PRICE & BRUMFIELD, LLP
Robert H. Brumfield, III, Esq., SBN 114467
Kimberly A. Ungar, Esq., SBN 200963
Greystone Plaza Building
841 Mohawk Street, Suite 200
Bakersfield, CA 93309
(6611) 323-3400

Attorneys for Creditor, Santos Gonzalez Herrera

50-27523

IN THE UNITED STATES BANKRUPTCY COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, Debtor. Federal LD No 94-0742640	Bky No 01-30923 DM Chapter 11 NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER DISALLOWING CLAIM OR ALTERNATIVELY, TO EXTEND TIME TO FILE PROOF OF CLAIM, MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION Date November 27, 2002 Time 9 30 a.m. Dept. 22

To Debtor, Pacific Gas and Electric Company, and to its attorney of record.

NOTICE IS HEREBY GIVEN that, on November 27, 2002, at 9 30 a.m., or as soon thereafter as the matter may be heard, in Department 22 of the United States Bankruptcy Court for the Northern District of California, located at 235 Pine Street, 19th Floor, San Francisco, California, Claimant, Santos Gonzalez Herrera, will, and hereby does, move for reconsideration of the Order Disallowing Claim which the above-entitled court entered on June 28, 2002, and for revocation of that Order and allowing the claim, or alternatively, that the court allow the late filing of Claimant's claim. The motion is made on the ground that a cause exists under Federal Bankruptcy Rule 3008 which allows a party-in-interest to seek reconsideration of an order of a court which disallows a claim

The motion is based on this Notice of Motion and the Memorandum of Points and Authorities served and filed concomitantly herewith, on the records and file herein, and on such evidence as may be presented at the hearing on the motion.

If you wish to oppose this Motion, you must file a written response with the Bankruptcy court and serve a copy of it upon the Claimant's attorney at the address set forth above no less than fourteen (14) days preceding the noticed date of hearing If you fail to file a written response to this Motion within such time period, the court may treat such failure as a waiver of your right to oppose the Motion and may grant the requested relief

Dated: October 18, 2002

PRICE & BRUMFIELD, LLP

By _____
ROBERT H. BRUMFIELD, III,
Attorneys for Creditor, Santos Gonzalez Herrera

PRICE & BRUMFIELD, LLP
Robert H. Brumfield, III, Esq., SBN 114467
Kimberly A. Ungar, Esq., SBN 200963
Greystone Plaza Building
841 Mohawk Street, Suite 200
Bakersfield, CA 93309
(611) 323-3400

Attorneys for Creditor, Santos Gonzalez Herrera

IN THE UNITED STATES BANKRUPTCY COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re. PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, Debtor Federal LD No 94-0742640	Bky No 01-30923 DM Chapter 11 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DISALLOWING CLAIM OR ALTERNATIVELY, TO EXTEND TIME TO FILE PROOF OF CLAIM Date November 27, 2002 Time: 9 30 a.m. Dept 22

I.

INTRODUCTION

Santos Gonzalez Herrera ("Mr Herrera" herein) hereby requests that the court reconsider its Order on Debtor's Omnibus Objection to Late-Filed Claims ("Order" herein) entered on or about June 28, 2002, wherein the court disallowed Mr Herrera's claim for damages sustained as the result of personal injuries caused by the Debtor Pacific Gas and Electric Company, a California corporation ("PG&E" herein)

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/ / /

/ / / A001 Add: KidsOgcMail Center

II.

CAUSE EXISTS FOR THE COURT TO EXERCISE ITS DISCRETION TO RECONSIDER ITS ORDER DISALLOWING MR. HERRERA'S CLAIM

Reconsideration of any order that disposes of a claim may be sought. Bankruptcy Rule, 3008 and 11 U S C § 502(j) A court may reconsider the disallowance of a claim "for cause". Bankruptcy Rule, 3008 What constitutes cause is not defined with precision, however, courts have considered such factors as new evidence, cause existing under the applicable standards for a reversal of the order, or that a manifest injustice has been done Courts have also applied the excusable neglect standard set forth in Bankruptcy Rule, 9006 in determining whether to grant reconsideration of an order. 9 Collier on Bankruptcy, 15th ed. revised, Chapter 3008, paragraph 3008 01[4]

The Ninth Circuit has looked to Bankruptcy Rule, 9024, which incorporates Federal Rule of Civil Procedure 60, for a definition of cause for reconsideration[1] Federal Rule of Civil Procedure 60 states that relief from an order may be granted due to: "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), (3) fraud or misrepresentation, or other misconduct by an adverse party; (4) the judgment is void, (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or (6) any other reason justifying relief from the operation of the judgment "

There are several reasons that this court should reconsider its Order disallowing Mr Herrera's claim, all of which should more than suffice under any of the standards listed above. In opposition to PG&E's Omnibus Objection, Mr Herrera's attorney filed only a vaguely titled declaration[2]. No Memorandum of Points and Authorities was filed in support of Mr Herrera's "opposition" It is entirely possible that the court was not even aware of Mr Herrera's "opposition"

[1] *See* U.S. v. Levoy (In re Levoy), 182 B.R. 827 (9th Cir BAP 1995), S.G. Wilson Co., Inc. v. Cleanmaster Industries Inc., (In re Cleanmaster Industries, Inc.), 106 B R. 628, 630 (9th Cir BAP 1989)

[2] A true and correct copy of which is attached hereto as Exhibit "A", and judicial notice of the same is requested under Federal Rule of Evidence 201

because it was not made in proper and adequate form or with a clear title indicating the nature and purpose of the document. Further, no appearance for Mr Herrera was made at the hearing on the Omnibus Objection and no oral argument was presented on his behalf. The circumstances surrounding the late filing of his claim and the actual nature of his claim, had they been presented properly to the court, and had counsel been present to address the court's concerns at the hearing, should have caused the court to deny PG&E's Omnibus Objection as to Mr Herrera's claim.

Mr Herrera is entitled to reconsideration of the court's Order disallowing his claim on the grounds of mistake, inadvertence and excusable neglect and other reasons justifying relief from the Order

III.

EXCUSABLE NEGLECT WARRANTS RECONSIDERATION OF THE COURTS ORDER AND ALLOWING MR. HERRERA'S CLAIM OR EXTENDING THE TIME FOR HIM TO FILE HIS PROOF OF CLAIM

Excusable neglect occurred on two levels The first incidence was that Mr Herrera's attorney filed a late Proof of Claim in the PG&E bankruptcy. The second occurrence was the attorney's failure to present a sufficient opposition to the Omnibus Objection. Mr. Herrera has a formidable opposition to offer but it was not truly before the court.

