121 FERC ¶ 61,065
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Pacific Gas & Electric Company Docket No. ER05-1284-000

Order Denying Motion to Permit Further Litigation

(Issued October 18, 2007)

1. As provided for in a recently approved Settlement Agreement,[1] the Cogeneration Association of California[2] and the Energy Producers and Users Coalition[3] (collectively, CoGen) filed a Motion for Procedural Determination to Permit Further Litigation. Pursuant to its Motion, CoGen seeks to relitigate the propriety of Pacific Gas and Electric Company's (PG&E) standby rate design. This rate design was recently approved in a prior proceeding. For the reasons set forth below, we deny the motion.

I. Background

A. Docket No. ER03-409-000 (TO6)

2. On January 13, 2003, in Docket No. ER03-409-000, PG&E filed a proposed change in its transmission rates (TO6 rates) under its Transmission Owner Tariff. On March 12, 2003, the Commission accepted the TO6 rates for filing, suspended them and

[1] *Pacific Gas & Electric Co.*, 115 FERC ¶ 61,220 (2006).

[2] This association represents the power generation, power marketing and cogeneration operation interests of the following entities: Coalinga Cogeneration Company, Mid-Set Cogeneration Company, Kern River Cogeneration Company, Sycamore Cogeneration Company, Sargent Canyon Cogeneration Company, Salinas River Cogeneration Company, Midway Sunset Cogeneration Company and Watson Cogeneration Company.

[3] The Coalition represents the electric end use and customer generation interests of the following companies: Aera Energy LLC, BP West Coast Products, Chevron U.S.A., Inc., ConocoPhillips Company, ExxonMobil Power and Gas Services Inc., Shell Oil Products US, THUMS Long Beach Company, Occidental Elk Hills, Inc., and Valero Refining Company – California.

made them effective August 13, 2003, subject to refund and set them for hearing.[4] As relevant here, PG&E proposed to increase the standby reservation charge for standby customers.

3. On April 30, 2004, PG&E filed an Offer of Partial Settlement that resolved all but one issue with CoGen. The remaining issue was whether PG&E's proposed rate design for rates charged to standby customers was just and reasonable. Specifically, the issue was whether the standby class is different from other classes in such a way that PG&E may allocate costs to the standby class on a contract demand basis rather than their contribution to system peak.

4. PG&E asserted that its standby rate design was just and reasonable because standby transmission service is fundamentally different from all other classes of transmission service. Particularly, PG&E noted that standby service differs from full requirements service because it is typically the function of random outages associated with customer generating equipment failure. PG&E asserted that no other customers have such extreme and unpredictable variation during summer peak hours.

5. PG&E claimed that its method for assigning cost responsibility to standby service was based on a reasonable modification of the 12 coincident peak (12-CP) methodology and that this method is consistent with the unique load characteristics of the standby class. PG&E claimed it used a probabilistic analysis to assign a fair level of cost responsibility to the standby class.[5]

6. CoGen stated that the variability of the standby class demand does not justify adjustment to the 12-CP method of allocation. CoGen claimed that there was no evidence that a class's variability at times other than system peak drives PG&E's transmission design and investment.

7. CoGen also claimed that the standby class demand is not unpredictable. They contended that the five-year history of the standby class shows a consistent amount of class demand at the system peak.

8. CoGen asserted that the 12-CP methodology is the basis on which costs should be allocated. CoGen also argued that there was no evidence on the record to support PG&E'S claim that PG&E must reserve some additional capacity to serve possible loads of standby customers. CoGen supported this argument by noting that no deficiencies

[4] *Pacific Gas & Electric Co.*, 102 FERC ¶ 61,270 (2003).

[5] The proposed method assigned retail transmission costs to the standby class based on 27.1 percent of the total contract demand of that class. The 27.1 allocation factor was developed on the basis of probabilities analyses.

identified during PG&E's transmission assessment could be attributed to the standby class and that no contingency related solely to a standby customer's generator required a system improvement. CoGen also asserted that PG&E's use of the contract demand is not an appropriate substitute for determining standby class cost responsibility since contract demand is not a factor in PG&E's transmission planning process.

