FILED
08-15-07
02:30 PM

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies	))))	Rulemaking 06-04-009 (Filed April 13, 2006)

REPLY COMMENTS OF MORGAN STANLEY CAPITAL GROUP INC. ON THE MARKET ADVISORY COMMITTEE TO THE CALIFORNIA AIR RESOURCES BOARD'S RECOMMENDATIONS FOR DESIGNING A GREENHOUSE GAS CAP-AND-TRADE SYSTEM FOR CALIFORNIA

Catherine M. Krupka
Adam J. Katz
McDermott Will & Emery LLP
600 Thirteenth Street, NW
Washington, DC 20005
Tel: (202) 756-8000
Fax: (202) 756-8087
Email: ckrupka@mwe.com
ajkatz@mwe.com

August 15, 2007

Attorneys for Morgan Stanley Capital Group Inc.

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I. INTRODUCTION

Pursuant to the July 19, 2007 ruling of Administrative Law Judges Charlotte F. TerKeust and Jonathan Lakritz, Morgan Stanley Capital Group Inc. ("MSCG") respectfully submits its reply comments on the Market Advisory Committee to the California Air Resources Board's Recommendations for Designing a Greenhouse Gas Cap-And-Trade System for California ("MAC Report").[1]

II. REPLY COMMENTS

MSCG divides its reply comments into two categories. First, MSCG responds to certain comments that address the Commission's questions on the policy considerations associated with adopting a load-based or first-seller approach when implementing an emissions cap-and-trade program in California. Second, MSCG replies to comments on the potential for federal preemption and constitutional challenges to California's cap-and-trade proposals. In both cases, MSCG's reply comments should be read in conjunction with its initial comments which lay out its overall position on the MAC Report.

[1] Administrative Law Judges' Ruling Requesting Comments and Legal Briefs on Market Advisory Committee Report and Notice of En Banc Hearing, *Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies* (Docket No. R.06-04-009) (issued July 19, 2007).

MSCG's comments and reply comments are subject to the caveat that it continues to believe that a source-based approach to cap-and-trade in California is superior, from both a policy and legal perspective, to either a load-based or first-seller approach. Finally, MSCG does not have a complete picture of how California would implement either a load-based or first-seller approach, so its positions could change once those details become known.

A. Policy-Related Questions Regarding the "First-Seller" Approach

Q.7 How would treatment of imports differ in a deliverer/first-seller system compared to a load-based approach?

As the MAC Report recognized, "the load-based and first-seller approaches seem to have comparable strengths in [the treatment of imports]."[2] However, Southern California Public Power Authority ("SCPPA") raises an interesting point about how California will regulate emissions for power that is wheeled through the State. SCPPA observes that sellers that deliver electricity from out-of-state to California points of delivery ("POD") for wheeling through California would be making deliveries at California PODs.[3] Accordingly, "[t]heir deliveries would become points of regulation[,]" and "[t]he cost of California allowances may affect a wholesaler's decision about whether to engage in a wholesale transaction that might require wheeling through California."[4]

MSCG continues to believe that, in theory, the "correct" location to assess responsibility for GHG compliance on imports is the border. However, some other method may be preferable, from a practical perspective, to avoid legal issues surrounding the imposition of burdensome

[2] *Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California: Recommendations of the Market Advisory Committee to the California Air Resources Board*, at 45 (June 30, 2007) ("MAC Report).

[3] SCPPA Comments at 13.

[4] *Id.* at 13.

state regulation on interstate commerce. For that reason, something like Pacific Gas and Electric's ("PG&E") suggestions for relying on the first point of delivery may provide California with a means for addressing emissions for imports without impacting wheeling transactions through California, and is worth further consideration.[5]

Q.9 Compare and contrast the environmental integrity of a deliverer/first-seller and a load-based approach. How would a deliverer/first-seller approach address leakage? How would a deliverer/first-seller approach address contract shuffling?

The Division of Ratepayer Advocates ("DRA") observes that leakage associated with in-state resources can occur under a first-seller approach if dirty in-state generation shuts down or reduces production, and relocates or increases production out-of-state to take advantage of lower estimated emission rates on imports.[6] At the same time, in-state buyers could shift their purchases to dirtier and cheaper out-of-state sources.[7] MSCG does not disagree that this scenario could happen. However, the same scenario is equally plausible under a load-based approach. Under both approaches, "leakage" would be enabled by the inability of the State to precisely identify the actual emissions associated with imported power. This problem is not a point of differentiation between the two approaches, as MSCG and others indicated in their initial comments.

The Los Angeles Department of Water and Power ("LADWP") suggests that a first-seller approach would somehow be more vulnerable to abuse. It states "[a] first seller approach that relies on NERC e-tags to track sources would create an opportunity for market manipulation and

[5] PG&E Comments at 7-8.

[6] DRA Comments at 7.

[7] *Id.* at 7.

gaming by market participants."[8] Subsequently, in response to Question 10, LADWP states, "[t]he first-seller approach is subject to gaming for the reason noted above[,]" although it provides no reasons "above."[9]

LADWP does not provide its rationale in its response to either question for why a first-seller approach would lead to manipulation and gaming. Indeed, it is axiomatic that the more complex the system, the more vulnerable it will be to manipulation and gaming, and it does not appear to be the view of any commenters that a load-based approach is simpler than a first-seller approach. Absent a more specific explanation from LADWP as to why it believes a first-seller approach is more vulnerable to manipulation, its concern does not provide a basis for favoring a load-based approach.

Q.12 Compare and contrast the deliverer/first-seller and load-based approaches in terms of their impacts on electricity prices, costs, and reliability for consumers.

PacifiCorp and LADWP filed comments that embrace the concept that it is important that California adopt emissions regulations that maintain and promote supply liquidity and reliability in California.[10] MSCG completely agrees. PacifiCorp and LADWP go on to conclude that liquidity will be reduced if California adopts a first-seller approach. This is not the case. A first-seller approach is more likely to keep suppliers like MSCG in California's energy markets than a load-based approach.

[8] LADWP Comments at 20.

[9] *Id.* at 21.

[10] PacifiCorp Comments at 8; LADWP Comments at 22.

Specifically, PacifiCorp suggests that banks and power marketers will participate less in California's wholesale power market if California adopts a first-seller approach.[11] MSCG assures the Commission that the opposite is true. ***MSCG is both an investment bank and a power marketer. It supports a first-seller approach over a load-based approach.*** MSCG has no intention of decreasing its participation in the California power markets if the State adopts a first-seller approach. In fact, the opposite is more likely to be true. It is MSCG's view that a load-based approach will, at a minimum, make it more problematic and costly to provide the full range of services it currently offers. Relative to a first-seller approach, a load-based approach creates a significant risk of reduced customer options and hence, increased costs. For this reason, we believe Pacificorp's concerns, while focusing on a very important issue, are misplaced.

PacifiCorp also comments that a first-seller approach will cause the wholesale market to gravitate towards contracts with specified resources instead of financial instruments in which emissions are not tied to specific power plants, thereby reducing liquidity and hedging opportunities and raising prices.[12] It observes that these threats are lessened with a load-based approach.[13] LADWP similarly claims that the first-seller approach will create price uncertainty for forward contracts that do not specify a generation resource, thereby creating disincentives for marketers to enter into such transactions.[14] Again, MSCG believes that both companies have identified a very important concern, but their conclusions may be the result of incomplete analyses. From MSCG's perspective as a supplier, the opposite is most likely. MSCG's ability

[11] *See* PacifiCorp Comments at 8.

[12] *Id.*

[13] *Id.*

[14] LADWP Comments at 22.

to offer a full range of physical and financial products and services will be far less likely to be impaired under the first-seller approach.

Q.13 Would a deliverer/first-seller approach and a load-based approach have different impacts on wholesale power prices? Which would result in higher prices? Why? Is this good or bad?

LADWP claims that a load-based approach is more transparent because "[e]ach long-term load-based transaction has an associated contract that can specify the source(s) of energy…."[15] Thus, by extension, LADWP believes a load-based approach better meets California's goals. LADWP's position is based on a faulty assumption. There are many types of long-term contracts and they do not routinely specify the source of power. Some are unit-contingent and designate a source. Others list a limited range of sources from which power may be supplied. Still others, in the interest of maximizing reliability and the certainty of delivery, do not specify a source of power and instead require the seller to deliver from the source of its choice or pay damages. The Commission should not adopt LADWP's approach as it is based on an inaccurate evaluation of the content of long-term contracts.

