

DOCKET
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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

DATE MAR 10 2008
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Order Instituting Rulemaking to Implement the)
Commission's Procurement Incentive Framework) R.06-04-009
and to Examine the Integration of Greenhouse)
Gas Emissions Standards Into Procurement) (Filed April 13, 2006)
Policies.)
_____)

BEFORE THE CALIFORNIA ENERGY COMMISSION

In The Matter Of,)
) Docket 07-OIIP-01
AB 32 Implementation – Greenhouse Gas)
Emissions.)
_____)

REPLY OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO
RESPONSES TO PETITION FOR MODIFICATION OF DECISION NO. 07-01-039

MICHAEL D. MONTOYA
LAURA I. GENAO
CATHY KARLSTAD

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (626) 302-6842
Facsimile: (626) 302-1935
E-mail: laura.genao@sce.com

Dated: **March 10, 2008**

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Pursuant to Rule 16.4(g) of the California Public Utilities Commission’s Rules of Practice and Procedure, Southern California Edison Company (“SCE”) requested and received authority to file this reply to responses to its Petition for Modification, filed January 28, 2008 (“Petition”).

SCE responds herein to the Western Power Trading Forum (“WPTF”), the Independent Energy Producers Association (“IEP”), the Division of Ratepayer Advocates (“DRA”), and a coalition comprised of the Natural Resources Defense Council, Union of Concerned Scientists, The Utility Reform Network, Environmental Defense Fund, Center for Energy Efficiency and Renewable Technologies, and Western Resource Advocates (collectively, the “Coalition”). As SCE notes below, there is no legitimate reason to reject a clarification of Decision No. 07-01-039

(the “Decision” or “EPS Decision”) which makes clear that the emissions performance standard (“EPS”) does not apply to the Four Corners Generating Station (“Four Corners”) during its current contractual term.¹

I.

THE PETITION WAS NOT INTENDED TO WEAKEN THE EPS BY APPLYING IT TO ALL CONTRACTS SIGNED BEFORE JANUARY 25, 2007

Several parties claim that SCE’s requested language is too broad and that there is no need for generic relief such as that requested by SCE. These parties assert that such an exemption would release every unit which is the subject of a contract signed before January 25, 2007 from the EPS compliance obligation and that such action would weaken the EPS.² These parties misunderstand the intention behind SCE’s petition.

SCE’s Petition clearly states that SCE intended to seek clarification of the Decision to ensure that its language “explicitly exclude[d] Four Corners during its current term.”³ SCE hoped that its proposed language requesting that “the EPS Decision be modified to reflect that the EPS does not apply to financial contributions required by existing contracts with third parties for baseload generation used by an LSE to serve its load” was narrow enough to cover no more than the units with the characteristic of being co-owned with third parties through contractual arrangements which predated the EPS.⁴ SCE did not intend to exempt itself or others from the EPS Decision’s requirements with regard to other types of generating units.

¹ As SCE has previously noted, Four Corners’ current term concludes in 2016. *See* Petition at 6.

² Response of the DRA to Petition of SCE for Modification of Decision 07-01-039, filed February 27, 2008 (“DRA Response”), at 5; Response of the Coalition to the Petition for Modification of D.07-01-039 by SCE, filed February 27, 2008 (“Coalition Response”), at 2-3.

³ Petition at 5.

⁴ Petition at 8. *See also*, Petition at 5 (“SCE urges the CPUC to modify the EPS Decision to find that financial contributions required under preexisting contractual obligations for generating units owned jointly with third parties are not ‘covered procurements’ under the EPS.”); Petition at 1 (“SCE urges the CPUC to recognize that SCE’s continued legal obligations regarding Four Corners Generating Station do not fall under the category of ‘covered procurements’ set out by the EPS Decision for CPUC-jurisdictional entities.”); Petition at 5 (“[T]he EPS Decision directed SCE to file an application or petition for modification requesting appropriate relief if it felt that the EPS would prevent it from complying with its contractual obligations at Four Corners.[]SCE does so now.”)

Nevertheless, in light of parties' comments, SCE does not oppose further narrowing of its proposed language so that clarification of the CPUC's EPS policy only addresses Four Corners.

In addition to concern about the breadth of SCE's requested language, the Coalition objects to the use of the effective date of January 25, 2007 in SCE's proposed modification of the EPS Decision.⁵ The Coalition asserts that if the CPUC adopts SCE's language, that language should be revised to apply to contracts signed before September 29, 2006, the effective date of Senate Bill ("SB") 1368.⁶ Although this change would have no effect on SCE's request for an exemption with regard to Four Corners, the Coalition's assertion should be rejected by the CPUC. As the CPUC and the Coalition are both aware, SB 1368 specifically gave the CPUC authority to, by February 1, 2007, "establish a greenhouse gas emissions performance standard for all baseload generation of load-serving entities."⁷ Because such rules were not established until the EPS Decision's effective date, the Coalition's request to revise the proposed date should be rejected.

II.

THE CPUC SHOULD REJECT THE CLAIM THAT IT DOES NOT HAVE LEGAL AUTHORITY TO GRANT SCE'S PETITION

A. The CPUC Explicitly Noted Its Intention To Not Subject Units Such As Four Corners to the EPS

WPTF asserts that SB 1368 does not give the CPUC authority to grant SCE's Petition because that legislation contains mandatory language that does not allow for the granting of an exemption such as that requested by SCE.⁸ WPTF's assertion blatantly ignores various CPUC statements which indicate that the CPUC never intended to subject units such as Four Corners to

⁵ Coalition Response at 4.

⁶ See Coalition Response at 4.

⁷ Cal. Pub. Util. Code § 8340(d)(1).

⁸ Comments of the WPTF on the SCE Petition, filed February 28, 2008 ("WPTF Comments"), at 4.

the EPS. By ignoring the statements, which SCE sets forth below, WPTF crafts the argument that the CPUC is creating new exemptions for which it does not have authority. Such an assertion is baseless. The EPS Decision expresses the CPUC's intention with regard to units like Four Corners and any modification of the Decision would merely conform the Decision's language to the CPUC's stated intention. Accordingly, there is no merit in the assertion that the CPUC is attempting to circumvent SB 1368's mandates.

1. The CPUC's Stated Intention Was To Adopt An EPS That Did Not Affect Previous Investment

Under the authority granted to the CPUC by SB 1368, the CPUC adopted an EPS that would not "subject[] the millions of dollars in the LSE's already built facilities to a standard that is being developed to prevent backsliding in LSE decisions made for future investments."⁹ Facing SCE with the possibility of not being able to make the financial commitments required to maintain Four Corners through the life of the contract, explicitly contravenes the CPUC's stated intention to not subject previous investments to a standard for generating units to be implemented on a going forward basis.

2. The CPUC's Stated Intention Was To Adopt An EPS That Did Not Require Extensive Reassessment of Additional Investment

WPTF seems to recommend that if the CPUC considers SCE's Petition it should require SCE to justify each proposed expenditure, on an EPS basis, before such proposed expenditure is made.¹⁰ Such a recommendation squarely contravenes the CPUC's EPS Decision. The EPS Decision clearly states the CPUC's intention was not to require an assessment of EPS compliance every time a piece of equipment was replaced.¹¹ Accordingly, WPTF's

⁹ Petition at 7.

¹⁰ WPTF Comments at 6.

¹¹ Petition at 7.

recommendation should be rejected as no more than an effort to have the CPUC revise its previously stated intention with regard to the EPS.

3. The CPUC’s Intention Was To Adopt An EPS For Facilities Over Which An LSE Has Discretion

WPTF’s legal argument should also be rejected because SCE is not asking the CPUC to create an exemption where one was not previously contemplated. As WPTF is aware, the EPS Decision clearly demonstrated the intention to preclude application of the EPS to facilities like Four Corners because the CPUC wanted to “[f]ocus[] compliance on the types of facilities over which the LSE has the most discretion and choice, thereby minimizing the cost of compliance to the LSE and its electricity customers.”¹² As SCE has explained, the joint ownership situation at Four Corners limits SCE’s discretion and choice about the future of that facility. As a co-owner, SCE is obligated to work with the other owners to approve capital budget items.¹³ Accordingly, SCE cannot unilaterally make EPS compliance decisions for the plant in the manner envisioned by the CPUC for plants to whom the EPS applied.

B. WPTF’s Collateral Attack on the CPUC’s Authority to Consider SCE’s Petition Should Be Summarily Dismissed

In addition to being rendered meritless by the CPUC’s own previous statements of intention, WPTF’s legal argument should be rejected because it ignores WPTF’s own failure to appropriately contest the CPUC’s legal authority to consider the Petition. At no time has WPTF attempted to follow the CPUC’s established procedures for presenting a claim of legal error to the CPUC. Instead, it attempts to tardily raise the issue in response to the Petition.

As the CPUC itself noted in the EPS Decision, the CPUC adopted an EPS consistent with the requirements and definitions of SB 1368.¹⁴ Within that Petition, the CPUC authorized SCE

¹² D.07-01-039, FOF 220(b)(iii).

¹³ See Petition, Appendix A, Exhibit C, at 9.

¹⁴ D.07-01-039 at 2.

to come back to it with an application or petition for modification if SCE felt that the EPS would prevent it from complying with the Decision. WPTF at no time since the EPS Decision's issuance contested the CPUC's authority to allow consideration of such a petition or application. WPTF's failure to contest this issue as required by the CPUC's Rules of Practice and Procedure is reason enough to summarily dismiss WPTF's legal argument against the Petition.

III.

THE CPUC SHOULD REJECT CLAIMS THAT RATEPAYERS WILL NOT BE HARMED BY ELIMINATION OF FOUR CORNERS FROM SCE'S PORTFOLIO

IEP claims that SCE's ratepayers will, at worst, be held neutral if the CPUC clarifies its EPS Decision to require that SCE remove the Four Corners facility from its resource portfolio.¹⁵ Each of IEP's asserted reasons for this belief are baseless.

Contrary to IEP's assertions, SCE's customers would not "save" \$178.5 million if Four Corners is eliminated from SCE's portfolio.¹⁶ Because of SCE's status as a co-owner of Four Corners, SCE is obligated to fund capital expenditures. If SCE does not fund its share of such expenditures, it is considered to be in default of the Co-Tenancy Agreement and the co-owners can reduce SCE's right to power from Four Corners as well as take action to recover the owed amounts.¹⁷ Assuming legal liability for contractually owed amounts, in addition to losing the right to receive power from Four Corners, does not result in net savings.

Similarly, IEP erroneously claims that SCE's ratepayers may benefit substantially from not having to incur greenhouse gas related costs if SCE defaults on its obligation to fund capital expenditures at Four Corners.¹⁸ IEP's analysis naively attempts to claim that in the case of SCE's default, all financial commitments are reassigned and SCE is free of liability. This is not the case. While IEP rightly notes that during a period of default obligations are reassigned to the

¹⁵ Response of the IEP to the Petition, filed February 28, 2008 ("IEP Response") at 7-8.

¹⁶ IEP Response at 7.

¹⁷ See Attachment A, Exhibit B, §20.5; Attachment A, Exhibit A, §15.3.

¹⁸ IEP Response at 7-8

non-defaulting co-owners, it ignores that SCE is still liable for its portion of costs, be they operation and maintenance costs, fuel costs, insurance costs, or other expenses.¹⁹

IV.

SCE HAS PROVIDED SUFFICIENT EVIDENCE OF THE NEED FOR THE REQUESTED CLARIFICATION

WPTF asserts that it is not clear whether SCE must default on its partnership obligations in order to comply with the EPS. It also asserts that SCE should be required to explain why SCE cannot make investments that would allow Four Corners “to get closer to EPS compliance” as well as how change in law provisions are or are not accommodated by the Four Corners agreements.²⁰ WPTF’s assertions should be rejected. SCE has provided the CPUC and parties with sufficient relevant evidence from which to make a determination as to SCE’s obligations under the Four Corners agreement.