9. Commission Trial Staff (Trial Staff) argued that PG&E's rate design was just and reasonable. Trial Staff asserted that PG&E's use of adjusted contract demand to determine rates for its standby customers was not unduly discriminatory because standby customers are not similarly situated to other customer classes and PG&E has justified its method. Trial Staff also agreed with PG&E that use of CoGen's proposed 12-CP method would result in an under-assignment of costs to the standby class because they would pay for about 40 MW of coincident peak responsibility when standby demand has actually been much higher.

10. The hearing was held August 31, 2004. On December 13, 2004, after the filing of briefs but prior to the Initial Decision, the Commission consolidated the TO6 proceeding with Docket No. EL05-35-000.[6] Docket No. EL05-35-000 was a subsequent proceeding under section 206 of the Federal Power Act, 16 U.S.C. § 824e (2007), to examine the justness and reasonableness of PG&E's allocation methodology for standby service. It was determined that the two dockets were inextricably linked, hence the dockets were consolidated.

11. On February 1, 2005, PG&E, CoGen, and Trial Staff reported to the presiding judge that the findings regarding rate design in the TO6 case should be applied to the Commission's investigation in Docket No. EL05-35-000. The parties agreed that there was no need for any additional proceedings in Docket No. EL05-35-000 and that whatever allocation method was determined by the Commission to be just and reasonable in the TO6 case should be applied to Docket No. EL05-35-000 (the 206 case).[7]

12. On February 9, 2005, the presiding judge issued an initial decision in which she noted that PG&E is obligated to provide standby service, and PG&E's proposed standby customer class rate based on contract demand is not *per se* unreasonable or discriminatory merely because PG&E uses a 12-CP methodology for other customer class rates.[8] The presiding judge found that, given the unpredictability of both the timing

[6] *Pacific Gas & Electric Co.*, 109 FERC ¶ 61,266 at P 21 (2004)

[7] *Pacific Gas & Electric Co.*, 110 FERC ¶ 63,026 at P 9 (2005) (Initial Decision).

[8] *Id.* P 38, 43.

of outages and the demand of individual members of the standby customer class, PG&E met its burden of proving that the standby customer class is not similarly situated to PG&E's other customer classes.

13. However, the presiding judge found that PG&E had not met its burden to prove that its particular proposed standby transmission rate design was just and reasonable.[9] The presiding judge found that the main problem was how PG&E generated its 27.1 percent allocation factor.[10] Therefore, the presiding judge found that PG&E's proposed rate was unjust, unreasonable, and unduly discriminatory.[11]

14. Exceptions to the initial decision were filed by PG&E and Trial Staff, and a brief opposing exceptions was filed by CoGen.

15. No exceptions were filed to the presiding judge's conclusions that: (1) PG&E's standby rate was not *per se* unreasonable or discriminatory merely because PG&E uses a 12-CP methodology for other rate classes; (2) the standby customer class is not similarly situated to other customer classes; and (3) PG&E standing ready to provide transmission service to standby customers on demand is a valuable service and rates based on this potential use of transmission, rather than actual use, are not *per se* unreasonable and may be reasonable if they are based on reasonable extrapolations from historical data on operating demand. The Commission affirmed these unchallenged conclusions.[12]

16. However, the Commission disagreed with the presiding judge's other conclusions, finding substantial and persuasive evidence to support PG&E's proposed allocation of costs to the standby class of customers, i.e., the use of the probabilistic methodology and the 27.1 percent factor.[13]

17. The Commission concluded that PG&E's probabilistic methodology fairly allocated the costs of PG&E's transmission system to the standby class, providing the necessary nexus between costs incurred and rate responsibility.[14]

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[9] *Id.* P 61.

[10] *Id.* P 58.

[11] *Id.* P 62.

[12] *Pacific Gas & Electric Co.*, Opinion No. 482, 113 FERC ¶ 61,084 at P 24(2005).

[13] *Id.* P 41.

[14] *Id.* P 63.

