *Maryland v. Louisiana, supra*), the respective state actions were deemed impermissible solely because the state approved rates created an actual conflict with either FERC's exclusive authority to set interstate wholesale rates, or its authority to allocate costs affecting interstate wholesale rates. Nothing in D.06-02-032 interferes with FERC approved interstate wholesale rates or FERC's exclusive rate authority. Therefore, these cases do not support a valid pre-emption claim in this proceeding.

The remaining two cases SCE cites are similarly inapplicable because they reflect other instances where state action was pre-empted because it created an actual conflict with federal authority. For example, in *CPUC v. FERC*, the state action conflicted with provisions of the Natural Gas Act. And in *Maryland v. Louisiana*, a state first-use tax on natural gas brought into the state from the outer continental shelf conflicted with FERC's authority to determine pipeline and producer costs under the NGA, and also interfered with the established federal administration of the outer continental shelf. (*Maryland v. Louisiana, supra*, 1981 U.S. LEXIS 27, at \*\* 4, 7, 11-12.)

Finally, SCE asserts that the Decision imposes a term or condition on wholesale transactions within FERC's exclusive jurisdiction, and that it will likely increase wholesale rates. (SCE Rhg. App., p. 4.) SCE does not explain or demonstrate how a load-based GHG emissions cap on certain utility and LSE procurement portfolios would interfere with any specific term or condition of a FERC-approved wholesale transaction. Further, there is no evidence the cap will increase wholesale rates in a manner that is unlawful.

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953; 1986 U.S. LEXIS 61; *Maryland et al. v. Louisiana* (“*Maryland v. Louisiana*”) (1981) 451 U.S. 725; 1981 U.S. LEXIS 27; and *Federal Power Commission v. Southern California Edison Co.* (“*FPC v. Edison*”) (1964) 376 U.S. 205; 1964 U.S. LEXIS 2169.

<sup>21</sup> Citing to *Mississippi Power & Light Co. v. Moore* (“*Mississippi Power & Light*”) (1988) 487 U.S. 354; 1988 U.S. LEXIS 2874; and *Public Utilities Commission of California v. FERC* (“*CPUC v. FERC*”) (Dist. of Columbia 1990) 900 F.2d 269; 1990 U.S. App. LEXIS 4822.

**ii) National Foreign Policy and Federal Jurisdiction Generally**

SCE contends that because the federal administration is involved in international negotiations over GHG emissions, any GHG emissions cap regulation by the Commission will reduce the President's leverage in negotiating international accords on global warming. Thus, SCE contends the Commission's action is contrary to *American Insurance Association v. Garamendi* ("AIA v. Garamendi") (2003) 539 U.S. 396; 2003 U.S. LEXIS 4797. (SCE Rhg. App., p. 4.)

In relation to the afore-mentioned pre-emption criteria, SCE again provides no federal law or statute which creates an actual conflict between state and federal regulation of GHG emissions. SCE also does not argue that compliance with both a federal and state GHG-related law is physically impossible. Thus, SCE appears to call into play pre-emption based on some implicit federal law barring state action, or a suggestion that congress has legislated so comprehensively as to have occupied the entire field. Neither argument is supportable.

SCE's reliance on *AIA v. Garamendi* does not support a pre-emption claim because there is no factual similarity with the Commission's action in this proceeding. *AIA v. Garamendi* involved a state action which created an actual conflict with a subject matter held to be traditionally within the federal purview and because the law acted in a directly opposite manner with established federal policy.

SCE also generally references 68 FR 52922, suggesting the Decision is somehow contrary to this administrative federal policy or authority. However, this reference is misleading because it does not pertain to the regulation of GHG emissions from stationary sources such as electric generators. Instead, it involved a question of whether the California Environmental Protection Agency ("EPA") has authority to regulate motor vehicle GHG emissions pursuant to the California Clean Air Act ("CCA"). In that matter, EPA declined to impose GHG emissions regulations because in its view the CCA does not authorize such regulation, further stating that even if it does, EPA did not want to exercise its authority at this time.

Moreover, SCE has not established that there is any implicit federal barrier to state GHG emissions regulation, or that congress has legislated so comprehensively in this area so as to have occupied the entire field. It is true that global warming and GHG emissions considerations have been subjects of federal inquiry for several years. Congress has acknowledged that carbon dioxide emissions cause significant global warming having adverse effects. Similarly there have been varying Presidential stances on the subject of taking action to reduce global warming by imposing GHG emissions limits. However, federal action to date has been directed at research, understanding, and negotiations as opposed to adoption of any formal law or policy for a GHG emissions program or limit on GHG emissions.