Specifically, SCE’s Petition contains General Rate Case testimony explaining the circumstances surrounding how decisions regarding capital expenditures at Four Corners are made. In that testimony, SCE explains that Four Corners capital expenditures require review and approval by SCE management and participant plant owners. This testimony explains the four levels of review faced by capital expenditures and how such planned expenditures conclude with plant participant owner evaluation of proposed expenditures. Each planned expenditure is detailed in SCE’s testimony.²¹ No party has contested the veracity of this information.

Additionally, SCE has provided the contractual term which obligates it to pay for capital expenditures in proportion to its percentage ownership of Four Corners and the default provisions applicable to SCE with regard to Four Corners.²²

¹⁹ See Petition, Appendix A, Exhibit B at § 20.5.3.

²⁰ WPTF Comments at 2-3.

²¹ Petition, Appendix A, Exhibit C at § 8-61.

²² Petition, Appendix A, Exhibit B at § 20.5.

V.

THE CPUC SHOULD REJECT CALLS TO SUMMARILY DISMISS THE PETITION

WPTF asserts that the CPUC should dismiss SCE’s Petition summarily because it was not filed within one year of the EPS Decision.²³ Although WPTF itself acknowledges that the CPUC has the discretion to allow the Petition to go forward, WPTF inexplicably asserts that “the SCE Petition does not acknowledge the fact that it is filed late and provides no explanation as to why SCE could not have filed in compliance with the Rules of Practice and Procedure.”²⁴ WPTF’s self-interested attempt to have the Petition summarily dismissed should be denied.²⁵

First, WPTF fails to acknowledge that SCE complied with Rule 16.4 of the CPUC’s Rules of Practice and Procedure. As the CPUC is aware, SCE filed an “Amended Petition for Modification” on February 12, 2008 (“Amended Petition”). That Amended Petition, among other things, explains why SCE filed its Petition on January 28, 2008.²⁶ WPTF seems to assert that because SCE did not use the word “late” in its filing it did not meet Rule 16.4’s requirement to explain why the Petition could not have been presented within one year of the effectiveness date of the decision. This claim lacks legal foundation and should be rejected.

The CPUC’s rules do not require the use of the word “late,” they merely require an explanation as to why the filing was not made within a year.²⁷ SCE’s Amended Petition included a description of the oversight that led to the Petition being filed on January 28, instead of on January 25.²⁸

²³ WPTF Comments at 8.

²⁴ WPTF Comments at 9.

²⁵ As WPTF notes, it is a corporation made up of, among other things, generators. SCE assumes such generators would be among those who could benefit if SCE was ordered to default on its Four Corners obligations and fill the energy void created by such a move with other baseload resources. *See* WPTF Comments at 1.

²⁶ SCE’s Amended Petition, filed February 12, 2008, at 1-2.

²⁷ CPUC’s Rules of Practice and Procedure, Rule 16.4(d).

²⁸ Notably, respondents to SCE’s petition were given an extra day to file their comments when Administrative Law Judge Amy Yip-Kikugawa explained, via an e-mail dated February 20, 2008, that based on SCE’s original filing date, responses were due on February 28, 2008. Rule 16.4(f) only allows 30 days for responses. That would have made responses due on February 27, 2008.

Second, WPTF's request for summary dismissal should be rejected because it would not resolve the issue of the CPUC's policy on pre-existing baseload resources such as Four Corners. This issue would continue to be live, as it is part of SCE's General Rate Case Application. In that proceeding, SCE has sought \$178.6 million for capital improvements to the Four Corners facility. If the Petition were summarily dismissed, another Administrative Law Judge, in a substantially different proceeding, with a service list substantially different than the service list for the greenhouse gas rulemaking, would be deciding this important policy issue. It is more efficient and transparent to make the decision about the CPUC's EPS policy in this proceeding.

Third, to date, no party (including WPTF) has asserted that it was harmed by SCE's one business day delay in filing the Petition. Accordingly, no purpose will be served by summary dismissal of SCE's requested modifications and WPTF's argument should be rejected.

VI.

SCE SUPPORTS CASE-BY-CASE ASSESSMENT OF REQUIRED EXCEPTIONS TO THE EPS DECISION

The Coalition and DRA both advocate determining exemptions on a case-by-case basis. SCE is supportive of such a process, be it via advice letter or through application, for those load-serving entities who may seek exemptions from the EPS Decision in the future. The CPUC should not, however, wait until such a process is assessed and implemented before ruling on the clarification SCE has sought through its Petition.

A policy determination with regard to SCE's request must be made now, so that parties can appropriately develop their positions in SCE's General Rate Case while the record in that case is open.²⁹ Deferring a decision on this important policy decision beyond the time during which the General Rate Case's record is being developed will prevent SCE and other parties

²⁹ As currently scoped, DRA and other intervenors will be filing testimony in April, SCE will respond in May, briefing will be in July, and hearings will begin in October 2008. See "Administrative Law Judges Ruling Revising the Schedule Set Forth in the Scoping Memo and Clarifying the Scoping Memo on the Issue of Philanthropy," A. 07-11-011, at Attachment.

from most efficiently being able to litigate the reasonableness of SCE's \$178.6 million request. Accordingly, while SCE supports the suggestion of a case-by-case method of reviewing requests such as SCE's and the evidentiary requirements put forth by DRA, SCE urges the CPUC to promptly act on SCE's request as set forth in its Petition.

VII.

CONCLUSION

For all of the foregoing reasons, SCE urges the CPUC to clarify its EPS Decision to ensure that SCE's Four Corners facility is appropriately exempted from EPS requirements.

Respectfully submitted,

MICHAEL D. MONTOYA
LAURA I. GENAO
CATHY KARLSTAD

/s/ Laura I. Genao

By: **Laura I. Genao**

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (626) 302-6842
Facsimile: (626) 302-1935
E-mail: laura.genao@sce.com

March 10, 2008

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of REPLY OF SOUTHERN CALIFORNIA EDISON COMPANY TO RESPONSES TO PETITION FOR MODIFICATION OF DECISION NO. 07-01-039 on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

Transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

Executed this **10th day of March, 2008**, at Rosemead, California.

/s/Raquel Ippoliti

Raquel Ippoliti

Project Analyst

SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770



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Parties

DAN HECHT
SEMPRA ENERGY
58 COMMERCE ROAD
STANFORD, CT 06902

CINDY ADAMS
COVANTA ENERGY CORPORATION
40 LANE ROAD
FAIRFIELD, NJ 07004
FOR: COVANTA ENERGY CORPORATION

STEVEN S. SCHLEIMER
DIRECTOR, COMPLIANCE & REGULATORY AFFAIRS
BARCLAYS BANK, PLC
200 PARK AVENUE, FIFTH FLOOR
NEW YORK, NY 10166
FOR: BARCLAYS CAPITAL

STEVEN HUHMANN
MORGAN STANLEY CAPITAL GROUP INC.
2000 WESTCHESTER AVENUE
PURCHASE, NY 10577

RICK C. NOGER
PRAXAIR PLAINFIELD, INC.
2711 CENTERVILLE ROAD, SUITE 400
WILMINGTON, DE 19808
FOR: PRAXAIR PLAINFIELD, INC.

KEITH R. MCCREA
ATTORNEY AT LAW
SUTHERLAND, ASBILL & BRENNAN, LLP
1275 PENNSYLVANIA AVE., N.W.
WASHINGTON, DC 20004-2415
FOR: CALIFORNIA MANUFACTURERS &
TECHNOLOGY ASSN.

ADAM J. KATZ
MCDERMOTT WILL & EMERY LLP
600 13TH STREET, NW.
WASHINGTON, DC 20005
FOR: MORGAN STANLEY CAPITAL GROUP, INC.

CATHERINE M. KRUPKA
MCDERMOTT WILL AND EMERY LLP
600 THIRTEEN STREEET, NW
WASHINGTON, DC 20005
FOR: MORGAN STANLEY CAPITAL GROUP, INC.

KYLE D. BOUDREAU
FPL GROUP
700 UNIVERSE BLVD., JES/JB
JUNO BEACH, FL 33408

CATHY S. WOOLLUMS
MIDAMERICAN ENERGY HOLDINGS COMPANY
106 EAST SECOND STREET
DAVENPORT, IA 52801

FOR: FPL ENERGY PROJECT MANAGEMENT

CYNTHIA A. FONNER
SENIOR COUNSEL
CONSTELLATION ENERGY GROUP INC
500 WEST WASHINGTON ST, STE 300
CHICAGO, IL 60661
FOR: CONSTELLATION ENERGY GROUP INC

THOMAS DILL
PRESIDENT
LODI GAS STORAGE, L.L.C.
1021 MAIN ST STE 1500
HOUSTON, TX 77002-6509

TIMOTHY R. ODIL
MCKENNA LONG & ALDRIDGE LLP
1875 LAWRENCE STREET, SUITE 200
DENVER, CO 80202
FOR: CENTER FOR ENERGY AND ECONOMIC
DEVELOPMENT

JENINE SCHENK
APS ENERGY SERVICES
400 E. VAN BUREN STREET, SUITE 750
PHOENIX, AZ 85004
FOR: APS ENERGY SERVICES COMPANY

KELLY BARR
MANAGER, REGULATORY AFFAIRS & CONTRACTS
SALT RIVER PROJECT
PO BOX 52025, PAB 221
PHOENIX, AZ 85072-2025
FOR: SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT

STEVEN S. MICHEL
WESTERN RESOURCE ADVOCATES
2025 SENDA DE ANDRES
SANTA FE, NM 87501
FOR: WESTERN RESOURCE ADVOCATES

JOSEPH GRECO
TERRA-GEN POWER LLC
9590 PROTOTYPE COURT, SUITE 200
RENO, NV 89521
FOR: TERRA-GEN POWER LLC

RONALD F. DEATON
LOS ANGELES DEPARTMENT OF WATER & POWER
111 NORTH HOPE STREET, ROOM 1550
LOS ANGELES, CA 90012
FOR: LOS ANGELES DEPARTMENT OF WATER
AND POWER

DAVID L. HUARD
ATTORNEY AT LAW
MANATT, PHELPS & PHILLIPS, LLP
11355 WEST OLYMPIC BOULEVARD
LOS ANGELES, CA 90064
FOR: LOS ANGELES COUNTY/TRANS CANADA
PIPELINES

FOR: KERN RIVER GAS TRANSMISSION

KEVIN BOUDREAUX
CALPINE POWER AMERICA-CA, LLC
717 TEXAS AVENUE, SUITE 1000
HOUSTON, TX 77002
FOR: CALPINE POWER AMERICA

E.J. WRIGHT
OCCIDENTAL POWER SERVICES, INC.
5 GREENWAY PLAZA, SUITE 110
HOUSTON, TX 77046

STEPHEN G. KOERNER, ESQ.
EL PASO CORPORATION
WESTERN PIPELINES
2 NORTH NEVADA AVENUE
COLORADO SPRINGS, CO 80903
FOR: EL PASO NATURAL GAS COMPANY/MOJAVE
PIPELINE COMPANY

JOHN B. WELDON, JR.
SALMON, LEWIS & WELDON, P.L.C.
2850 EAST CAMELBACK ROAD, SUITE 200
PHOENIX, AZ 85016
FOR: SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT

ROBERT R. TAYLOR
AGRICULTURAL IMPROVEMENT AND POWER DIST.
1600 NORTH PRIEST DRIVE, PAB221
TEMPE, AZ 85281

ROGER C. MONTGOMERY
VICE PRESIDENT, PRICING
SOUTHWEST GAS CORPORATION
PO BOX 98510
LAS VEGAS, NV 89193-8510

LORRAINE PASKETT
DIRECTOR, LEGISLATIVE AND REG. AFFAIRS
LA DEPT. OF WATER & POWER
PO BOX 51111
111 N. HOWARD ST., ROOM 1536
LOS ANGELES, CA 90012
FOR: LOS ANGELES DEPT OF WATER AND POWER