18. Moreover, the Commission specifically found that the 12-CP methodology was not appropriate for the design of PG&E's standby class rates.[15] The Commission determined that the 12-CP methodology did not fairly allocate the costs to the standby customers because the standby customer class is not similarly situated with PG&E's other classes of customers due to their unpredictability and demand for service from PG&E only when their own generators are unable to supply their own needs.[16]

19. CoGen filed a request for rehearing. First, CoGen argued that the Commission had failed to reference any evidence as to what particular costs PG&E actually incurs to stand ready to provide transmission service that may be imposed by the standby customers.[17] The Commission found that the issue of incremental transmission costs was not relevant because all rates for all classes of customers, as advocated by all the parties (including CoGen), were based on PG&E's annual transmission revenue requirement rather than any incremental transmission costs.[18]

20. CoGen also argued that the 12-CP methodology reasonably allocated costs to the standby customer class. The Commission rejected this argument because the 12-CP methodology does not fairly allocate costs to PG&E's standby customer class because that class is not similarly situated to PG&E's other classes due to its unpredictability.[19] The Commission found that PG&E's probabilistic methodology fairly allocated the costs of PG&E's transmission system to the standby customer class and was supported by substantial evidence.[20]

21. CoGen disagreed with the contention that the unpredictability of the standby customer class was a cost driver. The Commission found that CoGen ignored the fact that PG&E must be prepared to serve the entire contract demand of each standby

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[15] *Id.* P 45.

[16] *Id.* P 64.

[17] *Pacific Gas & Electric Co.*, 114 FERC ¶ 61,324 at P 10.

[18] *Id.* P 11. The Commission also found that CoGen had failed to take exception to the presiding judge's findings with regard to cost causation and thus could not raise the issue on rehearing. *Id.* P 12, citing 18 C.F.R. § 385.712(d) (2005).

[19] *Id.* P 13.

[20] *Id.*

customer when that customer's own generation equipment fails and the customer instantaneously requires service from PG&E. Thus, the Commission rejected CoGen's argument that the 12-CP methodology reasonably allocated costs to the standby customer class.[21]

22. The Commission noted that CoGen had every opportunity to challenge PG&E's methodology, but that CoGen instead focused on its alternative 12-CP methodology, which the Commission found was an inappropriate method to allocate costs and design rates for standby transmission customers. Moreover, the presiding judge accepted the probabilistic methodology (which CoGen did not take exception to and the Commission affirmed) and only rejected PG&E's rates based on an asserted failure to update the analysis.[22] Thus, the Commission denied CoGen's request for rehearing in its entirety.[23]

23. Finally, CoGen asked that the proceeding be remanded for further evidentiary hearings, possibly in conjunction with the pending PG&E TO8 proceeding in Docket No. ER05-1284-000. The Commission found that this proposal was without justification. According to the Commission, the record was adequate to decide the matter.[24]

B. Docket No. ER05-1284-000 (TO8)

24. On August 1, 2005, PG&E filed its eighth proposed change to its electric transmission rates under its Transmission Owner tariff (TO8 rates). On September 26, 2005, the Commission accepted the TO8 rates for filing, suspended them, made them effective March 1, 2006, subject to refund and set them for hearing.[25]

25. On April 3, 2006, a Settlement Agreement reached by all the parties and Trial Staff was filed with the Commission. The revised section 3.4 of the Settlement provided that the issue of whether further litigation of the standby rate design in this docket is

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[21] *Id.* P 14.

[22] *Id.* P 19.

[23] On May 24, 2006, CoGen filed an appeal of the Commission's orders in the TO6 proceeding with the U.S. Court of Appeals for the District of Columbia Circuit. That case – *Cogeneration Association of California, et al. v. FERC,* D.C. Cir., No. 06-1178 – remains pending before the court.

[24] *Id.* P 29.

[25] *Pacific Gas & Electric Co.*, 112 FERC ¶ 61,336 (2005).

permissible would be directly submitted to the Commission.[26] Notwithstanding the fact that the Commission had recently accepted PG&E's standby rate design, CoGen asserted that it would have raised the issue through submitted testimony in the TO8 proceeding and would have sought to relitigate the issue.[27] The Parties agreed that CoGen would file an opening brief addressing whether CoGen would be allowed to relitigate the standby rate design issue, previously litigated in TO6. PG&E and other parties would then file reply briefs addressing why CoGen should not be allowed to relitigate the issue.[28]