The Decision thus reasonably concludes that our action is not pre-empted by the federal government, noting that courts have held that general statements of legislative or regulatory intent on a subject are not sufficient to pre-empt state regulation, where there is no federal explicit statutory or regulatory language expressing such clear intent. (D.06-02-032, p. 24, citing to *Guschke v. Oklahoma City* (10<sup>th</sup> Cir. 1985) 763 F.2d 379; 1985 U.S. App. LEXIS 31562, \* 6.) Nevertheless, we also repeatedly express our intent to create a load-based cap that is compatible with any other GHG cap-and-trade regime that may be developed in the future, either with the Western region, nationally, or internationally. (D.06-02-032, pp. 2, 3, 19, 55.)

**D. Commission Jurisdiction to Impose GHG Emissions Caps on ESPs**

AReM argues that the Decision errs because the Commission has no legal authority to impose GHG emissions caps on ESPs. This argument is premised on the notion that the issue of GHG emissions is unrelated to RAR and RPS. Next, AReM argues that imposing the emissions cap requirement on ESPs is beyond the Commission's jurisdiction under Sections 380(e) and 701. Finally, AReM contends that imposing the emissions cap on ESPs regulates the rates or terms and conditions of ESP service, contrary to Section 394(f). (AReM Rehg. App., pp. 4-10.) Each of these arguments is discussed below.

**i) GHG Emissions as Part of RAR and RPS**

In AReM's view, because the RAR and RPS statutes do not contain an explicit legislative mandate to limit GHG emissions, the issue is unrelated to RAR or RPS. AReM argues that the Decision's linking of GHG emissions with RAR and RPS is contrary to principles of statutory interpretation. (AReM Rhg. App., pp. 4-6, 9 fn. 20.)

AReM supports its contention by stating that the general program objectives enumerated by the Legislature under Sections 380<sup>22</sup> and 454.5,<sup>23</sup> do not explicitly

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<sup>22</sup> Section 380 provides in pertinent part:

- (a) The commission, in consultation with the Independent System Operator, shall establish resource adequacy requirements for all load-serving entities.
- (b) In establishing resource adequacy requirements, the commission shall achieve all of the following objectives:
  - (1) Facilitate development of new generating capacity and retention of existing generating capacity that is economical and needed.
  - (2) Equitably allocate the cost of generating capacity and prevent shifting of costs between customer classes.
  - (3) Minimize enforcement requirements and costs.
- (h) The commission shall determine and authorize the most efficient and equitable means for achieving all of the following:
  - (1) Meeting the objectives of this section.
  - (2) Ensuring that investment is made in new generating capacity.
  - (3) Ensuring that existing generating capacity that is economic is retained. (Pub. Util. Code, § 830, subd. (a), (b), (h).)

<sup>23</sup> Section 454.5 provides in pertinent part:

- (a) The commission shall specify the allocation of electricity, including quantity, characteristics, and duration of electricity delivery, that the Department of Water Resources shall provide under its power purchase agreements to the customers of each electrical corporation, which shall be reflected in the electrical corporation's procurement plan. Each electrical corporation shall file a proposed procurement plan with the commission not later than 60 days after the commission specifies the allocation of electricity. The proposed procurement plan shall specify the date that the electrical corporation intends to resume procurement of electricity for its retail customers, consistent

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reference GHG emission reduction as among the program goals. According to AReM, the Commission's own view of statutory interpretation as articulated in D.06-01-047,<sup>24</sup> precludes regulating GHG emission reduction because that term is not within the "plain meaning" of the statutes. AReM quotes the following discussion from D.06-01-047 which states:

In construing a statute, our role, like the court's role, is to ascertain the Legislature's intent so as to effectuate the purpose of the law. In determining intent, we look first to the words of the statute, giving the language its usual, primary meaning. If there is no ambiguity in the language, we will presume that the Legislature meant what it said and the plain meaning of the statute governs. (*People v. Canty* (2004) 32 Cal. 4<sup>th</sup> 1266, 1276.) Where the language of a statute is ambiguous, it is appropriate for us to consider other evidence to ascertain legislative intent, such as the history and background of the provision. (*People v. Birkett* (1999) 21 Cal. 4<sup>th</sup> 226, 231-232.)

