

Decision PROPOSED DECISION OF ALJ YIP-KIKUGAWA (Mailed 6/14/2011)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U338E) for Applying the Market Index Formula and As-Available Capacity Prices adopted in D.07-09-040 to Calculate Short-Run Avoided Cost for Payments to Qualifying Facilities beginning July 2003 and Associated Relief.

Application 08-11-001
(Filed November 4, 2008)

And related matters.

Rulemaking 06-02-013
Rulemaking 04-04-003
Rulemaking 04-04-025
Rulemaking 99-11-022

**DECISION GRANTING PETITION TO
MODIFY DECISION 10-12-035**

Summary

This decision grants the petition for modification filed jointly by California Municipal Utilities Association, Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company, The Utility Reform Network, the California Cogeneration Council, the Independent Energy Producers Association, the Cogeneration Association of California, the Energy Producers and Users Coalition, and the Division of Ratepayer Advocates to modify Decision 10-12-035.

Background

On December 21, 2010, the Commission issued Decision (D.) 10-12-035, which approved the “Qualifying Facility and Combined Heat and Power Program Settlement Agreement” (Settlement) entered into by Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company, The Utility Reform Network, the California Cogeneration Council, the Independent Energy Producers Association, the Cogeneration Association of California, the Energy Producers and Users Coalition, and the Division of Ratepayer Advocates (Settling Parties). The Settlement provides a detailed and comprehensive framework for a Qualifying Facility and Combined Heat and Power Program (QF/CHP Program) in California. Among other things, the Settlement includes certain requirements and cost obligations on electric service providers (ESPs), Community Choice Aggregators (CCAs), publicly-owned utilities (POU), and their respective customers.

Applications for rehearing of D.10-12-035 were timely filed by the City and County of San Francisco (CCSF), the California Municipal Utilities Association (CMUA), and jointly by the Marin Energy Authority, the Alliance for Retail Energy Markets, and the Direct Access Customer Coalition. Subsequently, on March 16, 2011, CMUA filed a motion for abeyance of its rehearing application to allow it and Settling Parties time to agree upon modifications to the Settlement and to make an appropriate filing with the Commission for consideration of the modifications.

In D.11-03-051, the Commission granted CMUA’s request for abeyance of its rehearing application. This decision also held in abeyance the issues raised by

CCSF that were also raised in CMUA's rehearing application relating to cost allocation to municipal departing load (MDL) customers¹ and due process. As explained in D.11-03-051, a settlement on the allocation of costs to MDL customers could potentially moot these issues.² Rehearing of all other issues raised in the rehearing applications was denied.

On April 1, 2011, CMUA and the Settling Parties (jointly, Joint Petitioners) filed a petition for modification of D.10-12-035 (Petition). Joint Petitioners state that the proposed modifications would clarify the imposition of non-bypassable charges (NBCs) on MDL customers as a result of the QF/CHP Program and resolve the issues raised in CMUA's rehearing application.³

The Marin Energy Authority, the Alliance for Retail Energy Markets, Shell Energy North America (US) L.P and the Direct Access Customer Coalition (jointly, Joint Respondents) filed a timely response to the Petition. Joint Respondents do not object to the Petition, so long as the proposed changes do not create the potential for cost shifting to CCA and Direct Access (DA) Customers. Joint Respondents also request that the "vintaged" approach for

¹ There are two categories of Municipal Departing Load (MDL). Transferred MDL refers to customers who had previously received generation and distribution services from an investor owned utility, but are now receiving service from a publicly owned utility. New MDL is load that has never been served by an IOU but is located in an area that had previously been in the IOU's service territory (as that territory existed on February 1, 2001) and was annexed or otherwise expanded into by a publicly owned utility.

² D.11-03-051 at 3.

³ Petition at 3-4. This Decision only addresses the Petition, and not the issues raised in CMUA's rehearing application.

allocation of NBCs associated with the Settlement proposed in the Petition also be extended to CCA and DA Customers.