The failure of Mr. Herrera's counsel to timely file a Proof of Claim constitutes "excusable neglect" within the meaning of Bankruptcy Rule 9006(b)(1). The United States Supreme court has held that a lenient standard of "excusable neglect" found in Rule 9006 may be grounds for the extension of the time limit in considering whether to allow a late-filed claim Pioneer Investment Services Co. v. Brunswick Associates, 507 US 380, 389, 113 S Ct. 1489, 1495, 123 L.Ed. 2d 74 (1993) ("Pioneer") Pursuant to Pioneer, Rule 9006(b)(1) "grants a reprieve to out-of-time filings that were delayed by 'neglect'" The court in Pioneer also stated that Congress plainly permitted a court to accept late filings caused by inadvertence, mistake, or carelessness Under Pioneer, the court is to undertake an equitable inquiry addressing:

> "The danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good

faith." Id at 395.

A court has the broad power to allow a late-filed claim even upon carelessness of counsel to timely file a Proof of Claim Id. at 389 The Ninth Circuit court case, Dix v. Johnson, 95 B.R. 134 (9th Cir. 1988), stated that when disallowance of a late-filed claim forecloses a trial on the merits of that claim, a liberal construction of excusable neglect should be applied. In the context of Mr Herrera's claim, he has been foreclosed of a trial on the merits. Hence, the Court and the Court of Appeals for the Ninth Circuit mandate the application of a lenient definition of excusable neglect that allows a creditor's claim even if his attorney is at fault and the creditor is considered to have some fault for choosing that attorney Application of a strict excusable neglect standard would be an abuse of discretion in these circumstances.

Mr Herrera's claim is for personal injury damages in a superior court case that was nearing trial. PG&E was well aware of that case and defending the same when it filed bankruptcy shortly before the trial date which stayed the superior court action. Mr Herrera has been foreclosed from any compensation for his injuries alleged to be approximately $750,000 because his attorney filed the Proof of Claim form after the bar date. The excusable neglect analysis is available to Mr Herrera and should be seriously considered by the court. This is especially true given the severity of the penalty leveled upon by Mr. Herrera as a result of disallowance of his claim in a very large bankruptcy with a temporarily insolvent, soon to be reorganized, debtor with a huge amount of assets.

IV.

THE EQUITIES OF THIS MATTER MILITATE IN FAVOR OF RECONSIDERATION OF THE COURTS ORDER AND ALLOWING MR. HERRERA'S CLAIM

The United States Supreme Court could not have been clearer that attorney mistake and/or neglect could be a basis for allowing a late-filed claim when other equitable factors weigh in favor of the creditor. When determining whether neglect is "excusable" under 60(b)(1), courts generally consider (1) the danger of prejudice to the debtor; (2) the length of delay and its potential impact on judicial proceedings; (3) the reasons for the delay, including whether it was within the reasonable

control of the movant, (4) whether the movant acted in good faith, (5) whether the client should be penalized for the mistakes of their counsel, and (6) whether the claimant has a meritorious claim.

PG&E would not be prejudiced if this one contingent claim were allowed. It is highly doubtful that PG&E has altered its position or that the other creditors will be impacted if Mr Herrera's claim is allowed. The level of complexity of PG&E's bankruptcy administration renders Mr. Herrera's claim inconsequential in the scheme of things, but it is very significant and dire to Mr Herrera. Further, allowance of Mr Herrera's claim will have no impact on PG&E's ability to confirm a feasible Chapter 11 Plan. Also, PG&E was well aware of Mr. Herrera's claim as the superior court litigation[3] had been pending for some time and was nearing trial when PG&E filed bankruptcy

The delay in filing Mr Herrera's Proof of Claim was relatively brief. Once Mr Herrera realized the problem existed regarding the late Proof of Claim, Mr. Herrera retained new counsel to handle the matter and a Proof of Claim was filed on his behalf on or about November 21, 2001, approximately two and a half months after the bar date. This delay should not have any impact on the inherently complex judicial proceedings already required of the bankruptcy court in the PG&E case. In Dix, there was a two-year delay in filing a proof of claim and the court still extended the time to file the proof of claim because it would not impact efficient court administration. Dix v. Johnson, supra, at 138

The reasons for the delay are simply neglect and mistake by Mr. Herrera's attorney These reasons were not within control of Mr Herrera who is likely of minimal legal sophistication and who relied on his attorney to protect his interests in the superior court action against PG&E Even if Mr Herrera's choice of attorney's was within his control, this does not foreclose relief under this Motion according to any of the potentially applicable standards See In re Paul, 101 B.R. 228, 231 (S.D Cal 1989). Mr Herrera acted in good faith and had nothing to gain and much to lose from filing a late Proof of Claim. He is simply attempting to move forward in obtaining relief for his injuries

Mr Herrera should not be penalized for the mistakes or neglect of his attorney Although

[3] Herrera v Pacific Gas & Electric, Inc., filed in the Superior Court for the County of Fresno, Case No 640139-2.

the majority in Pioneer held that attorney mistake is not enough to allow a late-filed claim, attorney mistake or neglect along with consideration of the equitable inquiry militate squarely in favor of reconsideration of Mr Herrera's claim and with ultimate allowance of his claim. Congress and the United States Supreme Court clearly provided that under circumstances as are before the court on this Motion, warrant the court to grant Mr Herrera relief from its order disallowing Mr. Herrera's claim and not to permanently foreclose relief for Mr. Herrera's injuries

Lastly, Mr. Herrera has a meritorious claim against PG&E. Many of the facts involved in the superior court case were not in dispute. The undisputed facts show that a PG&E employee erred in preparing and/or reading a map of gas pipelines on property where Mr Herrera was hired to work. When PG&E personnel went to the mistaken location, they noted no underground gas pipelines and reported such to the landowner Mr Herrera relied on PG&E's representations that there were no gas pipelines where Mr Herrera intended to conduct his work. This representation turned out to be a grave error. When Mr Herrera began trenching the soil in the first row on the property, his tractor struck and ruptured an unmarked 16" gas pipeline that was pressurized at 680 lbs per square inch. The resulting explosion lifted the 50-ton tractor three to four feet off the ground and threw Mr Herrera. The explosion was heard for miles. As the result of the explosion, Mr Herrera suffered severe chest and back pain, initial hearing and breathing trouble and continuing back, leg and ankle pain. Mr. Herrera was ultimately diagnosed with severe and degenerative disc injury and underwent surgery to attempt to alleviate his pain. He has had extensive physical therapy and continued care but is permanently disabled. A psychological toll has accompanied Mr Herrera's permanent disability due to persistent pain, his inability to support his family and his deeply impacted quality of life. At the very least, PG&E is responsible to some degree for Mr Herrera's injuries and hence his claim is meritorious.

PG&E is taking full advantage of the laws under Chapter 11 of the Bankruptcy Code in order to reorganize and stay in business. Mr Herrera should likewise be able to utilize the applicable laws to obtain relief in this matter Although the Bankruptcy rules are generally designed to provide relief to the debtor, Bankruptcy Rule 9006 and 3008 were drafted with the intention and clear language granting relief to a creditor in just such a situation as is before the court on this

Motion.