II. CoGen's Motion

26. As envisioned in the TO8 proceeding Settlement Agreement, CoGen filed a motion seeking a Commission order permitting litigation of the question of whether the allocation of the retail transmission revenue requirement to the standby service class in the TO8 proceeding is just and reasonable. CoGen concedes that the issue was previously litigated but requests the opportunity to conduct discovery and present new evidence.[29]

27. CoGen claims that there are obvious differences between the TO6 and TO8 cases. CoGen relies on the fact that PG&E performed a new probabilistic study to calculate the allocation factor for the standby class. Furthermore, according to CoGen, there is a significant increase in the revenue requirement allocated to the standby class between the TO6 and TO8 cases.[30]

28. CoGen argues that the Commission allows further litigation in at least three instances: (1) because each rate case is a new case with new facts in a new test period; (2) where there is new evidence or changed circumstances in the new case; and (3) to allow the proponent to meet its burden of proof using the facts of the new case. According to CoGen, this precedent gives it the right to conduct discovery and further litigate the standby rate design issue.[31]

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[26] Originally, the Settlement called for PG&E and CoGen to request that a Presiding Judge determine the retail rate issue. After the motion was filed, the parties determined that the better procedure would be to submit the issue directly to the Commission. The Settlement Agreement was revised accordingly. *Id.* P 3 and P 4.

[27] *Id.* P 8.

[28] *Id.* P 9.

[29] CoGen Motion at 2.

[30] *Id.* at 4.

[31] *Id.* at 6.

29. CoGen claims that the new evidence includes: (1) the actual costs incurred by PG&E; (2) the level of service provided to standby customers; and (3) the service and costs imposed by the other customer classes.[32]

30. CoGen asserts that new facts or circumstances exist in the case. CoGen states that, "[I]t is unknown whether this [TO8] analysis was conducted in the same manner as the TO6 case, and it is unknown whether there may be any challenges to the results."[33] CoGen also relies on the fact that the revenue requirement assigned to the standby class increased as evidence of a changed circumstance.[34]

31. CoGen states that it may produce evidence that the significant increase in allocation to the standby class is not reflective of an increase in costs incurred to serve that class.[35] CoGen also claims that it would develop evidence regarding the cost causation responsibility of the standby class.[36]

32. CoGen proposes that it be allowed to conduct discovery and submit testimony and other evidence. After CoGen takes these actions, the Commission can determine if CoGen's evidence meets the threshold standard.[37]

III. Oppositions

33. Both PG&E and the Trial Staff (collectively, Opponents) oppose CoGen's Motion. According to Opponents, the Commission has a longstanding policy against re-litigating issues once final determinations have been made.

34. Opponents argue that CoGen must present new or changed circumstances in order to warrant the Commission's reconsideration of the recently approved rate design.[38] Opponents assert that CoGen has failed to meet this standard. According to Opponents, CoGen's alleged "changed circumstances" pertain to whether the allocation factor was

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[32] *Id.* at 9.

[33] *Id.* at 11.

[34] *Id.*

[35] *Id.* at 12 (emphasis added).

[36] *Id.*

[37] *Id.* at 17.

[38] S*ee, e.g.*, Trial Staff Answer at 8, 12-15.

computed correctly, but CoGen is not challenging the computation. Opponents contend that CoGen is challenging PG&E's use of a probabilistic analysis and none of CoGen's allegations of changed circumstances apply to PG&E's use of this analysis.

35. Opponents also disagree with CoGen's contention that it had no opportunity for discovery. Opponents note that the standby rate design issue was the sole issue litigated in the TO6 proceeding and in that proceeding CoGen had full opportunity to conduct discovery, depose PG&E's witness, file direct and answering testimony, and cross-examine PG&E's witness at length during the hearing.[39] Trial Staff also notes that there was opportunity for limited discovery in the TO8 proceeding and that CoGen took advantage of this opportunity.[40] Opponents further argue that relitigation is only allowed if the proponent comes forward with new evidence or changed circumstances that may lead to a different outcome (which they claim CoGen has failed to do here), and not for the purpose of pursuing discovery.

