

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Joint Application to Establish Non-Bypassable	)	
Charge (“NBC”) for Above-Market Costs	)	
Associated with Tree Mortality Power Purchase	)	Application No. 16-11-005
Agreements (“Tree Mortality”) in Compliance with	)	(Filed November 14, 2016)
Senate Bill 859 and Resolution E-4805.	)	
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**OPENING COMMENTS OF THE  
CALIFORNIA COMMUNITY CHOICE ASSOCIATION  
ON THE PROPOSED DECISION**

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In accordance with Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), the California Community Choice Association (“CalCCA”) hereby provides the following opening comments on the *Proposed Decision of Administrative Law Judge Doherty*, issued on November 8, 2018 (“Proposed Decision”).

**I. INTRODUCTION AND SUMMARY**

This proceeding’s purpose is “to establish a non-bypassable charge for above-market costs associated with tree mortality power purchase agreements [(“TM NBC”)] in compliance with [Senate Bill (“SB”) 859 (Committee on Budget and Fiscal Review, 2016) and Commission Resolution E-4805.”<sup>1</sup> Because of common principles and comparable methodologies, close coordination has occurred between this proceeding and the Power Charge Indifference Adjustment (“PCIA”) proceeding (R.17-06-026).<sup>2</sup>

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<sup>1</sup> See *Scoping Memo and Ruling of Assigned Commissioner*, dated May 30, 2018 (“Scoping Memo”) at 1-2. See also Proposed Decision at 2.

<sup>2</sup> See, e.g., Proposed Decision at 5, 20 (describing the need for coordination between this proceeding and the PCIA proceeding).

CalCCA is a trade association representing operational community choice aggregation programs in California. In addition to being an active party in the PCIA proceeding, CalCCA has been an active party in this proceeding. In fact, CalCCA has been one of three active parties in this proceeding, together with the Public Advocate’s Office (“Cal Advocates”)<sup>3</sup> and the joint investor-owned utilities (“Joint IOUs”). In addition, the Commission’s Energy Division has been an active participant in and contributor to this proceeding by facilitating a workshop and developing a draft proposal.<sup>4</sup> Administrative Law Judge (“ALJ”) Doherty has also contributed to the record of this proceeding by issuing a ruling requesting supplemental information from the Joint IOUs on historic renewable energy credit (“REC”) prices.<sup>5</sup> Finally, the record for this proceeding has been supplemented by information gained in or associated with the PCIA proceeding (R.17-06-026).<sup>6</sup>

In accordance with Rule 14.3(b), the following is a summary of CalCCA’s opening comments and recommend changes to the Proposed Decision (as delineated in Appendix A – Requested Changes to the Proposed Decision):

- CalCCA appreciates the efforts of ALJ Doherty, as reflected in the Proposed Decision, to review and include supplemental evidence from the Joint IOUs on REC valuation attributes associated with the tree mortality power purchase agreements (“TM Contracts”).
- The Proposed Decision adopts reasonable processes for discovery of values associated with the TM Contracts, with a limited exception.

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<sup>3</sup> As described in the Proposed Decision, pursuant to Senate Bill (“SB”) 854 (2018) the Office of Ratepayer Advocates (“ORA”) was renamed, and references herein to Cal Advocates include pleadings and documents submitted in this proceeding by ORA. (See Proposed Decision at 5.)

<sup>4</sup> See Proposed Decision at 4.

<sup>5</sup> See Proposed Decision at 5.

<sup>6</sup> See, e.g., Proposed Decision at 18 (relying on Resource Adequacy (“RA”) values established in Decision (“D.”)18-10-019 (“PCIA Decision”)).

- The Proposed Decision’s conclusion that the value of unsold TM Contract attributes should be zero in instances where an IOU uses the unsold attribute *for compliance purposes* is legal error and should be corrected.
- CalCCA appreciates the Proposed Decision’s acknowledgement of SB 901 and requests that discussion within the Proposed Decision be slightly expanded to recognize Community Choice Aggregators (“CCAs”) as potential counterparties under SB 901 for any extensions to the TM Contracts.
- Given the possibility for questions concerning the Joint IOUs’ implementation tariffs, CalCCA requests that the advice letters ordered by the Proposed Decision be designated as Tier 2, not Tier 1.