AReM's argument is flawed because it truncates our full discussion in a manner which ignores other relevant considerations to be weighed when rationalizing statutory purpose. Specifically, we went on to state:

The "plain meaning" rule does not prohibit us from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context. Provisions relating to the same subject matter must be harmonized to the extent possible. The intent of the law prevails over the letter of the law; and the letter of the law is

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with its obligation to serve. After the commission's adoption of a procurement plan, the commission shall allow not less than 90 days before the electrical corporation resumes procurement pursuant to this section. (Pub. Util. Code, § 454.5, subd. (a).)

<sup>24</sup> See *Order Modifying and Denying Rehearing of Decisions 04-05-017 and 04-05-018* [D.06-01-047] (2006), p. 7 (slip op.), \_\_\_ Cal.P.U.C. 3d \_\_\_.

read, if possible, to conform to the spirit of the act. (See *People v. Canty, supra*, pp. 1276-1277.)<sup>25</sup>

Based on the broader principles of statutory interpretation, it is reasonable to look to the purpose and spirit of the statutes as a whole, in implementing the RAR and RPS programs. Indeed, the “plain meaning” of the statutory language does clearly demonstrate that when the Legislature enacted Section 399.11, air pollution reduction and related environmental improvement were among the purpose and goals of the RPS Program. Section 399.11 provides in pertinent part:

(b) Increasing California’s reliance on renewable energy resources may promote stable electricity prices, **protect public health, improve environmental quality**, stimulate sustainable economic development, create new employment opportunities, and reduce reliance on imported fuels. (emphasis added.)

(c) The development of renewable energy resources may **ameliorate air quality problems** throughout the state and improve public health by reducing the burning of fossil fuels and the associated environmental impacts. (Pub. Util. Code, § 399.11, subd. (b) and (c) (emphasis added).)

Adoption of a GHG emissions cap may not be the only means of accomplishing these legislative goals, however it is one strategy for doing so and AReM’s view that GHG emissions reduction is somehow unrelated to the spirit and purpose of the statutes is an unreasonably narrow interpretation of the legislature’s express directives. Moreover, following the enactment of Section 399.11, we have publicly and repeatedly indicated that we consider the issue of GHG emission reduction to be intrinsically linked to meeting the RPS and RAR program goals.<sup>26</sup> Based on the

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<sup>25</sup> *Id.*, *supra*, fn. 24.

<sup>26</sup> See the April 2003 Joint EAP discussing the reduction of emissions and toxic and criteria pollutants and greenhouse gasses in the context of the envisioned “loading order” which includes renewable energy resources (Joint EAP, pp. 4-5.) See the October 2005 Joint EAP II discussing GHG emissions reductions in the context of the RPS program and overall RAR goals (Joint EAP II, pp. 8, 15-16.) See the *April 2004 OIR*, Appendix B, setting forth the concept paper to propose an incentive framework for procurement of energy resources located in-state or out-of-state specifically dealing with carbon-based procurement and  
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Legislature's subsequent enactment of Section 380 in 2005, it is also reasonable to conclude that the Legislature was aware of, and in agreement with our interpretation of our authority and charge under the statutes. Had the Legislature intended to restrict our ability to regulate GHG emissions, or to correct our interpretation of the Legislature's purpose in enacting Section 399.11, it could have explicitly done so.

Instead, the Legislature not only declined to place any explicit limit on our authority in implementing the statutes, but it went on to provide that its own [legislatively] enumerated objectives may be lawfully supplemented by other applicable law and by Commission order. Section 380(e) states:

(e) The commission shall implement and enforce the resource adequacy requirements established in accordance with this section in a nondiscriminatory manner. Each load-serving entity shall be subject to the same requirements for resource adequacy and the renewables portfolio standard program that are applicable to electrical corporations **pursuant to this section, or otherwise required by law, or by order or decision of the commission.** The commission shall exercise its enforcement powers to ensure compliance by all load-serving entities. (Pub. Util. Code, § 380, subd. (e) (emphasis added).)

For these reasons, ARem's claim that the issue of GHG emissions has nothing to do with RAR and RPS is flawed.