Joint Petitioners' request to reply to Joint Respondents' response was granted, and their reply was filed on April 28, 2011.

Discussion

The Settlement comprises an eight-page "CHP Settlement Agreement," a 76-page "CHP Program Settlement Agreement Term Sheet" (Term Sheet) with 17 sections, and 11 exhibits. Section 13 of the Term Sheet is entitled "IOU Cost Recovery for CHP Program (PPAs)." Section 13.1.2.2, which was adopted by the Commission in D.10-12-035, states:

If the CPUC determines that the IOUs should purchase CHP generation on behalf of Direct Access (DA) and CCA customers, then the D.06-07-029 (and D.08-09-012 if necessary) shall be superseded to the extent necessary to authorize the IOUs to recover the net capacity costs associated with the CHP Program from all bundled service, DA and CCA customers and all Departing Load Customers except for CHP Departing Load Customers, on a non-bypassable basis. The net capacity costs of the CHP Program shall be defined as the total costs paid by the IOU under the CHP Program less the value of the energy and any ancillary services supplied to the IOU under the CHP Program. No energy auction shall be required to value such energy and ancillary services. In exchange for paying a share of the net costs of the CHP Program, the load-serving entities (LSEs) serving DA and CCA customers will receive a pro-rata share of the RA credits procured via the CHP Program.

In its comments on the proposed settlement agreement that was ultimately adopted in D.10-12-035, CMUA asserted that Section 13.1.2.2 of the Term Sheet should not apply to MDL Customers because doing so would overturn or depart

from Commission precedent established in D.08-09-012 without adequate findings supported by the record.⁴ CMUA argued that since MDL Customers were not included within the IOUs' load forecast, the utilities were not procuring new CHP resources on behalf of MDL Customers.⁵ However, D.10-12-035 agreed with the Settling Parties' position that MDL Customers should be subject to the provisions of Section 13.1.2.2 because "the (greenhouse gas) Emissions Reduction Targets are not based on load forecasts that exclude MDL, but rather on actual retail sales data that includes all current bundled service customers, even if some of those customers later depart for municipal service."⁶

Although the Settling Parties and CMUA do not agree on whether Section 13.1.2.2 of the Term Sheet applies to MDL Customers, they subsequently met and developed mutually agreed upon changes and clarifications to D.10-12-035. The proposed changes and clarifications specify the extent to which Transferred MDL Customers would be responsible for any NBCs associated with the Settlement and provide that New MDL Customers will not be responsible for any NBCs associated with the Settlement.

⁴ CMUA Comments, filed October 25, 2010, at 7-9. In D.08-09-012, the Commission considered the extent to which MDL and customer generation departing load (CGDL) customers would be responsible for non-bypassable charges related to new generation. It determined that once departed from bundled service, MDL and CGDL will not have to pay the NBCs for new generation resources because the IOUs would have forecasted and not included these departing loads in determining the need for those resources. (D.08-09-012 at 23-25.)

⁵ CMUA Comments, filed October 25, 2010, at 8-9.

⁶ D.10-12-035 at 52-53.

As proposed in the Petition,⁷ Transferred MDL Customer responsibility for NBCs associated with the Settlement is based on whether the Transferred MDL Customer departs IOU service before or after the Settlement Effective Date.⁸ Specifically, Transferred MDL Customers who depart IOU service before the Settlement Effective Date will not be responsible for NBCs associated with the Settlement, while Transferred MDL Customers who depart IOU service after the Settlement Effective Date will be responsible, subject to certain limitations. The proposed changes⁹ also clarify:

- Transferred and New MDL Customers remain responsible for whatever other charges they would have incurred under current statutory conditions, such as the ongoing Competition Transition Charge (CTC).
- Which categories of Settlement PPAs would be subject to NBCs for Transferred MDL Customers departing after the Settlement Effective Date.
- How the NBCs associated with the applicable Settlement PPAs would be calculated for Transferred MDL Customers departing after the Settlement Effective Date and the date limitation for applicability of these charges.