## II. COMMENTS

### A. CalCCA Appreciates ALJ Doherty’s Efforts To Discover And Supplement The Record With Information From Actual Transactions

As noted above and described in the Proposed Decision, “on July 9, 2018 ALJ Doherty issued a ruling [(“Price Discovery Ruling”)] requesting supplemental information from the Joint IOUs regarding historic renewable energy credit prices.”<sup>7</sup> ALJ Doherty observed that “[t]he IOUs and various [load-serving entities (“LSEs”)] have engaged in, or will soon engage in, arms-length transactions for the sale of RECs in accordance with each IOU’s [Renewables Portfolio Standard (“RPS”)] sales framework, as approved by the Commission in Decision (D.) 17-12-007.”<sup>8</sup> ALJ Doherty reasonably concluded from this that “the prices for the RECs revealed by these transactions may be useful in constructing an administrative benchmark value for the RECs at issue in this proceeding.”<sup>9</sup>

CalCCA agrees that using information from arms-length transactions is reasonable and appreciates ALJ Doherty’s effort to supplement the record in this proceeding. The Proposed

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<sup>7</sup> Proposed Decision at 5.

<sup>8</sup> Price Discovery Ruling at 1-2.

<sup>9</sup> Price Discovery Ruling at 3.

Decision reveals that ALJ Doherty’s efforts produced an “administrative benchmark [Portfolio Content Category (“PCC”)] 1 REC price of \$15.04/MWh”<sup>10</sup> that “reflects the weighted, aggregated average price for PCC 1 RECs recently sold by IOUs as revealed in their confidential responses to ALJ Doherty’s ruling of July 9, 2018.”<sup>11</sup>

**B. CalCCA Generally Supports The Processes Identified In The Proposed Decision To Determine Values Associated With The TM Contracts**

Consistent with ALJ Doherty’s efforts to supplement the record through the Price Discovery Ruling, the Proposed Decision states that “the Commission prefers actual values discovered through market processes to proxy values that are administratively derived.”<sup>12</sup> The Proposed Decision concludes that actual values provide “the most accurate assignment of costs and benefits of procurement to ratepayers, and therefore maximizes the reasonableness of rates.”<sup>13</sup> As a general matter, the Proposed Decision only departs from this approach when attributes cannot be offered for sale to LSEs because the transaction occurred in the past or when attributes are unsold.<sup>14</sup>

Support for this conclusion is seen most substantively from discussion occurring in the PCIA Track 2 final decision (D.18-10-019). In D.18-10-019, the Commission adopted a new reporting requirement by which IOUs, Electric Service Providers (“ESPs”) and CCAs will provide pricing information that will be used to determine “adders” to the market price

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<sup>10</sup> Proposed Decision at 12.

<sup>11</sup> Proposed Decision at 12, note 18.

<sup>12</sup> Proposed Decision at 11.

<sup>13</sup> Proposed Decision at 11.

<sup>14</sup> See Proposed Decision at 12-13. As described below, CalCCA objects to a valuation of zero for attributes that are unsold but yet are *used* by one of the Joint IOUs *for compliance purposes*.

benchmark.<sup>15</sup> Specifically, “[t]he RPS Adder shall be calculated using the reported prices of purchases and sales of renewable energy by the IOUs, CCAs and ESPs \*\*\* and the RA Adder, ... shall be calculated using reported purchase and sales prices of IOU, CCA, and ESP transactions....<sup>16</sup> Support for this approach was based on testimony and arguments advanced principally by The Utility Reform Network (“TURN”).<sup>17</sup>

Except as described below, the valuation methodology adopted in the Proposed Decision is reasonable. Valuation, as opposed to allocation, of RA is the approach preferred by CalCCA, and CalCCA therefore supports the Proposed Decision’s answer to this “essential question.”<sup>18</sup>

**C. It Would Be Legal Error For The Proposed Decision To Conclude That Attributes Associated With The TM Contracts *And Used For Compliance Purposes* Have A Value Of Zero**

As described above, the Proposed Decision follows a reasonable, lawful approach to determine the value of TM Contract attributes based on actual transactions. Where the Proposed Decision commits legal error is assigning a zero value for attributes that are unsold but nevertheless used by the IOU for compliance purposes. The Proposed Decision defines and clarifies this approach as follows: “If the RECs were not purchased even though they were offered for sale, then the value deducted shall be \$0. \*\*\* For clarity, if the IOU offers the REC

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<sup>15</sup> See D.18-10-019 at 74-75.