Moreover, LADWP's proposal belies the concerns it expressed in response to Question 12 over "imped[ing] the liquidity of the market."[16] If LADWP is concerned with promoting market liquidity, then it should not be encouraging the Commission to adopt cap-and-trade rules that are based on or promote unit-contingent contracts. Instead, LADWP should promote the use of unspecified resource contracts.

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[15] LADWP Comments at 22.

[16] *Id.*

Q.19 To what extent would either approach (deliverer/first-seller or load-based) be likely to alter the dispatch of existing generation units in the near-term? Why? If there is a difference between the approaches, how significant would it be?

The California Municipal Utilities Association ("CMUA") contends that to alter the dispatch of existing generation, the cost of emissions credits will need to be included in the variable cost component and such cost will need to reach about \$50 to \$60 per ton of CO_2.[17] CMUA opines that "[t]hese numbers would provide an incentive for market manipulation and for ways to make money off of the credits."[18] While MSCG agrees with the importance of including the variable cost of emissions credits in the dispatch optimization, the conclusion that these costs provide an incentive for market manipulation is an unsupported leap. CMUA does not explain the basis for its calculation or why market manipulation would be incentivized. Furthermore, if its conclusion is true, CMUA offers no reason for why it does not apply equally to a load-based approach. As with certain of the comments responding to Question 9 discussed above, California should not rely on this unsupported assertion as evidence demonstrating that manipulation is any more likely under the first-seller approach than a load-based approach.

Q.22 How would a deliverer/first-seller approach interact with the State's Renewable Portfolio Standard requirements (both existing and proposed)?

PacifiCorp states that the compliance costs placed on renewable energy under a first-seller approach will increase price, drive down demand (outside of mandated RPS purchases), and discourage investment in renewable energy.[19] However, PacifiCorp does not explain why it

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[17] CMUA Comments at 9. CMUA's calculation assumes variable costs of coal at approximately \$20/MWh, 2000 lbs CO_2/MWh; variable costs of combined cycle natural gas of approximately \$54/MWh, 850 lbs of CO_2/MWh assuming \$7/MMBtu gas. *Id*.

[18] CMUA Comments at 9.

[19] PacifiCorp Comments at 9.

believes this to be true or why the impact would not be the same for a load-based approach. Tellingly, no other party commented on this issue or suggested it to be a concern.

Once California puts a cap in place, it would seem that renewable resources will be in great demand because market participants will need them in order to stay within the State's emissions limits. Furthermore, although MSCG has commented on the superfluity of an RPS once an emissions cap is in place, under current law, these requirements will still apply. For those reasons, MSCG believes there is no support for the view that a first-seller approach will have an adverse impact on renewables development.

Q.24 Compare and contrast the impact of a deliverer/first-seller and a load-based approach on the voluntary renewables market.

The Natural Resources Defense Council ("NRDC") and the Union of Concerned Scientists ("UCS") suggest that California should "periodically reduce the mandatory GHG cap to account for voluntary purchases of renewable energy…."[20] An "adjustable cap" is neither practical nor consistent with California's emissions reduction goals.

First, it is unclear from their comments how NRDC and UCS would have the State distinguish between "voluntary" and "involuntary" renewable purchases for purposes of reducing the cap. From MSCG's perspective, it would be difficult to fairly and accurately distinguish between the two types of purchases. Furthermore, a variable cap for renewables adds a layer of complexity to the program that would decrease stability in the allowances market. In a commodities market, which is what the allowances market will be, uncertainty increases volatility. NRDC's and UDC's proposal for periodic cap reductions for "excessive" adoption of

[20] NRDC/UCS Comments at 19.

renewables supply via "voluntary" action also appears to be counter-productive, punishing activity that should be encouraged.

Second, NRDC's and UCS's proposal fails to account for how California would calculate what level of emissions they would attribute to a "null" but zero emitting resource. Accordingly, it is difficult to understand how the proposal would work.

Third, as explained in the MAC Report, "[t]he cap establishes certainty as to the total amount of emissions that will occur under the program."[21] Thus, allowing for an adjustable cap would belie the very reason California is considering an emissions cap in the first instance: to "put a clear and specific limit on aggregate emissions…."[22] The administrative burden of having to distinguish "voluntary" from "involuntary" purchases, calculate emissions attributable to null but zero emitting resources, and regularly adjust the cap would be contrary to California's stated goals and should not be adopted by the State.

Q.25 Would one approach (deliverer/first-seller or load-based) have an advantage over the other in producing the greatest amount of emissions reductions through modifications (e.g., retrofitting, efficiency improvements, etc.) to existing power plants? Why?

NRDC and UCS contend that a "load-based approach would likely have an advantage in encouraging long-term investments in emission reduction measures such as end-use efficiency, renewable energy, and low-carbon generators."[23] The Commission should not rely on this statement when choosing between a load-based or first-seller approach.

NRDC and UCS do not provide support for their position. Conversely, MSCG and other parties, in their initial comments, pointed out why non-market investments in energy efficiency

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[21] MAC Report at 5.

[22] *Id.*

[23] NRDC/UCS Comments at 20.

are driven primarily by government-mandated programs. Such programs are separate from and unlikely to be influenced by adoption of either a load-based or source-based GHG reduction program.

With regard to retrofitting, long-term investment in new technologies, and similar commercial and industrial level activities, NRDC and UCS provide no rationale as to why a load-based approach would encourage more investment in renewable energy and low carbon generators than a first-seller approach. Indeed, the market will invest in modifications and upgrades when California's emissions reduction proposals send price signals that it is economical to do so (*e.g.,* when the cost of allowances required to operate an old plant exceeds the cost of the modifications needed to reduce emissions).

Q.32 Would implementation of a deliverer/first-seller approach necessitate auctioning of GHG emissions allowances? Why or why not?

PacifiCorp believes that, under a first-seller approach, it would be obligated to secure allowances for both its generation and contracted power.[24] By implication, then, it presumably believes that this would not be the case under a load-based program. However, LSEs would have to procure and surrender allowances attributable to GHG emissions under either program, not just a first-seller approach. To some extent, PacifiCorp indirectly raises a legitimate issue, in that calculating the GHG responsibility for a multi-jurisdictional utility may require a few rules unique to that set of circumstances. However, the problem is akin to the handling of imports, and will present itself under either a load-based or first seller program, since the problem is primarily one of attribution. A method must be developed to allocate responsibility for the GHG attributes of the utility's supply portfolio (owned assets and purchases) to its California

[24] PacifiCorp Comments at 9.

customers. The utility will then be responsible for surrendering the appropriate number of allowances. For the corporation as a whole, this activity is likely to be essentially the same regardless of whether California adopts a first-seller or a load-based approach.

LADWP states that "[i]f a large percentage of allowances are auctioned, there is a chance of market manipulation."[25] It then claims that entities that need allowances to serve native load and unsuccessfully bid at auction may have to "purchase allowances at significantly higher prices from entities that are speculating (*e.g.*, financial entities)."[26]

As with its response to Question 9, LADWP engages in a logical fallacy: it suggests that if one event occurs (*e.g.,* participation by financial entities in auctions) another event will result (*e.g.,* market manipulation). LADWP fails to provide a scintilla of evidence to show that a financial entity's market ***participation*** will result in market ***manipulation***. There simply is no cause-and-effect relationship and it is disturbing that LADWP would draw such a conclusion without proof.

Furthermore, LADWP's position is contrary to its response to Question 12 in which it advocates the importance of California avoiding actions that would impede market liquidity. If LADWP believes market liquidity is valuable and desirable, then it should want to encourage as broad a range of participants to be active in the California energy markets – including in the forward markets – as possible. Asking the Commission to impose allowance market rules and conditions that would single out a group of market participants based on their business model and prohibit their participation is counterproductive to LADWP's goal of market liquidity. Furthermore, LADWP's approach could have the unconscionable effect of preventing entities

[25] LADWP Comments at 32.

[26] *Id.* at 32-33.

required to surrender allowances under the GHG regulations from obtaining the allowances they need via some or all market channels.