We find that the proposed changes and clarifications reasonably address MDL Customers' responsibility for new generation costs associated with the

⁷ Defined terms used in the Petition have the same meaning as in the Settlement.

⁸ The Settlement Effective Date is defined in the Term Sheet as: "The date that is the later of the two following events: (1) final and non-appealable CPUC approval of the Settlement in its entirety in a form that is agreeable to each Party; and (2) a final and non-appealable order from FERC approving the IOUs' Joint Application to terminate their Public Utility Regulatory Policy Act of 1978 (PURPA) purchase requirement under Section 210(m) of the Energy Policy Act of 2005, 117 FERC ¶ 61,078 (2006)."

⁹ Petition, at 5-7.

Settlement. Consistent with D.08-09-012 and our overall guiding principles for resolving NBC implementation issues, the proposed changes clarify that MDL Customers would not pay any NBCs related to new generation resources that were not procured on their behalf.

The proposed modifications in the Petition limit the time period to recover certain costs associated with the Settlement from MDL Customers. Therefore, there is a possibility that MDL Customers would not be responsible for some portion of the costs related to generation resources procured on their behalf. Pursuant to Pub. Util. Code § 366.2(d)(1), which prohibits the shifting of recoverable costs between customers, the IOUs cannot recover costs attributable to MDL Customers from bundled or other departing load customers (i.e., CCA and DA Customers). As such, any unrecovered costs attributable to MDL Customers shall be the responsibility of the Settling Parties.¹⁰ Since costs incurred on behalf of MDL Customers shall be the responsibility of MDL Customers, as specified in D.08-09-012, or Settling Parties, as required under Pub. Util. Code § 366.2(d)(1), Joint Respondents' concern that there would be a potential for cost shifting to CCA and DA Customers is unfounded.

Joint Petitioners state that adoption of the Petition would resolve the MDL issues raised by CMUA in its application for rehearing of D.10-12-035, thus avoiding additional litigation over these issues. This Commission encourages parties to resolve disputed issues on their own, as it is a more effective use of resources and allows parties to achieve a mutually agreed-upon outcome. For all these reasons, it is reasonable to grant the Petition. Accordingly, we revise the

¹⁰ As suggested by Joint Respondents, this could include IOU shareholders and the Settling Parties that represent the QF and CHP owners and developers.

discussion on pages 52-53 of D.10-12-035 concerning MDL Customer responsibility for NBCs associated with the Settlement, as well as corresponding changes to related Findings of Facts and Conclusions of Law.

We decline, however, to extend the changes and clarifications proposed in the Petition to CCA and DA Customers. These changes were agreed upon by Settling Parties and CMUA to resolve the issues raised in CMUA's rehearing application. Joint Respondents have provided no persuasive reasons why the proposed modifications should be expanded to include CCA and DA customers.¹¹ To the extent that Joint Respondents wish to have similar treatment applied to CCA and DA Customers, they should attempt to resolve this issue with Settling Parties.

Revision to Settlement Agreement Term Sheet

Joint Petitioners propose that D.10-12-035 be modified to reflect their agreement regarding recovery of costs under the QF/CHP Program from MDL Customers. However, in addition Section 13.1.2.2 of the Term Sheet needs to be revised to reflect these changes. As such, the proposed changes to the Decision cannot be in effect unless we also modify the Term Sheet to reflect the changes agreed upon by Joint Petitioners. Accordingly, Section 13.1.2.2 of the Term Sheet shall be modified to read as follows¹²:

¹¹ Joint Respondents appear to believe that the vintaged approach is appropriate for CCA/DA customers because "[t]he Petition fails to address why MDL customers should be afforded vintaged treatment when CCA/DA customers are not." (Joint Response, filed April 18, 2011, at 5.) However, CMUA does not represent the interests of CCA or DA customers and has no obligation to advocate on these customers' behalf. As such, the Petition does not need to address whether the vintaged approach should be extended to CCA or DA Customers.