<sup>16</sup> D.18-10-019 at 73.

<sup>17</sup> See D.18-10-019 at 23-25.

<sup>18</sup> See Proposed Decision at 16; emphasis added (“[T]he essential question concerning RA values remains whether the RA associated with the TM contracts should be *allocated* to other LSEs as proposed by the Joint IOUs, or *valued and deducted* from TM contract costs as proposed by CalCCA.”)

for sale and it is not sold, it may still be used by the IOU for compliance purposes.”<sup>19</sup> The approach reflected in the Proposed Decision suffers from several legal defects and should be revised.

**1. *The Proposed Approach Is Not Supported By Substantial Evidence***

In order for a Commission decision to be legally sustainable, the findings in the decision must be supported by substantial evidence in light of the whole record.<sup>20</sup> In this context, not only is there no substantial evidence in the record to support a finding that a zero-price determination is reasonable for RA capacity *used by the IOU for compliance purposes*, there is no evidence at all. Worse yet, no proposal was even advanced or discussed in the proceeding. The approach appears *for the first time* in the Proposed Decision. To be clear, the Joint IOUs (the applicants in this ratesetting proceeding) did not propose this approach, nor is there anything in the record by which parties may have been alerted to the proposed approach and called upon to comment on it. As further described below, it would be procedurally improper and therefore unlawful to adopt an approach revealed for the first time in the Proposed Decision.

As a general matter, broad discretion is given to the Commission to weigh the preponderance of evidence in a proceeding, *but* the Commission’s determination must either be based on evidence in the record or reasonable inferences drawn from evidence in the record.<sup>21</sup> A decision cannot be based on evidence outside of the record because the affected parties will

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<sup>19</sup> Proposed Decision at 12-13. *See also* Proposed Decision at 18 (providing the same clarification with respect to RA capacity).

<sup>20</sup> *See* Public Utilities Code Section 1757(a)(4). All further statutory references are to the Public Utilities Code, unless otherwise stated.

<sup>21</sup> *See* D.08-06-023 at 11-12. *See also* D.06-04-075 at 24.

not have the ability to rebut, review or comment on that evidence. As the Commission has explained, “the requirements of substantial evidence provide that parties must be given an opportunity to review and comment on material that an administrative agency will use in the course of rendering a decision.”<sup>22</sup> More broadly, courts have “observed that statutory demands ‘for noticed and recorded hearings are designed to [ensure] fairness and inhibit arbitrariness through the instrumentalities of public participation in the investigative activity and a record paving the way for judicial review. Such assurances cannot be fulfilled by recorded hearings which are paralleled by substantial ‘off-record’ investigations.’”<sup>23</sup> In short, a decision made by the Commission without evidentiary support will be “arbitrary” and therefore such a decision will be nothing more than “the will or desire of the decision-maker.”<sup>24</sup>

In this context, there is nothing in the record (let alone, “substantial evidence”) to support the Proposed Decision’s finding that a valuation amount of zero should be ascribed to unsold attributes (RECs and RA capacity) from the TM Contracts that are used for compliance purposes. Accordingly, this aspect of the Proposed Decision must be modified.

## ***2. The Proposed Approach Unreasonably And Unjustifiably Expands Recent Precedent***

In D.18-10-019 (the PCIA Track 2 final decision), the Commission adopted a valuation methodology that assigns “a zero or de minimis price” for unsold RA capacity.<sup>25</sup> Importantly however, the basis for this determination was that the unsold RA capacity would

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<sup>22</sup> D.14-04-024 at 13.

<sup>23</sup> *California Assn. of Nursing Homes etc., Inc. v. Williams* (1970) 4 Cal.App.3d 800 (“Nursing Homes”), 810–811.