Finally, any effort to precisely pigeonhole a firm for purposes of restrictions of this type would be problematic, at best. For example, MSCG does not fit neatly into any one category. It provides financial products and services, is an active physical power marketer, and owns or operates generation. For all of these reasons, LADWP's proposal to limit participation in any or all allowance markets or distribution channels should be rejected.

Q.34 If you recommend allocation of allowances to retail providers, followed by an auction to deliverers/first sellers, how would such an auction be administered? What kinds of issues would such a system raise?

MSCG vehemently disagrees with CalEnergy's suggestion that California impose limitations on auctions to address alleged adverse consequences that can arise with "non-generators bidding to acquire GHG allowances."[27] CalEnergy's recommendation is premised on its false assumption that, unless auction participation is limited, "[f]inancial speculators could participate, hoping to acquire allowances cheaply and sell them to companies that need them to operate at a higher price."[28] CalEnergy's meritless theory that increased auction participation will result in unlawful manipulation warrants no consideration by California.

First, like LADWP, CalEnergy inaccurately equates market participation with "market manipulation." This is a significant conclusion and the fact that it is not accompanied by supporting data makes the conclusion all the more questionable. Furthermore, CalEnergy does not indicate why limiting auctions to current first-sellers, California-based generators or entities that can make a showing that they will be a first-seller, would some how eliminate the potential

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[27] CalEnergy Comments at 8.

[28] *Id.*

for speculation or market manipulation. Instead, if adopted, CalEnergy's proposal would be more apt to reduce beneficial market liquidity.

CalEnergy also claims that an open auction would lead to increased prices for end-users.[29] The experience in Europe demonstrates that allocating allowances for free can lead to speculation and windfall profits without corresponding benefits to end-users. Consequently, to address such problems, Europe has turned to an auction-based approach and has not limited participation to just generators.[30]

Finally, CalEnergy's recommendation for a *per se* ban on who is allowed to acquire GHG allowances could place other market participants at a competitive disadvantage in their ability to serve California. Such an outcome would increase the likelihood that California's GHG proposal would be overturned through court challenges.

SCPPA claims that if allowances were allocated "on the basis of load, population or any similar measure that is not directly related to the need to prevent economic harm to the retail provider's consumers, some retail providers would inevitably receive allowances that were disproportionate to their need for allowances."[31] The result, according to SCPPA, "would expose some retail providers to cross-subsidizing others."[32]

SCPPA is correct insofar as it suggests that, depending on how California allocates or auctions allowances, economic shifts will result between entities who need additional allowances and those that have more than they need.[33] However, it is inaccurate for SCPPA to claim that

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[29] CalEnergy Comments at 8 (emphasis added).

[30] Proposals pending in the U.S. Congress impose no such limitation either.

[31] SCPPA Comments at 43.

[32] *Id.*

[33] As explained in its initial comments, MSCG opposes the free allocation of emissions allowances under either a load-based or first-seller approach.

these "economic shifts" are "subsidies." SCPPA members will not subsidize the emissions costs of any other market participant if California's cap-and-trade program places them in a position of needing to buy excess allowances from another market participant. This is ordinary commerce and does not represent any more of a subsidy to or from California load than when SCPPA members make a profit by selling excess power to other LSEs, marketers or CAISO. Conversely, a sound argument can be made that any entity that receives an allocated allowance is receiving a subsidy. For this reason, SCPPA's complaint is really about receiving lesser versus greater subsidies for its members.

Q.40 How easily could a deliverer/first-seller approach scale or link to multi-state, national, or international programs?

SCPPA contends that the "imposition of GHG regulation on deliverers of electricity to first California PODs would not be compatible with multi-state, national, or international source-based programs[,]" and that the "imposition of California GHG regulations on electricity that is delivered to first California PODs from other jurisdictions that impose source-based regulation on GHG emissions could result in double-regulation of GHG emissions."[34]

MSCG does not necessarily disagree with SCPPA's characterization of the foregoing as "double regulation." However, the compatibility with other jurisdictions of any cap-and-trade program adopted by California will be based on whether other jurisdictions have confidence in California's program and not whether "double regulation" would occur. In other words, other jurisdictions will link with California's emissions program if they believe that the system has integrity (*e.g.*, that allowances are measured in a consistent manner, that the system will properly track emissions and allowances, and that allowances will not be double-counted). While double

[34] SCPPA Comment at 48.

regulation may be undesirable for efficiency reasons, it is not innately damaging to integrity. In fact, the greater risk to linkage would be the opposite scenario – regulatory gaps that would allow an emitting source to evade regulation, or other imperfections that are judged to allow evasion of the nominal emissions cap in an inappropriate manner.

Other Policy Comments

1. California Oversight Market Participants Throughout the WECC

PacifiCorp avers that the MAC Report fails to consider the practical implications associated with the first-seller approach.[35] Specifically, PacifiCorp claims that while a load-based approach would require California to regulate less than seventy jurisdictional entities, a first-seller approach would require California to oversee "hundreds, perhaps thousands, of electricity generators and power marketers located throughout the [WECC]…."[36] Neither a first-seller nor a load-based approach contemplates California having to oversee generators or power marketers outside of the State. In both cases, California would rely on estimates to impose reporting and allowance submission requirements associated with California out-of-state supply. Accordingly, PacifiCorp's concern appears unnecessary.

2. Emissions Requirements for Renewable Energy Providers with Existing Long-Term Contracts

CalEnergy believes that a first-seller approach will impose a greater burden on renewable energy providers with existing long-term contracts than a load-based approach because of contract disputes that may arise over added costs and potential benefits. However, CalEnergy provides no explanation as to why there may be more disputes if California adopts a first-seller

[35] PacifiCorp Comments at 2.

[36] *Id.* at 3.

approach versus a load-based approach. Moreover, its comments are inconsistent insofar as they vacillate between endorsing either approach.[37]

Nevertheless, CalEnergy raises a legitimate concern about transitional issues that may affect preexisting renewable energy contracts. However, such transitional concerns will arise irrespective of which cap-and-trade program California chooses to adopt. To address CalEnergy's specific concern, it is unclear whether AB 32 would allow regulators to completely exempt small renewable energy suppliers from having to comply with the law. However, MSCG is not necessarily averse to allowing individual facilities to make a showing to the State that they should not have to comply with reporting obligations because their emissions are at zero, or so low as to make their reporting immaterial to the success of the program.

3. Out-of-State Offsets

NRDC and UCS suggest that "offsets should only be considered if the cap is set tightly[,]" and "if offsets are allowed, they should be limited to a small portion of the compliance obligation and to project types that will provide environmental and economic co-benefits to California."[38] The rationales appear to be based on a stated need to reduce GHG emissions in California, the need to capture "co-benefits" (primarily an environmental justice argument) and a desire to maximize the economic benefits of GHG-reducing investment in California.

An independent "need" to reduce GHG emissions in California is not consistent with the global nature of the climate change problem. Offsets allow market participants to reduce their CO_2 emissions compliance obligation at one location by reducing or displacing CO_2 in another

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[37] *Compare* CalEnergy Comments at 2 ("CalEnergy does not believe that a 'first-seller' approach should be adopted for renewable electricity generators."), *with id.* at 4 ("The Commission should adopt a similar approach to renewable energy generators under either the 'first seller' approach or the 'load based' approach.").

[38] NRDC Comments at unnumbered p. 3.

place where it is more practical and economical to do so. A reduction to GHG emissions anywhere – and not simply California – will have the same impact on global climate change. Thus, if a goal of California is to reduce aggregate GHG emissions, then the State should not limit offsets to programs that provide in-state economic and environmental co-benefits.[39] Instead, reductions should be encouraged where they can be attained most quickly and most economically, avoiding the squandering of society's resources.