SID NEWSOM
TARIFF MANAGER
SOUTHERN CALIFORNIA GAS COMPANY
GT 14 D6
555 WEST 5TH STREET
LOS ANGELES, CA 90051

CURTIS L. KEBLER
J. ARON & COMPANY
SUITE 2600
2121 AVENUE OF THE STARS
LOS ANGELES, CA 90067
FOR: J. ARON

DENNIS M.P. EHLING
 ATTORNEY AT LAW
 KIRKPATRICK & LOCKHART NICHOLSON GRAHAM
 10100 SANTA MONICA BLVD., 7TH FLOOR
 LOS ANGELES, CA 90067
 FOR: CITY OF VERNON

GREGORY KOISER
 CONSTELLATION NEW ENERGY, INC.
 350 SOUTH GRAND AVENUE, SUITE 3800
 LOS ANGELES, CA 90071
 FOR: CONSTELLATION NEW ENERGY

NORMAN A. PEDERSEN
 ATTORNEY AT LAW
 HANNA AND MORTON, LLP
 444 SOUTH FLOWER STREET, NO. 1500
 LOS ANGELES, CA 90071
 FOR: SOUTHERN CALIFORNIA GENERATION
 COALITION/SOUTHERN CALIFORNIA PUBLIC
 POWER AUTHORITY

MICHAEL MAZUR
 CHIEF TECHNICAL OFFICER
 3 PHASES RENEWABLES, LLC
 8333 ZITOLA TER
 PLAYA DEL REY, CA 90293-7835
 FOR: 3 PHASES ENERGY SERVICES

VITALY LEE
 AES ALAMITOS, LLC
 690 N. STUDEBAKER ROAD
 LONG BEACH, CA 90803
 FOR: AES SOUTHLAND LLC

TIFFANY RAU
 POLICY AND COMMUNICATIONS MANAGER
 CARSON HYDROGEN POWER PROJECT LLC
 ONE WORLD TRADE CENTER, SUITE 1600
 LONG BEACH, CA 90831-1600
 FOR: CARSON HYDROGEN POWER PROJECT LLC

GREGORY KLATT
 ATTORNEY AT LAW
 DOUGLASS & LIDDELL
 411 E. HUNTINGTON DRIVE, STE. 107-356
 ARCADIA, CA 91006
 FOR: ALLIANCE FOR RETAIL ENERGY MARKETS

RICHARD HELGESON
 SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY
 225 S. LAKE AVE., SUITE 1250
 PASADENA, CA 91101
 FOR: SOUTHERN CALIFORNIA PUBLIC POWER
 AUTHORITY

DANIEL W. DOUGLASS
 ATTORNEY AT LAW
 DOUGLASS & LIDDELL
 21700 OXNARD STREET, SUITE 1030
 WOODLAND HILLS, CA 91367
 FOR: WESTERN POWER TRADING FORUM

PAUL DELANEY
 AMERICAN UTILITY NETWORK (A.U.N.)
 10705 DEER CANYON DRIVE
 ALTA LOMA, CA 91737
 FOR: AMERICAN UTILITY NETWORK

BARRY R. WALLERSTEIN
 EXECUTIVE OFFICER
 SOUTH COAST AQMD
 21865 COPLEY DRIVE
 DIAMOND BAR, CA 91765-4182
 FOR: SOUTH COAST AIR QUALITY MANAGEMENT
 DISTRICT

AKBAR JAZAYEIRI
 SOUTHERN CALIFORNIA EDISON COMPANY
 PO BOX 800
 2241 WALNUT GROVE AVE. ROOM 390
 ROSEMEAD, CA 91770
 FOR: SOUTHERN CALIFORNIA EDISON COMPANY

CATHY A. KARLSTAD
 SOUTHERN CALIFORNIA EDISON COMPANY
 2244 WALNUT GROVE AVE.
 ROSEMEAD, CA 91770
 FOR: SOUTHERN CALIFORNIA EDISON COMPANY

LAURA I. GENAO
 ATTORNEY
 SOUTHERN CALIFORNIA EDISON
 PO BOX 800
 2244 WALNUT GROVE AVENUE
 ROSEMEAD, CA 91770
 FOR: SOUTHERN CALIFORNIA EDISON

RONALD MOORE
 GOLDEN STATE WATER/BEAR VALLEY ELECTRIC
 630 EAST FOOTHILL BOULEVARD
 SAN DIMAS, CA 91773
 FOR: GOLDEN STATE WATER/BEAR VALLEY
 ELECTRIC

DON WOOD
 PACIFIC ENERGY POLICY CENTER
 4539 LEE AVENUE
 LA MESA, CA 91941

ALLEN K. TRIAL
 SAN DIEGO GAS & ELECTRIC COMPANY
 HQ-12
 101 ASH STREET
 SAN DIEGO, CA 92101

ALVIN PAK
 SEMPRA GLOBAL ENTERPRISES
 101 ASH STREET
 SAN DIEGO, CA 92101
 FOR: SEMPRA GLOBAL ENTERPRISES

DANIEL A. KING
SEMPRA ENERGY
101 ASH STREET, HQ 12
SAN DIEGO, CA 92101

SYMONE VONGDEUANE
SEMPRA ENERGY SOLUTIONS
101 ASH STREET, HQ09
SAN DIEGO, CA 92101-3017
FOR: SEMPra ENERGY SOLUTIONS

THEODORE ROBERTS
ATTORNEY AT LAW
SEMPRA GLOBAL
101 ASH STREET, HQ 13D
SAN DIEGO, CA 92101-3017
FOR: SEMPra GLOBAL/SEMPRA ENERGY SOLUTIONS

DONALD C. LIDDELL
DOUGLASS & LIDDELL
2928 2ND AVENUE
SAN DIEGO, CA 92103
FOR: CALIFORNIA NATURAL GAS VEHICLE ASSOCIATION/ CLEAN ENERGY FUELS CORPORATION

MARCIE MILNER
DIRECTOR - REGULATORY AFFAIRS
SHELL TRADING GAS & POWER COMPANY
4445 EASTGATE MALL, SUITE 100
SAN DIEGO, CA 92121

REID A. WINTHROP
PILOT POWER GROUP, INC.
8910 UNIVERSITY CENTER LANE, SUITE 520
SAN DIEGO, CA 92122

THOMAS DARTON
PILOT POWER GROUP, INC.
SUITE 520
8910 UNIVERSITY CENTER LANE
SAN DIEGO, CA 92122
FOR: PILOT POWER GROUP

STEVE RAHON
DIRECTOR, TARIFF & REGULATORY ACCOUNTS
SAN DIEGO GAS & ELECTRIC COMPANY
8330 CENTURY PARK COURT, CP32C
SAN DIEGO, CA 92123-1548
FOR: SAN DIEGO GAS & ELECTRIC COMPANY

GLORIA BRITTON
ANZA ELECTRIC COOPERATIVE, INC.
58470 HWY 371
PO BOX 391909
ANZA, CA 92539
FOR: ANZA ELECTRIC COOPERATIVE INC.

LYNELE LUND
COMMERCE ENERGY, INC.
600 ANTON BLVD., SUITE 2000
COSTA MESA, CA 92626
FOR: COMMERCE ENERGY, INC.

TAMLYN M. HUNT
ENERGY PROGRAM DIRECTOR
COMMUNITY ENVIRONMENTAL COUNCIL
26 W. ANAPAMU ST., 2ND FLOOR
SANTA BARBARA, CA 93101
FOR: COMMUNITY ENVIRONMENTAL COUNCIL

MARC D. JOSEPH
ADAMS BRADWELL JOSEPH & CARDOZO
601 GATEWAY BLVD. STE 1000
SOUTH SAN FRANCISCO, CA 94080
FOR: COALITION OF CALIFORNIA UTILITY EMPLOYEES

JEANNE M. SOLE
DEPUTY CITY ATTORNEY
CITY AND COUNTY OF SAN FRANCISCO
1 DR. CARLTON B. GOODLETT PLACE, RM. 234
SAN FRANCISCO, CA 94102
FOR: CITY AND COUNTY OF SAN FRANCISCO

JOHN P. HUGHES
MANAGER, REGULATORY AFFAIRS
SOUTHERN CALIFORNIA EDISON COMPANY
601 VAN NESS AVENUE, STE. 2040
SAN FRANCISCO, CA 94102

LAD LORENZ
V.P. REGULATORY AFFAIRS
SEMPRA UTILITIES
601 VAN NESS AVENUE, SUITE 2060
SAN FRANCISCO, CA 94102

MARCEL HAWIGER
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

NINA SUETAKE
ATTORNEY AT LAW
THE UTILITY REFORM NETWORK
711 VAN NESS AVE., STE. 350
SAN FRANCISCO, CA 94102

DIANA L. LEE
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4300
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
FOR: DRA

F. JACKSON STODDARD
CALIF PUBLIC UTILITIES COMMISSION

AUDREY CHANG
STAFF SCIENTIST

EXECUTIVE DIVISION
ROOM 5125
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER STREET, 20TH FLOOR
SAN FRANCISCO, CA 94104
FOR: NATURAL RESOURCES DEFENSE COUNCIL

DONALD BROOKHYSER
ATTORNEY AT LAW
ALCANTAR & KAHL
120 MONTGOMERY STREET
SAN FRANCISCO, CA 94104
FOR: COGENERATION ASSOCIATION OF
CALIFORNIA/ENERGY PRODUCERS AND USERS
COALITION

EVELYN KAHL
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104
FOR: ENERGY PRODUCERS & USERS COALITION

KRISTIN GRENFELL
PROJECT ATTORNEY, CALIF. ENERGY PROGRAM
NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER STREET, 20TH FLOOR
SAN FRANCISCO, CA 94104

MICHAEL P. ALCANTAR
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104
FOR: COGENERATION ASSOCIATION OF
CALIFORNIA/ENERGY PRODUCERS AND USERS
COALITION

SEEMA SRINIVASAN
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104
FOR: ENERGY PRODUCERS & USERS COALITION

WILLIAM H. CHEN
DIRECTOR, ENERGY POLICY WEST REGION
CONSTELLATION NEW ENERGY, INC.
SPEAR TOWER, 36TH FLOOR
ONE MARKET STREET
SAN FRANCISCO, CA 94105
FOR: UNION OF CONCERNED SCIENTISTS

EDWARD G POOLE
ANDERSON DONOVAN & POOLE
601 CALIFORNIA STREET SUITE 1300
SAN FRANCISCO, CA 94108
FOR: SAN FRANCISCO COMMUNITY POWER

ANN G. GRIMALDI
MCKENNA LONG & ALDRIDGE LLP
101 CALIFORNIA STREET, 41ST FLOOR
SAN FRANCISCO, CA 94111
FOR: CENTER FOR ENERGY AND ECONOMIC
DEVELOPMENT

BRIAN T. CRAGG
ATTORNEY AT LAW
GOODIN, MACBRIDE, SQUERI, RITCHIE & DAY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111
FOR: INDEPENDENT ENERGY PRODUCERS
ASSOCIATION

JAMES D. SQUERI
ATTORNEY AT LAW
GOODIN MACBRIDE SQUERI RITCHIE & DAY LLP
505 SANSOME STREET, STE 900
SAN FRANCISCO, CA 94111
FOR: POWEREX CORP.