36. Moreover, Opponents disagree with CoGen's contention that PG&E must prove anew in each rate case that the methodology used to allocate revenue to the standby class produces a reasonable result.[41] According to Opponents, PG&E does not have to establish the continued reasonableness of unchanged rates or unchanged attributes of its rate structure. Because PG&E did not change the probabilistic methodology, PG&E is not required to again prove the reasonableness of this methodology.

37. Finally, Trial Staff notes that in the TO6 proceeding the Commission rejected CoGen's request to reopen the record or remand for further hearing. Trial Staff contends that to allow relitigation of the standby rate design issue would be inconsistent with the Commission's policy of avoiding the waste of resources and its desire to achieve finality in its decision making.[42]

IV. Discussion

38. Collateral estoppel prohibits a party from bringing a different claim on an issue that has already been decided.[43] The issue must have been actually litigated and determined, and the determination must be essential to that judgment.[44]

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[39] Trial Staff Answer at 16, PG&E Answer at 1, 4.

[40] Trial Staff Answer at 16, citing Settlement Judge's Status Report, Docket No. ER05-1284-000, issued November 15, 2005.

[41] *See, e.g.*, Trial Staff Answer at 16-17; PG&E Answer at 5.

[42] Trial Staff Answer at 19-20.

[43] Restatement (Second) of Judgments at §§ 17(c), 27.

39. Both the courts and the Commission have previously found that, to the extent that "new evidence" is not presented or "changed circumstances" are not demonstrated, preclusion doctrines such as collateral estoppel apply to administrative rate cases. For example, in *Tagg Bros. & Moorhead v. U.S.*, the Supreme Court held that a rate order is not *res judicata* where a party presents new evidence that warrants the change.[45] Similarly, the D.C. Circuit found that the Federal Power Commission could "change its mind if *new evidence or changed circumstances arise*."[46]

40. The Commission has reached a similar result. For example, in 1978, the Commission considered the interplay between collateral estoppel and ratemaking principles, stating that "[i]n the absence of new or changed circumstances requiring a different result, there appears no reason why substantive ratemaking principles, once established, should not continue to be applied."[47] In *Alamito Co.*, the Commission expressly stated that its policy against relitigation of issues is not constrained by the limits of the doctrine of collateral estoppel. The Commission explained that "in the absence of new or changed circumstances requiring a different result, it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been finally determined."[48]

41. For these reasons, CoGen's contention that PG&E has the burden of establishing the reasonableness of the standby rate design methodology in this case is incorrect. The statutory obligation of the utility is not to prove the continued reasonableness of the unchanged attributes of its rate structure.[49] The D.C. Circuit has stated that it "cannot accept the proposition that because a company files for higher rates, it bears the burden of

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[44] *Norfolk and Western Ry. Co. v. U.S.*, 768 F2d 373 (D.C. Cir. 1985).

[45] 280 U.S. 420, 445 (1930) (emphasis added).

[46] *FTC v. Texaco*, 555 F2d 862, 934-35 (D.C. Cir.), *cert. denied*, 431 U.S. 974, *reh. denied*, 434 U.S. 883 (1977) (footnotes omitted) (emphasis in original).

[47] *Central Kansas Power Co., Inc.*, 5 FERC ¶ 61,291 at 61,621 (1978). *See, also, CNG Transmission Corp.*, 51 FERC ¶ 63,003 at 65,007 (1990) ("[w]here a party seeks to relitigate issues previously ruled upon by the Commission, without showing any new or changed circumstances requiring a different result, summary disposition is appropriate with respect to those issues").

[48] *Alamito Co.*, 41 FERC ¶ 61,312 at 61,829 (1987) (emphasis added), *order denying reconsideration and granting request for clarification*, 43 FERC ¶ 61,274 (1988).

[49] *City of Winnfield, Louisiana v. FERC*, 744 F2d 871 (D.C. Cir 1984).

proof on those portions of its filing that represent no departure from the status quo… The emphasis is on making petitioner justify changes in rates, not the constant elements."[50] In this instance, PG&E calculated the standby servicerates using the previously approved probabilistic methodology. Thus, PG&E is not required to establish the continued reasonableness of that methodology.