In some jurisdictions that contemplate GHG regulations, a "safety valve" has been discussed. Typically, this consists of a price at which the regulator will sell unlimited additional allowances. MSCG believes that California's decision not to adopt a price-based safety valve is wise, as doing so would undermine both the underlying goal of emissions reduction, and the incentive to invest in GHG reducing technologies. However, that does not mean that consideration of a safety valve is a bad idea *per se*. Clearly, a major economic disruption due to GHG regulation would be a setback for the policy, both in terms of public support and in terms of achieving the underlying goal. Indeed, AB 32 provides safety valves in a non-specific sense by authorizing the Governor to take emergency actions under various circumstances if an economic crisis were to impinge. While MSCG supports the decision to avoid an automatic price-based safety valve, it urges policy makers to recognize that a well-designed system has non-price, non-emergency safety valves built in, if properly used. These safety valves are linkage and offsets. Because these "natural" safety valves allow needed flexibility without undermining the underlying goal to reduce GHG emissions, there should be no arbitrary restrictions on them, such as geographic location. Instead, a verification protocol should be

[39] MSCG appreciates that the offsets need to be verifiable and that procedures must be put in place to ensure the integrity of the offset program.

developed to ensure the environmental integrity of individual offset projects, and any and all projects that meet the verification standards should be accepted for compliance purposes in the GHG regulatory program.

With regard to co-benefits, the argument here is of two sub-types. One is the possibility of synergistic reductions in other undesirable emissions attributable to investments made to reduce the need for GHG allowances. While this is not necessarily far-fetched, the degree of such opportunities is unlikely to be high. California already has some of the nation's strictest standards for emissions such as SOx and NOx. Furthermore, California does not have significant amounts of the most problematic generation types (*i.e.*, units that burn coal or oil) that would be the most likely to see some co-benefit.

The other sub-type of co-benefit is typically referred to as "environmental justice." MSCG believes that NRDC and UCS have not thought this co-benefit through completely. Any environmental justice benefit that would result from generation emissions reduction in California is highly likely to be realized via a similar emissions reduction impact on a different emission source outside the State. The benefit will be the same, it will just accrue to a different group of beneficiaries. In fact, given the relative cleanliness of California's generation fleet, the environmental justice co-benefits of emissions reductions outside the State are likely to be much greater. Admittedly, this would depend on exactly what the reduction project is, and MSCG lacks definitive analysis at this point to demonstrate it unequivocally, but intuitively, it seems probable. For all the reasons above, the co-benefit argument does not appear to be a strong reason to make uneconomic decisions to force emissions reductions to take place physically in California.

With regard to maximizing investment in California to capture economic benefits associated with developing and deploying low-GHG technologies, it is far from clear that severe restrictions on offsets will have this result. First, the location of research and development activity will not be related to the location of where that technology will be deployed. California's share of this activity will not likely be affected by its offset rules. Second, most renewable technology is dependent on the distribution of its underlying resource. If the underlying wind, geothermal, tidal or other types of renewable resources physically exist in California, then that is where the capture technology will be deployed. Third, as discussed in the comments responding to Question 25, energy efficiency activities are driven by consumer economics for commercial installations and government programs for residential users. It is not likely that this type of investment will be impacted by offset rules. For all these reasons, it seems that offset rules will have at most a *de minimis* impact on in-state investment, and should not be an influential factor when deciding which program to adopt.

Finally, adopting NRDC's and UCS's proposal to limit offsets to programs that benefit California potentially raises the very Commerce Clause concerns that California appears to want to avoid. MSCG believes that California should permit offsets without geographic or quantitative limitations. It would be economically irrational of California to do otherwise.

4. Long-Term Emission Reduction Strategies

NRDC and UCS concede that "a first-seller approach provides a stronger price signal for investment in supply side GHG reduction strategies than a load-based cap."[40] They believe the short-term price signal is the most important driver of long-term investments in least-cost

[40] NRDC/UCS Comments at 8.

reduction strategies and that the lowest-cost investment opportunities are demand-side ones.[41] NRDC and UCS then claim that low-cost reduction strategies like energy efficiency measures do not apply to generators or power marketers, so "[t]he only way to promote such investments under a first-seller approach is to use the allowance value."[42]

The claim that allowances are the only real way to promote investment in a first-seller system fails to adequately consider how energy efficiency strategies to reduce GHG emissions are related to cap-and-trade. As discussed in MSCG's initial comments, the market will induce consumers to make efficiency investments even if load is not the point of regulation under a cap-and-trade program. In addition, education and publicity will continue to induce customers to take efficiency actions. Finally, California is likely to continue to use rebates, tax credits and other programs to encourage energy efficiency by end users. These types of programs can be used to promote energy efficient investment under either a load-based or first-seller approach.

5. Auctions and CHP Self-Generators

Energy Producers and Users Coalition ("EPUC") and Cogeneration Association of California ("CAC") claim that "an auction penalizes firms that chose to invest, operate and create jobs in the state by devaluing those investments and rewards those who have invested in other states or countries."[43] EPUC and CAC also contend that any allocation methodology, but particularly auctions, would require special consideration for CHP self-generators. They explain that when an industrial site invests in a high efficiency CHP plant, total emissions from the production of electrical and thermal energy are decreased, and emissions attributable to CHP are more than offset by emissions displaced from separate central power generation and industrial

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[41] *Id.*

[42] NRDC/UCS Comments at 9.

boiler installations.[44] The description of the efficiency and emissions benefits of a CHP plant are accurate but irrelevant to the question of which method of allowance distribution California should adopt for the power industry.

AB 32 seeks to limit absolute emissions in California. In order to achieve this goal, California will need to use allowance auctions to ensure that market participants have access to the allowances they need. CHP self-generators will still be rewarded for their prior efficiency reduction efforts under either approach. First, they will require fewer allowances in the future than if they had to separately surrender allowances for boiler emissions and power generation fuel consumption. Second, CHP self-generators will realize future savings from their efficiency measures because they will need to make fewer power purchases, which would have the cost of allowances priced in. Therefore, the argument that CHP resources will be unduly burdened by auctions does not appear to withstand scrutiny.

6. Alternative Hybrid Approach

Under the hybrid cap-and-trade approach proposed by EPUC and CAC, the point of regulation would be the emitting resource for in-state resources and the LSE for imports.[45] From a legal perspective this approach may appear to be somewhat more sustainable because the points of regulation would be in-state entities that are subject to California's jurisdiction.[46] However, from a practical perspective, California would have to establish which LSE is responsible for the import at the time it crosses the border – a difficult if not impossible task. LSEs would not always, and maybe not typically, be the custodian of the power as it crosses the

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[43] EPUC/CAC Comments at 7.

[44] *Id.* at 10.

[45] EPUC/CAC Comments at 17.

[46] *See id.* at 36.

border. In this circumstance, the hybrid approach would add another layer of complexity to the cap-and-trade program because California would need to make additional assumptions about which LSE is "responsible" for the imported power. As the hybrid approach is not materially better than the first-seller or load-based approaches, California should not pursue it.

B. Legal Questions Regarding the First-Seller Versus Load-Based Approaches

California should choose a cap-and-trade proposal that is most likely to achieve its emissions reduction goals rather than trying to anticipate which approach is least likely to be challenged in court. The issues raised in the comments make clear that any cap-and-trade requirement that the State imposes on the electric industry could face legal challenges. For example, LADWP provides figures which serve as a reminder of California's reliance on imports.[47] Thus, because California is dependent on imports, it is foreseeable that a load-based or first-seller approach may impact interstate wholesale transactions, transmission and reliability, and could have economic consequences that favor California over other Western states regardless of which point of regulation California selects for its cap-and-trade program.

Accordingly, MSCG urges California to implement cap-and-trade regulations based on whether: (1) the program will help the State reach its GHG emissions reduction goals; (2) the program would mesh easily with existing GHG reduction programs and a projected federal program; and (3) the program is easy to administer and fosters accuracy. The record indicates that the first-seller approach fares better under all three prongs. As explained below, MSCG agrees with the majority of the 11 parties that commented on the legal questions and found that a first-seller approach could be designed to withstand preemption and dormant Commerce Clause

[47] LADWP Comments at 20.

challenges.[48] Thus, the Commission can move forward with the first-seller approach with some confidence that the approach that best fits California's needs is not bound for failure in the courts.[49]

1. Preemption

The Supremacy Clause of the United States Constitution declares unlawful state laws that "interfere with, or are contrary to," federal law. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (*quoting Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)); *see also* U.S. Const. art. VI, cl. 2. Preemption analysis starts "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "[T]he purpose of Congress is the ultimate touchstone of preemption analysis." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (internal quotation marks omitted).

Federal law can preempt state law in three ways. First, Congress may expressly preempt state law. Second, preemption may be inferred where Congress has occupied a given field with comprehensive regulation. Third, a state law is preempted to the extent that it actually conflicts with federal law. An "actual[] conflict" exists when "'compliance with both federal and state regulations is a physical impossibility[.]'" *Automated Med. Labs., Inc.*, 471 U.S. at 713.