V

CONCLUSION

Based upon the foregoing, Mr Herrera's respectfully requests that the court grant this Motion for Reconsideration of its Order Disallowing Claim, or, alternatively grant Mr Herrera an extension of time in which to file his Proof of Claim. Mr Herrera also requests such other relief as the court, in its discretion, deems just and proper

Dated. October 18, 2002 - PRICE & BRUMFIELD, LLP

By _____
ROBERT H. BRUMFIELD, III,
Attorneys for Creditor, Santos Gonzalez Herrera

BRUNDAGE PLAZA BUILDING
801 HOWARD STREET SUITE 200
BAKERSFIELD CALIFORNIA 93305 1500
(661) 323-2400

A LAW CORPORATION
1430 TRUXTUN AVENUE, SUITE 100
BAKERSFIELD, CA 93301-5220
FAX (661) 324-1352
(661) 323-4000

JOHN A. TELLO, ESQ.
STATE BAR NO. 86589
CHAIN, YOUNGER, COHN & STILES
1430 Truxtun Avenue Suite 100
Bakersfield, California 93301
(661) 323-4000

FILED
MAY 29 2002
UNITED STATES BANKRUPTCY COURT
SAN FRANCISCO, CA

UNITED STATES BANKRUPTCY COURT
NORTHERN DISRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re PACIFIC GAS & ELECTRIC COMPANY, a California corporation, Federal I.D. No. 940742640	CASE NO 01-30923 DM Chapter 11 Case DECLARATION OF JOHN A. TELLO IN RESPONSE TO OMNIBUS OBJECTION AND OMNIBUS OBJECTION TO LATE-FILED CLAIMS [SANTOS GONZALEZ HERRERA]

I, JOHN A. TELLO, declare as follows:

1. I am an attorney duly licensed to practice law in all of the courts of the State of California, and am a partner in the law firm of CHAIN, YOUNGER, COHN & STILES, the original attorneys for plaintiff, SANTOS GONZALEZ HERRERA in the lawsuit filed in the Superior Court of

California, County of Fresno, Case No. 640139-2 designated Santos Gonzalez Herrera vs Pacific Gas & Electric, Inc., et al

2. During the months of June, July and August and September, 2001, my office staff of four individuals was reduced to one (1) medical secretary who herself was a new employee in the department. This was due to staff resignations and to the departure of my longtime paralegal, Marie Weston, who took ill with cancer and never returned. Unfortunately, due to inadvertence and mistake, the Proof of Claim to be filed in response to the Notice of the Filing Deadline for Filing Proofs of Claim In re PACIFIC GAS AND ELECTRIC COMPANY, a California corporation debtor, Chapter 11 filing Case No. 01-30923 DM was not filed on September 5, 2001, as required. It was not until October, 2001 that my new paralegal discovered this error and brought it to my attention. By this time, I had been informed by Attorney Robert L Slater that Plaintiff HERERRA had signed a Substitution of Attorney on October 5, 2001, substituting me out of the underlying case and substituting Attorney Slater in as Attorney of Record. I then forwarded the Notice of Hearing in the bankruptcy petition of PG & E to Attorney Slater on November 15, 2001. It is my understanding Attorney Slater filed the claim on or about November 21, 2001.

3. It is respectfully requested that SANTOS GONZALEZ HERRERA be given leave to file the late claim which occurred as a result of the above mistake and inadvertance by me in this matter and that he be granted relief from the Omnibus Objection to Late-Filed Claims filed against MR. HERRERA.

4 I DECLARE THE ABOVE TO BE TRUE UNDER PENALTY OF PERJURY EXCEPT AS TO THOSE ITEMS ATTESTED TO UPON INFORMATION AND BELIEF.

DATED May 22, 2002.

Respectfully Submitted,

CHAIN, YOUNGER, COHN & STILES

By _____
JOHN A. TELLO, ESQ

1430 TRUXTUN AVENUE, SUITE 100
BAKERSFIELD, CA 93301-5220
FAX (661) 324-1352
(661) 323-4000

A LAW CORPORATION
1430 TRUXTUN AVENUE, SUITE 100
BAKERSFIELD, CA 93301-5220
FAX (661) 324-1352
(661) 323-4000

6771

PROOF OF SERVICE BY MAIL--(1013a,2015.5 C C.P)

(1) I am over the age of 18 years and not a party to the within action.

(2) My business address is 1430 Truxtun Avenue, Suite 100, Bakersfield, California, 93301.

(3) On May 22, 2002, I served a true copy of the following document entitled exactly DECLARATION OF JOHN A. TELLO IN RESPONSE TO OMNIBUS OBJECTION AND OMNIBUS OBJECTION TO LATE-FILED CLAIMS [SANTOS GONZALEZ HERRERA] by placing it in an addressed sealed as follows:

CARA J. FREY
HOWARD, RICE, NEMEROVSKI, CANADY
FALK & RABKIN
Three Embarcadero Center 7th Floor
San Francisco, CA 94111-4065

ROBERT I. SLATER, ESQ
A Law Corporation
16633 Ventura Boulevard Suite 1405
Encino, CA 91436

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION
235 Pine Street 22nd Floor
San Francisco, California 94111

[X] (By Mail)
[ ] I deposited such envelope in the mail at Bakersfield, California. The envelope was mailed with postage thereon fully prepaid.
[X] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Bakersfield, California, in the ordinary course of business.
[X] (STATE) I declare, under penalty of perjury, under the laws of the State of California, that the above is true and correct.

Executed on May 22, 2002, at Bakersfield, California.

SALLY FELIX

PROOF OF SERVICE BY MAIL

EXHIBIT A

ATTORNEYS AT LAW
GREYSTONE PLAZA BUILDING
841 MOHAWK STREET SUITE 200
BAKERSFIELD CALIFORNIA 93309-1500
(661) 322-2400

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF KERN

I am employed in the County of Kern, State of California. I am over the age of 18 and not a party to the within action; my business address is 841 Mohawk Street, Suite 200, Bakersfield, California 93309

On October 18, 2002, I served the foregoing document described NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER DISALLOWING CLAIM OR ALTERNATIVELY, TO EXTEND TIME TO FILE PROOF OF CLAIM; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION on the interested parties in this action by placing a true and correct copy thereof in sealed envelopes, addressed as follows

SEE ATTACHED LIST

X BY MAIL:

I am "readily familiar" with the firm's practice regarding the collection and processing of correspondence for mailing. Under that practice, all correspondence is deposited in the United States mail, with postage thereon fully prepaid, at Bakersfield, California, on the same day it is collected in the ordinary course of business.

I caused such envelope(s), with postage thereon fully prepaid, to be deposited in the United States mail at Bakersfield, California. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or the postage meter date is more than one (1) day after the date such envelopes were deposited in the United States mail.

Executed on October 18, 2002, at Bakersfield, California.

___ BY PERSONAL SERVICE:

I caused such envelope(s) to be personally delivered by hand to the office(s) of the addressee(s)

Executed on October 18, 2002, at Bakersfield, California.

___ STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

X FEDERAL: I declare that I am employed in the office of a member of the bar of this Court, at whose direction the above-described service was made

LESLIE R. GREGORY

ATTORNEYS AT LAW
GREYSTONE PLAZA BUILDING
841 MOHAWK STREET SUITE 200
BAKERSFIELD CALIFORNIA 93309-1500
(661) 322-2400

Adam A. Lewis
Morrison & Foerster
425 Market Street, 33rd Floor
San Francisco, California 94105
[Counsel for El Paso, Idaho Power]

Adolfo M. Corona
Dowling, Aaron & Keeler
6051 North Fresno Street, Suite 200
Fresno, California 93710
[Counsel for Westcal, Inc.]

Adrienne Vadell Sturges
Sodexho Marriott Services, Inc.
9801 Washingtonian Boulevard, 12th Floor
Gaithersburg, MD 20878

Alan Kolod
Moses & Singer LLP
1301 Avenue of the Americas
40th Floor
New York, NY 10019
[Counsel for Bankers Trust Company]

Alan Z. Yudowsky
Anne E. Wells
Stroock & Stroock & Lavan LLP
2029 Century Park East, Suite 1800
Los Angeles, California 90067
[Counsel for Sempra Energy Trading Corp]

Alex Malder
Calpine Greenleaf, Inc.
P O. Box 11749
Pleasanton, California 94588

Alexis S. Coll
Simpson Thacher & Bartlett
3330 Hillview Avenue
Palo Alto, California 94117
[Counsel for Lehman Commercial Paper, Inc.]

Allan H Ickowitz
Donna M. Balbun
Nossaman, Guthner, Knox & Elliott
445 South Figueroa Street, 31st Floor
Los Angeles, California 90071
[Counsel for City of Redwood City, California]

American State Bank and Trust Company
P O. Box 1446
Williston, North Dakota 58802
Attn: Patrick O. Sogard

AMROC Investments, LLC
Attn: Sheri Levine
535 Madison Avenue, 15th Floor
New York, NY 10022

Amy Hallman Rice
Dorsey & Whitney LLP
50 S Sixth Street, Suite 1500
Minneapolis, Minnesota 55402
[Counsel for U.S. Bank Trust National Association]

Andrew N Chau
1177 West Loop South, Suite 900
Houston, Texas 77027

Angela M. Ahoto
Law Offices of Joseph L. Ahoto
and Angela Ahoto
700 Montgomery Street
San Francisco, California 94111
[Counsel for Frank Pinguelo]

Arlen Orchard
Sacramento Municipal Utility District
6201 S Street, Mail Stop B408
Sacramento, California 95817

Arnold Wallenstein
ThermoEcotek Corporation
245 Winter Street, Suite 300
Waltham, MA 02154

Aron M. Oliner
Buchalter, Nemer, Fields & Younger
333 Market Street
San Francisco California 94105
[Counsel for CSAA and MBIA Insurance Corporation]

B C. Barmann, Sr
County Counsel
Attn Jern S. Bradley, Deputy
1115 Truxtun Avenue, Fourth Floor
Bakersfield, California 93301
[Counsel for Phil Franey, Treasurer/Tax Collector for Kern County]

Bank of America National Trust and Savings Association
Attn. Peggie Sanders
1850 Gateway Boulevard
Concord, CA 94520

Bank of America
Attn Clara Strand
555 South Flower Street
Mail Code CA9-706-11-21
Los Angeles, CA 90071

Bank One
Corporate Trust Administration
Attn. Janice Ott Rotunno
Mail Code IL1 0126
1 Bank One Plaza
Chicago, IL 60670-0126

PROOF OF SERVICE NOTICE OF NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER DISALLOWING CLAIM OR ALTERNATIVELY TO EXTEND TIME TO FILE PROOF OF CLAIM; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

Bank One, NA
Attn. Robert G. Busse, Jane Bek
Energy & Utilities
Mail Code IL 1-0363
Bank One Plaza
Chicago, IL 60670

Bankers Trust Co. of California, NA
Structured Finance Group
Attn: Peter Becker
4 Albany St., 10th Floor
New York, NY 10006

Bankers Trust Co.
Trustee Corp. Trust
Safet Kalabovic
4 Albany Street, 4th Floor
New York, NY 10006

Bankers Trust Company
Corporate Trust Services
Attn. Safet Kalabovic
4 Albany Street, 4th Floor
New York, NY 10006

Ben Whitwell
Whitwell & Emhoff LLP
202 N. Canon Drive
Beverly Hills, California 90210
[Attorney for California Power Exchange]

Bennett G. Young
LeBoeuf, Lamb, Greene & MacRae, LLP
One Embarcadero Center Suite 400
San Francisco, California 94111
[Counsel for Enron North America Corp and Enron Canada Corp.]

Beth Smayda, Director
MBIA Insurance Corporation
113 King Street
Armonk, New York 10504

Bill Wong
AMROC Investments, LLC
535 Madison Avenue, 15th Floor
New York, NY 10022

BMO Nesbitt Burns
Attn: John Harcha
700 Louisiana, Suite 4400
Houston, TX 77002

BNP Paribas
Attn. Mark Renaud
787 7th Avenue, 31st Floor
New York, NY 10019

BNY Western Trust Company
Attn. Rose Ruelos, Corp. Trust Administration
550 Kearny St., Suite 600
San Francisco, CA 94108-2527

BNY Western Trust
Attn: Mr. Todd Duncan
700 South Flower, 5th Floor
Los Angeles, CA 90017

BP Energy Co
Attn. Louis Anderson
501 Westlake Park Blvd
Houston, TX 77079

BP Energy Company
501 Westlake Park Boulevard
Houston, Texas 77079
Attn: Ken McClanahan

Brian L. Holman
White & Case LLP
633 West Fifth Street, 19th Floor
Los Angeles, California 90071
[Counsel for Mirant Corporation]

Bruce Bennett, Esq.
Bennett J. Murphy, Esq.
Henrigan Bennett & Dorman
601 South Figueroa St., Suite 3300
Los Angeles, CA 90017
[Counsel for Sempra and Southern California Gas Company]

Bruce R. Worthington
Senior Vice President and General Counsel
PG&E Corp
One Market, Spear Tower, Room 2426
San Francisco, California 94105

Bruce W. Leaverton
Mary Jo Heston
Lane Powell Spears Lubersky LLP
1420 Fifth Avenue, Suite 4100
Seattle, WA 89101
[Counsel for Mid-Set Cogen., Coalinga Cogen. Co., Salinas River Cogen Co., and Sargent Canyon Cogen. Co.]