¹² All new language to be added to Section 13.1.2.2 is underlined.

13.1.2.2 If the CPUC determines that the IOUs should purchase CHP generation on behalf of DA and CCA customers, then D.06-07-029 (and D.08-09-012 if necessary) shall be superseded to the extent necessary to authorize the IOUs to recover the net capacity costs associated with the CHP Program from all bundled service, DA and CCA customers and all Departing Load Customers except for CHP Departing Load Customers and from Municipal Departing Load (MDL) Customers only to the extent as described below, on a non-bypassable basis. The net capacity costs of the CHP Program shall be defined as the total costs paid by the IOU under the CHP Program less the value of the energy and any ancillary services supplied to the IOU under the CHP Program. No energy auction shall be required to value such energy and ancillary services. In exchange for paying a share of the net costs of the CHP Program, the LSEs serving DA and CCA customers will receive a pro-rata share of the RA credits procured via the CHP Program.

Relevant costs associated with the CHP Program and of new Power Purchase Agreements entered into pursuant to the Program may only be recovered from MDL Customers as follows:

Transferred MDL

Transferred MDL Customers who have departed IOU service as of the Settlement Effective Date will not be responsible for any non-bypassable charges (NBC) associated with the Settlement Agreement, but will remain responsible for whatever other charges they will incur at the time of departure under the Status Quo (e.g., Ongoing Competition Transition Charge, etc.).

Transferred MDL Customers who depart IOU service after the Settlement Effective Date will be responsible for any NBC for Settlement PPAs, namely, an NBC associated with PPAs entered into to meet the 3,000 MW Target established in Section 5.1.1 of the Settlement Agreement (CHP Settlement PPAs) executed before the date of the Transferred MDL Customer's departure (i.e., on a vintage basis). The NBC for

CHP Settlement PPAs will be determined by comparing the cost of the CHP Settlement PPAs to market value of those using the market price benchmark adopted in R.07-05-025 or subsequent Commission Proceeding. If the difference between the cost of CHP Settlement PPAs and their market value is positive (i.e., there are above-market costs), these costs will be allocated through the NBC for CHP Settlement PPAs. If the difference between the cost of CHP Settlement PPAs and their market value is negative (i.e., the cost of the CHP Settlement PPAs is below market) the negative amount will be tracked in a memorandum account and be available to offset future above-market costs of CHP Settlement PPAs.

In no event shall the NBC for CHP Settlement PPAs apply to Transferred MDL Customers after July 1, 2027. Moreover, after July 1, 2022, the cost of Existing CHP Facilities shall not be included in the NBC for CHP Settlement PPAs applicable to Transferred MDL Customers.

Transferred MDL Customers who have departed IOU service after the Settlement Effective Date will also be responsible for whatever other charges they would incur at the time of departure under Status Quo (e.g., Ongoing CTC, etc.).

Transferred MDL Customers who depart IOU service after the Settlement Effective Date will not be responsible for any CHP Program costs associated with the Second Program Period and the IOU's Greenhouse Gas Emissions Reduction Targets.

New MDL

New MDL Customers will not be responsible for any NBC associated with the Settlement Agreement, including but not limited to the NBC for CHP Settlement PPAs. New MDL Customers will continue to be responsible for whatever other charges they would incur under Status Quo (e.g., Ongoing CTC, etc.).

Ongoing CTC

Ongoing CTC currently includes QF contract costs as well as other costs under previous Commission decisions. The Transition PPA costs will be included in the Ongoing CTC recovered from Transferred and New MDL Customers; provided however, after July 1, 2015 the Transition PPA costs shall not be included in the Ongoing CTC applicable to MDL Customers.