A preemption claim involving state actions that conflict with the Federal Power Act ("FPA") are predicated on the Supremacy Clause. *See Duke Energy Trading & Mktg., L.L.C. v. Davis,* 267 F.3d 1042, 1055 (9th Cir. 2001). The FPA grants to FERC "'exclusive authority to

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[48] *See, e.g.,* Comments of NRDC and ED; DRA; SDG&E and SoCalGas; EPUC and CAC; PG&E; and CEC.

[49] MSCG's comments are subject to three caveats: (1) there is not enough information on California's cap-and-trade proposals, including on the first-seller or the load-based approach, to definitively opine on its chances of surviving legal challenges; (2) California's cap-and-trade proposals raise complex legal questions that cannot be addressed

regulate the transmission and sale at wholesale of electric energy in interstate commerce.'" *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 928 (9th Cir. 2002) ("TANC") (*quoting New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982)). Through the FPA, "'Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction …. This was done in the Power Act by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.'" *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (*quoting Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964)). As explained below, the proposed first-seller approach is no more likely than a load-based approach to be preempted by the FPA.

a. Express Preemption

Several commenters note that Congress in the FPA did not expressly preempt a state's authority to regulate GHG emissions associated with interstate sales of electricity.[50] MSCG agrees that the doctrine of express preemption currently is inapplicable.

b. Field Preemption

"Field preemption occurs when the federal statutory scheme is sufficiently comprehensive to infer that Congress left no room for supplementary regulation by the states." *Gadda v. Ashcroft*, 363 F.3d 861, 869 (9th Cir. 2004). "When the federal government completely occupies a given field or an identifiable portion of it . . ., the test of preemption is whether 'the matter on which the State asserts the right to act is in any way regulated by the

fully in a matter of days; (3) Congress is considering federal climate change legislation that could have preemptive effect on California and make the above analysis moot.

[50] *See, e.g.*, Comments of NRDC and ED at 4; PG&E at 3; CEC at 7.

Federal Act.'" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13 (1983) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)).

NRDC and ED, CMUA, the Community Environmental Council ("CEC"), and others properly note that one purpose of the federal statutory scheme concerns the reasonableness of interstate power rates and nondiscriminatory access to interstate power transmission.[51] *See* 16 U.S.C. § 824d(a). In contrast, California's purpose for enacting AB 32 was to "reduce emissions of greenhouse gases."[52] Accordingly, MSCG agrees with NRDC and ED that the intent of California's GHG regulation differs from the objectives of the FPA, and that California's cap-and-trade program appears to impose regulations in a separate field.

NRDC and ED suggest that California could adopt a cap-and-trade system that avoids preemption if it: (1) ensures that the costs of complying with California's GHG regulations for wholesale electricity sellers is included in the FERC rate-making process and that California's requirements do not purport to supersede or interfere with that process; (2) ensures that California's program does not stand as an obstacle to Congress' goal of ensuring just and reasonable rates for wholesale power; and (3) makes clear that the intent of California's cap-and-trade program is to reduce GHG emissions.[53] MSCG agrees that these suggestions may decrease the chance of a court sustaining a preemption challenge. However, because the load-based and first-seller approaches could impose California emissions regulations on wholesale power transactions that rely on interstate transmission, and if California is not careful with how it structures its cap-and-trade program, a court could find that California exceeded the scope of its authority and trespassed into FERC's exclusive jurisdiction.

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[51] *See, e.g.,* Comments of NRDC-ED at 6; CEC at 7; CMUA at 18.

[52] AB 32 § 38501(c).

Moreover, like NRDC and Environmental Defense ("ED"), DRA, and others, MSCG believes that if the cap-and-trade program is designed as an environmental regulation that does not interfere with FERC's authority, then there will be less likelihood of FPA preemption.[54] Indeed, although not necessarily indicative of how a court would rule, the Commission earlier this year dismissed preemption challenges to the EPS (an environmental regulation) on the ground that, *inter alia*, EPS "is not regulating wholesale generators or marketers. The EPS is regulating LSEs, which sell electric energy in the retail markets in California."[55] California would be expected to argue that similar reasoning applies here: California's cap-and-trade program would not regulate wholesale generators, marketers or transmission as such. It would regulate market participants who first sell power into the State. Again, even if the State characterizes its cap-and-trade program as regulating LSEs under a load-based approach or regulating first-sellers in California, all such transactions and their associated transmission are wholesale in nature, so federal preemption is at least a possibility. The critical point is that the preemption analysis will not necessarily turn on California's choice of a first-seller or a load-based approach. The potential for preemption would, instead, stem from California's decision to implement a single-state emissions reduction program in a state that relies on wholesale, interstate power to meet its energy needs.

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[53] NRDC and ED Comments at 6.

[54] *See, e.g.,* Comments of NRDC and ED at 6, 8; DRA at 22

c. Conflict Preemption

If it is impossible to comply with both state law and federal law, then the state law is preempted. *See Gade v. Nat'l Solid Waste Management Ass'n*, 505 U.S. 88, 108 (1992). MSCG agrees with the parties that commented that the proposed first-seller approach does not clearly conflict with the FPA.[56] As NRDC and ED explain, wholesale sellers should be able to negotiate with their counterparties contract terms that allocate the rights and responsibilities associated with California's cap-and-trade program without interfering with FERC's ability to regulate wholesale energy and transmission.[57] However, it remains to be seen whether California will impose any additional cap-and-trade obligations that make a first-seller or load-based approach legally untenable under the FPA.

CMUA suggests that a possible conflict exists between the first-seller approach and Section 824o of the FPA, which governs electric reliability.[58] MSCG agrees that a conflict is possible between Section 824o and California's cap-and-trade program, but whether such a conflict arises will depend on what California law requires. The potential conflict could arise if California's cap-and-trade regulations require suppliers to select between complying with the State's emission standards or Federal reliability requirements. For example, would California prevent a supplier who has committed to provide power from a green energy source from supplying power from a dirty source if the supplier needed the dirty energy to alleviate a transmission outage? MSCG believes this regulatory conflict is possible under either a first-

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[55] Interim Opinion on Phase 1 Issues: Greenhouse Gas Emissions Performance Standard, *Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies*, D.07-01-039, at 202 (issued Jan. 25, 2007).

[56] *See, e.g.,* Comments of NRDC and ED; DRA; SDG&E and SoCalGas; EPUC and CAC; PG&E; and CEC.

[57] NRDC-ED Comments at 9.

[58] CMUA Comments at 19-20.

seller or a load-based approach. Accordingly, California must design whichever cap-and-trade program it adopts to ensure that suppliers are not forced to comply with State GHG regulations in lieu of federal reliability obligations.

2. Commerce Clause

The Commerce Clause of the United States Constitution is phrased as an affirmative grant of regulatory power to Congress. The Supreme Court has nevertheless interpreted the Clause to have a "negative aspect," referred to as the dormant Commerce Clause, "that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). To establish a claim under the dormant Commerce Clause, the aggrieved party "must show that the state law or regulation in question penalizes interstate commerce, and does so without sufficient economic justification." *National Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 857 (9th Cir.), *amended on denial of reh'g en banc*, 312 F.3d 416 (2002); *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed … is clearly excessive in relation to the putative local benefits.").[59]

The courts have found that "CPUC regulations are afforded a presumption of constitutionality," and a party challenging a state statute or CPUC regulation must meet a "rather stringent test." *Union Pac. R.R. Co. v. Cal. PUC*, 346 F.3d 851, 870 (9th Cir. 2003) (internal citation omitted). "'When [] a statute has only indirect effects on interstate commerce and

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[59] State regulations that facially discriminate against interstate commerce will almost certainly be struck down under a "virtually *per se* rule of invalidity." *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Because the first-seller approach, as proposed, does not facially discriminate against out-of-state entities and regulates all first-sellers of electricity in an evenhanded manner, a court likely would apply the *Pike* balancing test which weighs whether the burden on interstate commerce from the first-seller approach is excessive in relation to the benefits arising from it. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

regulates evenhandedly, [a court will] examine[] whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.'" *Union Pac. R.R. Co.*, 346 F.3d at 870 (*quoting Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)) (first alteration in original). To prevail, the challenging party must establish that the Commission's regulations "impede substantially the free flow of commerce from state to state or that … because of the need of national uniformity [the subject] can only be regulated by the national government." *Id.* (citations and internal quotation marks omitted, alteration added). In light of the substantial deference to the Commission's regulations, MSCG agrees with PG&E, SDG&E, SoCalGas, EPUC, CAC, NRDC and ED that a first-seller approach could be designed to withstand a Commerce Clause challenge.