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cap and trade principles of the Sky Trust. See *Long-Term Planning Decision [D.04-12-048]* (2004), pp. 3-4, 210 (slip op.) \_\_ Cal. P.U.C. 3d \_\_, encompassing integrated RPS and RAR program goals and stating: “[T]o further the state’s clear goal of promoting environmentally responsible energy generation, we also adopt a policy that reflects attempts to mitigate the impact of GHG emissions in influencing global climate change patterns. As described in this decision, the IOUs are to employ a “GHG adder” when evaluating fossil and renewable generation bids....[S]taff will also begin to explore the concept of carbon content requirement for the IOUs, in coordination with other governmental and nongovernmental entities that are addressing the climate change issue.”

ii) **Scope of Commission Authority Over ESPs**

AReM contends that requiring ESPs to comply with the GHG emissions cap is beyond the scope of the Commission's authority under Sections 380(e), 399.11 et seq., and 701. (AReM Rhg. App., pp 5-8.)

As explained immediately above, adoption of a GHG emissions cap is permissibly linked to implementation of the RAR and RPS statutes. Implementation directives under the statutes not only give the Commission explicit authority over ESPs, they direct that we implement the requirements in a nondiscriminatory manner and in the same manner as to both the utilities and ESPs. Specifically, Section 399.12 (c)(3)(C) provides:

(C) The commission shall institute a rulemaking to determine the manner in which electric service providers will participate in the renewables portfolio standard. **The electric service provider shall be subject to the same terms and conditions applicable to an electrical corporation** pursuant to this article. (Pub. Util. Code, § 399.12, subd. (c)(3)(C) (emphasis added).)

In addition, Section 380(e) provides:

(e) The commission shall implement and enforce the resource adequacy requirements established in accordance with this section in a nondiscriminatory manner. **Each load-serving entity shall be subject to the same requirements for resource adequacy and the renewables portfolio standard program that are applicable to electrical corporations** pursuant to this section, or otherwise required by law, or by order or decision of the commission. The commission shall exercise its enforcement powers to ensure compliance by all load-serving entities. (Pub. Util. Code, § 380, subd. (e) (emphasis added).)

Even if AReM could argue our jurisdiction under Sections 399.11 and 380(e) is somehow ambiguous, AReM is wrong that Section 701 and *PG&E v. PUC, supra*, would not act to permit imposition of the GHG emissions cap on entities providing

service to utility customers. AReM suggests that a GHG emissions cap for ESPs is not cognate and germane to utility regulation because the relationship between the ESPs and IOUs is simply transactional in nature. This argument misses the point. The Decision does not impose the requirement on the ESPs simply because they engage in transactions with the utilities. As explained above, the Commission has a legitimate interest to reduce GHG emissions in connection with the RAR/RPS statutory goals to ameliorate air pollution and improve the environment. The Decision imposes a load-based cap on the procurement portfolios of the three major California IOUs. It is consistent with the standard under *PG&E v. PUC* to also require the same standard for ESPs who provide service within the service territories of the three IOUs or to the customers of the IOUs, because it is related to RAR and RPS utility regulation, and because, exempting non-IOU generation from the GHG emission cap would provide a competitive advantage to non-IOU generation. (D.06-02-032, p. 26.)

Moreover, we have not asserted general regulatory control over ESPs for all purposes as if they were public utilities. While we retain extensive jurisdiction over public utilities. However, our assertion of jurisdiction over ESPs is reasonably limited to RAR and RPS. Even in that defined area, we have interpreted the applicable statutes to provide us with discretion to adopt less rigorous and different program requirements for ESPs than for the utilities.<sup>27</sup> Further, we have properly endeavored to limit any perceived over-extension of jurisdiction over ESPs by providing that during implementation, we will identify areas where terms and conditions of the GHG reduction requirements should

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<sup>27</sup> See *Opinion on Participation of Energy Service Providers, Community Choice Aggregators, and Small and Multi-Jurisdictional Utilities in the Renewables Portfolio Standard Program* [D.05-11-025] (2005) pp. 4-6, 12-13 (slip op.) \_\_ Cal.P.U.C.3d\_\_. In D.05-11-025, we discussed the need to harmonize the competing directives under the statutes pursuant to language which authorizes the Commission to “determine the manner” in which an ESP will participate, and at the same time states that ESPs shall be subject to “the same” program requirements as the utilities. In balancing these directives the Commission concluded: “[W]e do not believe it is reasonable to require these entities [ESPs and CCAs] to be subject to the exact same steps for RPS implementation purposes as the utilities we fully regulate. We also do not believe that it is necessarily reasonable to subject ESPs and CCAs to the same RPS process requirements as each other, simply because they are not utilities...we will ask the Assigned Commissioner and Assigned ALJ to determine a process for deciding how ESPs, CCAs, and small and multi-jurisdictional utilities participate in and comply with the RPS.”

appropriately differ as between ESPs, community choice aggregators (“CCAs”), and the utilities. (D.06-02-032, pp. 26, 68 [Ordering Paragraph 4].)