Bryan Krakauer, Esq.
Sidley & Austin
One First National Plaza
Chicago, IL 60603
[Attorney for Bank of America, Admin. Agent]

Bryant Danner
Southern California Edison
2244 Walnut Grove Ave.
Rosemead, CA 91770

California Farm Bureau Federation
2300 River Plaza Drive
Sacramento, California 95833

California Independent System Op.
Margaret A. Rostker
P O. Box 639014
Folsom, CA 95630-9017

California Independent System Operator
Attn Margaret A. Rostker
151 Blue Ravine Rd.
Folsom, CA 95630

California Power Exchange
Lisa G Urick
200 S. Los Robles Avenue, Suite 400
Pasadena, California 91101

California Power Exchange
Attn. Lynn Miller
700 S. Lake Avenue, Suite 910
Pasadena, California 91106-3925

California Public Utilities Commission
Brian Hermann
Alan Komberg, Esq.
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019-6064
[Attorney for California Public Utilities Commission]

California Public Utilities Commission
Attn. General Counsel
505 Van Ness Avenue
San Francisco, CA 94102

California State Board of Equalization
PO Box 942879
Sacramento, CA 94279-8063

California State Lands Commission
Attn. James Frey
100 Howe Avenue, Suite 100 South
Sacramento, California 95825

Calpine Gilroy Cogeneration LP
Robert Brown
1400 Pecheco Pass Highway, Gate 1
Gilroy, California 95020

Calpine Gilroy Cogeneration LP
Robert Brown
Pennzoil Building
700 Milam Street Suite 800
Houston, TX 77002

Calpine Greenleaf Inc.
P O Box 3330
Yuba City, California 95992

Calpine Greenleaf, Inc.
6700 Knoll Center Parkway
Suite 200
Pleasanton, California 94566

Calpine Pittsburg Power Plant
Zahir Ahmadi
50 W San Fernando St.
San Jose, CA 95113

Carl A. Eklund
LeBoeuf, Lamb Greene & MacRae, LLP
125 West 55th Street
New York, NY 10019
[Counsel for Enron North America Corp and Enron Canada Corp.]

Carla Batchler
Trust Department
Bank of Cherry Creek
3033 East 1st Avenue
Denver, Colorado 80206

Catherine S. Krug
National City Bank of Indiana
101 West Washington Street
Suite 655-South
Indianapolis, Indiana 46255
[Successor Indenture Trustee]

Chaim J Fortgang, Esq.
Richard G. Mason, Esq
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
[Counsel for Unofficial Committee of Pacific Gas & Electric Company First Mortgage Bondholders]

Christine C. Yokan
General Electric Capital Business Asset Funding Corp
10900 N.E. 4th Street, Suite 500
Bellevue, Washington 98004

Christopher Beard
Beard & Beard
306 N Market Street
Frederick, MD 21701

Christopher R. Belmonte
Satterlee Stephens Burke & Burke LLP
230 Park Avenue
New York, NY 10169
[Counsel for Moody's Investors Service]

City of St. Francis
Attn. Steve Bjork
P O. Box 730
St. Francis, MN 55070

Coast Energy Canada Inc.
530 8th Avenue S W
Suite 920
Calgary, Alberta
Canada T2P 3S8
Attn. Caroline Pitre

Coast Energy Group, A Division of Cornerstone Propane, LP
1600 Highway 6, Suite 400
Sugarland, TX 77478
Attn. Ruben Alonso

Cook Inlet Energy Supply
10100 Santa Monica Blvd., 25 th Floor
Los Angeles, CA 90067

GREYSTONE PLAZA BUILDING
840 NOHAWK STREET, SUITE 500
BAKERSFIELD, CALIFORNIA 93309-1500
(661) 323-3400

Attn. Hans O Saeby
Craig Barbarosh
Mark D Houle
Pillsbury Winthrop LLP
650 Town Center Drive, 7th Floor
Costa Mesa, California 92626
[Counsel for Halcyon Partners]

Craig H. Millet
Gibson Dunn & Crutcher LLP
Jamboree Center
4 Park Plaza, Suite 1400
Irvine, California 92614
[Counsel for Tucson Electric Power Company]

D Cameron Baker
City Attorney
Michael Slattery
Theresa Mueller
City Hall, Room 234
One Dr Carlton B. Goodlett Place
San Francisco, California 94102
[Counsel for the City and County of San Francisco]

DACA V, LLC
Attn: Julie Bubnack
2120 W Washington Street
San Diego, California 92110

Dale W Mahon
9951 Grant Line Road
Elk Grove, California 95624
[Counsel for Mutual Hydro]

Daniel A. DeMarco
David T Graham
Hahn Loeser & Parks LLP
21 East State Street, Suite 1050
Columbus, Ohio 43215
[Counsel for Twenty-First Century Communications]

Daniel H. Slate
Deborah Fried-Rubin
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004
[Counsel Viacom Inc.]

Daniel H. Slate
Noah Graff
Hughes Hubbard & Reed LLP
350 South grand Avenue, 36th Floor
Los Angeles, California 90071
[Counsel Viacom Inc.]

Daniel M. Pellecchia
Julia W Brand
Katten Muchin Zavis
1999 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
[Proposed Counsel for Official Committee of Unsecured Creditors]

Daniel P Ginsberg
Howard S Beltzer
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
[Counsel for Deutch Bank AG, New York Branch]

Daniel R. Murray
Vincent E. Lazar
Jenner & Block, LLC
One IBM Plaza
Chicago, IL 60611

Darcy M. Pertcheck
Nixon Peabody LLP
Two Embarcadero Center, 27th Floor
San Francisco, California 94111
[Counsel for Silverado Napa Corp.]

Daren R. Brinkman
Brinkman & Associates
800 Wilshire Boulevard, Suite 950
Los Angeles, California 90017
[Counsel for TransAlta Energy]

David A. Burns
Baker Botts LLP
One Shell Plaza
910 Louisiana
Houston, TX 77002
[Counsel for Reliant Energy, Inc.]

David A. Gill
Richard K. Diamond
Danning, Gill, Diamond & Kollitz LLP
2029 Century Park East, Third Floor
Los Angeles, California 90067
[Counsel for Interested Party, Department of Water and Power]

David Boies
Christopher A. Boies
Philip C Korologos
Boies, Schiller & Flexner LLP
80 Business Park Drive, Suite 110
Armonk, New York 10504
[Counsel for POSDEF Power Company, L.P.]

David Gould
McDermott, Will & Emery
2049 Century Park East, 34th Floor
Los Angeles, California 90067
[Counsel for Morgan Stanley Capital Group Inc.]

David H. Ford
David Kovaer
OZ Management LLC
9 West 57th Street, 39th Floor
New York, NY 10019

ATTORNEYS AT LAW
GREYSTONE PLAZA BUILDING
840 NOHAWK STREET, SUITE 500
BAKERSFIELD, CALIFORNIA 93309-1500
(661) 323-3400

David J. Hankey
Gohn, Hankey & Stichel LLP
Suite 1520, The Fidelity Building
210 North Charles Street
Baltimore, Maryland 21201
[Counsel for Corestaff Services (California), Inc.]

David L. Ronn
Mayer, Brown & Platt
700 Louisiana, Suite 3600
Houston, Texas 77002
[Counsel for Cook Inlet Energy Supply]

David Neale
Levene, Neale, Bender, Rankin & Brill LLP
1801 Avenue of the Stars, Suite 1120
Los Angeles, California 90067
[Counsel for California Independent System Operator, Inc.]