<sup>24</sup> See *Nursing Homes* at 810, note 10; internal citations omitted (“An action is arbitrary when it is based on no more than the will or desire of the decision-maker and not supported by a fair or substantial reason.”).

remain “long” or “surplus” – that is, *not* used for compliance purposes. This is most clearly seen in the Commission’s reliance on TURN’s testimony, which proposes a zero or *de minimis* price only when RA capacity is unsold because of “long” positions that result in RA capacity being “surplus.”<sup>26</sup> The fact that RA capacity is “long” and “surplus” necessarily means that it is not used by the IOU.

The Proposed Decision unreasonably and unjustifiably expands the determination in D.18-10-019 because it would assign a zero value even for RA capacity that is not long or surplus. This is unreasonable and should not be sustained.

**3. *The Proposed Approach Cannot Be Reconciled With Overarching, Statutory Cost-Shifting Principles***

The proposed approach would allow an *unvalued* benefit to remain with bundled customers, in contravention to statutory provisions. The simple matter is that if RA capacity is *used for compliance purposes* it has some value, since the IOU would otherwise need to purchase RA capacity to satisfy the compliance obligation. Under Section 366.2(g), in determining NBCs paid by customers of a CCA, the NBC “shall be reduced by the value of any benefits that remain with bundled service customers....” By assigning no value to RECs and RA capacity that are used for compliance purposes for bundled customer load, the Commission is violating this statutory provision. If the IOU allows these attributes to remain unsold *and* does not use the unsold attributes for compliance purposes, no benefit is provided to bundled service customers. However, if the attributes are used for compliance purposes, some value is

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<sup>25</sup> See D.18-10-019 at 153-154 (Finding of Fact 4).

<sup>26</sup> See D.18-10-019 at 24-25 (citing and relying on TURN Opening Brief at 15 [Exhibit No. TURN-1 at 8-10]).

provided to bundled service customers and that value *must* be determined and offset against the TM NBC.

Under Section 366.3, the Commission is also directed to “ensure that departing load does not experience any cost increases as a result of an allocation of costs that were not incurred on behalf of the departing load.” By making an election to use the attribute for compliance purposes, the IOU is affirming that attribute and the corresponding cost are for the benefit of bundled customers, not departing load. Therefore, Section 366.3 would also be violated by the proposed approach because the cost of attributes, if used for compliance purposes, would not be wholly incurred on behalf of bundled customers, but part of which would be borne by departing load. While it is within the Commission’s discretion to determine what value should be associated with the attributes used for compliance purposes, some value must be assigned. Otherwise, Section 366.3 is violated by allowing CCA load to experience a cost increase that is not offset by an appropriate countervailing amount for the determined value of the attributes.

***4. The Proposed Approach Ignores Meaningful Distinctions Applicable To The Joint IOUs And Contributes To Market Power Conditions***

In its simplest form, the approach set forth in the Proposed Decision would allow an IOU to offer RA capacity from the TM Contracts, reject offers from CCAs, and then use the unsold RA capacity for the IOU’s own compliance purpose, with part of the cost of the unsold RA capacity being paid for by CCAs’ customers. This approach would create a competitive advantage insofar as the IOUs would retain RA capacity at a discounted price (since the cost would be paid by all customers, including CCAs’ customers, but the benefit only realized for bundled customers). This competitive advantage would accentuate the IOUs’ dominant position in the market and unwittingly contribute to market power conditions.

It is undeniable that the IOUs, with a dominant share of RA capacity, hold a unique position vis-à-vis RA transactions. This unique position has been recently described and affirmed. First, in a joint ruling in the Commission’s principal resource procurement proceeding (the Integrated Resource Plan proceeding – R.16-02-007), the assigned ALJ and Commissioner stated the obvious: “the argument of the ESPs and CCAs is also true that the IOUs occupy a different position in the market, particularly for resource adequacy currently, than do ESPs and CCAs.”<sup>27</sup> The “different” position in the market has been more specifically described in a recent proposed decision in the RA proceeding (R.17-09-020).<sup>28</sup> In the RA Proposed Decision, the assigned ALJs “agree with parties who recognize that, at this time, the utilities are the only candidates with ‘*the resources*, knowledge and experience’ to procure local reliability resources on behalf of all LSEs without excessive delay.”<sup>29</sup> Underscoring concerns about the unique position held by the IOUs, the assigned ALJs in the RA proceeding acknowledge the need to address requests that “the Commission adopt safeguards before designating the distribution utilities to act as the central buyers in order to mitigate conflict of interest, transparency, and anticompetitive concerns.”<sup>30</sup> These safeguards are addressed extensively in the RA Proposed Decision.<sup>31</sup>