Finally, AReM makes the broad assertion that the line of cases discussed by the court in *PG&E v. PUC* would not support our jurisdiction over ESPs for purposes of the GHG cap.<sup>28</sup> AReM does not explain on what basis it feels the cited cases are controlling. However, neither are analogous or relevant to the situation in this proceeding. Contrary to the situation in *Transmission Television v. PUC*, we do not attempt to exercise general jurisdiction over ESPs by classifying them as any class of public utility. Similarly, *Hartwell Corp. v. Superior Court* is not relevant because it did not analyze whether any particular entity was in fact subject to Commission jurisdiction or whether the Commission has improperly exerted jurisdiction under Section 701.

### iii) Regulation of ESP Rates or Terms and Conditions

AReM argues that the Decision errs because imposing a GHG emissions cap on ESPs will impact the rates and the terms and conditions of service offered by ESPs and is thus beyond the Commission’s authority pursuant to Section 394(f). (AReM Rhg. App., p. 8.)

Section 394 is a consumer protection statute regarding the registration requirements for ESPs and provides in pertinent part:

(f) Registration with the commission is an exercise of the licensing function of the commission, and does not constitute regulation of the rates or terms and conditions of service offered by electric service providers. Nothing in this part authorizes the commission to regulate the rates or terms and conditions of service offered by the electric service providers. (Pub. Util. Code, § 394, subd. (f).)

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<sup>28</sup> Citing to *Television Transmission, Inc. v. Public Utilities Commission* (“*Television Transmission v. PUC*”) (1956) 47 Cal.2d 82; 1956 Cal. LEXIS 254; and *Hartwell Corporation v. The Superior Court of Ventura County* (“*Hartwell Corp. v. Superior Court*”) (2002) 27 Cal. 4<sup>th</sup> 256; 2002 Cal. LEXIS 590.

AReM does not offer explanation of how a general portfolio-based emissions cap constitutes an attempt to assert direct regulatory authority over any specific rates or terms and conditions that ESPs offer under their service contracts. The rates, terms and conditions of ESP service remain entirely within the discretion of the ESPs, regardless of whether their decision making in effectuating the cap may influence the rates, terms and conditions they are willing to offer under certain contracts for service.

The Decision reasonably concludes: "...regulating the GHG emissions of entities providing service to utility customers is cognate and germane to the regulation of public utilities...[M]oreover, it would provide a competitive advantage to non-IOU generation over IOU generation if only IOU were subject to GHG emission limits. Such limited measures do not amount to general regulation of the rates or terms of services provided by ESPs..." (D.06-02-032, p. 26.) AReM has failed to establish how an emissions cap acts to assert regulatory control over any specific rates, terms, or conditions of ESP service contracts.

#### **E. Scope of the Proceeding**

AReM contends that imposing a GHG emissions cap on ESPs is beyond the noticed scope of the proceeding. Accordingly, AReM asserts that the Commission exceeded its lawful authority contrary to Section 1757(a)(1) and (a)(2). (AReM Rhg. App., pp. 10-12.)

AReM does not allege that consideration of a GHG emissions cap requirement, as a general matter, was outside the scope of the proceeding. Rather, AReM argues that Commission documents only discussed adopting such a requirement for the utilities. AReM argues that nowhere did we provide notice that an emissions cap requirement would be extended to ESPs. In support of this argument, AReM quotes various snippets from the *April 2004 OIR* and the *Long-Term Planning Decision* [D.04-12-048], *supra*, where we stated our intent to evaluate a procurement incentive framework including potential carbon caps on "utility procurement." We do not believe that AReM's reliance on these statements to insulate ESPs from possible application of the GHG emissions cap is persuasive.

First, as established in Section II. D. i) of this Order, GHG emission reduction is lawfully and intrinsically linked to implementation of the RAR and RPS statutes. Statutes governing both programs, in particular Sections 380(e) and 399.12(c)(3)(C), contain explicit language directing that load-serving entities (e.g. ESPs), shall be subject to the same requirements as the utilities for purposes of program requirements. We have in some instances exercised our discretion under these statutes to apply less rigorous requirements upon ESPs than the utilities. However, as AREM itself has argued, generally the “plain meaning” of a statute governs. By that standard, the statutory directive that ESPs be subject to the same requirements as the utilities is sufficient to put ESPs on notice that any program requirement considered for the utilities also involves ESPs, and should be expected to apply to ESPs, unless we exercise our discretion to find otherwise.

