

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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| _____) | |
| California Independent System) | Docket Nos. ER01-313-000 and |
| Operator Corporation) | ER01-313-001 |
|) | |
| Pacific Gas and Electric) | Docket Nos. ER01-424-000 and |
| Company) | ER01-424-001 |
| _____) | |

MOTION FOR LATE INTERVENTION AND
BRIEF ON EXCEPTIONS OF:

Electricity Consumers Resource Council (ELCON)
United States Combined Heat and Power Association (USCHPA)
American Chemistry Council (ACC)
American Iron and Steel Institute (AISI)
American Forest & Paper Association (AF&PA)
American Petroleum Institute (API)
National Petrochemical & Refiners Association (NPRO)
The Fertilizer Institute (TFI)
Chemical Industry Council of California (CICC)
(Collectively, "Customer Generators")

Pursuant to Rules 214 and 711, the Electricity Consumers Resource Council ("ELCON"), American Chemistry Council ("ACC"), the United States Combined Heat and Power Association ("USCHPA"), American Iron and Steel Institute ("AISI"), American Forest & Paper Association ("AF&PA"), American Petroleum Institute ("API"), National Petrochemical & Refiners Association ("NPRO"), The Fertilizer Institute ("TFI"), and the Chemical Industry Council of California ("CICC") (collectively, "Customer Generators") move for late intervention in this proceeding to oppose the Initial Decision of ALJ McCartney, issued on May 10, 2002 ("Initial Decision"), which assesses the Control Area Services ("CAS") charge,

part of the Unbundled Grid Management Charge (“GMC”), on the basis of a retail customer’s “gross” load served by on-site, customer generation located “behind the meter.” This assessment would incorrectly and unlawfully burden a facility’s “gross” load to other overhead and transmission-related charges and would destroy the economic viability of customer generation.

SUMMARY OF EXCEPTIONS

Customer Generators take exception to the decision by Administrative Law Judge McCartney to allow California ISO (“CAISO”) to assess two Unbundled Grid Management Charges (“Control Area Services” or “CAS” and “Market Operations” or “MO”) on facilities served by customer generation on the basis of the gross “retail behind-the-meter load.” This decision reverses standard industry practice of over twenty-five years that assessed such costs on the “net load” – with net load being the amount of energy purchased from the utility or grid for emergency purposes or additional power requirements, *i.e.*, energy that must be purchased and not self-supplied.

Customer Generators demonstrate that ALJ McCartney’s decision is contrary to FERC precedent on cost causation and directly conflicts with national energy policy with respect to encouragement of Combined Heat and Power (“CHP”) technologies (*e.g.*, co-generation) and customer-owned Distributed Generation (“DG”), and the Commission’s draft guidelines in creating a Standard Market Design. This decision authorizing CAISO to inappropriately impose charges on load served by customer generation even when such load is not utilizing any ISO grid services is erroneous as a matter of law and is bad public policy.

Customer Generators raise as exceptions the following points of error:

(1) The Initial Decision is arbitrary and capricious in that it approves a “gross metering” policy that would devastate customer generation in California (and elsewhere), reversing federal and state policy to encourage such investment. The Initial Decision authorizes an unwarranted change in California’s historic practice and the typical practice in other states by allowing CAISO to schedule and bill generation and load on the customer’s side of the interconnection meter. This decision will drastically increase the overhead and transmission-related charges imposed on load served by customer generation – load that doesn’t use the transmission and distribution system. These new fees could potentially total \$2 million to \$2.5 million annually for a 50 MW load served by customer generation, and could make the difference whether or not new projects are economically viable, or current business can be sustained.

The ALJ, FERC and the ISO Board should retain the historic “net metering” policy for load served by customer generation, which offsets a customer’s load with its own generation, and only meter and charge fees for energy withdrawn from the grid. Maintaining this policy would preclude unfair and punitive increases in transmission and overhead costs and would forestall unnecessary and disruptive metering and scheduling of load and generation. Customer Generators should only pay these overhead and transmission-related charges for energy actually transmitted over a utility-owned electric system, not for the “potential” that they may withdraw energy from the grid, for which they have historically paid standby charges.

(2) The Assessment of the Unbundled GMC on the basis of “gross” load represents an unjustified departure from principles of cost causation and is therefore arbitrary

and capricious. The precedent is clear that departures from cost causation are warranted only in extraordinary circumstances -- a standard ALJ McCartney does not purport to meet. The judicial case law is equally clear that FERC may not be selective and inconsistently apply cost causation within the same order, as ALJ McCartney has done.

(3) ALJ McCartney's Initial Decision is inconsistent with ALJ Leventhal's rulings on similar issues in Docket No. ER98-997-000 and ER98-1309-000. California Independent System Operator Corp., 96 FERC ¶ 63,015 (2001). ALJ Leventhal ruled that CAISO must tailor its assessments to avoid penalizing QF generation and must impose charges on a "net" metered basis. ALJ Leventhal correctly ruled that:

... the adoption of the ISO proposal would deny to those end-use customers who have invested in self generation to supply their energy needs the benefits they expected ... For over twenty years, the California Grid was operated reliably without any scheduling of load and generation behind the site boundary meter. There has been no showing that with the advent of the ISO that there need be a change to gross metering.

96 FERC at 65,141.

(4) The Initial Decision adversely impacts customer generation provided by qualifying facilities ("QFs") in contravention of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Assessment of CAS charges on a "gross" rather than "net" metered basis disproportionately burdens on-site customer generation and the owner's manufacturing or commercial operations. The assessment of Unbundled GMC on the load associated with QFs versus other retail load that does not self-generate violates PURPA and results in the cross-subsidization of load not served by customer generation, by load that is served by customer generation. This is equivalent to a penalty or tax on load served by a customer's own generation that would not also be assessed on non-customer-owned generation.

(5) The Initial Decision contradicts and will undermine national energy policy that encourages Combined Heat and Power (“CHP”) and Distributed Generation (“DG”) technologies because of their superior energy efficiencies and environmental benefits. The Initial Decision imposes an unwarranted cost burden on customer generation without considering whether other cost allocation methodologies would allow CAISO recovery while avoiding disproportionate impact on customer generation.

EXCEPTIONS

1. The Initial Decision Is Arbitrary And Capricious Because It Will Devastate The Customer Generation Industry In California

The California ISO was originally intended to serve as a platform for a competitive electricity market. Instead, it has become a platform for one disaster after another. No one can reasonably expect the restoration of a competitive market in the Golden State in the foreseeable future. CAISO’s operating costs continue to grow. CAISO is seeking a larger customer base to mask the fact that the costs are out-of-control and have been poorly managed.