JEANNE B. ARMSTRONG
ATTORNEY AT LAW
GOODIN MACBRIDE SQUERI DAY & LAMPREY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111
FOR: WILD GOOSE STORAGE LLC

KAREN BOWEN
ATTORNEY AT LAW
WINSTON & STRAWN LLP
101 CALIFORNIA STREET
SAN FRANCISCO, CA 94111
FOR: MIRANT CALIFORNIA, LLC/MIRANT
DELTA, LLC, AND MIRANT POTRERO, LLC

LISA A. COTTLE
ATTORNEY AT LAW
WINSTON & STRAWN LLP
101 CALIFORNIA STREET, 39TH FLOOR
SAN FRANCISCO, CA 94111
FOR: MIRANT CALIFORNIA, LLC, MIRANT
DELTA, LLC, AND MIRANT POTRERO, LLC

MICHAEL B. DAY
ATTORNEY AT LAW
GOODIN MACBRIDE SQUERI DAY & LAMPREY LLP
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111
FOR: SOLAR ALLIANCE

SEAN P. BEATY
ATTORNEY AT LAW
COOPER, WHITE & COOPER, LLP
201 CALIFORNIA ST., 17TH FLOOR
SAN FRANCISCO, CA 94111

VIDHYA PRABHAKARAN
GOODIN, MACBRIDE, SQUERI, DAY, LAMPREY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111
FOR: INDEPENDENT ENERGY PRODUCERS

ASSOCIATION

JOSEPH M. KARP
ATTORNEY AT LAW
WINSTON & STRAWN LLP
101 CALIFORNIA STREET
SAN FRANCISCO, CA 94111-5802
FOR: CALIFORNIA COGENERATION COUNCIL

EDWARD W. O'NEILL
ATTORNEY AT LAW
DAVIS WRIGHT TREMAINE LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533
FOR: CALIFORNIA LARGE ENERGY CONSUMERS
ASSOCIATION

JEFFREY P. GRAY
DAVIS WRIGHT TREMAINE, LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533
FOR: CALPINE CORPORATION

CHRISTOPHER J. WARNER
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, PO BOX 7442
SAN FRANCISCO, CA 94120-7442
FOR: PACIFIC GAS AND ELECTRIC

SARA STECK MYERS
ATTORNEY AT LAW
122 28TH AVENUE
SAN FRANCISCO, CA 94121
FOR: CENTER FOR ENERGY EFFICIENCY AND
RENEWABLE TECHNOLOGIES

LARS KVALE
CENTER FOR RESOURCE SOLUTIONS
PRESIDIO BUILDING 97
PO BOX 39512
SAN FRANCISCO, CA 94129
FOR: CENTER FOR RESOURCE SOLUTION

ANDREW L. HARRIS
PACIFIC GAS & ELECTRIC COMPANY
PO BOX 770000 MAIL CODE B9A
SAN FRANCISCO, CA 94177

BRIAN K. CHERRY
VICE PRESIDENT, REGULATORY RELATIONS
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, MAIL CODE: B10C
SAN FRANCISCO, CA 94177
FOR: PACIFIC GAS AND ELECTRIC COMPANY

ANDREA WELLER
STRATEGIC ENERGY
3130 D BALFOUR RD., SUITE 290
BRENTWOOD, CA 94513
FOR: STRATEGIC ENERGY

JENNIFER CHAMBERLIN
MGR. OF REG. AND GOV. AFFAIRS
STRATEGIC ENERGY, LLC
2633 WELLINGTON CT.
CLYDE, CA 94520
FOR: STRATEGIC ENERGY, LLC

BETH VAUGHAN
CALIFORNIA COGENERATION COUNCIL
4391 N. MARSH ELDER COURT
CONCORD, CA 94521

KERRY HATTEVIK
MIRANT CORPORATION
696 WEST 10TH STREET
PITTSBURG, CA 94565
FOR: MIRANT CORPORATION

AVIS KOWALEWSKI
CALPINE CORPORATION
3875 HOPYARD ROAD, SUITE 345
PLEASANTON, CA 94588

J. ANDREW HOERNER
REDEFINING PROGRESS
1904 FRANKLIN STREET
OAKLAND, CA 94612

JANILL RICHARDS
DEPUTY ATTORNEY GENERAL
CALIFORNIA ATTORNEY GENERAL'S OFFICE
1515 CLAY STREET, 20TH FLOOR
OAKLAND, CA 94702
FOR: PEOPLE OF THE STATE OF CALIFORNIA

CLIFF CHEN
UNION OF CONCERNED SCIENTIST
2397 SHATTUCK AVENUE, STE 203
BERKELEY, CA 94704
FOR: UNION OF CONCERNED SCIENTISTS

GREGG MORRIS
DIRECTOR
GREEN POWER INSTITUTE
2039 SHATTUCK AVENUE, STE 402
BERKELEY, CA 94704
FOR: GREEN POWER INSTITUTE

R. THOMAS BEACH
CROSSBORDER ENERGY
2560 NINTH STREET, SUITE 213A
BERKELEY, CA 94710-2557
FOR: THE CALIFORNIA COGENERATION COUNCIL

KENNETH C. JOHNSON
KENNETH CARLISLE JOHNSON
2502 ROBERTSON RD

BARRY F. MCCARTHY
ATTORNEY AT LAW
MCCARTHY & BERLIN, LLP

SANTA CLARA, CA 95051
FOR: KENNETH CARLISLE JOHNSON

100 PARK CENTER PLAZA, SUITE 501
SAN JOSE, CA 95113
FOR: NORTHERN CALIFORNIA GENERATION
COALITION

C. SUSIE BERLIN
ATTORNEY AT LAW
MC CARTHY & BERLIN, LLP
100 PARK CENTER PLAZA, SUITE 501
SAN JOSE, CA 95113
FOR: NORTHERN CALIFORNIA POWER AGENCY

MIKE LAMOND
ALPINE NATURAL GAS OPERATING CO. #1 LLC
PO BOX 550
VALLEY SPRINGS, CA 95252

JOY A. WARREN
REGULATORY ADMINISTRATOR
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95354

BALDASSARO DI CAPO
151 BLUE RAVINE ROAD
FOLSOM, CA 95630
FOR: CALIFORNIA INDEPENDENT SYSTEM
OPERATOR

UDI HELMAN
CALIFORNIA INDEPENDENT SYS. OPER. CORP
151 BLUE RAVINE ROAD
FOLSOM, CA 95630
FOR: CALIFORNIA INDEPENDENT SYSTEM
OPERATOR CORPORATION

WAYNE AMER
PRESIDENT
MOUNTAIN UTILITIES
PO BOX 205
KIRKWOOD, CA 95646
FOR: MOUNTAIN UTILITIES

MARY LYNCH
VP - REGULATORY AND LEGISLATIVE AFFAIRS
CONSTELLATION ENERGY COMMODITIES GROUP
2377 GOLD MEDAL WAY, SUITE 100
GOLD RIVER, CA 95670

LEONARD DEVANNA
EXECUTIVE VICE PRESIDENT
CLEAN ENERGY SYSTEMS, INC.
11330 SUNCO DRIVE, SUITE A
RANCHO CORDOVA, CA 95742
FOR: CLEAN ENERGY SYSTEMS, INC.

ANDREW BROWN
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO, CA 95811
FOR: CONSTELLATION NEW ENERGY,
INC., CONSTELLATION ENERGY COMMODITIES
GROUP, INC. CONSTELLATION GENERATION

BRUCE MCLAUGHLIN
BRAUN & BLAISING, P.C.
915 L STREET, SUITE 1270
SACRAMENTO, CA 95814
FOR: CALIFORNIA MUNICIPAL UTILITIES
ASSOCIATION

JANE E. LUCKHARDT
ATTORNEY AT LAW
DOWNEY BRAND LLP
555 CAPITOL MALL, 10TH FLOOR
SACRAMENTO, CA 95814
FOR: SACRAMENTO MUNICIPAL UTILITY
DISTRICT

VIRGIL WELCH
STAFF ATTORNEY
ENVIRONMENTAL DEFENSE
1107 9TH STREET, SUITE 540
SACRAMENTO, CA 95814

WILLIAM W. WESTERFIELD, 111
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS L.L.P.
2015 H STREET
SACRAMENTO, CA 95814
FOR: SIERRA PACIFIC POWER COMPANY

GREGGORY L. WHEATLAND
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO, CA 95814-3109
FOR: LS POWER, INC.

JEFFERY D. HARRIS
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS LLP
2015 H STREET
SACRAMENTO, CA 95814-3109
FOR: DYNEGY

DOWNEY BRAND
DOWNEY BRAND
555 CAPITOL MALL, 10TH FLOOR
SACRAMENTO, CA 95814-4686
FOR: SACRAMENTO MUNICIPAL

RAYMOND J. CZAHAR, C.P.A.
CHIEF FINANCIAL OFFICER
WEST COAST GAS COMPANY

STEVEN M. COHN
ASSISTANT GENERAL COUNSEL
SACRAMENTO MUNICIPAL UTILITY DISTRICT

9203 BEATTY DRIVE
SACRAMENTO, CA 95826

PO BOX 15830
SACRAMENTO, CA 95852-1830
FOR: SACRAMENTO MUNICIPAL UTILITY
DISTRICT

ANN L. TROWBRIDGE
ATTORNEY AT LAW
DAY CARTER & MURPHY, LLP
3620 AMERICAN RIVER DRIVE, SUITE 205
SACRAMENTO, CA 95864
FOR: CALIFORNIA CLEAN DG
COALITION/NORTHWEST NATURAL GAS

DAN SILVERIA
SURPRISE VALLEY ELECTRIC CORPORATION
PO BOX 691
ALTURAS, CA 96101
FOR: SURPRISE VALLEY ELECTRIC
COOPERATIVE

JESSICA NELSON
PLUMAS-SIERRA RURAL ELECTRIC CO-OP
73233 STATE ROUTE 70, STE A
PORTOLA, CA 96122-7064
FOR: PLUMAS-SIERRA RURAL ELECTRIC COOP

CYNTHIA SCHULTZ
REGULATORY FILING COORDINATOR
PACIFIC POWER AND LIGHT COMPANY
825 N.E. MULTNOMAH
PORTLAND, OR 97232

KYLE L. DAVIS
PACIFICORP
825 NE MULTNOMAH ST., 20TH FLOOR
PORTLAND, OR 97232
FOR: PACIFICORP

RYAN FLYNN
PACIFICORP
825 NE MULTNOMAH STREET, 18TH FLOOR
PORTLAND, OR 97232

IAN CARTER
POLICY COORDINATOR-NORTH AMERICA
INTERNATIONAL EMISSIONS TRADING ASSN.
350 SPARKS STREET, STE. 809
OTTAWA, ON K1R 7S8
CANADA
FOR: INTERNATIONAL EMISSIONS TRADING
ASSOCIATION

JASON A. DUBCHAK
VICE PRESIDENT/GENERAL COUNSEL
WILD GOOSE STORAGE LLC
C/O NISKA GAS STORAGE, SUITE 400
607 8TH AVENUE S.W.
CALGARY, AB T2P 0A7
CANADA
FOR: WILD GOOSE STORAGE LLC

Information Only

BRIAN M. JONES
M. J. BRADLEY & ASSOCIATES, INC.
47 JUNCTION SQUARE DRIVE
CONCORD, MA 01742

MATTHEW MOST
EDISON MISSION MARKETING & TRADING, INC.
160 FEDERAL STREET
BOSTON, MA 02110-1776

KENNETH A. COLBURN
SYMBILITIC STRATEGIES, LLC
26 WINTON ROAD
MEREDITH, NH 03253

RICHARD COWART
REGULATORY ASSISTANCE PROJECT
50 STATE STREET, SUITE 3
MONTPELIER, VT 05602

KATHRYN WIG
PARALEGAL
NRG ENERGY, INC.
211 CARNEGIE CENTER
PRINCETON, NY 08540

SAKIS ASTERIADIS
APX INC
1270 FIFTH AVE., SUITE 15R
NEW YORK, NY 10029

GEORGE HOPLEY
BARCLAYS CAPITAL
200 PARK AVENUE
NEW YORK, NY 10166

MICHAEL A. YUFFEE
MCDERMOTT WILL & EMERY LLP
600 THIRTEENTH STREET, N.W.
WASHINGTON, DC 20005-3096

ELIZABETH ZELLJADT
1725 I STREET, N.W. SUITE 300
WASHINGTON, DC 20006

DALLAS BURTRAW
1616 P STREET, NW
WASHINGTON, DC 20036

VERONIQUE BUGNION

GARY BARCH

POINT CARBON
205 SEVERN RIVER RD
SEVERNA PARK, MD 21146

FELLON-MCCORD & ASSOCIATES, INC.
SUITE 2000
9960 CORPORATE CAMPUS DRIVE
LOUISVILLE, KY 40223

SAMARA MINDEL
REGULATORY AFFAIRS ANALYST
FELLON-MCCORD & ASSOCIATES
9960 CORPORATE CAMPUS DRIVE, SUITE 2000
LOUISVILLE, KY 40223