Second, we have consistently provided notice to ESPs of proceeding issues which may impact them, by making ESPs and CCAs respondents in proceeding activities which relate to RAR and RPS. In this instance, the ALJ noted that by D.05-03-013,<sup>29</sup> we made ESPs and CCAs respondents in this proceeding (R.04-04-003). Consistent with D.05-03-013, in April 2005 the ALJ served ESPs and CCAs with copies of the ruling specific to the procurement incentive framework and directed that all workshop comments and briefs dealing with the GHG emissions cap issues be served on ESPs and CCAs as well.<sup>30</sup> The Procurement Incentive Framework R.04-04-003 Workshop Report also noticed our inclusion of ESPs by stating: “[I]n addition, the Commission should also address several legal issues, including its jurisdiction over the allocation and sale of emissions allowances, trading of allowances, and its purview over CCAs and ESPs for the purpose of establishing a load-based GHG cap.” (Workshop Report, p. 26.)

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<sup>29</sup> *Opinion Modifying Order Instituting Rulemaking* [D.05-03-013] (2005) \_\_ Cal.P.U.C. 3d \_\_.

<sup>30</sup> See ALJ Ruling Soliciting Post-Workshop Comments on Procurement Incentive Framework, dated April 4, 2005.

RAR and RPS implementation is a substantial undertaking and the programs are comprised of numerous individual, yet interrelated issues. AReM offers no legal basis to support a conclusion that absent notice as to any one issue, the ESPs are free to assume they will be free of any requirements. It is somewhat disingenuous for AReM to attempt to segment and disassociate discussion of a GHG emissions cap from discussion of other program issues where we have more explicitly referenced ESPs.

Any of the documents to which AReM refers discuss numerous RAR and RPS issues for our consideration and action. For example, one of the many issues to be addressed under the umbrella of the *April 2004 OIR* was consideration of procurement incentives including carbon-based GHG emissions caps. (*April 2004 OIR*, pp 15-17, Appendix B.) The *April 2004 OIR* did not explicitly link ESPs to that discussion or reference ESPs relative to each and every issue where RAR and RPS requirements might be developed. Nonetheless, we have indeed stated the broad view that ESPs are inherently involved in program implementation, stating: “[W]e have previously concluded, and affirm here, that resource adequacy is not merely an issue for the utilities. Electric Service Providers (ESPs) are load-serving entities, and they should have an obligation to acquire sufficient resources for their customer load.”<sup>31</sup>

AReM has not demonstrated that we acted in excess of our jurisdiction or failed to proceed in a manner required by law pursuant to Section 1757(a)(1) and (a)(2). Consideration of a GHG emissions cap was, by AReM’s own admission, within the noticed scope of this proceeding. Further, ESPs had notice of its potential applicability by virtue of the RAR and RPS statutes, our action to specifically make ESPs respondents for purposes of considering this issue, and other Commission statements making clear ESPs are within the umbrella of RAR and RPS implementation issues.

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<sup>31</sup> See *April 2004 OIR*, p. 14.

## F. Due Process Requirements

AReM asserts that the Decision errs because the Commission denied parties their due process rights. Apart from the notice issue addressed in the preceding section of this memo, the crux of AReM's position is that the Commission failed to hold evidentiary hearings as required by law. (AReM Rhg. App., pp. 12-13.)

AReM does not explain why it believes hearings were necessary in this proceeding and/or about what particular issues. Instead, AReM merely asserts the following broad principles to suggest that, as a matter of course, hearings are required in all proceedings: 1) federal and state due process clauses require that parties be given adequate notice and opportunity to be heard;<sup>32</sup> 2) administrative agencies such as the Commission are subject to procedural due process requirements;<sup>33</sup> 3) when a hearing is not made available, there is a denial of procedural due process;<sup>34</sup> and 4) workshops and unsworn comments are not a replacement for evidentiary hearings.<sup>35</sup> AReM offers no explanation or analysis to establish how the facts of this proceeding are analogous to any of the cited cases such as to warrant hearings. AReM's reliance on these cases is flawed.

In each of the cited cases, the courts reviewed decisions associated with administrative proceedings deemed judicial or quasi-judicial, which adjudicated individual rights of a party. The judicial or quasi-judicial character of the proceeding was central to implicating heightened administrative procedure requirements. In addition, in most cases, the administrative action was governed by explicit statutory requirements that the agency conduct hearings before deciding on the matter in question.