The Initial Decision assesses unwarranted charges on retail behind-the-meter load that was never within the purview of the ISO or its predecessor utility control areas in the past. The ISO does not perform any control functions that benefit retail behind-the-meter load that were not also provided by the predecessor utility control areas operated by the Pacific Gas & Electric Company (“PG&E”) and the Southern California Edison Company (“SCE”). The ISO is not providing anything new that benefits load served by on-site customer generation. In the past, PG&E and SCE planned and operated their respective control areas to meet the same NERC reliability standards now performed by the ISO: emergency management, outage coordination, interchange scheduling, system planning, etc. PG&E and SCE performed those functions based

on the net-metered load of all applicable customer generators interconnected with their transmission systems. They did not know and they did not need to know the gross load served behind the meter. Neither does the ISO.

The potential damage done by the Initial Decision is to further expose the load served by on-site customer generation to still additional charges and fees (including the costs necessary to meter the behind-the-meter load) just to maintain the fiction that the gross load and the on-site generation must be “scheduled” with the ISO. This will result in the subsidization of loads not served by on-site generation by customer generations and the cessation of new and some existing private investment in cogeneration and other forms of CHP and customer-owned DG, including renewable energy resources.

For more than 25 years, state and federal policies have encouraged self-reliant electrical generation by large and small energy users. These policies have promoted “customer generation,” which is generation located at or near the loads of residential, commercial or industrial end-users, and which includes cogeneration, self-generation and Distributed Generation. The benefits of these policies are enormous: private investment in the state’s energy infrastructure and economy, reliable energy supplies, diversified and flexible sources of electricity, and reduced air emissions. It is arbitrary and capricious to impose crippling new charges on the customer generation industry in contravention of state and national energy policy objectives.

2. The Initial Decision Is Erroneous As A Matter Of Law Because It Is Inconsistent With FERC And Court Precedent On Cost Causation

Contrary to the claim in the Initial Decision, CAISO does not incur CAS costs to the extent retail electric load behind the meter is served by customer generation. While ALJ

McCartney claims the CAS billing determinant is based on cost causation,¹ the Initial Decision hinges on a “benefits” analysis to justify assessing the CAS charges based on gross load.²

Customer Generators contend that the “benefits” analysis does not justify imposing CAS charges on customer generation except during the very limited periods when such loads draw standby power or other requirements in excess of the on-site generating capability off the utility system and/or the ISO Grid. Principal CAS tasks -- performing operation studies; system security analysis; transmission maintenance standards; system planning; integration with other Control Areas; emergency management; outage coordination; transmission planning; and scheduling³ -- do not benefit self-served retail loads. Customer loads do not benefit from the scheduling of “generation, imports, exports and wheeling transactions the day before and the hour before actual operations”⁴ when loads are self-served by customer generation.

a. Cost Causation Is The Preferred Methodology Absent Justification Of Extraordinary Circumstances

In the Order No. 888 rulemaking, Industrial Consumers (ELCON, et al.) and other commentors urged that FERC require that shareholders absorb some proportion of stranded costs to reflect responsibility for improvident decisions by management of investor-owned utilities.

FERC rejected the argument by invoking the hallowed principle of cost causation. FERC stated

¹ ALJ McCartney states, “I concur with the ISO’s assessment that it is not merely ‘actual usage’ of the grid which ‘causes’ the ISO to incur costs for Control Area Services. Because the ISO performs its Control Area Services, which include planning and operational functions designed to ensure the reliability of the system, based on all load in its Control Area, the charges are fairly allocated to all load.” Initial Decision, slip op. at 35.

² According to ALJ McCartney, the “[b]ehind-the-meter Loads ‘cause’ CAS costs to be incurred and ‘benefit’ from CAS services even when they are not actually using power transmitted over the ISO Controlled Grid.” *Id.* at 97 (emphasis added). See also *id.* at 44 (“the ISO has established that Control Area Services do not depend primarily on energy imbalances and transmission flows...but rather, that CAS costs represent the ISO’s administrative costs of ensuring the safe, reliable operation of the transmission grid and the dispatch of bulk power supplies in accordance with regional and national reliability standards and are ‘caused’ by and provided for the benefit of all load utilizing the grid”) (emphasis added).

³ *Id.* at 27.

⁴ *Id.* at 31.

in Order 888 that it is appropriate for departing customers to bear all costs stranded by their departure. “[T]he departing wholesale generation customer . . . [should] bear its fair share of the legitimate and prudent obligations that the utility undertook on that customer’s behalf.” Order No. 888, 61 Fed. Reg. 21,540, 21,634 (May 10, 1996). FERC cited “the well-established principle of cost causation, namely, that the party who has caused a cost to be incurred should pay it.”⁵ In contrast, “[a] broad-based approach . . . would violate the cost causation principle by shifting costs to customers (such as transmission users of the utility’s system) that had no responsibility for stranding the costs in the first place.”⁶ FERC claimed that Order No. 500’s equitable sharing was “an exception to the time-honored principle that rates should reflect cost causation.”⁷

D.C. Circuit precedent requires that FERC follow principles of cost causation unless extraordinary or crisis circumstances justify departure. In K.N. Energy, Inc. v. FERC, 968 F.2d 1295, 1300-03 (D.C. Cir. 1992), a customer challenged application of Order No. 500 with respect to take-or-pay costs. The court accepted FERC’s departure from cost causation because “circumstances surrounding the take-or-pay crisis and the transformation of the pipeline industry necessitate and justify the crafting of new ratemaking principles.” Id. at 1301. FERC’s allocation of gas costs to customers who “may not have directly caused them” was “acceptable” only because of the Commission’s judgment that “the extraordinary nature of this problem requires the aid of the entire industry to solve it” and that there were “no other alternatives.” Id. The D.C. Circuit upheld FERC action on the basis that it could be “reconciled with the NGA,”

⁵ Id. at 21,635.

⁶ Id. See also id. at 21,633 (defending pass-through as “consistent with the traditional regulatory concept of cost causation”).

⁷ Id. at 21,636-37.

but only “given the unusual circumstances surrounding the take-or-pay problem, and the limited nature – both in time and scope – of the Commission’s departure from the cost-causation principle.” Id.

In TAPS v. FERC, 225 F.3d 667 (D.C. Cir. 2000), the D.C. Circuit upheld Order 888’s application of cost causation. The court emphasized that cost causation is the norm and that exceptions must be justified by extraordinary circumstances:

POSCR reads this history to require FERC to order cost sharing, but it ignores Order 888’s explanation of the difference between natural gas restructuring and the situation in the electricity industry. Most fundamentally, Order 888 explains, stranded cost recovery in the electricity industry conforms to cost causation principles, which normally govern the allocation of costs and require customers to pay the costs they caused. See Order 888, ¶ 31,036 at 31,798. Cost causation principles could not be applied in natural gas restructuring, Order 888 explains, because many customers had already begun purchasing gas from other suppliers before FERC had addressed the take-or-pay problem on remand from AGD, and because the filed rate doctrine prohibits assessing charges against former customers. *Id.* at 31,800-01. Order 888 also explains that unlike stranded costs in the electricity industry, the take-or-pay liabilities in the gas industry were extraordinary. The billions of dollars of take-or-pay liabilities resulted not from Order 636, but from earlier regulatory policies that had encouraged pipelines to enter into long-term, fixed-price gas purchase contracts, combined with declining gas prices that made those contracts uneconomical. See Order 888-A, ¶ 31,048 at 30,380. . . .