David R. Frank
Office of the City Attorney
411 Main street
P O. Box 3420
Chico, California 95927

David S MacCuish
Andrew M. Gilford
Weston, Benshoof, Rochefort
444 South Flower Street, Forty Third Floor
Los Angeles, California 90071
[Counsel for POSDEF Power Company, L.P.]

David T Biderman
Perkins Coie LLP
1620 26th Street, Sixth Floor
Santa Monica, CA 90404-4013
[Counsel for Bank of Montreal]

Department of Justice
U.S. Attorney's Office
450 Golden Gate Avenue
Box 36055
San Francisco, CA 94102

Dennda L. Messenger
Lombardo & Gilles, PLC
P O. Box 2119
Salinas, California 93902
[Counsel for Carmel Development Company]

Deutsche Bank AG
New York Branch
Attn. John Quinn
31 West 52nd Street
New York, NY 10019

Deutsche Bank
New York Branch
Attn. Will Christoph
130 Liberty Street, 31st Floor
New York, NY 10006

Duane C. McKenzie
Office of the Treasurer and Tax Collector
County of San Bernardino
172 W Third Street, 1st Floor
San Bernardino, California 92415
[Secured Creditor County of San Bernardino, California]

DK Acquisition Partners L.P.
c/o M.H. Davidson & Co.
885 Third Avenue, Suite 3300
New York, NY 10022
Attn. Tony Yoseloff

Don Gaffney
Snell & Wilmer LLP
One Arizona Center
400 East Van Buren
Phoenix, AZ 85004
[Counsel for Arizona Public Service Co.]

Douglas M. Butz
Butz, Dunn, DeSantis & Bingham
101 West Broadway, Suite 1700
San Diego, California 92101

Douglas M Foley
McGuirewoods LLP
9000 West Main Street
Norfolk, Virginia 23510
[Counsel for Siemens Westinghouse]

Douglas P Bartner
Andrew Tenzer
Shearman & Sterling
599 Lexington Avenue
New York, NY 10022
[Counsel for Citibank, N.A.]

Duane H. Nelsen
GWF Power Systems Company, Inc.
4300 Railroad Ave.
Pittsburgh, CA 94565-6006

Dulcie D Brand
Ricky L. Shackelford
James L. Poth
Jones Day Reavis & Pogue
555 West Fifth Street, Suite 4600
Los Angeles, California 90013
[Counsel for Williams Energy Services and Williams Energy
Marketing]

Dulcie D Brand
Ricky L. Shackelford
James L. Poth
Jones Day Reavis & Pogue
555 West Fifth Street, Suite 4600
Los Angeles, California 90013
[Counsel for Public Utility District No 2 of Grant County, WA]

GREYSTONE PLAZA BUILDING
840 NOHAWK STREET, SUITE 500
BAKERSFIELD, CALIFORNIA 93309-1500
(661) 323-3400

Dynergy Canada Marketing & Trade
350 – 7th Avenue S.W
Calgary, Alberta
Canada, T2P 3N9
Attn. Steve Barron

Dynergy Marketing & Trade
1000 Louisiana Street, Suite 5800
Houston, Texas 77002
Attn. Steve Barron

E. Katherine Wells, Esq
Staff Counsel
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201-1708

EDAW, Inc.
Brodie Stephens, Esq
Corporate Counsel
753 Davis Street
San Francisco, California 94111

Edward Curren
The Babcock & Wilcox Company
20 S Van Buren Avenue
P O. Box 351
Barberton, Ohio 44203

Edward J Tiedemann
Kronick, Moskowitz, Tiedemann & Girard
400 Capitol Mall, 27nd Floor
Sacramento, California 95814
[Counsel for Southern Joaquin Valley Power Authority]

Edwin Berlin
Richard Wyron
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N W
Washington, DC 20007
[Counsel for California Independent System Operator, Inc.]

El Paso Merchant Energy Gas LP
Darrel Rogers
1001 Louisiana Street
Houston, TX 77002

El Paso Merchant Energy, L.P.
1010 Travis Street
Houston, Texas 77002
Attn. John Harrison

Elaine M. Seid
McPharlin, Sprinkles & Thomas LLP
10 Alamaden Boulevard, Suite 1460
San Jose, California 95113
[Counsel for City of Santa Clara]

Ellen K. Wolf
Michael S Abrams
Gilchrist & Rutter
Wilshire Palisades Building
1299 Ocean Avenue, Suite 900
Santa Monica, California 90401
[Counsel for IBM Corporation]

Enron Canada Corporation
3500 Canterra Tower
400 3rd Ave. S.W
Calgary, AB T2P 4H2
Canada

Estela O Pino
Cynthia E. Chisum
Pino & Associates
1260 Fulton Avenue
Sacramento, California 95825
[Counsel for Elliot Jones, Jr.]

Evan Hollander
White & Case
1155 Avenue of the Americas
New York, NY 10036
[Counsel for BNY Western Trust]

Evelyn H. Biery
Corestaff Services (California), Inc.
Fulbright & Jaworski LLP
1301 McKinney, Suite 5100
Houston, Texas 77010
[Counsel for Corestaff Services (California), Inc.]

California Energy Commission
Chief Counsel's Office
1516 9th Street, MS-14
Sacramento, California 95814

Franchise Tax Board
PO Box 942857
Sacramento, CA 94257-2021

G Larry Engel
Roberto J. Kampfner
Brobeck, Phleger & Harrison LLP
2000 University Avenue
Palo Alto, California 94303
[Counsel for City of Palo Alto and its municipality utility]

Gary P Blitz
Piper Marbury Rudnick & Wolfe LLP
1200 19th Street, N W
Washington, D.C. 20036
[Counsel for Certain Underwriters at Lloyd's and Interested Insurance
Companies]

William Bates III
Bingham McCutchen LLP
1900 University Avenue
Palo Alto, California 94303
[Counsel for Reliant Energy, Inc.]

Geoffrey T Holtz
Three Embarcadero Center, Suite 1800
San Francisco, California 94111

George O'Brien
Vice President and Treasurer
Intecom, Inc.
5057 Keller Springs Road
Addison, Texas 75001

Gerard T Bukowski
General Counsel
Burns & McDonnell Engineering
9400 Ward Parkway
Kansas City, Missouri 64114
[Counsel for Burns & McDonnell Engineering]

Geysers Power Company LLC
Joe McClendon
P O. Box 11749
Pleasanton, CA 94588

Glenn M. Reisman
Two Corporate Drive
P O. Box 861
Shelton, CT 06484
[Counsel for GE Power Systems and GE Supply Divisions]

Gordon P Erspamer
Morrison & Foerster LLP
101 Ygnacio Valley Road, Suite 450
P O. Box 8130
Walnut Creek, California 94596
[Counsel for AES New Energy, Inc.]