California could claim "legitimate local public interest[s]" in reducing GHG emissions in the State and in contributing to a global reduction in GHG emissions. These benefits likely would be found to outweigh "incidental" burdens on interstate commerce arising from the first-seller approach to cap-and-trade. Notably, no party has established that a first-seller approach would provide in-state firms with a significant competitive advantage. This is because, under a first-seller approach, both in-state and out-of-state firms would be covered equally by the GHG reporting protocol.

As CEC points out, "while the first-seller approach may have an adverse effect on certain out-of-state generators," the benefits of the first-seller approach should be found by a court "to outweigh any incidental adverse effects upon discrete market participants seeking to sell power generated with high GHG emissions into California."[60] Indeed, the Supreme Court has explained that the Commerce Clause "protects the interstate market, not particular interstate

[60] CEC Comments at 26.

firms, from prohibitive or burdensome regulations." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978). Finally, as noted in the MAC Report and quoted by CEC, "[a] first seller approach would take advantage of emission monitoring at every source to achieve a precise connection between regulated entities and the emissions for which they are responsible under the program."[61]

If California adopts a first-seller or load-based approach, there is some chance that California's cap-and-trade program for energy could be structured in a manner that provides economic advantages to California at a cost to other Western states. For example, NRDC asks California to limit offsets to project types that will provide environmental and economic co-benefits to California.[62] CEC argues that California's cap-and-trade program is critical for bringing green power from other states to California in order to reduce California's power costs.[63] These proposals, and others like them, raise potential Constitutional concerns by asking California to adopt GHG emissions regulations that favor California economically and potentially discriminate against or burden interstate commerce in other parts of the United States. The possibility of such an outcome is inherent in the fact that California relies on energy imports from other states, so California must be diligent about avoiding such outcomes when it decides which cap-and-trade program to adopt.

For the reasons stated above, and because California likely cannot achieve the same local benefits with less burden upon interstate commerce, *see Pike*, 397 U.S. at 142, the State should adopt a first-seller cap-and-trade program over a load-based approach.

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[61] CEC Comments at 27 (*quoting* MAC Report at 41).

[62] NRDC Comments at 3.

[63] *See* CEC Comments at 10-11.

III. CONCLUSION

MSCG respectfully requests that the Commission take into account the foregoing reply comments as it considers the first-seller proposals in the MAC Report.

Respectfully submitted,

/s/

Catherine M. Krupka
Adam J. Katz
McDermott Will & Emery LLP
600 Thirteenth Street, NW
Washington, DC 20005

August 15, 2007

Attorneys for Morgan Stanley Capital Group Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply Comments of Morgan Stanley Capital Group Inc. on the Market Advisory Committee to the California Air Resources Board's Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California on all of parties of record in R.06-04-009 by electronic mail and by U.S. mail to those parties who have not provided an electronic address to the Commission. I also have sent hard copies by overnight mail to the assigned Commissioner, Michael R. Peevy, and the assigned Administrative Law Judges, Charlotte F. TerKeurst and Jonathan Lakritz.

Moreover, pursuant to the July 19, 2007 Administrative Law Judges' Ruling Requesting Comments and Legal Briefs on Market Advisory Committee Report and Notice of *En Banc* Hearing issued in R.06-04-009, I have sent one hard copy of these comments by overnight mail to the California Energy Commission and also have sent electronic copies of these comments to docket@energy.state.ca.us and kgriffin@energy.state.ca.us.

Dated at Washington, DC, this 15th day of August, 2007.

____/s/____________________

Adam J. Katz

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Service List: R. 06-04-009

Appearance

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

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

STEVEN HUHMAN
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

KEITH R. MCCREA
ATTORNEY AT LAW
SUTHERLAND, ASBILL & BRENNAN, LLP
1275 PENNSYLVANIA AVE., N.W.
WASHINGTON, DC 20004-2415

ADAM J. KATZ
MCDERMOTT WILL & EMERY LLP
600 13TH STREET, NW.
WASHINGTON, DC 20005

CATHERINE M. KRUPKA
MCDERMOTT WILL AND EMERY LLP
600 THIRTEEN STREEET, NW
WASHINGTON, DC 20005

LISA M. DECKER
CONSTELLATION ENERGY GROUP, INC.
111 MARKET PLACE, SUITE 500
BALTIMORE, MD 21202

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

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

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

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

PAUL M. SEBY
MCKENNA LONG & ALDRIDGE LLP
1875 LAWRENCE STREET, SUITE 200
DENVER, CO 80202

TIMOTHY R. ODIL
MCKENNA LONG & ALDRIDGE LLP
1875 LAWRENCE STREET, SUITE 200
DENVER, CO 80202

STEPHEN G. KOERNER, ESQ.
EL PASO CORPORATION
WESTERN PIPELINES
2 NORTH NEVADA AVENUE
COLORADO SPRINGS, CO 80903

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

JOHN B. WELDON, JR.
SALMON, LEWIS & WELDON, P.L.C.
2850 EAST CAMELBACK ROAD, SUITE 200
PHOENIX, AZ 85016

KELLY BARR
MANAGER, REGULATORY AFFAIRS & CONTRACTS
SALT RIVER PROJECT
PO BOX 52025, PAB 221
PHOENIX, AZ 85072-2025

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

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

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

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

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

DAVID L. HUARD
ATTORNEY AT LAW
MANATT, PHELPS & PHILLIPS, LLP
11355 WEST OLYMPIC BOULEVARD
LOS ANGELES, CA 90064

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

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

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

NORMAN A. PEDERSEN
ATTORNEY AT LAW
HANNA AND MORTON, LLP
444 SOUTH FLOWER STREET, NO. 1500
LOS ANGELES, CA 90071

MICHAEL MAZUR
CHIEF TECHNICAL OFFICER
3 PHASES RENEWABLES, LLC
2100 SEPULVEDA BLVD., SUITE 37
MANHATTAN BEACH, CA 90266

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

GREGORY KLATT
ATTORNEY AT LAW
DOUGLASS & LIDDELL
411 E. HUNTINGTON DRIVE, STE. 107-356
ARCADIA, CA 91006

MAUREEN LENNON
CALIFORNIA COGENERATION COUNCIL
595 EAST COLORADO BLVD., SUITE 623
PASADENA, CA 91101

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

DANIEL W. DOUGLASS
ATTORNEY AT LAW
DOUGLASS & LIDDELL
21700 OXNARD STREET, SUITE 1030
WOODLAND HILLS, CA 91367

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

AKBAR JAZAYEIRI
DIRECTOR OF REVENUE & TARRIFFS
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE. ROOM 390
ROSEMEAD, CA 91770

ANNETTE GILLIAM
ATTORNEY AT LAW
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

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

LAURA I. GENAO
ATTORNEY
ELECTRIC
SOUTHERN CALIFORNIA EDISON
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

RONALD MOORE
GOLDEN STATE WATER/BEAR VALLEY

630 EAST FOOTHILL BOULEVARD
SAN DIMAS, CA 91773

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

AIMEE M. SMITH
ATTORNEY AT LAW
SEMPRA ENERGY
101 ASH STREET HQ13
SAN DIEGO, CA 92101

ALLEN K. TRIAL
SAN DIEGO GAS & ELECTRIC COMPANY
HQ-13
101 ASH STREET
SAN DIEGO, CA 92101

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

DAN HECHT
SEMPRA ENERGY
101 ASH STREET
SAN DIEGO, CA 92101

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

THEODORE ROBERTS
ATTORNEY AT LAW
SEMPRA GLOBAL
101 ASH STREET, HQ 13D
SAN DIEGO, CA 92101-3017

DONALD C. LIDDELL, P.C.
DOUGLASS & LIDDELL
2928 2ND AVENUE
SAN DIEGO, CA 92103

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.
9320 CHESAPEAKE DRIVE, SUITE 112
SAN DIEGO, CA 92123