K.N. Energy recognized that cost sharing in the natural gas industry was a departure from the cost causation principles that normally apply, a departure justified by extraordinary circumstances in the natural gas industry. *K.N. Energy*, 968 F.2d at 1301-02.

...

We have explained the cost causation principle as follows: “Simply put, it has been traditionally required that all approved rates reflect to some degree the costs actually caused by the customer who must pay them.” *K.N. Energy*, 968 F.2d at 1300. . . .

Cost causation requires not that costs be incurred at the same time they are included in rates, but that the rates “reflect to some degree the costs actually caused by the customer who must pay them.” *Id.*

In fashioning Order 888’s stranded cost recovery provisions, FERC went to great lengths to ensure that customers would be responsible for only those costs they caused.

225 F.3d at 706, 707 (emphasis added).

As recently as February 2002, the D.C. Circuit remanded a decision by FERC that departed from its cost causation methodology. Sithe/Independence Power Partners v. FERC, 285 F.3d 1 (D.C. Cir. 2002). “FERC failed to adequately explain its decision to depart from its long-standing cost causation principle” in approving NYISO’s tariff’s methodology for accounting for transmission losses. 285 F.3d at 2. The court vacated FERC’s approval of the NYISO LMP methodology insofar as NYISO would refund overcharges based on offsetting customers’ user fees. The proposal disadvantaged independent producers such as Sithe that do not serve end-users, do not pay scheduling charges, and thus would never receive refunds for excess revenues. The Sithe court cited prior D.C. Circuit precedent, Tejas Power Corp. v. FERC, 908 F.2d 998 (D.C. Cir. 1990), where the court endorsed FERC’s methodology of cost causation, “matching cost incurrence and cost causation wherever feasible.” 908 F.2d at 1005 (emphasis added).

ALJ McCartney’s Initial Decision does not purport to assess the CAS charge on the gross behind-the-meter load of self-generators based on “extraordinary circumstances,” as required by D.C. Circuit precedent. Rather, ALJ McCartney makes a subtle shift away from “cost causation” and relies on a “benefits” analysis to justify the CAS charge gross-load billing determinant:

As with “wholesale” behind-the-meter Loads, “retail” behind-the-meter Loads benefit whether or not they actually use the grid. The ISO is not seeking to charge behind-the-meter Load served by behind-the-meter Generation for the *use*

of the ISO Controlled Grid in the sense of an Energy transaction at all, whether actual or potential. Nor does the ISO assume a simultaneous outage of behind-the-meter Load in assessing those Loads the Control Area Services Charge....Whether a contract path for energy transmission involves the ISO Controlled Grid is irrelevant to the provision of CAS or the allocation of CAS charges.

Initial Decision at 98 (emphasis added) (footnotes and citations omitted). See also id. at 36

(“unlike IZS and MO charges, which are based on actual usage billing determinants, the Control Area Services are caused by and provided for the benefit of all load utilizing the grid”) (emphasis added); id. at 97 (“[b]ehind-the-meter Loads ‘cause’ CAS costs to be incurred and ‘benefit’ from CAS services even when they are not actually using power transmitted over the ISO Controlled Grid”) (emphasis added); id. at 44 (“the ISO has established that Control Area Services do not depend primarily on energy imbalances and transmission flows...but rather, that CAS costs represent the ISO’s administrative costs of ensuring the safe, reliable operation of the transmission grid and the dispatch of bulk power supplies in accordance with regional and national reliability standards and are ‘caused’ by and provided for the benefit of all load utilizing the grid”) (emphasis added).

While relying on a benefits analysis for assessing CAS charges based on gross behind-the-meter load, ALJ McCartney also concedes that the benefits vary and reverts back to a flawed cost causation analysis: “I note here, however, that *cost causation* is not necessarily the same as *cost benefit*. Thus, the fact that *all* load *causes* the ISO to incur administrative costs as reflected in the CAS may nevertheless support recovery of those costs based on *all* Control Area Gross Load plus exports even assuming *arguendo* that variable levels of use result in variable levels of benefits.” Id. at 36 (emphasis in original).

ALJ McCartney also admits the possibility that the CAS charge could be further unbundled in the future to reflect a billing determinant more closely aligned with cost causation. The Initial Decision directs the CAISO to conduct a full stakeholder review of the GMC in 2003 and encourages consideration of CAS charge alternatives presented by parties to the proceeding (specifically Modesto Irrigation District and California Public Utilities Commission). Id. at 37. The ALJ also states, “Given my ruling that the ISO’s proposal, while not perfect, is just and reasonable, there is no basis to supplant or replace the ISO’s proposal *at this time*.” Id. at 43 (emphasis added).

The direction set by ALJ McCartney for 2003 demonstrates that the current diversion from cost causation is neither justified by “extraordinary circumstances,” as explained in TAPS v. FERC, supra, or justified by the fact that assessing CAS charges based on some other formulation closer to cost causation would be infeasible, as described in Tejas Power Corp. v. FERC, supra. ALJ McCartney states:

Cost causation principles require only that rates match costs to serve classes of customers and individual customers “as closely as practicable,” not that they do so perfectly. *See Alabama Elec. Coop., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982). On balance, it is my determination that the ISO’s proposal, while not perfect, is just and reasonable *at this time*. Nevertheless, I agree with the parties that serious consideration of further unbundling of the CAS is appropriate. Throughout these proceedings, the ISO has repeatedly affirmed its position that it is not opposed to consideration of other ways to recover CAS costs. In this regard, I am directing that a full stakeholder review of the GMC be conducted in 2003 fo [sic] this purpose; including, specifically, full stakeholder review of Dr. Kirsch’s proposal and the suggestions made by the CPUC and EOB that the ISO should move from a pure energy-based (*i.e.*, per-kwh) charge for CAS to a mix of demand and energy-based charges.

Id. at 36-37 (citations to record omitted).

As noted, even CAISO acknowledges the possibility of a CAS charge more closely linked to cost causation principles in the future:

While the ISO acknowledges all entities may not benefit from CAS services to the degree [sic], the ISO submits that those entities with behind-the-meter Loads that argue that they are benefiting to a lesser degree than parties that actually use the grid more are really requesting unbundling of the CAS service categories, which the ISO supports as being appropriate in the future but not feasible for the current filing.

Id. at 61 (emphasis added). CAISO explained that the alternatives presented by parties in the proceeding were not feasible for this ratemaking because: 1) the alternatives should be subject to stakeholder review; 2) adding additional “buckets” for the purpose of further unbundling would not be possible due to lack of data and the need to establish an accounting system; 3) the ISO’s software is set up to accommodate a single CAS charge; 4) current software is not capable of the tracking required by proposed alternatives; and 5) the changes would be costly and time-consuming. Id. at 37. CAISO stated, however, that it would not dismiss either CAS reform proposal (one presented by Modesto Irrigation District and the other by the California Public Utilities Commission) from consideration during the 2003 process. Id.