In this context, there is no need to enhance or accentuate the IOUs’ dominant position and there is no countervailing public policy rationale for doing so. By assigning

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<sup>27</sup> See joint ruling in R.16-02-007, dated October 5, 2018.

<sup>28</sup> See *Proposed Decision of ALJ Chiv and ALJ Allen*, mailed on November 21, 2018 in R.17-09-020 (“RA Proposed Decision”).

<sup>29</sup> RA Proposed Decision at 14; emphasis added (internal citation omitted).

<sup>30</sup> See RA Proposed Decision at 43.

<sup>31</sup> See RA Proposed Decision at 43-54.

“some” value to unsold attributes that are used by the IOUs for compliance purposes, the Commission will ameliorate market power concerns.

**D. The Proposed Decision Rightly Acknowledges SB 901, But Should Be Slightly Expanded To Describe Implications Of SB 901’s Express Authorization For CCAs To Act As Counterparties for TM Contract Extensions**

In addressing the duration of the TM NBC, the Proposed Decision references SB 901, observing that “SB 901 (stats. 2018, ch. 626) ... added Section 8388 to the Public Utilities Code[, which] mandates that counterparties to the TM contracts seek to renew the contracts....”<sup>32</sup> Importantly, unlike Section 399.20.3 (added by SB 859), which limited TM Contract procurement to the IOUs and publicly owned utilities, SB 901 expressly contemplates that *CCAs* may serve as counterparties under the TM Contracts.<sup>33</sup> SB 901 brings the TM Contract legislation in line with overarching principles expressed elsewhere by the Legislature that the Commission should “[m]aximize the ability of community choice aggregators to determine the generation resources used to serve their customers.”<sup>34</sup>

In light of SB 901, and affirmation by the Legislature that CCAs should be considered for extensions of the TM Contracts, the Proposed Decision should be slightly modified to contemplate that a CCA might be the counterparty to an extended TM Contract.

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<sup>32</sup> Proposed Decision at 20.

<sup>33</sup> See Section 8388 (added by SB 901).

<sup>34</sup> Section 380(a)(5) (defining legislative objectives with respect to the RA program). See also Section 366.2(a)(5) (“[CCAs] shall be solely responsible for all generation procurement activities on behalf of the [CCA’s] customers, except where other generation procurement arrangements are expressly authorized by statute.”) and Section 454.51(d) (expressly providing a self-procurement option for Community Choice Aggregators with respect to renewable integration requirements).

### **E. Implementation Efforts Should Be Processed Under Tier 2 Advice Letters, Not Tier 1 Advice Letters**

The Proposed Decision orders the Joint IOUs to “file a Tier 1 advice letter describing the design and implementation of the [TM] non-bypassable charge.”<sup>35</sup> Under General Order (“GO”) 96-B, a Tier 1 advice letter, which is effective upon submittal and pending disposition, is appropriate for perfunctory tariff changes like “a non-substantive editorial change to the text of a tariff” and a “tariff change in compliance with specific requirements of a statute or Commission order where the wording of the change follows directly from the statute or Commission order.”<sup>36</sup> On the other hand, a Tier 2 advice letter is appropriate for matters requiring more significant oversight and review by the appropriate industry division, such as a “change in a rate or charge pursuant to an index or formula that the Commission has approved for use in an advice letter by the Utility submitting the advice letter but that the Utility has not used previously for this purpose.”<sup>37</sup>

As stated in the Proposed Decision, the Joint IOUs’ advice letters will describe “design and implementation” elements of the TM NBC. As such, the advice letters could include matters that may be protested and ultimately resolved by the Energy Division. If the Energy Division’s disposition requires changes to the proposed TM NBC, these changes would require “refunds or such other or additional adjustments as the Commission may require,”<sup>38</sup> since a Tier 1 advice letter would be effective immediately. To avoid unnecessary adjustments and

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<sup>35</sup> Proposed Decision at 13 (Ordering Paragraphs 13-15).