Status Quo

Status Quo for the purposes of Section 13.1.2.2 means the current (i.e., March 16, 2011, the date of final agreement among the Settling Parties and the California Municipal Utilities Association) statutory conditions, regulations and existing agreements applicable to MDL treatment for applicable charges. CMUA and the Settling Parties recognize and accept that the Status Quo may be changed by subsequent legislative, regulatory or administrative action, or by agreement of the parties to modify existing agreements, including but not limited to regulatory action reflecting possible changes to the market price benchmark currently under consideration in Rulemaking (R.) 07-05-025. Unless otherwise stated herein, the changes and clarifications contained in Section 13.1.2.2 are not intended to affect charges under current law, regulation or existing Agreements, including the existing calculation methodologies, exemptions and the ongoing applicability of existing NBC agreements.

Under the terms of the Settlement, all Settling Parties must agree to any change or modification to any portion of the Settlement. Although all Settling Parties joined in filing this Petition, each Settling Party was provided an opportunity to comment on whether it would be willing to accept the proposed modifications to Section 13.1.2.2 of the Term Sheet. As part of their July 5, 2011 comments on the Proposed Decision, Settling Parties stated that they would be willing to accept the modifications to Section 13.1.2.2 of the Term Sheet provided these modifications reflect what had been proposed in the Petition.

Comments of Proposed Decision

The proposed decision of Administrative Law Judge (ALJ) Yip-Kikugawa in this matter was mailed to the parties in accordance with Section 311 of the Pub. Util. Code, and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on July 5, 2011 by Joint Petitioners and Joint Respondents. Reply comments were filed on July 11, 2011 by Joint Petitioners.

In response to comments, this decision has been revised to clarify that consistent with the requirements of Pub. Util. Code § 366.2(d)(1), bundled, CCA and DA customers shall not be responsible for any costs incurred on behalf of MDL Customers. Rather, to the extent the modifications proposed in the Petition result in any unrecovered costs that are attributable to MDL Customers, these costs shall be the responsibility of Settling Parties.

Assignment of Proceeding

Mark Ferron is the assigned Commissioner in Application (A.) 08-11-001, R.06-02-013, R.04-04-025, R.04-04-003 and R.99-11-022 and Amy Yip-Kikugawa is the co-assigned ALJ in these proceedings.

Findings of Fact

1. D.10-12-035 approved the "Qualifying Facility and Combined Heat and Power Program Settlement Agreement (Settlement).
2. D.10-12-035 determined that MDL Customers should be responsible for stranded costs associated with the Settlement.
3. CMUA filed an application for rehearing of D.10-12-035, challenging the allocation of stranded costs to MDL Customers.
4. On April 1, 2011, CMUA and Settling Parties filed a Petition.

5. The proposed changes in the Petition would clarify the cost responsibility of MDL Customers under the Settlement.
6. Adoption of the proposed changes and clarifications would reasonably address the issues raised by CMUA in its rehearing application.
7. The proposed modifications would modify the method by which the IOUs will recover net capacity costs from MDL Customers under Section 13.1.2.2 of the Term Sheet.
8. The Settlement requires all Settling Parties to agree to any change or modification to any portion of the Settlement.
9. All Settling Parties joined in the filing of the Petition.
10. Settling Parties have stated that they would accept the modifications to Section 13.1.2.2 of the Term Sheet provided these modifications reflect what had been proposed in the Petition.

Conclusions of Law

1. The proposed modifications in the Petition are consistent with D.08-09-012 and the Commission's overall guiding principles for resolving NBC implementation issues.
2. Adoption of the proposed modifications in the Petition would resolve the MDL issues raised by CMUA in its rehearing application, thus avoiding additional litigation over these issues.
3. Pub. Util. Code § 366.2(d)(1) prohibits the shifting of recoverable costs between customers.
4. Pursuant to Pub. Util. Code §366.2(d)(1), the IOUs cannot recover any unrecovered costs attributable to MDL Customers from bundled, DA or CCA customers.
5. It would be reasonable to grant the Petition.