If such options are left on the table by the ALJ and CAISO for future ratemaking proceedings, and the billing determinant formulation is recognized as less than perfect, it is hard to see how “extraordinary circumstances” or “feasibility” could be driving the decision to assess CAS on behind-the-meter gross load served by customer generation in a way that is not aligned with cost causation.

b. The Initial Decision's Inconsistent Approach To Cost Allocation Is Arbitrary And Capricious

ALJ McCartney applies a flawed “benefits” principle with respect to the load served by customer generation. The logic of this principle is, that by simply demonstrating that a customer benefits from the ISO’s existence, the option to allocate costs based on the actual level of that customer’s usage of ISO services can be ignored.⁸ This turns the principle of cost causation on its head. The fallacy of the Initial Decision’s “benefits” principles is that load served by on-site generation causes the ISO to incur the same costs as an equivalent load served with generation procured from the grid (e.g., via network service). Such fallacious reasoning ignores the economic incentive that motivated the investment in on-site generation in the first place. There is also no demonstration that the ISO is providing any net additional control area services or benefits as compared with its predecessor control areas that were operated by PG&E and SCE. Those utilities performed the control area functions for decades based solely on the net load of each applicable customer generator interconnected with its transmission system.

Certainly, other aspects of the CAISO proposal are intended to apply cost causation methodology. Indeed, the ISO advised FERC that cost causation was a main purpose of unbundling the GMC:

The main objective of unbundling the GMC is to allocate costs fairly among all ISO system users, and minimize cost subsidization among Market Participants. In achieving this goal, the ISO has been guided by the principle of cost causation, i.e., the principle that the ISO’s costs, to the extent possible, should be attributed to those entities that caused them to be incurred. It is only when this

⁸ The ALJ said: “I note here, however, that *cost causation* is not necessarily the same thing as *cost benefit*. Thus, the fact that *all load causes* the ISO to incur administrative costs as reflected in the CAS may nevertheless support recovery of those costs based on all Control Area Gross Load plus exports even assuming *arguendo* that variable levels of use result in variable levels of benefits.” Id. at 36 (emphasis in original).

has been achieved that the market can operate efficiently with price signals directing market behavior towards optimum results.⁹

In Louisiana Public Service Commission v. FERC, 184 F.3d 892 (D.C. Cir.

1999), the court vacated as arbitrary and capricious FERC's order assessing interruptible power with responsibility for capacity costs. The D.C. Circuit observed that FERC had not consistently applied principles of cost causation with respect to allocation of capital costs to interruptible service:

The Commission firmly embraced this principle of cost causation in *Kentucky Utilities Co.*, 15 F.E.R.C. ¶ 61,002 (1981), where it persuasively set out its rationale for not considering interruptible service when allocating capacity costs. In that case KU had the right, by agreement, to interrupt service to the City of Paris. The utility argued that it should be able to charge Paris capacity costs whenever it supplied electricity to Paris at peak. The Commission flatly rejected this position, reasoning that "because of the right to interrupt, Kentucky can keep Paris from imposing any demand on Kentucky's system during peak periods and thereby control its capacity costs." *Id.* at 51,004.

Id. at 896. In Louisiana PSC, the court delivered a sarcastic rebuke because FERC had failed to offer a coherent explanation for its abandonment of prior precedent:

The Commission reasoned that "the mere fact that a load may be curtailable does not mean that it should not be considered in allocating costs" if power is in fact taken at peak. *Louisiana PSC*, 76 F.E.R.C. at 61,955-956. Sound familiar? This is the argument the agency rejected in *Kentucky Utilities*. *See* 15 F.E.R.C. at 61,004 ("Although Kentucky has not interrupted service to Paris at every peak period, this is irrelevant to the application of the peak responsibility method").

We therefore hold that the Commission's 180 degree turn away from *Kentucky Utilities* was arbitrary and capricious. For the agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*

⁹ *See* ISO letter to The Honorable David P. Boegers dated November 1, 2000 (emphasis added).

Auto. Ins. Co., 463 U.S. 29, 57, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983) (“An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis”). If there is any reason interruptible load should be considered in the assessment of capacity costs, it has not been articulated either by the Commission or by its claue in this proceeding.

Id. at 897.

In another decision, the D.C. Circuit rejected FERC’s inconsistent application of cost causation versus cost spreading principles within the same adjudication. In United Distribution Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996), the court remanded FERC’s assignment of gas supply realignment (“GSR”) costs to all blanket certificated shippers. FERC had applied “cost spreading” or “value of services” principles to allocate some GSR costs to the pipeline’s transportation-only customers, yet had inconsistently exempted pipelines from any share of GSR cost.¹⁰

ALJ McCartney’s Initial Decision is internally inconsistent. The Initial Decision endorses the CAISO’s proposal to unbundle its GMC into three charges – CAS, Inter-Zonal Scheduling (“IZS”), and Market Operations (“MO”). Only with respect to the CAS do ALJ

¹⁰ The Commission nevertheless puts forward a wide variety of arguments for exempting pipelines from paying GSR costs, which we will address on the merits seriatim. We begin, however, by noting that, as a general matter, the Commission’s arguments seem directed toward proving the wrong point. FERC allocated Order No. 636 GSR costs to customers based on the principles of “cost spreading” and “value of service.” When it exempted the pipelines from those costs, however, the Commission reverted to traditional concepts of “cost causation.” It is important to emphasize that these are competing models for allocating the industry’s costs of service. “Cost causation” correlates costs with these customers for whom a service is rendered or a cost is incurred. For example, the Industrial End-Users argue that under a cost causation model, the only customers who should be required to pay GSR costs are those that reduced their pipeline gas purchases in response to Order No. 636. “Cost spreading” and “value of service” in contrast, take a much wider view, assigning the costs of service to those classes of industry participants that either are at fault for the take-or-pay dilemma or benefit from its resolution.

88 F.3d at 1188-89.

McCartney and the CAISO shift from a cost causation analysis to a “benefit” justification for assessing CAS on gross load rather than net. “However, unlike the IZS and MO charges, which are based on actual usage billing determinants, the Control Area Services are caused by and provided for the benefit of all load utilizing the grid.” Initial Decision at 36 (emphasis added).

IZS – the ISO’s costs of administering congestion management and transmission right auctions, monitoring, and scheduling – is assessed based on a billing determinant “equal to the absolute value of the net scheduled intra-zonal flow (excluding existing transmission customers) per path for a given Scheduling Coordinator.”¹¹ MO – the ISO’s costs of market- and settlement-related services – is assessed based on a billing determinant “equal to a given Scheduling Coordinator’s total purchases and sales of Ancillary Services, Supplementary Energy, and Imbalance Energy.”¹² CAS, on the other hand, is assessed based on control area gross load and exports.¹³

ALJ McCartney’s departure from cost causation principles is not only internally inconsistent but also is inconsistent with current FERC policy for RTO standard market design which intends to avoid socialization or “uplifting” of costs, e.g., congestion management through LMP.¹⁴

Thus, the Initial Decision is erroneous because it is (a) inconsistent with the preference for cost causation except in extraordinary circumstances; and (b) internally

¹¹ Id. at 27.