This proceeding is not analogous. This is not a judicial or quasi-judicial proceeding which would potentially be subject to heightened procedural requirements.

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<sup>32</sup> Citing to *Morgan v. United States* (1936) 298 U.S. 468; 1936 U.S. LEXIS 717; and *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434; 1001 Cal. App. LEXIS 761.

<sup>33</sup> Citing to *Sommerfield v. Helmick* (1997) 57 Cal.App.4<sup>th</sup> 315; 1997 Cal. App. LEXIS 674.

<sup>34</sup> Citing to *Mohilef v. Janovici* (1996) 51 Cal.App.4<sup>th</sup> 267; 1996 Cal. App. LEXIS 1112.

<sup>35</sup> Citing to *California Trucking Association v. Public Utilities Commission* ("*Calif. Trucking Assn. v. PUC*") (1977) 19 Cal.3d 240; 1977 Cal. LEXIS 128.

Instead, as rulemaking proceeding it is quasi-legislative in character pursuant to Section 1701.1(c)(1).<sup>36</sup> It does not adjudicate the individual rights of a party, rather it sets policy and/or rules which may be generally applicable to an industry. Specifically, D.06-02-032 adopts our stated [policy] intent to develop a load-based cap on GHG emissions for specified electric utilities and ESPs providing electric power in the respective utility service territories. (D.06-02-032, p. 2.)

In a rulemaking proceeding, we are not required by due process principles to hold hearings or to rely on the nature of evidence submitted in hearings. In such proceedings, we may properly rely on other materials such as written comments and proposals to support its decision.

Moreover, there is no statute which applies to the issues under consideration in this proceeding to explicitly require a hearing. Section 1708,<sup>37</sup> does require notice and opportunity to be heard in a manner that may require evidentiary hearings. However, it is limited to matters involving complaint cases or decisions which rescind, alter, or amend prior orders or decisions. Decision 06-02-032 does not involve a complaint case nor does it act to rescind, alter, or amend a prior Commission decision. Consequently, Section 1708 does not apply to this proceeding.

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<sup>36</sup> Section 1701.1 provides in pertinent part:

(c)(1) Quasi-legislative cases, for purposes of this article, are cases that establish policy, including, but not limited to, rulemakings and investigations which may establish rules affecting an entire industry. (Pub. Util. Code, § 1701.1, subd. (c)(1).)

<sup>37</sup> Section 1708 provides:

The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

**G. Findings of Fact on Material Issues**

AReM contends that the Decision errs because it is not supported by findings of fact and conclusions of law as required by Section 1705. (AReM Rhg. App., pp. 13-14.)

Section 1705 provides in pertinent part that a Commission decision:

shall contain, separately stated, findings of fact and conclusions of law on all issues material to the order or decision. (Pub. Util Code, § 1705.)

AReM asserts that even if it is within our authority to impose a GHG emissions cap on ESPs, we failed to consider and make findings regarding certain factual issues that in AReM's view, are material to such a determination.<sup>38</sup> While the questions AReM poses may be worthy of consideration at some juncture, AReM fails to explain or establish why any of the issues were material for purposes of D.06-02-032. There is no legal requirement that we treat any particular issue as material simply because an entity says it is.

In addition, AReM ignores that what constitutes a material issue varies depending upon the goal of the proceeding in question. Here, the goal was to establish a policy to develop a GHG emissions cap. (D.06-02-032, p. 1.) Consistent with that goal, we identified threshold issues deemed material to a determination. These include: whether to establish a GHG emissions cap at this time; consistency and compatibility with state and any regional and national climate change policies; whether to adopt a load-based or generator-based cap; Commission jurisdiction and applicability of a cap; and potential conflicts with federal law or federal pre-emption. (D.06-02-032, pp. 11-27.) As required by Section 1705, our Decision contains findings of fact and conclusions of law corresponding to all of these material issues. (D.06-02-032, pp. 58-66.)

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<sup>38</sup> Examples of AReM's questions include: what impact would imposing load-based GHG emissions caps on ESPs have on the state's GHG emissions?; and what are the estimated costs associated with imposing load-based GHG emissions caps on ESPs? (AReM Rhg. App., p. 13.)