BARRY RABE
1427 ROSS STREET
PLYMOUTH, MI 48170

BRIAN POTTS
FOLEY & LARDNER
PO BOX 1497
150 EAST GILMAN STREET
MADISON, WI 53701-1497

JAMES W. KEATING
BP AMERICA, INC.
MAIL CODE 603-1E
150 W. WARRENVILLE RD.
NAPERVILLE, IL 60563

JAMES ROSS
RCS, INC.
500 CHESTERFIELD CENTER, SUITE 320
CHESTERFIELD, MO 63017

ANNE HENDRICKSON
DIRECTOR, REGULATORY AFFAIRS
COMMERCE ENERGY INC
222 W. LAS COLINAS BLVD., STE. 950-E
IRVING, TX 75039
FOR: COMMERCE ENERGY INC

COURTNEY WEDDINGTON
COMPLIANCE ANALYST
COMMERCE ENERGY INC
222 W. LAS COLINAS BLVD., STE. 950-E
IRVING, TX 75039

TRENT A. CARLSON
RELIANT ENERGY
1000 MAIN STREET
HOUSTON, TX 77001

GARY HINNERS
RELIANT ENERGY, INC.
PO BOX 148
HOUSTON, TX 77001-0148

JEANNE ZAIONTZ
BP ENERGY COMPANY
501 WESTLAKE PARK BLVD, RM. 4328
HOUSTON, TX 77079

JULIE L. MARTIN
WEST ISO COORDINATOR
NORTH AMERICA GAS AND POWER
BP ENERGY COMPANY
501 WESTLAKE PARK BLVD.
HOUSTON, TX 77079

FIJI GEORGE
EL PASO CORPORATION
EL PASO BUILDING
PO BOX 2511
HOUSTON, TX 77252

ED CHIANG
ELEMENT MARKETS, LLC
ONE SUGAR CREEK CENTER BLVD., SUITE 250
SUGAR LAND, TX 77478

FRANK STERN
SUMMIT BLUE CONSULTING
1722 14TH STREET, SUITE 230
BOULDER, CO 80302
FOR: SUMMIT BLUE CONSULTING

NADAV ENBAR
ENERGY INSIGHTS
1750 14TH STREET, SUITE 200
BOULDER, CO 80302

NICHOLAS LENSSEN
ENERGY INSIGHTS
1750 14TH STREET, SUITE 200
BOULDER, CO 80302

ELIZABETH BAKER
SUMMIT BLUE CONSULTING
1722 14TH STREET, SUITE 230
BOULDER, CO 80304

W. WAYNE TOMLINSON
EL PASO CORPORATION- WESTERN PIPELINES
2 NORTH NEVADA AVENUE
COLORADO SPRINGS, CO 80903

KEVIN J. SIMONSEN
ENERGY MANAGEMENT SERVICES
646 EAST THIRD AVENUE
DURANGO, CO 81301

JAMES A. HOLTkamp
HOLLAND & HART, LLP
60 EAST SOUTH TEMPLE, STE. 2000
SALT LAKE CITY, UT 84111

SANDRA ELY

BRIAN MCQUOWN

NEW MEXICO ENVIRONMENT DEPARTMENT
1190 ST FRANCIS DRIVE
SANTA FE, NM 87501

RELIANT ENERGY
7251 AMIGO ST., SUITE 120
LAS VEGAS, NV 89119

DOUGLAS BROOKS
NEVADA POWER COMPANY
SIERRA PACIFIC POWER COMPANY
6226 WEST SAHARA AVENUE
LAS VEGAS, NV 89151

ANITA HART
SENIOR SPECIALIST/STATE REGULATORYAFFAIR
SOUTHWEST GAS CORPORATION
5241 SPRING MOUNTAIN ROAD
LAS VEGAS, NV 89193

RANDY SABLE
SOUTHWEST GAS CORPORATION
MAILSTOP: LVB-105
5241 SPRING MOUNTAIN ROAD
LAS VEGAS, NV 89193

BILL SCHRAND
SOUTHWEST GAS CORPORATON
PO BOX 98510
LAS VEGAS, NV 89193-8510

JJ PRUCNAL
SOUTHWEST GAS CORPORATION
PO BOX 98510
LAS VEGAS, NV 89193-8510

SANDRA CAROLINA
SOUTHWEST GAS CORPORATION
PO BOX 98510
LAS VEGAS, NV 89193-8510

CYNTHIA MITCHELL
ENERGY ECONOMICS, INC.
530 COLGATE COURT
RENO, NV 89503

CHRISTOPHER A. HILEN
ASSISTANT GENERAL COUNSEL
SIERRA PACIFIC POWER COMPANY
6100 NEIL ROAD
RENO, NV 89511

ELENA MELLO
SIERRA PACIFIC POWER COMPANY
6100 NEIL ROAD
RENO, NV 89520

DARRELL SOYARS
MANAGER-RESOURCE PERMITTING&STRATEGIC
SIERRA PACIFIC RESOURCES
6100 NEIL ROAD
RENO, NV 89520-0024
FOR: SIERRA PACIFIC RESOURCES

TREVOR DILLARD
SIERRA PACIFIC POWER COMPANY
PO BOX 10100
6100 NEIL ROAD, MS S4A50
RENO, NV 89520-0024

LEILANI JOHNSON KOWAL
LOS ANGELES DEPT. OF WATER AND POWER
111 N. HOPE STREET, ROOM 1050
LOS ANGELES, CA 90012
FOR: LOS ANGELES DEPT. OF WATER AND
POWER

RANDY S. HOWARD
LOS ANGELES DEPT. OF WATER AND POWER
111 NORTH HOPE STREET, ROOM 921
LOS ANGELES, CA 90012

ROBERT K. ROZANSKI
LOS ANGELES DEPT OF WATER AND POWER
111 NORTH HOPE STREET, ROOM 1520
LOS ANGELES, CA 90012

ROBERT L. PETTINATO
LOS ANGELES DEPARTMENT OF WATER & POWER
111 NORTH HOPE STREET, SUITE 1151
LOS ANGELES, CA 90012

HUGH YAO
SOUTHERN CALIFORNIA GAS COMPANY
555 W. 5TH ST, GT22G2
LOS ANGELES, CA 90013

RASHA PRINCE
SOUTHERN CALIFORNIA GAS COMPANY
555 WEST 5TH STREET, GT14D6
LOS ANGELES, CA 90013

LEE WALLACH
SOLEL, INC
3424 MOTOR AVE., STE. 100
LOS ANGELES, CA 90034

RANDALL W. KEEN
ATTORNEY AT LAW
MANATT PHELPS & PHILLIPS, LLP
11355 WEST OLYMPIC BLVD.
LOS ANGELES, CA 90064
FOR: LOS ANGELES COUNTY

S. NANCY WHANG
ATTORNEY AT LAW
MANATT, PHELPS & PHILLIPS, LLP
11355 WEST OLYMPIC BLVD.
LOS ANGELES, CA 90064

PETER JAZAYERI

DEREK MARKOLF

STROOCK & STROOCK & LAVAN LLP
2029 CENTURY PARK EAST, SUITE 1800
LOS ANGELES, CA 90067

CALIFORNIA CLIMATE ACTION REGISTRY
515 S. FLOWER STREET, SUITE 1640
LOS ANGELES, CA 90071

DAVID NEMTZOW
1254 9TH STREET, NO. 6
SANTA MONICA, CA 90401

HARVEY EDER
PUBLIC SOLAR POWER COALITION
1218 12TH ST., 25
SANTA MONICA, CA 90401

STEVE ENDO
PASADENA DEPARTMENT OF WATER & POWER
45 EAST GLENARM STREET
PASADENA, CA 91105

STEVEN G. LINS
GENERAL COUNSEL
GLENDALE WATER AND POWER
613 EAST BROADWAY, SUITE 220
GLENDALE, CA 91206-4394

TOM HAMILTON
MANAGING PARTNER
ENERGY CONCIERGE SERVICES
321 MESA LILA RD
GLENDALE, CA 91208

BRUNO JEIDER
BURBANK WATER & POWER
164 WEST MAGNOLIA BLVD.
BURBANK, CA 91502

RICHARD J. MORILLO
ASSISTANT CITY ATTORNEY
CITY OF BURBANK
215 E. OLIVE AVENUE
BURBANK, CA 91502

AIMEE BARNES
MANAGER REGULATORY AFFAIRS
ECOSECURITIES
HARVARD SQUARE
206 W. BONITA AVENUE
CLAREMONT, CA 91711

CASE ADMINISTRATION
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE., RM. 370
ROSEMEAD, CA 91770

JAIRAM GOPAL
SOUTHERN CALIFORNIA EDISON
2244 WALNUT GROVE, G01-C
ROSEMEAD, CA 91770

TIM HEMIG
NRG ENERGY, INC.
1819 ASTON AVENUE, SUITE 105
CARLSBAD, CA 92008

BARRY LOVELL
15708 POMERADO RD., SUITE 203
POWAY, CA 92064

ALDYN HOEKSTRA
PACE GLOBAL ENERGY SERVICES
420 WEST BROADWAY, 4TH FLOOR
SAN DIEGO, CA 92101

YVONNE GROSS
REGULATORY POLICY MANAGER
SEMPRA ENERGY
HQ08C
101 ASH STREET
SAN DIEGO, CA 92103

JOHN LAUN
APOGEE INTERACTIVE, INC.
1220 ROSECRANS ST., SUITE 308
SAN DIEGO, CA 92106

KIM KIENER
504 CATALINA BLVD.
SAN DIEGO, CA 92106

SCOTT J. ANDERS
RESEARCH/ADMINISTRATIVE DIRECTOR
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW
5998 ALCALA PARK
SAN DIEGO, CA 92110

JOSEPH R. KLOBERDANZ
SAN DIEGO GAS & ELECTRIC
PO BOX 1831
SAN DIEGO, CA 92112

ANDREW MCALLISTER
DIRECTOR OF OPERATIONS
CALIFORNIA CENTER FOR SUSTAINABLE ENERGY
8690 BALBOA AVE., SUITE 100
SAN DIEGO, CA 92123

JENNIFER PORTER
POLICY ANALYST
CALIFORNIA CENTER FOR SUSTAINABLE ENERGY
8690 BALBOA AVENUE, SUITE 100
SAN DIEGO, CA 92123

SEPHRA A. NINOW
POLICY ANALYST

DESPINA NIEHAUS
SAN DIEGO GAS AND ELECTRIC COMPANY

CALIFORNIA CENTER FOR SUSTAINABLE ENERGY 8330 CENTURY PARK COURT, CP32H
8690 BALBOA AVENUE, SUITE 100 SAN DIEGO, CA 92123-1530
SAN DIEGO, CA 92123 FOR: SAN DIEGO GAS AND ELECTRIC COMPANY

JOHN W. LESLIE ORLANDO B. FOOTE, III
ATTORNEY AT LAW ATTORNEY AT LAW
LUCE, FORWARD, HAMILTON & SCRIPPS, LLP HORTON, KNOX, CARTER & FOOTE
11988 EL CAMINO REAL, SUITE 200 895 BROADWAY, SUITE 101
SAN DIEGO, CA 92130 EL CENTRO, CA 92243