¹² Id.

¹³ Control Area Gross Load is defined as “all demand for energy within the ISO control area, except for auxiliary load (*i.e.*, energy used in the power production process) or load that is electrically isolated from the ISO controlled grid (*i.e.*, load that is not synchronized with the ISO controlled grid).” Id. at 31.

¹⁴ See Working Paper on Standardized Transmission Service and Wholesale Electric Market Design, Federal Energy Regulatory Commission, March 15, 2002.

inconsistent with respect to justifying cost allocation on cost causation principles in general, but declining to apply cost causation in its assessment of CAS charges with respect to load served by retail customer generation.

3. The Initial Decision Is Erroneous As A Matter Of Law Because It Is Inconsistent With Judge Leventhal’s Decision In Docket ER98-997

In California Independent System Operator Corp. (“CAISO Corp”), 96 FERC ¶ 63,015 (2001), ALJ Leventhal ruled that CAISO’s pro forma participating generating agreement (“PGA”) should be tailored to address cogeneration. ALJ McCartney’s decision is fundamentally inconsistent with ALJ Leventhal’s resolution of overlapping issues in ER98-997 where ALJ Leventhal considered (1) whether the ISO may require gross metering and gross telemetry on QF cogeneration; (2) whether the ISO may require gross scheduling of behind-the-meter generation and load; and (3) whether the ISO may procure Ancillary Services and allocate Ancillary Service costs on a gross load basis.

ALJ Leventhal found that “because the ISO does not backup the behind-the-meter load, only net loads are included within the ISO’s control area firm load”;¹⁵ thus the control area firm load includes a QF’s net load for purposes of determining CAISO’s responsibilities under relevant reliability criteria. With respect to ancillary services, ALJ Leventhal found that the ISO’s control area firm load should include a QF’s net load. He also found that it was unjust and unreasonable to require QFs to enter into the ISO’s pro forma PGA because of the distinct characteristics of QFs. ALJ Leventhal ruled that CAISO’s proposal to require QFs to schedule all of their loads and generation with the ISO, including on-site energy consumption and

¹⁵ Id. at 65,138.

generation, is not just and reasonable. Companies that invested in cogeneration would retroactively be denied the benefit of their investment.

The Initial Decision is entirely unpersuasive in its effort to distinguish the result reached in this docket from ALJ Leventhal's opinion on the same or similar questions. ALJ McCartney attempts to distinguish the two dockets on the basis that ER98-997 addresses "gross v. net" in the context of ancillary services and the instant dockets (ER01-313; ER01-424) address administrative costs for maintaining the grid:

Judge Leventhal's Initial Decision in Docket No. ER98-997, concerned the procurement of Ancillary Services and the allocation of those costs to a QF's net load. It did not address the CAS costs at issue here and therefore has no bearing on the ISO's allocation of those costs based on CAGL as it applies to behind-the-meter Load in this proceeding. As has been previously noted, the appropriate charges for ancillary services, for transmission, or for the provision of any power, are simply not at issue in the present case.

Initial Decision at 100. This facile distinction must be rejected. Both dockets concern whether the ISO's assessment of charges is just and reasonable because costs are allocated to load served by customer generation that the customer generation did not cause the ISO to incur. The Initial Decision fails to offer a coherent rationale for reaching a different outcome from the Leventhal opinion.

4. The Initial Decision Is Erroneous As A Matter Of Law Because PURPA Precludes Discriminatory Actions Against Customer Generators That Are QFs

The Initial Decision would assess substantial new costs on behind-the-meter load served by QFs -- costs which retroactively impair the benefit of investment decisions.

ALJ McCartney argues that the CAISO's assessment of CAS charges on gross behind-the-meter load served by QFs is not inconsistent with PURPA and does not discourage cogeneration because: 1) the cost of energy for behind-the-meter load outweighs the CAS

charges; 2) there is little evidence that QFs will “island” as a result of the assessment of CAS against behind-the-meter gross load; and 3) Congress did not intend to give QFs an unfair advantage. Id. at 107-09. ALJ McCartney concludes by stating that behind-the-meter load served by QFs would receive an “unfair advantage over other market participants who would not be similarly exempted from the CAS charge in violation of Commission policy and congressional intent.” Id. at 109.

Customer Generators oppose the “one-size-fits-all” policy of the CAISO (and, prospectively as the case may be, of all future RTOs) with regard to the ISO’s treatment of generation. On-site customer generators are not merchant plants. Merchant plants are in the business solely to produce and sell electricity at wholesale. Customer generation projects are sized solely to provide steam and/or electric energy for a related industrial or commercial process and only sell electricity at the utility’s “avoided costs” when necessary. As ALJ Leventhal correctly observed for the limited case of QFs:

The ISO has failed to demonstrate that the pro forma PGA is just and reasonable as applied to QFs. The QF differs in purpose and operation from a traditional generator. As argued by CAC, the basic purpose of a QF is to provide for the needs of an industrial site and to sell off only excess electricity only if available. To treat a QF as simply another system operator defeats the purpose for its creation. I find the testimony of CAC witness Ross convincing. He points out that:

Treating QF generation like other interconnected generation may cause the QF industrial site to lose the benefits of the self-sufficiency contemplated by PURPA. First, operating the QF generator as simply another system generator would diminish the ability to operate the industrial site in an integrated manner to optimize thermal and electric energy supply. Second, reducing the site’s control over the curtailment and dispatch of QF generation could lead to process, safety and health problems on the site. Third, treating QF generation like other generation

ultimately will lead to placing costs on QF served electric energy consumption as if the electric energy were served from the grid, thus negating traditional cost savings of installing QF generation.

Ex. CAC-2 at 6.

I find that the pro forma PGA is not just and reasonable as applied to QFs because of the distinct characteristics of the QFs.

CAISO Corp., 96 FERC at 65,132-33 (emphasis added).

In enacting PURPA, Congress's "basic purpose...was to increase the utilization of cogeneration and small power production facilities and to reduce reliance on fossil fuels." American Paper Inst. v. American Elec. Power Serv. Corp., 461 U.S. 402, 417 (1983). In Environmental Action, Inc. v. FERC, 939 F.2d 1057 (D.C. Cir. 1991), petitioners challenged FERC's approval of a merger that excluded QFs from access to the firm transmission. The Commission argued that allowing QFs mandatory transmission access would give them an unwarranted competitive advantage by enabling them to exercise their statutory right to force utilities to buy the power. The court rejected this argument given the public interest in encouraging QF generation:

[S]uch advantage as a QF may have stems directly from the Congress's policy choice to encourage the sale of power by QFs rather than by traditional utilities. *See API*, 461 U.S. at 417, 103 S.Ct. at 1930 ("basic purpose of §210 of PURPA was to increase the utilization of cogeneration and small power production facilities and to reduce reliance on fossil fuels"). The Commission's effort to place QFs "on an essentially equal competitive footing with competing suppliers," *Opinion No. 318-A*, 47 FERC at 61,740, by giving such suppliers the access it denies to QFs would effect an administrative repeal of this congressional choice; by definition, this is not in the public interest. Put otherwise, the PURPA establishes a specific public interest in encouraging QFs by giving them certain rights.