6. Section 13.1.2.2 of the Term Sheet should be modified to reflect the changes agreed upon by Joint Petitioners.

O R D E R

IT IS ORDERED that:

1. The joint petition filed by California Municipal Utilities Association, Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company, The Utility Reform Network, the California Cogeneration Council, the Independent Energy Producers Association, the Cogeneration Association of California, the Energy Producers and Users Coalition, and the Division of Ratepayer Advocates to modify Decision 10-12-035 is granted as set forth in the Ordering Paragraphs below.

2. Decision 10-12-035 is modified as follows:

- a. On the bottom of page 52 and continuing onto page 53, the last paragraph beginning with “CMUA also proposes...” is deleted and replaced with the following:

CMUA also proposes deleting provisions in the Proposed Settlement that would require IOU bundled customers who depart bundled service to become municipal utility customers (MDL) to bear a share of the IOU costs incurred on their behalf. CMUA bases its argument primarily on D.08-09-012. After the Settlement Agreement was adopted, without any modifications, in D.10-12-035, CMUA and Joint Parties agreed on the allocation of costs to MDL customers. This agreement, contained in a Petition to Modify D.10-12-035 filed on April 1, 2011, proposes the following language be added to clarify the allocation of costs to MDL customers:

“Relevant costs associated with the CHP Program and of new Power Purchase Agreements entered into pursuant to the Program may only be recovered from MDL Customers as follows:

Transferred MDL

Transferred MDL Customers who have departed IOU service as of the Settlement Effective Date will not be responsible for any non-bypassable charges (NBC) associated with the Settlement Agreement, but will remain responsible for whatever other charges they will incur at the time of departure under the Status Quo (e.g., Ongoing Competition Transition Charge, etc.).

Transferred MDL Customers who depart IOU service after the Settlement Effective Date will be responsible for any NBC for Settlement PPAs, namely, an NBC associated with PPAs entered into to meet the 3,000 MW Target established in Section 5.1.1 of the Settlement Agreement (CHP Settlement PPAs) executed before the date of the Transferred MDL Customer's departure (i.e., on a vintage basis). The NBC for CHP Settlement PPAs will be determined by comparing the cost of the CHP Settlement PPAs to market value of those using the market price benchmark adopted in R.07-05-025 or subsequent Commission Proceeding. If the difference between the cost of CHP Settlement PPAs and their market value is positive (i.e., there are above-market costs), these costs will be allocated through the NBC for CHP Settlement PPAs. If the difference between the cost of CHP Settlement PPAs and their market value is negative (i.e., the cost of the CHP Settlement PPAs is below market) the negative amount will be tracked in a memorandum account and be available to offset future above-market costs of CHP Settlement PPAs.

In no event shall the NBC for CHP Settlement PPAs apply to Transferred MDL Customers after July 1, 2027. Moreover, after July 1, 2022, the cost of Existing CHP Facilities shall not be included in the NBC for CHP Settlement PPAs applicable to Transferred MDL Customers.

Transferred MDL Customers who have departed IOU service after the Settlement Effective Date will also be responsible for whatever other charges they would incur at the time of departure under Status Quo (e.g., Ongoing CTC, etc.).

Transferred MDL Customers who depart IOU service after the Settlement Effective Date will not be responsible for any CHP Program costs associated with the Second Program Period and the IOU's Greenhouse Gas Emissions Reduction Targets.

New MDL

New MDL Customers will not be responsible for any NBC associated with the Settlement Agreement, including but not limited to the NBC for CHP Settlement PPAs. New MDL Customers will continue to be responsible for whatever other charges they would incur under Status Quo (e.g., Ongoing CTC, etc.).

Ongoing CTC

Ongoing CTC currently includes QF contract costs as well as other costs under previous Commission decisions. The Transition PPA costs will be included in the Ongoing CTC recovered from Transferred and New MDL Customers; provided however, after July 1, 2015 the Transition PPA costs shall not be included in the Ongoing CTC applicable to MDL Customers.