ELSTON K. GRUBAUGH THOMAS MCCABE
IMPERIAL IRRIGATION DISTRICT EDISON MISSION ENERGY
333 EAST BARIONI BLVD. 18101 VON KARMAN AVE., SUITE 1700
IMPERIAL, CA 92251 IRVINE, CA 92612

MONA TIERNEY-LLOYD JAN PEPPER
LANDSITE, INC CLEAN POWER MARKETS, INC.
PO BOX 378 PO BOX 3206
CAYUCOS, CA 93430 418 BENVENUE AVENUE
FOR: LANDSITE, INC LOS ALTOS, CA 94024

GLORIA D. SMITH DIANE I. FELLMAN
ADAMS, BROADWELL, JOSEPH & CARDOZO DIRECTOR, REGULATORY AFFAIRS
601 GATEWAY BLVD., SUITE 1000 FPL ENERGY PROJECT MANAGEMENT, INC.
SOUTH SAN FRANCISCO, CA 94080 234 VAN NESS AVENUE
SAN FRANCISCO, CA 94102
FOR: FPL ENERGY PROJECT MANAGEMENT INC

HAYLEY GOODSON MICHEL FLORIO
ATTORNEY AT LAW ATTORNEYS AT LAW
THE UTILITY REFORM NETWORK 711 VAN NESS AVE., STE. 350
711 VAN NESS AVENUE, SUITE 350 SAN FRANCISCO, CA 94102
SAN FRANCISCO, CA 94102

DAN ADLER MICHAEL A. HYAMS
DIRECTOR, TECH AND POLICY DEVELOPMENT POWER ENTERPRISE-REGULATORY AFFAIRS
CALIFORNIA CLEAN ENERGY FUND SAN FRANCISCO PUBLIC UTILITIES COMM
5 THIRD STREET, SUITE 1125 1155 MARKET ST., 4TH FLOOR
SAN FRANCISCO, CA 94103 SAN FRANCISCO, CA 94103

THERESA BURKE NORMAN J. FURUTA
REGULATORY ANALYSTI ATTORNEY AT LAW
SAN FRANCISCO PUC FEDERAL EXECUTIVE AGENCIES
1155 MARKET STREET, 4TH FLOOR 1455 MARKET ST., SUITE 1744
SAN FRANCISCO, CA 94103 SAN FRANCISCO, CA 94103-1399

AMBER MAHONE ANNABELLE MALINS
ENERGY & ENVIRONMENTAL ECONOMICS, INC. CONSUL-SCIENCE AND TECHNOLOGY
101 MONTGOMERY STREET, SUITE 1600 BRITISH CONSULATE-GENERAL
SAN FRANCISCO, CA 94104 ONE SANSOME STREET, SUITE 850
SAN FRANCISCO, CA 94104

DEVRA WANG KAREN TERRANOVA
NATURAL RESOURCES DEFENSE COUNCIL ALCANTAR & KAHL, LLP
111 SUTTER STREET, 20TH FLOOR 120 MONTGOMERY STREET, STE 2200
SAN FRANCISCO, CA 94104 SAN FRANCISCO, CA 94104

NORA SHERIFF OLOF BYSTROM
ATTORNEY AT LAW DIRECTOR, WESTERN ENERGY
ALCANTAR & KAHL, LLP CAMBRIDGE ENERGY RESEARCH ASSOCIATES
120 MONTGOMERY STREET, SUITE 2200 555 CALIFORNIA STREET, 3RD FLOOR
SAN FRANCISCO, CA 94104 SAN FRANCISCO, CA 94104

SETH HILTON SHERYL CARTER

ATTORNEY AT LAW
 STOEL RIVES
 111 SUTTER ST., SUITE 700
 SAN FRANCISCO, CA 94104
 FOR: EL PASO NATURAL GAS

NATURAL RESOURCES DEFENSE COUNCIL
 111 SUTTER STREET, 20TH FLOOR
 SAN FRANCISCO, CA 94104

ASHLEE M. BONDS
 THELEN REID BROWN RAYSMAN&STEINER LLP
 SUITE 1800
 101 SECOND STREET
 SAN FRANCISCO, CA 94105

BIANCA BOWMAN
 RATE CASE COORDINATOR
 PACIFIC GAS AND ELECTRIC COMPANY
 77 BEALE STREET, MAIL CODE B9A
 SAN FRANCISCO, CA 94105
 FOR: PACIFIC GAS AND ELECTRIC COMPANY

CARMEN E. BASKETTE
 SENIOR MGR MARKET DEVELOPMENT
 ENERNOC
 594 HOWARD ST., SUITE 400
 SAN FRANCISCO, CA 94105
 FOR: ENERNOC, INC.

COLIN PETHERAM
 DIRECTOR-REGULATORY
 SBC CALIFORNIA
 140 NEW MONTGOMERY ST., SUITE 1325
 SAN FRANCISCO, CA 94105

JAMES W. TARNAGHAN
 DUANE MORRIS LLP
 SUITE 2000
 ONE MARKET, SPEAR TOWER
 SAN FRANCISCO, CA 94105
 FOR: LODI GAS STORAGE

KEVIN FOX
 WILSON SONSINI GOODRICH & ROSATI
 ONE MARKET STREET, SPEAR TOWER, 3300
 SAN FRANCISCO, CA 94105

KHURSHID KHOJA
 ASSOCIATE
 THELEN REID BROWN RAYSMAN & STEINER
 101 SECOND STREET, SUITE 1800
 SAN FRANCISCO, CA 94105

PETER V. ALLEN
 THELEN REID BROWN RAYSMAN & STEINER
 101 SECOND STREET, SUITE 1800
 SAN FRANCISCO, CA 94105

RAY WELCH
 ASSOCIATE DIRECTOR
 NAVIGANT CONSULTING, INC.
 ONE MARKET PLAZA, SUITE 1200
 SAN FRANCISCO, CA 94105

SHERIDAN J. PAUKER
 WILSON SONSINI GOODRICH & ROSATI
 SPEAR TOWER, SUITE 3300
 ONE MARKET ST
 SAN FRANCISCO, CA 94105

JAMES W. MCTARNAGHAN
 ATTORNEY AT LAW
 DUANE MORRIS LLP
 ONE MARKET, SPEAR TOWER 2000
 SAN FRANCISCO, CA 94105-1104

ROBERT J. REINHARD
 MORRISON AND FOERSTER
 425 MARKET STREET
 SAN FRANCISCO, CA 94105-2482

CALIFORNIA ENERGY MARKETS
 517-B POTRERO AVENUE
 SAN FRANCISCO, CA 94110

ARNO HARRIS
 RECURRENT ENERGY, INC.
 1700 MONTGOMERY ST., SUITE 251
 SAN FRANCISCO, CA 94111

HOWARD V. GOLUB
 NIXON PEABODY LLP
 2 EMBARCADERO CENTER, STE. 2700
 SAN FRANCISCO, CA 94111

JANINE L. SCANCARELLI
 ATTORNEY AT LAW
 FOLGER, LEVIN & KAHN, LLP
 275 BATTERY STREET, 23RD FLOOR
 SAN FRANCISCO, CA 94111

JOSEPH F. WIEDMAN
 ATTORNEY AT LAW
 GOODIN MACBRIDE SQUERI DAY & LAMPREY LLP
 505 SANSOME STREET, SUITE 900
 SAN FRANCISCO, CA 94111

JOSEPH M. KARP
 ATTORNEY AT LAW
 WINSTON & STRAWN LLP
 101 CALIFORNIA STREET
 SAN FRANCISCO, CA 94111

KARLEEN O'CONNOR
 WINSTON & STRAWN LLP
 101 CALIFORNIA STREET 39TH FLR

MARTIN A. MATTES
 NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP
 50 CALIFORNIA STREET, SUITE 3400

SAN FRANCISCO, CA 94111

BRAD WETSTONE
236 HARTFORD STREET
SAN FRANCISCO, CA 94114

LISA WEINZIMER
ASSOCIATE EDITOR
PLATTS MCGRAW-HILL
695 NINTH AVENUE, NO. 2
SAN FRANCISCO, CA 94118

SHAUN ELLIS
2183 UNION STREET
SAN FRANCISCO, CA 94123

GRACE LIVINGSTON-NUNLEY
ASSISTANT PROJECT MANAGER
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000 MAIL CODE B9A
SAN FRANCISCO, CA 94177

JONATHAN FORRESTER
PG&E
MAIL CODE N13C
PO BOX 770000
SAN FRANCISCO, CA 94177

SEBASTIEN CSAPO
PG&E PROJECT MGR.
MAIL CODE B9A
PO BOX 770000
SAN FRANCISCO, CA 94177

SOUMYA SASTRY
PACIFIC GAS AND ELECTRIC COMPANY
MAIL CODE B9A
PO BOX 770000
SAN FRANCISCO, CA 94177

VALERIE J. WINN
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, B9A
SAN FRANCISCO, CA 94177-0001

FARROKH ALBUYEH
VICE PRESIDENT
OPEN ACCESS TECHNOLOGY INTERNATIONAL INC
SUITE 910
1875 SOUTH GRANT STREET
SAN MATEO, CA 94402

JOHN DUTCHER
VICE PRESIDENT - REGULATORY AFFAIRS
MOUNTAIN UTILITIES
3210 CORTE VALENCIA
FAIRFIELD, CA 94534-7875
FOR: MOUNTAIN UTILITIES

SAN FRANCISCO, CA 94111

JEN MCGRAW
CENTER FOR NEIGHBORHOOD TECHNOLOGY
PO BOX 14322
SAN FRANCISCO, CA 94114

STEVEN MOSS
SAN FRANCISCO COMMUNITY POWER COOP
2325 3RD STREET, SUITE 344
SAN FRANCISCO, CA 94120

ED LUCHA
CASE COORDINATOR
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, MAIL CODE B9A
SAN FRANCISCO, CA 94177

JASMIN ANSAR
PG&E
MAIL CODE B24A
PO BOX 770000
SAN FRANCISCO, CA 94177

RAYMOND HUNG
PG&E
PO BOX 770000 MAIL CODE B9A
SAN FRANCISCO, CA 94177

SHAUN HALVERSON
PACIFIC GAS AND ELECTRIC COMPANY
PG&E MAIL CODE B9A
PO BOX 770000
SAN FRANCISCO, CA 94177
FOR: PACIFIC GAS AND ELECTRIC COMPANY

STEPHANIE LA SHAWN
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, MAIL CODE B9A
SAN FRANCISCO, CA 94177

KARLA DAILEY
CITY OF PALO ALTO
UTILITIES DEPARTMENT
BOX 10250
PALO ALTO, CA 94303

DEAN R. TIBBS
PRESIDENT
ADVANCED ENERGY STRATEGIES, INC.
1390 WILLOW PASS ROAD, SUITE 610
CONCORD, CA 94520

JEFFREY L. HAHN
COVANTA ENERGY CORPORATION
876 MT. VIEW DRIVE
LAFAYETTE, CA 94549

ANDREW J. VAN HORN
VAN HORN CONSULTING
12 LIND COURT
ORINDA, CA 94563

JOSEPH PAUL
SENIOR CORPORATE COUNSEL
DYNEGY, INC.
4140 DUBLIN BLVD., STE. 100
DUBLIN, CA 94568

SUE KATELEY
EXECUTIVE DIRECTOR
CALIFORNIA SOLAR ENERGY INDUSTRIES ASSN
PO BOX 782
RIO VISTA, CA 94571

GREG BLUE
ENXCO DEVELOPMENT CORP
5000 EXECUTIVE PARKWAY, STE.140
SAN RAMON, CA 94583

SARAH BESERRA
CALIFORNIA REPORTS
39 CASTLE HILL COURT
VALLEJO, CA 94591
FOR: CALIFORNIA REPORTS

MONICA A. SCHWEBS, ESQ.
BINGHAM MCCUTCHEEN LLP
PO BOX V
1333 N. CALIFORNIA BLVD., SUITE 210
WALNUT CREEK, CA 94596

PETER W. HANSCHEN
ATTORNEY AT LAW
MORRISON & FOERSTER, LLP
101 YGNACIO VALLEY ROAD, SUITE 450
WALNUT CREEK, CA 94596

WILLIAM H. BOOTH
ATTORNEY AT LAW
LAW OFFICES OF WILLIAM H. BOOTH
67 CARR DRIVE
MORAGA, CA 94596
FOR: CALIFORNIA LARGE ENERGY CONSUMERS
ASSOCIATION