Id. at 1062.

Decisions that undermine the settled expectations of the parties is anathema. Customer Generators endorse this fundamental principle, notwithstanding our concern as ratepayers that utility power purchase costs be as low as possible. “Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.” Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994). In New York State Electric & Gas Corp., 71 FERC ¶ 61,027 (1995), FERC appropriately declined to retroactively impair QF contracts. QFs made their investments on the basis of a statute (PURPA §210) and a regulatory regime (18 C.F.R. §292) that requires utilities to purchase their power at avoided cost. As FERC stated in NYSE&G: “We note that utilities have been quick to defend, and properly so, their right to recover legitimate, prudent and verifiable ‘stranded costs,’ based on claims that such costs are the product of settled and reasonable investor expectation. The same principle applies to the investors in QF projects.” Id. at 61,117 (footnote omitted). The reliance interest of these investments should be respected not only out of fairness to QF cogenerators and small power producers, but in the broader policy interest of encouraging badly-needed investment in CHP and DG technologies.¹⁶

¹⁶ Customer Generators are aware of the recent efforts in Congress to amend PURPA. Senate bill 517, the Energy Policy Act of 2002, included a provision that would have freed utilities from their PURPA obligation to buy power from QFs. During Senate floor debate, the provision was replaced by an amendment that preserves that mandatory purchase provisions of PURPA until FERC certifies that the competitive wholesale markets have been established. The House and Senate must convene a conference committee to address the differences between the House and Senate versions of the bill. The House version does not contain any provisions that alter the PURPA obligations.

5. The Initial Decision Is Erroneous Because It Discourages All Forms Of On-Site Generation In Conflict With National Energy Policy To Foster Combined Heat and Power (CHP) Technologies and Distributed Generation

a. The Initial Decision Ignores That Distributed Generation Is A Policy Priority

The Initial Decision and the tariff terms and conditions are very broad and, without change, may apply to all forms of behind-the-meter load.

This issue is of concern to consumers whether they have the potential to self-generate or not. In a competitive wholesale market, the economic viability of some loads to self-generate puts downward pressure on market clearing prices that everyone pays. As it becomes more expensive to self-generate, *i.e.*, as customer's opportunity costs increase, all customers become vulnerable to higher prices.

It is well known (and recognized by the Commission) that on-site generation avoids the need for new transmission and distribution ("T&D") facilities. The Commission's policy to implement locational pricing in wholesale markets is clearly done with that objective in mind. It is ill-advised for FERC to discourage customer generation given its benefits to the grid in the form on network externalities. Customer generation contributes many system benefits by: (1) reducing the coincident peak load imposed on the system thus improving the reliability of transmission service; (2) providing VAR support usually on an uncompensated basis; (3) alleviating transmission congestion; and (4) mitigating the need for new transmission facilities. These benefits reduce system costs that are shared by all customers because most T&D costs are rolled into rate base. In the Initial Decision, the ALJ limits her consideration to

selective network externalities that make CAISO's case and not other countervailing externalities that would support direct assignment of costs based on actual usage.¹⁷

The Initial Decision contravenes Bush Administration energy policy in support of increased energy efficiency and associated air emissions reductions. The decision would substantially increase the cost of on-site generation and also increase cost uncertainty given that it is unclear what the costs of future RTOs will be. The direction set by the Initial Decision will chill the development of new on-site customer resources. The May 2001 Report of the National Energy Policy Development Group expressly identified Combined Heat and Power technologies and renewable energy resources for further development as a matter of national policy.¹⁸ The U.S. Department of Energy's May 2002 National Transmission Grid Study identified customer load reduction and Distributed Generation as important and "underutilized" options for reducing transmission bottlenecks.¹⁹ For many end-use customers, voluntary load reductions are only feasible by offsetting power purchased from the grid with on-site backup generation. In testimony before the House Subcommittee on Energy and Air Quality in December 2001, Chairman Wood said that "standardization of rules and procedures for interconnecting all new

¹⁷ ALJ McCartney concludes, "Exemptions for behind-the-meter Loads would result in an increase for other customers. All load-serving entities should pay for these administrative CAS costs comparably on the basis of their gross load. Accordingly, it is my determination that the CAS charge based on CAGL is a fair allocation of costs and does not contravene public policy." Initial Decision at 110-11.

¹⁸ Reliable, Affordable, and Environmentally Sound Energy for America's Future, Report of the National Energy Policy Development Group, May 2001. Chapter Four of the Report showcases several CHP technologies, including industrial cogeneration, and Chapter Six does the same for renewable energy technologies (biomass, geothermal, wind, and solar) and microturbines. The cost effectiveness of all of these resources would be crippled by the ALJ's decision.

¹⁹ U.S. Department of Energy, National Transmission Grid Study, May 2002. The Study said, "Distributed generation and storage allows customers to reduce reliance on the transmission system by 'distributing' or placing generation sources (such as photovoltaics; combined heat and power systems; and small, clean generators, including microturbines and fuel cells) and energy storage closer to the locations at which electricity is used, e.g., at customers' homes or businesses. For distributed generation that also incorporates combined heat and power technologies, the economics are enhanced by opportunities to use the heat produced in the conversion of fuel to electricity. Other applications benefit from the increase in power quality offered by certain distributed technologies (e.g., energy storage)." Grid Study at 44.

generation and expansions of existing generation is good policy, both for traditional power plants and for small-scale distributed generation.”²⁰

Commissioner Massey in a recent speech explained why FERC policy should encourage distributed generation:

The FERC has jurisdiction over wholesale sales of power and over transmission in interstate commerce. We must ensure that our policies with respect to interconnection and transmission access, and with respect to the design of wholesale markets, facilitate the integration of distributed generation and value it as a critical resource.

But, one might ask, why should federal regulators care about distributed resources? After all, isn't this area primarily the worry of state and local officials.

Federal policymakers should care for five important reasons. First, these resources offer the opportunity to save money. They can substitute for transmission and distribution system investment, in addition to providing capacity and energy savings. Second, they can certainly improve reliability, a strong federal concern, and provide relief for highly stressed transmission and distribution systems. They can also improve power quality. Third, distributed resources can reduce pollution, especially with some of the new technologies. This is clearly in the national interest.

The fourth reason is the customer choice. We want customers to have a wide range of choices to meet their energy needs. This is, after all, the philosophical underpinning of the entire movement at FERC toward wholesale electricity markets. What better way to offer choice than to provide an opportunity for the customer to generate his own power.