42. This conclusion does not "forever bar" CoGen from reexamining the standby rate design issue, despite CoGen's concern to the contrary.[51] Under the applicable authorities, the preclusive effect of collateral estoppel ends when a party presents new evidence or a change in circumstances that warrants reopening the issue.

43. However, in this instance, CoGen has failed to present the necessary new evidence or significant changed circumstances that would warrant our authorizing relitigation of the standby rate design issue.

44. CoGen contends that there are two changed circumstances that warrant relitigation of the standby rate design issue. The first change that CoGen identifies is PG&E's new probabilistic analysis, which used the previously approved methodology but an updated test period.[52] The second change is what CoGen deems a significant increase in the revenue requirement allocated to the standby class. These changes are relevant to issues that involve those inputs, such as how updated determinants affect the numerical result of the probabilistic analysis, and the proper level of the revenue requirement allocated to the standby class.[53] However, the changes identified by CoGen are not relevant to the standby rate design issue that CoGen has raised here: whether PG&E may use a probabilistic analysis to determine the percentage of the aggregate contract demand of all customers in the standby class that PG&E must stand ready to serve. That rate design issue was fully litigated and decided by the Commission in the TO6 proceeding.

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[50] *Id.* at 877 (citing *PSC of NY v. FERC*, 642 F2d 1335, 1345 (D.C. Cir. 1980)).

[51] CoGen Motion at 9.

[52] For the TO8 proceeding, PG&E performed an updated probabilistic analysis based on a new test period that resulted in a decrease in the cost allocation factor for standby service from 27.1 percent to 23 percent. Trial Staff Answer at 12.

[53] CoGen could have presented challenges on these issues (*e.g.*, whether the cost allocation factor was computed correctly) based on the changed circumstances it identified, but it did not do so. The previously approved settlement in the TO8 proceeding reserved only the standby rate design issue for further proceedings before the Commission. *Pacific Gas & Elec. Co.*, 115 FERC ¶ 61,220 at P 3 (2006).

45. Furthermore, CoGen's contention that PG&E must establish that the allocation reflects the historical actual usage of the standby class is inconsistent with our previous determinations. In the TO6 proceeding, we affirmed the presiding judge's finding that standby service rates based on potential use of transmission, rather than actual use, are not *per se* unreasonable and may be reasonable if they are based on reasonable extrapolations from historical data on operating demand.[54] CoGen cannot simply ignore this conclusion.[55]

46. Finally, CoGen asks the Commission to permit it to conduct discovery and submit testimony, stating that we can then establish "some further evidentiary hurdle" for CoGen to meet.[56] This request ignores that the "hurdle" CoGen must meet already is established by case law and previous Commission decisions. Because CoGen has had the opportunity to litigate this issue once, including conducting extensive discovery, and also had the opportunity to conduct limited discovery in this proceeding, it is only reasonable that CoGen be required to show a significant change in circumstances or produce new evidence at this juncture. For the motion currently under consideration to be granted, CoGen was required to demonstrate, that circumstances have changed significantly so as to warrant further expenditure of time and resources on these previously litigated issues. None of CoGen's assertions show that there was a significant change in circumstances that is relevant to the rate design issue that CoGen has raised. Furthermore, CoGen has asserted no new evidentiary basis which would justify reexamining this issue.

V. Conclusion

47. In sum, Commission policy favors the avoidance of relitigating the same issues in a company's successive rate cases. CoGen is seeking the same goal it pursued in the TO6 proceeding, establishing that the 12-CP methodology is more appropriate for determining standby class rates than PG&E's probabilistic methodology. Because Cogen presents no new evidence or changed circumstances that are relevant to that rate design issue, it is barred by Commission policy from relitigating that issue here.

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[54] *Pacific Gas & Electric Co.*, 113 FERC ¶ 61,084 at P 22, 24.

[55] In addition, CoGen states that it "will certainly provide additional evidence addressing cost causation in the TO8 case." CoGen Motion at pg. 13. However, Cogen neither articulates that evidence nor explains why the evidence would alter the Commission's findings in the TO6 proceeding..

[56] CoGen Motion at pg. 16.

The Commission orders:

The Cogeneration Association of California and the Energy Producers and User Coalition's Motion for Procedural Determination to Permit Further Litigation is denied for the reasons set forth above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.