JOSEPH HENRI
31 MIRAMONTE ROAD
WALNUT CREEK, CA 94597

PATRICIA THOMPSON
SUMMIT BLUE CONSULTING
2920 CAMINO DIABLO, SUITE 210
WALNUT CREEK, CA 94597

WILLIAM F. DIETRICH
ATTORNEY AT LAW
DIETRICH LAW
2977 YGNACIO VALLEY ROAD, 613
WALNUT CREEK, CA 94598-3535

ALEX KANG
ITRON, INC.
1111 BROADWAY, STE. 1800
OAKLAND, CA 94607

BETTY SETO
POLICY ANALYST
KEMA, INC.
492 NINTH STREET, SUITE 220
OAKLAND, CA 94607

GERALD L. LAHR
ABAG POWER
101 EIGHTH STREET
OAKLAND, CA 94607
FOR: ASSOCIATION OF BAY AREA GOVERNMENTS

JODY S. LONDON
JODY LONDON CONSULTING
PO BOX 3629
OAKLAND, CA 94609

STEVEN SCHILLER
SCHILLER CONSULTING, INC.
111 HILLSIDE AVENUE
PIEDMONT, CA 94611

MRW & ASSOCIATES, INC.
1814 FRANKLIN STREET, SUITE 720
OAKLAND, CA 94612

REED V. SCHMIDT
VICE PRESIDENT
BARTLE WELLS ASSOCIATES
1889 ALCATRAZ AVENUE
BERKELEY, CA 94703
FOR: CALIFORNIA CITY-COUNTY STREET
LIGHT ASSOCIATION

ADAM BRIONES
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVENUE, 2ND FLOOR
BERKELEY, CA 94704

STEVE KROMER
3110 COLLEGE AVENUE, APT 12
BERKELEY, CA 94705
FOR: STEVE KROMER

CLYDE MURLEY
CONSULTANT TO NRDC
1031 ORDWAY STREET
ALBANY, CA 94706

BRENDA LEMAY
DIRECTOR OF PROJECT DEVELOPMENT
HORIZON WIND ENERGY
1600 SHATTUCK, SUITE 222

BERKELEY, CA 94709

NANCY RADER
CALIFORNIA WIND ENERGY ASSOCIATION
2560 NINTH STREET, SUITE 213A
BERKELEY, CA 94710

CARLA PETERMAN
UCEI
2547 CHANNING WAY
BERKELEY, CA 94720

EDWARD VINE
LAWRENCE BERKELEY NATIONAL LABORATORY
BUILDING 90R4000
BERKELEY, CA 94720

RYAN WISER
BERKELEY LAB
MS-90-4000
ONE CYCLOTRON ROAD
BERKELEY, CA 94720

CHRIS MARNAY
BERKELEY LAB
1 CYCLOTRON RD MS 90R4000
BERKELEY, CA 94720-8136

PHILLIP J. MULLER
SCD ENERGY SOLUTIONS
436 NOVA ALBION WAY
SAN RAFAEL, CA 94903

RITA NORTON
RITA NORTON AND ASSOCIATES, LLC
18700 BLYTHSWOOD DRIVE,
LOS GATOS, CA 95030

CARL PECHMAN
POWER ECONOMICS
901 CENTER STREET
SANTA CRUZ, CA 95060

MAHLON ALDRIDGE
ECOLOGY ACTION
PO BOX 1188
SANTA CRUZ, CA 95060

RICHARD SMITH
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95352-4060

ROGER VAN HOY
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95354

THOMAS S. KIMBALL
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95354

WES MONIER
STRATEGIC ISSUES AND PLANNING MANAGER
TURLOCK IRRIGATION DISTRICT
333 EAST CANAL DRIVE, PO BOX 949
TURLOCK, CA 95381-0949

BARBARA R. BARKOVICH
BARKOVICH & YAP, INC.
44810 ROSEWOOD TERRACE
MENDOCINO, CA 95460

JOHN R. REDDING
ARCTURUS ENERGY CONSULTING
44810 ROSEWOOD TERRACE
MENDOCINO, CA 95460

CLARK BERNIER
RLW ANALYTICS
1055 BROADWAY, SUITE G
SONOMA, CA 95476

RICHARD MCCANN, PH.D.
M. CUBED
2655 PORTAGE BAY, SUITE 3
DAVIS, CA 95616

CAROLYN M. KEHREIN
ENERGY MANAGEMENT SERVICES
1505 DUNLAP COURT
DIXON, CA 95620-4208

GRANT ROSENBLUM, ESQ.
CALIFORNIA ISO
LEGAL AND REGULATORY DEPARTMENT
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

MELANIE GILLETTE
SR MGR WESTERN REG. AFFAIRS
ENERNOC, INC.
115 HAZELMERE DRIVE
FOLSOM, CA 95630

ROBIN SMUTNY-JONES
CALIFORNIA ISO
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

SAEED FARROKHPAY
FEDERAL ENERGY REGULATORY COMMISSION
110 BLUE RAVINE RD., SUITE 107
FOLSOM, CA 95630

CALIFORNIA ISO
LEGAL AND REGULATORY DEPARTMENT
151 BLUE RAVINE ROAD

DAVID BRANCHCOMB
BRANCHCOMB ASSOCIATES, LLC
9360 OAKTREE LANE

FOLSOM, CA 95630

KENNY SWAIN
 NAVIGANT CONSULTING
 3100 ZINFANDEL DRIVE, SUITE 600
 RANCHO CORDOVA, CA 95670

GORDON PICKERING
 PRINCIPAL
 NAVIGANT CONSULTING, INC.
 3100 ZINFANDEL DRIVE, SUITE 600
 RANCHO CORDOVA, CA 95670-6078

DAVID REYNOLDS
 MEMBER SERVICES MANAGER
 NORTHERN CALIFORNIA POWER AGENCY
 180 CIRBY WAY
 ROSEVILLE, CA 95678-6420

ELLEN WOLFE
 RESERO CONSULTING
 9289 SHADOW BROOK PL.
 GRANITE BAY, CA 95746

BOB LUCAS
 LUCAS ADVOCATES
 1121 L STREET, SUITE 407
 SACRAMENTO, CA 95814

DANIELLE MATTHEWS SEPERAS
 CALPINE CORPORATION
 1127 11TH STREET, SUITE 242
 SACRAMENTO, CA 95814
 FOR: CALPINE CORPORATION

DOUGLAS K. KERNER
 ATTORNEY AT LAW
 ELLISON, SCHNEIDER & HARRIS, LLP
 2015 H STREET
 SACRAMENTO, CA 95814

KASSANDRA GOUGH
 CALPINE CORPORATION
 1127 11TH STREET, SUITE 242
 SACRAMENTO, CA 95814
 FOR: CALPINE CORPORATION

KEVIN WOODRUFF
 WOODRUFF EXPERT SERVICES
 1100 K STREET, SUITE 204
 SACRAMENTO, CA 95814

PANAMA BARTHOLOMY
 ADVISOR TO CHAIR PFANNENSTIEL
 CALIFORNIA ENERGY COMMISSION
 1516 9TH STREET
 SACRAMENTO, CA 95814

RACHEL MCMAHON
 DIR. OF REG. AFFAIRS
 CEERT
 1100 11TH STREET, SUITE 311
 SACRAMENTO, CA 95814

ORANGEVILLE, CA 95662

KIRBY DUSEL
 NAVIGANT CONSULTING, INC.
 3100 ZINFANDEL DRIVE, SUITE 600
 RANCHO CORDOVA, CA 95670

LAURIE PARK
 NAVIGANT CONSULTING, INC.
 3100 ZINFANDEL DRIVE, SUITE 600
 RANCHO CORDOVA, CA 95670-6078

SCOTT TOMASHEFSKY
 NORTHERN CALIFORNIA POWER AGENCY
 180 CIRBY WAY
 ROSEVILLE, CA 95678-6420

AUDRA HARTMANN
 DYNEGY INC.
 980 NINTH STREET, SUITE 2130
 SACRAMENTO, CA 95814

CURT BARRY
 717 K STREET, SUITE 503
 SACRAMENTO, CA 95814

DAVID L. MODISETTE
 EXECUTIVE DIRECTOR
 CALIFORNIA ELECTRIC TRANSP. COALITION
 1015 K STREET, SUITE 200
 SACRAMENTO, CA 95814

JUSTIN C. WYNNE
 ATTORNEY AT LAW
 BRAU & BLAISING, P.C.
 915 L STREET, SUITE 1270
 SACRAMENTO, CA 95814

KELLIE SMITH
 SENATE ENERGY/UTILITIES & COMMUNICATION
 STATE CAPITOL, ROOM 4038
 SACRAMENTO, CA 95814

MICHAEL WAUGH
 AIR RESOURCES BOARD
 1001 10TH STREET
 SACRAMENTO, CA 95814

PATRICK STONER
 PROGRAM DIRECTOR
 LOCAL GOVERNMENT COMMISSION
 1303 J STREET, SUITE 250
 SACRAMENTO, CA 95814

RYAN BERNARDO
 BRAUN & BLAISING, P.C.
 915 L STREET, SUITE 1270
 SACRAMENTO, CA 95814

STEVEN A. LIPMAN
 STEVEN LIPMAN CONSULTING
 500 N. STREET 1108
 SACRAMENTO, CA 95814
 FOR: LIPMAN CONSULTING

STEVEN KELLY
 INDEPENDENT ENERGY PRODUCERS
 1215 K STREET, SUITE 900
 SACRAMENTO, CA 95814

WEBSTER TASAT
 AIR RESOURCES BOARD
 1001 I STREET
 SACRAMENTO, CA 95814

LYNN HAUG
 ELLISON, SCHNEIDER & HARRIS, LLP
 2015 H STREET
 SACRAMENTO, CA 95814-3109

EDWARD J. TIEDEMANN
 ATTORNEY AT LAW
 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
 400 CAPITOL MALL, 27TH FLOOR
 SACRAMENTO, CA 95814-4416
 FOR: PLACER COUNTY WATER AGENCY & KINGS
 RIVER CONSERVATION DISTRICT

LAURIE TEN HOPE
 ADVISOR TO COMMISSIONER BYRON
 CALIFORNIA ENERGY COMMISSION
 1516 9TH STREET, MS-32
 SACRAMENTO, CA 95814-5512

JOSHUA BUSHINSKY
 WESTERN POLICY COORDINATOR
 PEW CENTER ON GLOBAL CLIMATE CHANGE
 2101 WILSON BLVD., SUITE 550
 ARLINGTON, VA 95816

OBADIAH BARTHOLOMY
 MECHANICAL ENGINEER
 SACRAMENTO MUNICIPAL UTILITY DISTRICT
 M.S. B257
 6201 S. STREET
 SACRAMENTO, CA 95817

BUD BEEBE
 SACRAMENTO MUNICIPAL UTIL DIST
 MS B257
 6201 S STREET
 SACRAMENTO, CA 95817-1899

BALWANT S. PUREWAL
 DEPARTMENT OF WATER RESOURCES
 3310 EL CAMINO AVE., LL-90
 SACRAMENTO, CA 95821

DOUGLAS MACMULLLEN
 CHIEF, POWER PLANNING SECTION
 CA DEPARTMENT OF WATER RESOURCES
 3310 EL CAMINO AVE., ROOM 356
 SACRAMENTO, CA 95821