And reason number five is market power. A primary focus of regulators is sharply limiting the exercise of market power. It seems obvious that distributed resources can provide an important check on the market power of the incumbent supplier, and federal policymakers have a keen interest in achieving this goal.

²⁰ Testimony of Pat Wood III, Chairman, Federal Energy Regulatory Commission, Before the Subcommittee on Energy and Air Quality of the Committee on Energy and Commerce, United States House of Representatives, December 12, 2001, at 11.

For these reasons, the Commission has a growing awareness of the value of distributed resources in a market driven policy environment. We want our policy choices to reflect this awareness.²¹

ALJ McCartney's decision would impose substantial new cost burdens on distributed generation without reflecting reasoned consideration whether alternative approaches would allow CAISO to collect CAS charges without imposing undue burdens on distributed generation.²²

b. The Initial Decision's Treatment Of Customer Generation Is Inconsistent With The Commission's Proposed Standard Market Design

ALJ McCartney contends that the ISO "is not seeking to charge behind-the-meter Load served by behind-the-meter Generation for the *use* of the ISO Controlled Grid in the sense of an Energy transaction at all, whether actual or potential." Initial Decision at 98 (emphasis in original). Furthermore, the Initial Decision states that the ISO does not "assume simultaneous outage of behind-the-meter Load in assessing those Loads the Control Area Services Charge." Id. Rather, the Initial Decision states that the "[b]ehind-the-meter Loads 'cause' CAS costs to be incurred and 'benefit' from CAS services even when they are not actually using power transmitted over the ISO Controlled Grid." Id. at 97.

The expanded costs and responsibilities imposed on parties with on-site generation and behind-the-meter load by the Initial Decision conflict with a key tenet of the Commission's proposed SMD. Under the SMD, customers with on-site generation and behind-the-meter loads would be afforded an enhanced role to manage their resources including engage

²¹ Remarks of Commr. W.L. Massey, Distributed Resources Conference and Exhibition, Electric Power Research Institute, March 20, 2002, at 1-2 (emphasis added).

²² In fact, ALJ McCartney adopts the assessment of CAS charges based on the behind-the-meter gross load, but raises the possibility of unbundling the CAS charge in future ratemaking dockets. See Initial Decision at 37.

in demand response. In fact, much demand response can only be offered into the market by loads that are also served by customer generation.

Based on the proposed SMD model, on-site generators would have one of two options under the SMD to address the possibility of future outages and ensure adequate standby power:

(1) Negotiate a bilateral contract with a generator or marketer, or multiple generators and marketers. The extent to which the on-site generator and load is using ISO or RTO services depends on the terms and conditions of the bilateral contract which will likely provide for “across-the-fence” or “within-the-fence” power delivery. A merchant generator might be an aggregator for the standby needs of dozens of on-site generators. Such contracts might depend on the use of demand response, thus limiting the impact that a behind-the-meter load could have on the reliability of the grid should there be a need to access standby service. An ISO or RTO does not incur overhead costs associated with transactions that originate in the bilateral markets to the same extent it incurs costs associated with its full menu of energy and capacity market services that it directly facilitates per Order 2000 and prospectively under an SMD rule. Transmission services including ancillary services would be procured on an a la carte basis at cost of service and the ISO or RTO would not even know nor need to know the nature of the load or facility taking the services.

(2) Lean on the RTO's balancing market and accept power at the LMP during an outage.

Based on the Commission's vision for the SMD, the cost of participation in an RTO for the on-site generators and behind-the-meter loads should be limited to their direct impact on the RTO's grid, and should be substantially less than implied in the Initial Decision.

LATE INTERVENTION SHOULD BE GRANTED

Customer Generators' late intervention is warranted under the standard set forth in Rule 214(d)(1). As required by Rule 214(d)(3)(ii), Customer Generators will accept the record of the proceeding as developed prior to their motion for late intervention.

In Southern Company Services, Docket ER96-2573-001, FERC reversed course with respect to its reporting obligations for sellers charging market-based rates. Recognizing the change in policy and the importance of the issue, FERC adopted a liberal approach to late intervention. 87 FERC ¶ 61,214, 61,847 (1999). Here too, FERC has reversed course with respect to assessment of CAISO charges on parties with retail customer generation (compare the decisions by ALJ Leventhal and McCartney). As in Southern Company Services, the issue here is of significant importance, both with respect to treatment of QFs and other generators in California and as a precedent for similar assessments that other ISOs and RTOs may be expected to impose in other regions predicated on ALJ McCartney's Initial Decision. Considerations of procedural fairness favor liberal intervention.

The Commission has granted motions for late intervention and leave to file briefs on exceptions in previous proceedings with similar procedural postures. See Dakota Gasification Co., et al., Opinion and Order Reversing Initial Decision, 77 FERC ¶ 61,271 (1996) (granting North Dakota's opposed motion for late intervention and brief on exceptions filed a month after issuance of Initial Decision); Municipal Electric Utilities Ass'n of New York State v. Power

Authority of State of New York, Opinion Affirming Initial Decision, 48 FERC ¶ 61,124 (1989) (granting New York PSC’s opposed motion for late intervention and leave to file a brief on exceptions more than a month after the release of the Initial Decision, since the intervention did not “require a reopening of the record for additional evidence” and did “not delay or disrupt the proceeding”). See also Lakehead Pipe Line Co., L.P., Opinion and Order Affirming in Part and Modifying in Part Initial Decision, 71 FERC ¶ 61,338 (1995) (granting Amoco Canada Petroleum Company’s unopposed motion to intervene out-of-time and brief opposing exceptions filed after issuance of ALJ’s Initial Decision); CNG Transmission Corp., Order Incorporating Record as Developed and Consolidating Proceedings, 46 FERC ¶ 61,284 (1989) (granting the West Virginia Congressional Delegation’s motion to intervene out-of-time after the issuance of the ALJ’s Initial Decision, and treating the Natural Gas Supply Association’s opposed “Amicus Curiae Brief Opposing Exceptions” as a motion to intervene out-of-time and brief opposing exceptions and granting such motion).

MOTION TO INTERVENE OUT-OF-TIME
SHOULD BE GRANTED

Customer Generators’ late intervention is warranted under the standard set forth in Rule 214(d)(1). As required by Rule 214(d)(3)(ii), Intervenors will accept the record of the proceeding as developed prior to their motion for late intervention.

DESCRIPTION OF INTERVENORS

The Electricity Consumers Resource Council (“ELCON”) is the national association representing large industrial consumers of electricity. Most ELCON members also own and operate on-site generation such as cogeneration. ELCON was organized to promote the development of coordinated and rational federal and state policies that will assure an adequate,

reliable and efficient supply of electricity for all users at competitive prices. ELCON's member companies come from virtually every segment of the manufacturing community.