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

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

LYNELLE LUND
COMMERCE ENERGY, INC.
600 ANTON BLVD., SUITE 2000
COSTA MESA, CA 92626

TAMLYN M. HUNT
ENERGY PROGRAM DIRECTOR
COMMUNITY ENVIRONMENTAL COUNCIL
26 W. ANAPAMU ST., 2/F
SANTA BARBARA, CA 93101

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

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
SOUTHERN CALIFORNIA GAS COMPANY
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

F. JACKSON STODDARD
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5125
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

AUDREY CHANG
STAFF SCIENTIST
NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER STREET, 20TH FLOOR
SAN FRANCISCO, CA 94104

EVELYN KAHL
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104

MICHAEL P. ALCANTAR
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104

SEEMA SRINIVASAN
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104

WILLIAM H. CHEN
CONSTELLATION NEW ENERGY, INC.
SPEAR TOWER, 36TH FLOOR
ONE MARKET STREET
SAN FRANCISCO, CA 94105

BRIAN K. CHERRY
DIRECTOR REGULATORY RELATIONS
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, B10C
SAN FRANCISCO, CA 94106

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

ANN G. GRIMALDI
MCKENNA LONG & ALDRIDGE LLP
101 CALIFORNIA STREET, 41ST FLOOR
SAN FRANCISCO, CA 94111

BRIAN T. CRAGG
ATTORNEY AT LAW
GOODIN, MACBRIDE, SQUERI, RITCHIE & DAY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111

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

JEANNE B. ARMSTRONG
ATTORNEY AT LAW
GOODIN MACBRIDE SQUERI DAY & LLP LAMPREY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111

KAREN BOWEN
ATTORNEY AT LAW
WINSTON & STRAWN LLP
101 CALIFORNIA STREET
SAN FRANCISCO, CA 94111

LISA A. COTTLE
ATTORNEY AT LAW
WINSTON & STRAWN LLP
101 CALIFORNIA STREET, 39TH FLOOR
SAN FRANCISCO, CA 94111

SEAN P. BEATTY
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

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

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

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

SARA STECK MYERS
ATTORNEY AT LAW
122 28TH AVENUE
SAN FRANCISCO, CA 94121

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

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

JENNIFER CHAMBERLIN
STRATEGIC ENERGY, LLC
2633 WELLINGTON CT.
CLYDE, CA 94520

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

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

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

WILLIAM H. BOOTH
ATTORNEY AT LAW
LAW OFFICES OF WILLIAM H. BOOTH
1500 NEWELL AVENUE, 5TH FLOOR
WALNUT CREEK, CA 94596

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

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

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

R. THOMAS BEACH
CROSSBORDER ENERGY
2560 NINTH STREET, SUITE 213A
BERKELEY, CA 94710-2557

BARRY F. MCCARTHY
ATTORNEY AT LAW
MCCARTHY & BERLIN, LLP
100 PARK CENTER PLAZA, SUITE 501
SAN JOSE, CA 95113

C. SUSIE BERLIN
ATTORNEY AT LAW
MC CARTHY & BERLIN, LLP
100 PARK CENTER PLAZA, SUITE 501
SAN JOSE, CA 95113

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

JOY A. WARREN
ATTORNEY AT LAW
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95354

BALDASSARO DI CAPO
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

JOHN JENSEN
PRESIDENT
MOUNTAIN UTILITIES
PO BOX 205
KIRKWOOD, CA 95646

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

ANDREW BROWN
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO, CA 95811

BRUCE MCLAUGHLIN
BRAUN & BLAISING, P.C.
915 L STREET, SUITE 1270
SACRAMENTO, CA 95814

GREGGORY L. WHEATLAND
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO, CA 95814

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

JEFFERY D. HARRIS
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS LLP
2015 H STREET
SACRAMENTO, CA 95814

VIRGIL WELCH
CLIMATE CAMPAIGN COORDINATOR
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

DOWNEY BRAND
JANE E. LUCKHARDT
555 CAPITOL MALL, 10TH FLOOR
SACRAMENTO, CA 95814-4686

RAYMOND J. CZAHAR, C.P.A.
CHIEF FINANCIAL OFFICER
WEST COAST GAS COMPANY
9203 BEATTY DRIVE
SACRAMENTO, CA 95826

STEVEN M. COHN
ASSISTANT GENERAL COUNSEL
SACRAMENTO MUNICIPAL UTILITY
DISTRICT
PO BOX 15830
SACRAMENTO, CA 95852-1830

ANN L. TROWBRIDGE
ATTORNEY AT LAW
DAY CARTER & MURPHY, LLP
3620 AMERICAN RIVER DRIVE, SUITE 205
SACRAMENTO, CA 95864

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

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

DONALD BROOKHYSER
ALCANTAR & KAHL
1300 SW FIFTH AVE., SUITE 1750
PORTLAND, OR 97210

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

KYLE L. DAVIS
PACIFICORP
825 NE MULTNOMAH,
PORTLAND, OR 97232

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

TARA KNOX
AVISTA CORPORATION
PO BOX 3727
SPOKANE, WA 99220

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

JASON DUBCHAK
ASSOCIATE GENERAL COUNSEL
WILD GOOSE STORAGE, LLC
C/O NISKA GAS STORAGE, SUITE 400
607 8TH AVENUE S.W.
CALGARY, AB T2P OA7
CANADA

Information Only

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

KENNETH A. COLBURN
SYMBILTIC 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

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

DALLAS BURTRAW
1616 P STREET, NW
WASHINGTON, DC 20036

VERONIQUE BUGNION
POINT CARBON
205 SEVERN RIVER RD
SEVERNA PARK, MD 21146

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

ANDREW BRADFORD
SENIOR MARKET RESEARCH ASSOCIATE
FELLON-MCCORD & ASSOCIATES
SUITE 2000
9960 CORPORATE CAMPUS DRIVE
LOUISVILLE, KY 40223

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

RALPH E. DENNIS
DIRECTOR, REGULATORY AFFAIRS
FELLON-MCCORD & ASSOCIATES
CONSTELLATION NEWENERGY-GAS DIVISION
9960 CORPORATE CAMPUS DRIVE, STE 2000
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

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

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

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

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

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

PHILIP D. LUSK
WESTERN ELECTRICITY COORDINATING COUNCIL
615 ARAPEEN DRIVE,SUITE 210
SALT LAKE CITY, UT 84108-1262

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

BRIAN MCQUOWN
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

MERIDITH J. STRAND
SENIOR COUNSEL
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

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

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

FRANK LUCHETTI
NEVADA DIV. OF ENVIRONMENTAL PROTECTION
901 S. STEWART ST., SUITE 4001
CARSON CITY, NV 89701

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

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

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

ROBERT L. PETTINATO
LOS ANGELES DEPARTMENT OF WATER & POWER
111 NORTH HOPE STREET, SUITE 1150
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

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

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

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

DEREK MARKOLF
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

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

STEVE ENDO
DEPARTMENT OF WATER & POWER
150 S LOS ROBLES AVE., STE. 200
PASADENA, CA 91101

STEVEN G. LINS
CITY OF GLENDALE
OFFICE OF THE CITY ATTORNEY
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

ROGER PELOTE
WILLIAMS POWER COMPANY
12736 CALIFA STREET
VALLEY VILLAGE, CA 91607

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

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

JACK BURKE
LEGISLATIVE AFFAIRS MANAGER
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
CALIFORNIA CENTER FOR SUSTAINABLE ENERGY
8690 BALBOA AVENUE, SUITE 100
SAN DIEGO, CA 92123

JOHN W. LESLIE
ATTORNEY AT LAW
LUCE, FORWARD, HAMILTON & SCRIPPS, LLP
11988 EL CAMINO REAL, SUITE 200
SAN DIEGO, CA 92130