Grant Kolling
City of Palo Alto
P O Box 10250
Palo Alto, California 94303

Gregory Clore
Gnazzothill, A.P C.
625 Market Street, Suite 1100
San Francisco, California 94105
[Counsel for Mid-Set Cogen., Coalinga Cogen. Co., Salmas River Cogen Co., and Sargent Canyon Cogen. Co]

Gregory W Jones
El Paso Merchant Energy
1001 Louisiana, Suite 2754B
Houston, Texas 77002

GWF Power Systems LP
4300 Railroad Ave.
Pittsburg, CA 94565

H. Slayton Dabney
McGuirewoods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
[Counsel for Siemens Westinghouse]

Harold L. Kaplan
Jeffrey M Schwartz
Mark F Hebbeln
Gardner, Carton & Douglas
321 North Clark Street, 34th Floor
Chicago, IL 60610
[Counsel for Indenture Trustee for 7.90% Deferrable Interest Subordinated Debendures Series A]

Heather Brown
Williams Energy Marketing and Trading Co.
One Williams Center, Suite 4100
Tulsa, OK 74172

Heinz Binder
Robert G Harris
Binder & Malter
2775 Park Avenue
Santa Clara, California 95050
[Counsel for Corestaff Services (California), Inc.]

Herbert Katz
Kelly Lytton & Vann LLP
1900 Avenue of the Stars, Suite 1450
Los Angeles, California 90067
[Counsel for Cheryl Ann Acosta]

Hodgson Russ LLP
Attn: Stephen L. Yonaty, Esq.
One M&T Plaza, Suite 2000
Buffalo, New York 14203

Howard J Weg
Pettzman, Glassmen & Weg
1801 Avenue of the Stars, Suite 1225
Los Angeles, California 90067
[Counsel for Powerex Corp.]

Howard Susman
Duckor Spradling & Metzger
401 West A Street, Suite 2400
San Diego, California 92101
[Counsel for Altamont - Midway, Ltd.]

Hydee R. Feldstein
Cynthia M. Cohen
Paul, Hastings, Janofsky & Walker LLP
Twenty Third Floor
555 South Flower Street
Los Angeles, California 90071
[Counsel for Rio Bravo Poso, Rio Bravo Rocklin, Rio Bravo Fresno and Malancha Hydro Limited Partnership, The Toronto-Dominion Bank]

Hydee R. Feldstein
Katherine A. Traxler
Kelly Aran
Paul, Hastings, Janofsky & Walker LLP
Twenty Third Floor
555 South Flower Street
Los Angeles, California 90071
[Counsel for Constellation Power Source, Inc.]

I. Richard Levy
Gerard, Singer & Levick, P C.
16200 Addison Road, Suite 140
Addison, Texas 75001
[Counsel for Babcock & Wilcox Company]

Iain Macdonald
Macdonald & Associates
Two Embarcadero Center, Suite 1670
San Francisco, California 94111
[Counsel for The Utility Reform Network (TURN)]

Iathan T Annand
Pacific Gas and Electric Company
77 Beale Street
San Francisco, California 94105

ICC Energy Corporation
302 N. Market Street, Suite 500
Dallas, TX 75202-1846
Attn. Karl Butler

Internal Revenue Service
Fresno, CA 93888

Internal Revenue Service
Spec Proc / Bankruptcy
1301 Clay Street, Suite 1400
Oakland, CA 94612

Internal Revenue Service
Compliance Services, Insolvency Group 3
1301 Clay Street, 1400-S
Oakland, California 94612

Irving Sulmeyer
Victor A. Sahn
Frank V Zerunyan
Sulmeyer, Kupetz, Baumann & Rothman
300 South Grand Avenue, 14th Floor
Los Angeles, California 90071
[Counsel for Certain California Counties with Claims against PG&E]

Isabelle M. Salgado
General Attorney
Pacific Telesis Group
2600 Camino Ramon, Room 4CS100
San Ramon, California 94583

J Christopher Kennedy
Irell & Manella LLP
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067
[Counsel for party in interest]

J Christopher Kohn
Tracy J Whitaker
Brendan Collins
Civil Division
Department of Justice
P O Box 875
Ben Franklin Station
Washington, D C. 20044
[Counsel for United States of America]

J Christopher Kohn
Tracy J. Whitaker
Brendan Collins
Department of Justice
1100 L Street, N.W Room 10004
Washington, D.C. 20005
[Counsel for United States of America]

J. Christopher Shore
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
[Counsel for Oildale Energy LLC, Wadham Energy LP, Martinez Cogen LP, KES-Kingsburg LP]

J Matthew Derstine
Roshka Heyman & DeWulf PLC
One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, AZ 85004
[Counsel for Tucson Electric Power Company]

Jack L. Taylor
1289 Lincoln Road
P O. Box 1850
Yuba City, California 95992
[Counsel for James Bowsher]

James A. Reuben
David Silverman
Reuben & Alter LLP
235 Pine Street, Suite 1600
San Francisco, California 94104

James E. Spiotta
Ann Acker
Chapman & Cutler
111 W Monroe Street
Chicago, IL 60603
[Counsel for Pacific Investment Management Company]

James L. Lopez
Cara J Frey
Howard, Rice, Nemerovski, Canady, Falk & Rabkin
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
[Counsel for Pacific Gas and Electric Company]

James Mori
Mori & Associates
317 Noe Street
San Francisco, California 94114
[Counsel for The City and County of San Francisco]

James R. Thompson
Idaho Power Company
1221 W Idaho Street
Boise, Idaho 83702

James S. Monroe
Nixon Peabody LLP
Two Embarcadero Center, Suite 2700
San Francisco, California 94111
[Counsel for SPL WorldGroup, Inc. and Wilmington Trust]

Jane Castle
Lehman Commercial Paper, Inc.
745 7th Ave., 3rd Floor
New York, NY 10022

Janine D Bloch
Preston Gates & Ellis LLP
55 Second Street, Suite 1700
San Francisco, California 94105
[Counsel for PPL Montana, LLC, Utility Tree Service, Fabte Company]

Jeanne Miller
Regency Centers, LP
Legal Department
121 West Forsyth Street, Suite 200
Jacksonville, Florida 32202

Jeff St. Onge
c/o Greg Baumann
Bloomberg News
345 California Street
San Francisco, California 94104

Jeffrey D. Chansler
Empire Blue Cross Blue Shield
One World Trade Center, 28th Floor
New York, NY 10048

Jeffrey M. Wilson
Saybrook Capital LLC
303 Twin Dolphin Drive, Suite 600
Redwood City, California 94065
[Proposed Investment Banker to Committee]

Laurie R. Binder
Kirkpatrick & Lockhart
1251 Avenue of the Americas, 45th Floor
New York, NY 10020
[Counsel for Waddell & Reed Advisors]

Jeffry A. Davis
Gray Cary Ware & Freidenrich LLP
401 B Street, Suite 1700
San Diego, California 92101
[Counsel for International Brotherhood of Electrical Workers, Local 47 and Local 1245]

Jennifer A. Merlo
Bradley B. Pearce
Moore & Van Allen, PLLC
Bank of America Corporation Center
100 North Tryon Street, Floor 47
Charlotte, North Carolina 28202