Status Quo

Status Quo for the purposes of Section 13.1.2.2 means the current (i.e., March 16, 2011, the date of final agreement among the Settling Parties and the California Municipal Utilities Association) statutory conditions, regulations and existing agreements applicable to MDL treatment for applicable charges. CMUA and the Settling Parties recognize and accept that the Status Quo may be changed by subsequent legislative, regulatory or administrative action, or by agreement of the parties to modify existing agreements, including but not limited to regulatory action reflecting possible changes to the market price benchmark currently under consideration in Rulemaking (R.) 07-05-025. Unless otherwise stated herein, the changes and clarifications contained in Section 13.1.2.2 are not intended to affect charges under current law, regulation or existing Agreements, including the existing calculation methodologies, exemptions and the ongoing applicability of existing NBC agreements.”

The proposed changes address the allocation of costs to MDL customers in a manner that is mutually acceptable to Joint Parties and CMUA. Further, the proposed changes are consistent with D.08-09-012 and our overall guiding principles for resolving NBC implementation issues. The proposed changes shall be incorporated into the Term Sheet attached to the Settlement Agreement.

- b. On page 58, the following sentence is added after the sentence “We have reviewed the elements of the Proposed Settlement and find that it does not contravene any provision of law”:

Similarly, the agreed upon changes proposed by Joint Parties and CMUA do not contravene any provision of law.

- c. At the bottom of page 58, the sentence “We will therefore approve the Proposed Settlement without modification.” is modified to read:

We will therefore approve the Proposed Settlement, as clarified by the decision approving the Joint Petition for Modification filed on April 1, 2011 by Joint Parties and CMUA.

- d. On page 60, the last sentence before Section 7 Assignment of Proceedings is deleted and replaced with the following sentence:

Section 13.1.2.2 of the Term Sheet is also modified to reflect the clarification requested in the Joint Petition for Modification filed on April 1, 2011 by Joint Parties and California Municipal Utilities Association.

- e. On page 63, Finding of Fact number 28 is deleted and replaced with the following:

On April 1, 2011, Joint Parties and CMUA filed a Joint Petition for Modification of D.10-12-035 that would clarify the allocation of stranded costs for new generation resources associated with the Settlement Agreement to MDL customers. The proposed changes are consistent with the Commission's overall guiding principles for resolving NBC implementation issues.

- f. On page 66, Conclusion of Law (COL) number 13 is modified to read: "It is appropriate to provide a limited exception to the D.08-09-012 conditions to ensure recovery of the QF/CHP program costs that will be incurred over the entire term of the PPAs."
- g. On page 66, COL number 16 is deleted and replaced with the following: "The clarifications proposed by Joint Parties and CMUA in the Joint Petition for Modification of D.10-12-035 are reasonable and should be adopted."
- h. On page 67, COL 23 is modified to read: "The cost allocation method set forth in Section 13.1.2.2 of the Term Sheet should be adopted, subject to the modifications proposed by Joint Parties and CMUA in the Joint Petition for Modification of D.10-12-035."
- i. On page 67, Ordering Paragraph 1 is modified to read:

The “Qualifying Facility and Combined Heat and Power Program Settlement Agreement,” filed on October 8, 2010 and modified by the Joint Petition for Modification of D.10-12-035 filed on April 1, 2011 by Settling Parties and the California Municipal Utilities Association, is approved.

3. Section 13.1.2.2 of the Term Sheet attached to the Settlement Agreement is modified to read as follows:

If the CPUC determines that the IOUs should purchase CHP generation on behalf of DA and CCA customers, then D.06-07-029 (and D.08-09-012 if necessary) shall be superseded to the extent necessary to authorize the IOUs to recover the net capacity costs associated with the CHP Program from all bundled service, DA and CCA customers and all Departing Load Customers except for CHP Departing Load Customers and from Municipal Departing Load (MDL) Customers only to the extent as described below, on a non-bypassable basis. The net capacity costs of the CHP Program shall be defined as the total costs paid by the IOU under the CHP Program less the value of the energy and any ancillary services supplied to the IOU under the CHP Program. No energy auction shall be required to value such energy and ancillary services. In exchange for paying a share of the net costs of the CHP Program, the LSEs serving DA and CCA customers will receive a pro-rata share of the RA credits procured via the CHP Program.