The United States Combined Heat and Power Association (“USCHPA”) is the national trade association of companies who manufacture, install, and use CHP equipment as a means of optimizing energy efficiency and minimizing environmental emissions along with other benefits. USCHPA participates in regulatory and legislative matters, as well as public outreach and education, in an effort to obtain a policy environment conducive to CHP and a public educated to its merits.

The American Chemistry Council (“ACC”) is a nonprofit trade association whose member companies represent more than ninety percent of the productive capacity of basic industrial chemicals in the United States. The manufacturing processes of many ACC member companies are highly energy-intensive. In addition, the chemical industry uses a substantial amount of self-generated electricity. Total electricity used by the industry, purchased plus self-generated, represents approximately eighteen percent of industrial electricity consumption in the United States and approximately six percent of national electricity consumption.

The American Iron and Steel Institute (“AISI”) is the principal trade association of the North American steel industry. Its member companies account for about seventy percent of the raw steel production in the United States. The steel industry is one of the most energy-intensive sectors in the United States. The cost of electricity for AISI members may constitute as much as twenty percent of the manufacturing cost of a steel mill product.

The American Forest & Paper Association (“AF&PA”) is the trade association of the forest, pulp, paper, paperboard and wood products industry in the United States. It represents

member companies engaged in growing, harvesting, and processing wood and wood fiber, manufacturing pulp, paper, and paperboard products from both virgin and recycled fiber, and producing engineered and traditional wood products. AF&PA members include manufacturers of over 80 percent of the paper, wood, and forest products produced in the United States and the members include small non-industrial private landowners, large multiproduct producers, and family-run mills. As such, AF&PA is the leading voice of the forestry, wood, and paper industries in the United States. AF&PA's members are among the nation's largest consumers of electric power, purchasing over 82 billion kilowatt-hours of electricity annually nationwide.

The American Petroleum Institute (“API”) is the primary petroleum trade association that represents over 400 companies engaged in all aspects of the U.S. oil and natural gas industry, including exploration, production, refining, distribution and marketing. Combined Heat and Power (CHP) technologies are an important tool for upstream and downstream segments of the industry.

The National Petrochemical & Refiners Association (“NPRA”) is a national trade association representing the owners or operators of almost all of the United States petroleum refining capacity, as well as most petrochemical producers in the country. A majority of these companies are Customer Generators and, indeed, constitute the second largest source of on-site generation. NPRA members manufacture and distribute all types of gasoline, home heating oil, and aviation fuel. It is crucial for the nation’s transportation and heating fuel supply that these energy producers themselves have uninterrupted electricity supply.

The Fertilizer Institute (“TFI”) is the national trade association of the fertilizer industry. In that capacity, TFI represents the interests of manufacturers and distributors of nitrogen, potash

and phosphate fertilizers throughout the United States. Many of these companies operate cogeneration facilities at their manufacturing plants in order to supply all or part of their electric power needs. Other TFI-member companies are considering new or additional investments in such facilities. As a result, TFI has a significant interest in any proceeding which could undercut or adversely affect the economic viability of these facilities.

The Chemical Industry Council of California (“CICC”) is a not-for-profit trade association representing the business of chemistry in the State of California. It’s members manufacture, market and distribute chemicals in California. There are over 1500 chemical manufacturing facilities in California directly employing over 80,000 people and accounting for 4.3% of the state’s manufacturing workforce. Chemical manufacturing is an energy intensive process and CICC members are significant consumers of electric power.

NOTICES AND COMMUNICATIONS

Notices and communications should be sent to:

Sara D. Schotland, Esq.
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801

John W. Jimison, Esq.
Executive Director and General Counsel
U.S. Combined Heat & Power Association
1225 19th Street, NW
Washington, D.C. 20036-2453

Respectfully submitted,

/s/ Sara D. Schotland

Sara D. Schotland, Esq.
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
Phone: 202-974-1500
Fax: 202-974-1999
Email: Sschotland@cgsh.com
Counsel for ELCON

/s/ John A. Anderson

Dr. John A. Anderson
Executive Director
Electricity Consumers Resource Council (ELCON)
1333 H Street, NW, West Tower, Suite 800
Washington, DC 20005
Phone: 202-682-1390
Fax: 202-289-6370
Email: janderson@elcon.org, jhughes@elcon.org

/s/ John W. Jimison

John W. Jimison, Esq.
Executive Director and General Counsel
U.S. Combined Heat and Power Association
1225 19th Street, N.W., Suite 800
Washington, D.C. 20036-2453
Phone 202-728-9049
Fax 202-822-0109
Email: johnj@admgt.com

/s/Mark Nelson

Mark Nelson
Vice President
American Chemistry Council
1300 Wilson Boulevard
Arlington, VA 22209
Phone: 703-741-5900
Fax: 703-741-6097
Email: mark_nelson@americanchemistry.com

/s/ James D. Schultz

James D. Schultz
Vice President – Environment & Energy
American Iron and Steel Institute
1101 17th Street, NW, Suite 1300
Washington, DC 20036-4700
Phone: 202-452-7180
Fax: 202-463-6573
Email: jschultz@steel.org

/s/ Red Cavaney

Red Cavaney
President
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005
Phone: 202-682-8100
Fax: 202-682-8110
Email: felmyj@api.org

/s/ Robert G. Slaughter

Robert G. Slaughter
President and General Counsel
National Petrochemical & Refiners Association
1899 L Street, NW
Washington, DC 20036
Phone: 202-457-0481
Email: mcbride@npra.org

/s/ James D. Senger

James D. Senger, Esq.
Kirkland & Ellis
655 15th Street, NW
Washington, DC, 20005
Phone: 202-879-5068,
Email: james_senger@dc.kirkland.com
Counsel for The Fertilizer Institute

/s/ Stephen D. Murrill

Stephen D. Murrill
Executive Director
Chemical Industry Council of California
1029 K Street, Suite 46
Sacramento, CA 95814
Phone: 916-266-0600
Fax: 916-266-0605
Email: sdmurrill@cic-ca.org

/s/ Sharon H. Kneiss

Sharon H. Kneiss
Vice President, Regulatory Affairs
American Forest & Paper Association
1111 19th Street, NW
Suite 800
Washington, DC 20036
Phone: 202-463-2580
Fax: 202-463-2423
Email: sharon_kneiss@afandpa.org

Dated: June 10, 2002

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Late Intervention and Brief on Exceptions of Electricity Consumers Resource Council (ELCON), United States Combined Heat and Power Association (USCHPA), American Chemistry Council (ACC), American Iron and Steel Institute (AISI), American Forest & Paper Association (AF&PA), American Petroleum Institute (API), National Petrochemical & Refiners Association (NPRA), The Fertilizer Institute (TFI), and Chemical Industry Council of California (CICC) were mailed today to parties on the service list of this proceeding by U.S. mail, postage prepaid.

Dated at Washington, D.C., this 10th Day of June, 2002.

/s/ Jennifer A. Morrissey

Jennifer A. Morrissey
Law Clerk
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Ave., NW
Suite 9000
Washington, D.C. 20006-1801
(202) 974 -1500