ORLANDO B. FOOTE, III
ATTORNEY AT LAW
HORTON, KNOX, CARTER & FOOTE
895 BROADWAY, SUITE 101
EL CENTRO, CA 92243

ELSTON K. GRUBAUGH
IMPERIAL IRRIGATION DISTRICT
333 EAST BARIONI BLVD.
IMPERIAL, CA 92251

JAN PEPPER
CLEAN POWER MARKETS, INC.
PO BOX 3206
418 BENVENUE AVENUE
LOS ALTOS, CA 94024

GLORIA D. SMITH
ADAMS, BROADWELL, JOSEPH & CARDOZO
601 GATEWAY BLVD., SUITE 1000
SOUTH SAN FRANCISCO, CA 94080

MARC D. JOSEPH
ADAMS BRADWELL JOSEPH & CARDOZO
601 GATEWAY BLVD. STE 1000
SOUTH SAN FRANCISCO, CA 94080

DIANE I. FELLMAN
ATTORNEY AT LAW
LAW OFFICES OF DIANE I. FELLMAN
234 VAN NESS AVENUE
SAN FRANCISCO, CA 94102

HAYLEY GOODSON
ATTORNEY AT LAW
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

MICHEL FLORIO
ATTORNEYS AT LAW
711 VAN NESS AVE., STE. 350
SAN FRANCISCO, CA 94102

DAN ADLER
DIRECTOR, TECH AND POLICY DEVELOPMENT
CALIFORNIA CLEAN ENERGY FUND
5 THIRD STREET, SUITE 1125
SAN FRANCISCO, CA 94103

MICHAEL A. HYAMS
POWER ENTERPRISE-REGULATORY AFFAIRS
SAN FRANCISCO PUBLIC UTILITIES COMM
1155 MARKET ST., 4TH FLOOR
SAN FRANCISCO, CA 94103

THERESA BURKE
SAN FRANCISCO PUC
1155 MARKET STREET, 4TH FLOOR
SAN FRANCISO, CA 94103

NORMAN J. FURUTA
ATTORNEY AT LAW
FEDERAL EXECUTIVE AGENCIES
1455 MARKET ST., SUITE 1744
SAN FRANCISCO, CA 94103-1399

AMBER MAHONE
ENERGY & ENVIRONMENTAL ECONOMICS, INC.
101 MONTGOMERY STREET, SUITE 1600
SAN FRANCISCO, CA 94104

ANNABELLE MALINS
CONSUL-SCIENCE AND TECHNOLOGY
BRITISH CONSULATE-GENERAL
ONE SANSOME STREET, SUITE 850
SAN FRANCISCO, CA 94104

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

KAREN TERRANOVA
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, STE 2200
SAN FRANCISCO, CA 94104

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

NORA SHERIFF
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104

OLOF BYSTROM
DIRECTOR, WESTERN ENERGY
CAMBRIDGE ENERGY RESEARCH ASSOCIATES
555 CALIFORNIA STREET, 3RD FLOOR
SAN FRANCISCO, CA 94104

SETH HILTON
ATTORNEY AT LAW
STOEL RIVES
111 SUTTER ST., SUITE 700
SAN FRANCISCO, CA 94104

SHERYL CARTER
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

CARMEN E. BASKETTE
CORPORATE DEVELOPMENT PRINCIPAL
594 HOWARD ST., SUITE 400
SAN FRANCISCO, CA 94105

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

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

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

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

MARTIN A. MATTES
NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP
50 CALIFORNIA STREET, 34TH FLOOR
SAN FRANCISCO, CA 94111

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

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

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

SHAUN ELLIS
2183 UNION STREET
SAN FRANCISCO, CA 94123

ARNO HARRIS
RECURRENT ENERGY, INC.
220 HALLECK ST., SUITE 220
SAN FRANCISCO, CA 94129

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

GRACE LIVINGSTON-NUNLEY
ASSISTANT PROJECT MANAGER
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

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

SEBASTIEN CSAPO
PROJECT MANAGER
PACIFIC GAS AND ELECTRIC COMPANY
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

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

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

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

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

GREG BLUE
140 MOUNTAIN PKWY.
CLAYTON, CA 94517

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

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

JOSEPH M. PAUL
SENIOR CORPORATE COUNSEL
DYNEGY, INC.
2420 CAMINO RAMON, SUITE 215
SAN RAMON, CA 94583

MONICA A. SCHWEBS, ESQ.
BINGHAM MCCUTCHEN LLP
SUITE 210
1333 N. CALIFORNIA BLVD.
WALNUT CREEK, CA 94596

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

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

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

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

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

CLYDE MURLEY
1031 ORDWAY STREET
ALBANY, CA 94706

BRENDA LEMAY
DIRECTOR OF PROJECT DEVELOPMENT
HORIZON WIND ENERGY
1600 SHATTUCK, SUITE 222
BERKELEY, CA 94709

CARLA PETERMAN
UCEI
2547 CHANNING WAY
BERKELEY, CA 94720

EDWARD VINE
LAWRENCE BERKELEY NATIONAL LABORATORY
BUILDING 90-4000
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

CHRISTOPHER J. MAYER
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95354

ROGER VAN HOY
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

CALIFORNIA ISO
LEGAL AND REGULATORY DEPARTMENT
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

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

KAREN EDSON
151 BLUE RAVINE ROAD
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

DAVID BRANCHCOMB
BRANCHCOMB ASSOCIATES, LLC
9360 OAKTREE LANE
ORANGEVILLE, CA 95662

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

KIRBY DUSEL
NAVIGANT CONSULTING, INC.
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

LAURIE PARK
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

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

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

AUDRA HARTMANN
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

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

RACHEL MCMAHON
CEERT
1100 11TH STREET, SUITE 311
SACRAMENTO, CA 95814

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

STEVEN KELLY
INDEPENDENT ENERGY PRODUCERS ASSN
1215 K STREET, SUITE 900
SACRAMENTO, CA 95814-3947

EDWARD J. TIEDEMANN
ATTORNEY AT LAW
KRONICK, MOSKOVITZ, TIEDEMANN &
GIRARD
400 CAPITOL MALL, 27TH FLOOR
SACRAMENTO, CA 95814-4416

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

LYNN HAUG
ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO, CA 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
LINDH & ASSOCIATES
7909 WALERGA ROAD, NO. 112, PMB 119
ANTELOPE, CA 95843

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

DENISE HILL
DIRECTOR
4004 KRUSE WAY PLACE, SUITE 150
LAKE OSWEGO, OR 97035

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

ELIZABETH WESTBY
ALCANTAR & KAHL, LLP
1300 SW FIFTH AVENUE, SUITE 1700
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
224 1/2 24TH AVENUE EAST
SEATTLE, WA 98112

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

KAREN MCDONALD
POWEREX CORPORATION
1400,
666 BURRAND STREET
VANCOUVER, BC V6C 2X8
CANADA

State Service

JAMES LOEWEN
CALIF PUBLIC UTILITIES COMMISSION
RATEMAKING BRANCH
320 WEST 4TH STREET SUITE 500
LOS ANGELES, CA 90013

CLARENCE BINNINGER
DEPUTY ATTORNEY GENERAL
CALIFORNIA ATTORNEY GENERAL'S
OFFICE
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

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 RESOURCES & PRICING
BRANCH
ROOM 4103
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 RESOURCES & PRICING
BRANCH
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

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

ED MOLDAVSKY
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5130
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

EUGENE CADENASSO
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

HENRY STERN
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 2106
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
DIVISION OF STRATEGIC PLANNING
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

JEORGE 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

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

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

LAINIE MOTAMEDI
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF STRATEGIC PLANNING
ROOM 5119
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

MEG GOTTSTEIN
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW
JUDGES
ROOM 2106
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 RESOURCES & PRICING BRANCH
ROOM 4101
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

PEARLIE SABINO
CALIF PUBLIC UTILITIES COMMISSION
ENERGY COST OF SERVICE & NATURAL
GAS BRANCH
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

RAHMON MOMOH
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY RESOURCES & PRICING 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 DIVISION
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

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

BALDASSARO DICAPO
CALIFORNIA ISO
LEGAL AND REGULATORY DEPARTMENT
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

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

JULIE GILL
EXTERNAL AFFAIRS MANAGER
CALIFORNIA INDEPENDENT SYSTEM
OPERATOR
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

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

PHILIP D. PETTINGILL
CALIFORNIA INDEPENDENT SYSTEM
OPERATOR
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

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

MEG GOTTSTEIN
ADMINISTRATIVE LAW JUDGE
PO BOX 210/21496 NATIONAL STREET
VOLCANO, CA 95689

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

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

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
ELECTRICITY RESOURCES & PRICING BRANCH
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 I STREET
SACRAMENTO, CA 95814

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

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

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