KAREN NORENE MILLS
 ATTORNEY AT LAW
 CALIFORNIA FARM BUREAU FEDERATION
 2300 RIVER PLAZA DRIVE
 SACRAMENTO, CA 95833

KAREN LINDH
 CALIFORNIA ONSITE GENERATION
 7909 WALERGA ROAD, NO. 112, PMB 119
 ANTELOPE, CA 95843

ELIZABETH W. HADLEY
 CITY OF REDDING
 777 CYPRESS AVENUE
 REDDING, CA 96001

ANNIE STANGE
 ALCANTAR & KAHL
 1300 SW FIFTH AVE., SUITE 1750
 PORTLAND, OR 97201

ELIZABETH WESTBY
 ALCANTAR & KAHL, LLP
 1300 SW FIFTH AVENUE, SUITE 1750
 PORTLAND, OR 97201

ALEXIA C. KELLY
 THE CLIMATE TRUST
 65 SW YAMHILL STREET, SUITE 400
 PORTLAND, OR 97204

ALAN COMNES
 WEST COAST POWER
 3934 SE ASH STREET
 PORTLAND, OR 97214

KYLE SILON
 ECOSECURITIES CONSULTING LIMITED
 529 SE GRAND AVENUE
 PORTLAND, OR 97214

CATHIE ALLEN
 CA STATE MGR.
 PACIFICORP
 825 NE MULTNOMAH STREET, SUITE 2000
 PORTLAND, OR 97232

PHIL CARVER
 OREGON DEPARTMENT OF ENERGY
 625 MARION ST., NE
 SALEM, OR 97301-3737

SAM SADLER
 OREGON DEPARTMENT OF ENERGY
 625 NE MARION STREET
 SALEM, OR 97301-3737

LISA SCHWARTZ
 SENIOR ANALYST
 ORGEON PUBLIC UTILITY COMMISSION
 PO BOX 2148
 SALEM, OR 97308-2148

CLARE BREIDENICH
 WESTERN POWER TRADING FORUM
 224 1/2 24TH AVENUE EAST
 SEATTLE, WA 98112
 FOR: WESTERN POWER TRADING FORUM

DONALD SCHOENBECK
 RCS, INC.
 900 WASHINGTON STREET, SUITE 780
 VANCOUVER, WA 98660

JESUS ARREDONDO
 NRG ENERGY INC.
 4600 CARLSBAD BLVD.
 CARLSBAD, CA 99208

CHARLIE BLAIR
 DELTA ENERGY & ENVIRONMENT
 15 GREAT STUART STREET
 EDINBURGH, UK EH2 7TP
 UNITED KINGDOM

THOMAS ELGIE
 POWEREX CORPORATION
 1400, 666 BURRAND ST
 VANCOUVER, BC V6C 2X8
 CANADA

State Service

CLARENCE BINNINGER
 DEPUTY ATTORNEY GENERAL
 DEPARTMENT OF JUSTICE
 455 GOLDEN GATE AVENUE, SUITE 11000
 SAN FRANCISCO, CA 94102

DAVID ZONANA
 DEPUTY ATTORNEY GENERAL
 CALIFORNIA ATTORNEY GENERAL'S OFFICE
 455 GOLDEN GATE AVENUE, SUITE 11000
 SAN FRANCISCO, CA 94102

AMY C. YIP-KIKUGAWA
 CALIF PUBLIC UTILITIES COMMISSION
 DIVISION OF ADMINISTRATIVE LAW JUDGES
 ROOM 2106
 505 VAN NESS AVENUE
 SAN FRANCISCO, CA 94102-3214

ANDREW CAMPBELL
 CALIF PUBLIC UTILITIES COMMISSION
 EXECUTIVE DIVISION
 ROOM 5203
 505 VAN NESS AVENUE
 SAN FRANCISCO, CA 94102-3214

ANNE GILLETTE
 CALIF PUBLIC UTILITIES COMMISSION
 ENERGY RESOURCES BRANCH
 AREA 4-A
 505 VAN NESS AVENUE
 SAN FRANCISCO, CA 94102-3214

BETH MOORE
 CALIF PUBLIC UTILITIES COMMISSION
 ELECTRICITY PLANNING & POLICY BRANCH
 ROOM 4103
 505 VAN NESS AVENUE
 SAN FRANCISCO, CA 94102-3214
 FOR: DRA

BISHU CHATTERJEE
 CALIF PUBLIC UTILITIES COMMISSION
 RATEMAKING BRANCH
 AREA 4-A
 505 VAN NESS AVENUE
 SAN FRANCISCO, CA 94102-3214

CATHLEEN A. FOGEL
 CALIF PUBLIC UTILITIES COMMISSION
 ENERGY RESOURCES BRANCH
 AREA 4-A
 505 VAN NESS AVENUE
 SAN FRANCISCO, CA 94102-3214

CHARLOTTE TERKEURST
 CALIF PUBLIC UTILITIES COMMISSION
 DIVISION OF ADMINISTRATIVE LAW JUDGES
 ROOM 5117
 505 VAN NESS AVENUE
 SAN FRANCISCO, CA 94102-3214

CHRISTINE S. TAM
 CALIF PUBLIC UTILITIES COMMISSION
 ELECTRICITY PLANNING & POLICY BRANCH
 ROOM 4209
 505 VAN NESS AVENUE
 SAN FRANCISCO, CA 94102-3214

DONALD R. SMITH
 CALIF PUBLIC UTILITIES COMMISSION
 ELECTRICITY PLANNING & POLICY BRANCH
 ROOM 4209
 505 VAN NESS AVENUE
 SAN FRANCISCO, CA 94102-3214

ED MOLDAVSKY
 CALIF PUBLIC UTILITIES COMMISSION
 LEGAL DIVISION
 ROOM 5037
 505 VAN NESS AVENUE
 SAN FRANCISCO, CA 94102-3214

ELIZABETH STOLTZFUS

EUGENE CADENASSO

CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

CALIF PUBLIC UTILITIES COMMISSION
RATEMAKING BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

HARVEY Y. MORRIS
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5036
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JACLYN MARKS
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5306
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JACQUELINE GREIG
CALIF PUBLIC UTILITIES COMMISSION
ENERGY COST OF SERVICE & NATURAL GAS BRA
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JAMIE FORDYCE
CALIF PUBLIC UTILITIES COMMISSION
POLICY & PLANNING DIVISION
AREA 5-B
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JASON R. SALMI KLOTZ
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

GEORGE S. TAGNIPES
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JOEL T. PERLSTEIN
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5133
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JONATHAN LAKRITZ
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 5020
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JUDITH IKLE
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
ROOM 4012
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
FOR: ENERGY RESOURCES BRANCH

JULIE A. FITCH
CALIF PUBLIC UTILITIES COMMISSION
POLICY & PLANNING DIVISION
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

KRISTIN RALFF DOUGLAS
CALIF PUBLIC UTILITIES COMMISSION
POLICY & PLANNING DIVISION
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LAINIE MOTAMEDI
CALIF PUBLIC UTILITIES COMMISSION
POLICY & PLANNING DIVISION
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LANA TRAN
CALIF PUBLIC UTILITIES COMMISSION
ELECTRIC GENERATION PERFORMANCE BRANCH
AREA 2-D
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

MATTHEW DEAL
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5215
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

NANCY RYAN
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5217
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

PAMELA WELLNER
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

PAUL S. PHILLIPS
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY PLANNING & POLICY BRANCH

PEARLIE SABINO
CALIF PUBLIC UTILITIES COMMISSION
ENERGY COST OF SERVICE & NATURAL GAS BRA

ROOM 4101
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

RAHMON MOMOH
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY PLANNING & POLICY BRANCH
ROOM 4205
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

RICHARD A. MYERS
CALIF PUBLIC UTILITIES COMMISSION
RATEMAKING BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SARA M. KAMINS
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SCOTT MURTISHAW
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SEAN A. SIMON
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

STEVE ROSCOW
CALIF PUBLIC UTILITIES COMMISSION
RATEMAKING BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

THERESA CHO
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5207
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ZACH CHURCH
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 2252
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

BILL LOCKYER
STATE ATTORNEY GENERAL
STATE OF CALIFORNIA, DEPT OF JUSTICE
PO BOX 944255
SACRAMENTO, CA 94244-2550

KEN ALEX
PO BOX 944255
1300 I STREET, SUITE 125
SACRAMENTO, CA 94244-2550
FOR: PEOPLE OF THE STATE OF CALIFORNIA

JUDITH B. SANDERS
ATTORNEY AT LAW
CALIFORNIA INDEPENDENT SYSTEM OPERATOR
151 BLUE RAVINE ROAD
FOLSOM, CA 95630
FOR: CAISO

MARY MCDONALD
DIRECTOR OF STATE AFFAIRS
CALIFORNIA INDEPENDENT SYSTEM OPERATOR
151 BLUE RAVINE ROAD
FOLSOM, CA 95630
FOR: CAISO

PHILIP D. PETTINGILL
LEGAL & REG. DEPT.
CALIFORNIA INDEPENDENT SYSTEM OPERATOR
151 BLUE RAVINE ROAD
FOLSOM, CA 95630
FOR: CAISO

MICHAEL SCHEIBLE
DEPUTY EXECUTIVE OFFICER
CALIFORNIA AIR RESOURCES BOARD
1001 I STREET
SACRAMENTO, CA 95677
FOR: CALIFORNIA AIR RESOURCES BOARD

GARY COLLORD
STATIONARY SOURCE DIVISION
AIR RESOURCES BOARD
1001 I STREET, PO BOX 2815
SACRAMENTO, CA 95812

JEFFREY DOLL
CALIFORNIA AIR RESOURCES BOARD
PO BOX 2815 1001 I STREET
SACRAMENTO, CA 95812

PAM BURMICH
AIR RESOURCES BOARD
1001 I STREET, BOX 2815
SACRAMENTO, CA 95812

B. B. BLEVINS
EXECUTIVE DIRECTOR
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS-39
SACRAMENTO, CA 95814
FOR: CALIFORNIA ENERGY COMMISSION

DARYL METZ
CALIFORNIA ENERGY COMMISSION
1516 9TH ST., MS-20
SACRAMENTO, CA 95814

DEBORAH SLON
DEPUTY ATTORNEY GENERAL, ENVIRONMENT
OFFICE OF THE ATTORNEY GENERAL
1300 I STREET, 15TH FLOOR
SACRAMENTO, CA 95814

DON SCHULTZ
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRA
770 L STREET, SUITE 1050
SACRAMENTO, CA 95814

KAREN GRIFFIN
EXECUTIVE OFFICE
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS 39
SACRAMENTO, CA 95814

LISA DECARLO
STAFF COUNSEL
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET MS-14
SACRAMENTO, CA 95814

MARC PRYOR
CALIFORNIA ENERGY COMMISSION
1516 9TH ST., MS-20
SACRAMENTO, CA 95814

MICHELLE GARCIA
AIR RESOURCES BOARD
1001 10TH STREET
SACRAMENTO, CA 95814

PIERRE H. DUVAIR
CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET, MS-41
SACRAMENTO, CA 95814

WADE MCCARTNEY
CALIF PUBLIC UTILITIES COMMISSION
POLICY & PLANNING DIVISION
770 L STREET, SUITE 1050
SACRAMENTO, CA 95814

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

CAROL J. HURLOCK
CALIFORNIA DEPT. OF WATER RESOURCES
JOINT OPERATIONS CENTER
3310 EL CAMINO AVE. RM 300
SACRAMENTO, CA 95821

HOLLY B. CRONIN
STATE WATER PROJECT OPERATIONS DIV
CALIFORNIA DEPARTMENT OF WATER RESOURCES
3310 EL CAMINO AVE., LL-90
SACRAMENTO, CA 95821

ROSS A. MILLER
ELECTRICITY ANALYSIS OFFICE
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET MS 20
SACRAMENTO, CA 96814-5512
FOR: CALIFORNIA ENERGY COMMISSION

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