By contrast, the issues raised by AReM are not material for purposes of this Decision because, as factual inquiries, they are more akin to evaluation we plan to undertake during the implementation phase of the proceeding. Further, to the extent the issues AReM raises suggest ESPs should be treated differently than utilities for purposes of the GHG emissions cap, they also constitute issues that may be appropriate for a later phase of the proceeding, but which are not material to D.06-02-032. (D.06-02-032, pp. 26, 68 [Ordering Paragraph 4].)

Our Decision properly contains findings of fact and conclusions of law to support all the threshold material policy issues and AReM fails to establish why consideration of the proffered factual issues was material to our determination.

#### **H. Substantial Evidence**

AReM contends the Decision errs because it is not supported by sufficient evidence. In particular, AReM asserts there is no “expert testimony or empirical data” to support the Decision or its findings.<sup>39</sup> (AReM Rhg. App., p. 14.)

AReM’s argument is flawed for two reasons. First, as discussed in Section II. F. of this Order, in a rulemaking proceeding such as this we were not required to conduct evidentiary hearings of the nature that would involve the submittal of “expert testimony or empirical data.” We followed lawful administrative procedure and the Decision is not rendered unlawful simply because there is no “expert testimony or empirical data.”

Second, AReM makes no case why the information in the record was not sufficient to support our determination, nor does it identify any type of “expert testimony or empirical data” would have been necessary to support any of our findings. The Decision identifies the threshold policy issues which must be considered to support our determination to adopt a GHG emissions cap policy (D.06-02-032, pp. 11-27.), and the record contains information submitted by the parties on all of the threshold material

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<sup>39</sup> Citing to *Calif. Trucking Assn. v. PUC*, *supra*.

issues.<sup>40</sup> While AReM may disagree with our conclusions, disagreement does not constitute legal error. There was sufficient information in the record to support adoption of a GHG emission cap policy and AReM has failed to establish how the Decision is unlawful.

### **I. Discrimination Against ESPs**

AReM contends that requiring ESPs to comply with a GHG emissions cap will place them at an unfair competitive disadvantage relative to the utilities. AReM argues that utilities with Commission-approved procurement plans have assured cost recovery of procurement-related costs, while ESPs do not have similar cost-recovery mechanisms. AReM thus argues that the GHG emission cap policy is inherently discriminatory and ESPs should be exempted. (AReM Rhg. App. p. 14.)

AReM does not offer any law or requirement that it alleges has been violated. It merely seeks exemption from the GHG emissions cap requirement because it believes its members are not similarly situated as the utilities for purposes of implementation. We in fact concluded differently, finding that non-utility generators would have a competitive advantage over utility generation if only the utilities were subject to GHG emission limits. (D.06-02-032, p. 26.)

Nonetheless, our Decision acknowledges numerous issues for further evaluation which may ultimately impact the relative competitive positions of the utilities, ESPs, and CCAs. (D.06-02-032, p. 35.) Thus, we provide that during this subsequent phase we will determine whether the GHG emissions cap requirements will be imposed on ESPs, CCAs, and utilities in a similar fashion, and where differences may be appropriate. (D.06-02-032, pp. 26, 68 [Ordering Paragraph 4].) AReM has failed to

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<sup>40</sup> Comments on the Workshop Report Regarding a Procurement Incentive Framework, dated May 2, 2005, were filed by: Cogeneration Association of California (“CAC”) and Energy Producers and Users Coalition (“EPUC”) (jointly), Duke Energy North America (“Duke”), Green Power Institute (“GPI”), Natural Resources Defense Council (“NRDC”), Division of Ratepayer Advocates (“DRA”), PG&E, Sempra Global (“Sempra”), Solargenix, SCE, The Utility Reform Network (“TURN”), and the Union of Concern Scientists (“UCS”). Reply Comments on Workshop Report Regarding a Procurement Incentive Framework, dated May 23, 2005, filed by: GPI, NRDC, PG&E, SCE, UCS, and TURN.

establish that adopting a GHG emission policy for both the utilities and ESPs is in itself unlawful or discriminatory.

### III. CONCLUSION

For the reasons stated above, the applications for rehearing of D.06-02-032 filed by SCE and AReM are denied because no legal error has been shown. In addition, CEED's motion to intervene and application for rehearing are dismissed because CEED lacks standing to apply for rehearing.

**THEREFORE, IT IS ORDERED** that:

1. Rehearing of D.06-02-032 is denied.
2. CEED's motion to intervene and application for rehearing are dismissed.

This order is effective today.

Dated June 29, 2006, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE R. CHONG  
Commissioners