Relevant costs associated with the CHP Program and of new Power Purchase Agreements entered into pursuant to the Program may only be recovered from MDL Customers as follows:

Transferred MDL

Transferred MDL Customers who have departed IOU service as of the Settlement Effective Date will not be responsible for any non-bypassable charges (NBC) associated with the Settlement Agreement, but will remain responsible for whatever other charges they will incur at the time of departure under the Status Quo (e.g., Ongoing Competition Transition Charge, etc.).

Transferred MDL Customers who depart IOU service after the Settlement Effective Date will be responsible for any NBC for Settlement PPAs, namely, an NBC associated with PPAs entered into to meet the 3,000 MW Target established in Section 5.1.1 of the Settlement Agreement (CHP Settlement PPAs) executed before the date of the Transferred MDL Customer's departure (i.e., on a vintage basis). The NBC for CHP Settlement PPAs will be determined by comparing the cost of the CHP Settlement PPAs to market value of those using the market price benchmark adopted in R.07-05-025 or subsequent Commission Proceeding. If the difference between the cost of CHP Settlement PPAs and their market value is positive (i.e., there are above-market costs), these costs will be allocated through the NBC for CHP Settlement PPAs. If the difference between the cost of CHP Settlement PPAs and their market value is negative (i.e., the cost of the CHP Settlement PPAs is below market) the negative amount will be tracked in a memorandum account and be available to offset future above-market costs of CHP Settlement PPAs.

In no event shall the NBC for CHP Settlement PPAs apply to Transferred MDL Customers after July 1, 2027. Moreover, after July 1, 2022, the cost of Existing CHP Facilities shall not be included in the NBC for CHP Settlement PPAs applicable to Transferred MDL Customers.

Transferred MDL Customers who have departed IOU service after the Settlement Effective Date will also be

responsible for whatever other charges they would incur at the time of departure under Status Quo (e.g., Ongoing CTC, etc.).

Transferred MDL Customers who depart IOU service after the Settlement Effective Date will not be responsible for any CHP Program costs associated with the Second Program Period and the IOU's Greenhouse Gas Emissions Reduction Targets.

New MDL

New MDL Customers will not be responsible for any NBC associated with the Settlement Agreement, including but not limited to the NBC for CHP Settlement PPAs. New MDL Customers will continue to be responsible for whatever other charges they would incur under Status Quo (e.g., Ongoing CTC, etc.).

Ongoing CTC

Ongoing CTC currently includes QF contract costs as well as other costs under previous Commission decisions. The Transition PPA costs will be included in the Ongoing CTC recovered from Transferred and New MDL Customers; provided however, after July 1, 2015 the Transition PPA costs shall not be included in the Ongoing CTC applicable to MDL Customers.

Status Quo

Status Quo for the purposes of Section 13.1.2.2 means the current (i.e., March 16, 2011, the date of final agreement among the Settling Parties and the California Municipal Utilities Association) statutory conditions, regulations and existing agreements applicable to MDL treatment for applicable charges. CMUA and the Settling Parties recognize and accept that the Status Quo may be changed by subsequent legislative, regulatory or administrative action, or by agreement of the parties to modify existing agreements, including but not limited to regulatory action reflecting possible changes to the market price benchmark currently under consideration in Rulemaking 07-05-025.

Unless otherwise stated herein, the changes and clarifications contained in Section 13.1.2.2 are not intended to affect charges under current law, regulation or existing Agreements, including the existing calculation methodologies, exemptions and the ongoing applicability of existing NBC agreements.

4. Application 08-11-001 and Rulemaking (R.) 06-02-013, R.04-04-025, R.04-04-003 and R.99-11-022 remain open.

This order is effective today.

Dated _____, at San Francisco, California.