<sup>36</sup> GO 96-B; Industry Rule 5.1(1)-(2).

<sup>37</sup> GO 96-B; Industry Rule 5.2(1).

<sup>38</sup> GO 96-B; General Rule 7.3.3.

allow for meaningful review and oversight of the proposed TM NBC tariffs, the Proposed Decision should be modified to require that the TM NBC advice letters be designated as Tier 2.

### **III. PROPOSED CHANGES**

In accordance with Rule 14.3(b) and in light of the discussion above, CalCCA requests that the changes set forth in Appendix A be made to the Proposed Decision.

### **IV. CONCLUSION**

CalCCA thanks Commissioner Guzman Aceves and ALJ Doherty for their consideration of CalCCA's opening comments on the Proposed Decision.

Dated: November 28, 2018

Respectfully submitted,

*/s/ Scott Blaising*

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Appendix A: Proposed Changes to the Proposed Decision

**Appendix A  
to the  
Opening Comments of the  
California Community Choice Association  
on the Proposed Decision**

Recommended Changes

In accordance with Rule 14.3(b), the California Community Choice Association requests that the following changes be made to the Proposed Decision (as shown in redline/track format):

Page 13	For clarity, if the IOU offers the REC for sale and it is not sold, it may still be used by the IOU for compliance purposes, <u>however, if it is used for compliance purposes it must be valued at the administrative benchmark price for a PCC 1 REC established by this decision.</u>
Page 18	For clarity, if the IOU offers the RA capacity for sale and it is not sold, it may still be used by the IOU for compliance purposes, <u>however, if it is used for compliance purposes it must be valued at the benchmark RA values established by the decision issued in the PCIA proceeding.</u>
Page 20	This will allow for the TM NBC to continue past 2022 if some of the TM contracts covered by the TM NBC are renewed pursuant to SB 901. <u>If any of the TM contracts are renewed by a CCA, as authorized by SB 901, cost-recovery under the TM NBC will be modified.</u>
Page 24 (Ordering Paragraph 4)	If the RECs are not purchased <u>and not used for compliance purposes</u> , then the value deducted shall be \$0. * * * Use an administrative benchmark PCC 1 REC price of \$15.04/megawatt hour and deduct this value from the total costs of the TM contract(s) assigned to its ratepayers through the TM NBC if RECs associated with the TM contracts cannot be offered for sale as PCC 1 RECs (e.g., because the energy generation occurred in the past) <u>or the RECs are used by the IOU for compliance purposes.</u>
Page 25 (Ordering Paragraph 6)	If the RA capacity is not purchased <u>and not used for compliance purposes</u> , then the value deducted shall be \$0. * * * Use the benchmark RA values (also referred to as an “RA adder”) established by the decision issued in the Power Charge

	<p>Indifference Adjustment proceeding (Rulemaking 17-06-026) to value the RA capacity associated with the TM contracts and deduct from the costs of the TM contract assigned to the TM NBC if RA values cannot be offered for sale, due to the expiration of the RA value or for another reason, <u>or the RA capacity is used by the IOU for compliance purposes</u></p>
<p>Page 27 (Ordering Paragraph 13; but similar changes should be made in Ordering Paragraphs 14 and 15 for SCE and SDG&amp;E, respectively)</p>	<p>No later than 60 days after the issuance of this decision, Pacific Gas and Electric Company (PG&amp;E) shall design and implement a non-bypassable charge to collect from its ratepayers the net costs of PG&amp;E's tree mortality-related procurement contracts required by Resolution E-4770 and Resolution E-4805 as defined in this decision, and shall file a Tier <del>1</del><u>2</u> advice letter describing the design and implementation of the non-bypassable charge. This advice letter shall be served on the service list for this proceeding.</p>