Jeremiah F Hallisey
Hallisey & Johnson
300 Montgomery Street, Suite 538
San Francisco, California 94104

Joann Noble-Choder
Viacom, Inc.
11 Stanwix Street
Pittsburgh, PA 15222

JoAnn P Russell
Duke Energy Trading and Marketing LLC
10777 Westhemer, Suite 650
Houston, TX 77042

Jody A. Messel
2632 Larkin Street, Suite 0
San Francisco, California 94109
[Counsel for Frank Pinguelo]

John A. Vos, Attorney
1430 Lincoln Avenue
San Rafael, CA 94901

John Chu
Corporate Counsel Law Group LLP
417 Montgomery Street, 10th Floor
San Francisco, California 94104
[Counsel for Bay Area Rapid Transit District]

John F Shellabarger
Carriage Homes, Inc.
Law Offices of John F Shellabarger
928 Garden Street, Suite 3
Santa Barbara, California 93101
[Counsel for Carriage Homes, Inc.]

John G Klaugberg
LeBoeuf, Lamb, Greene & MacRae, LLP
125 West 55th Street
New York, NY 10019
[Counsel for Enron North America Corp and Enron Canada Corp.]

John P Dillman
Linebarger Heard Goggan Blair
Graham Pena & Sampson, LLP
P O. Box 3064
Houston TX 77253

John P Hurt
The Babcock & Wilcox Company
20 S. Van Buren Avenue
P O. Box 351
Barberton, Ohio 44203

Wendy K. Laubach
Diamond, McCarthy, Taylor & Finley
2 Houston Center, 909 Fannin, Suite 1500
Houston, Texas 77010
[Counsel for Sacramento Municipal Utility District]

John Robert Weiss
Katten Muchin Zavis
525 West Monroe Street, Suite 1600
Chicago, IL 60661
[Proposed Counsel for Official Committee of Unsecured Creditors]

John T Hansen
Deborah H. Beck
Nossaman, Guthner, Knox & Elliott
50 California Street, 34th Floor
San Francisco, California 94111
[Counsel for Committee of PG&E Retirees and Survivors and BSW Claim Acquisition LLC]

Jonathan Rosenthal
Jon P Schotz
Jonathan Y Thomas
Saybrook Capital LLC
401 Wilshire Boulevard, Suite 850
Santa Monica, California 90401
[Proposed Investment Banker to Committee]

Jonathan S. Storper
Hanson, Bridgett, Marcus, Vlahos & Rudy LLP
333 Market Street, Suite 2300
San Francisco, California 94105
[Counsel for Creditor Hanson, Bridgett, Marcus, Vlahos & Rudy LLP]

Joseph A. Eisenberg, Esq
Jeffer, Mangels, Butler & Marmaro
1900 Avenue of the Stars, 7th FL
Los Angeles, CA 90067
[Attorney for California Power Exchange]

Joseph A. Eisenberg, P C.
Victoria S Kaufman
Jeffer, Mangels, Butler & Marmaro LLP
2121 Avenue of the Stars, Tenth Floor
Los Angeles, CA 90067
[Counsel for California Power Exchange Corp]

Joseph J Smolinski
Chadbourne & Parke LLP
30 Rockefeller Plaza
New York, NY 10112
[Counsel for El Dorado Hydro and Rock Creek Limited Partnership]

Juan C. Basombrio
Kent J Schmidt
Dorsey & Whitney LLP
650 Town Center Drive, Suite 1850
Costa Mesa, California 92626
[Counsel for US Bank Trust National Association]

Julia Hill, County Counsel
County of Santa Cruz
Office of the Treasurer – Tax Collector
701 Ocean Street, Room 505
Santa Cruz, California 95060
[Counsel for County of Santa Cruz]

K. Bailey
Bankruptcy Specialist
General Motors Acceptance Corporation
P O Box 173928
Denver, CO 80217

Kaaren E. Thomas
Beckley Singleton Chtd.
530 Las Vegas Boulevard South
Las Vegas, NV 89101

Karen Keating Jahr, County Counsel
Michael A. Ralston, Assistant County Counsel
1815 Yuba Street, Suite 3
Redding, California 96001

Kathryn A. Coleman
Desmond A. Coleman
Gibson, Dunn & Crutcher LLP
One Montgomery Street, Telesis Tower
San Francisco, California 94104
[Attorney for Creditor Merrill Lynch, Pierce, Fenner & Smith]

KBC Bank
Attn. Ivan Vertenten
515 So. Figueroa St., Suite 1920
Los Angeles, CA 90071

Kelly Greene McConnell
Givens Pursley LLP
277 North 6th Street, Suite 200
Boise, ID 83702
[Counsel for Windpower Partners, 1987, 1988, Altamond Winds, Inc. Windworks, Inc.]

Kenneth A. Brunetti
Miller & Van Eaton, LLP
400 Montgomery Street, Suite 501
San Francisco California
[Counsel for Ubiquitel, Inc.]

Kenneth M. Greene
Carruthers & Roth PA
Post Office Box 540
Greensboro, North Carolina 27402
[Counsel for Royal Insurance Company]

Kenneth N Klee
David M. Stern
Michael L. Tuchin
Michelle C. Campbell
Klee, Tuchin, Bogdanoff & Stern LLP
1880 Century Park East, Suite 200
Los Angeles, California 90067
[Counsel for POSDEF Power Company, L.P.]

ATTORNEYS AT LAW
GREYSTONE PLAZA BUILDING
840 MCKAWK STREET, SUITE 200
BAKERSFIELD, CALIFORNIA 93309-1500
(661) 323-3400

Kenneth N Rusnak
Pillsbury Winthrop LLP
725 South Figueroa Street, Suite 2800
Los Angeles, California 90017
[Counsel for Dynergy Power Marketing, Inc., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, Cabrillo Power II, LLC, Dynergy Marketing & Trade LLC, West Coast LLC]

Kenneth R. Reynolds, Esq
Kenneth R. Reynolds, Inc.
2020 Hurley Way, Suite 210
Sacramento, CA 95825
[Attorneys for Mountain Firewood and Hazard Tree]

Kevin K. Haah
Ervin, Cohen & Jessup LLP
9401 Wilshire Boulevard, 9th Floor
Beverly Hills, California 90212
[Counsel for Ronald A. Katz Technology Licensing L.P.]

Kimberly S. Winick
Mayer, Brown & Platt
350 South Grand Avenue, 25th Floor
Los Angeles, California 90071
[Counsel for Aera Energy LLC and Watt Fresno Associates II]

Kjehl T Johansen
Legal Division
Office of City Attorney
Department of Water and Power
P O Box 51111, Suite 340
Los Angeles, California 90051

Larren M. Nashelsky
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104
[Counsel for El Paso Merchant Energy L.P.]

Laurence M. Frazen
Stephen S. Sparks
Bryan Cave
1200 Main Street, Suite 3500
Kansas City, Missouri 64105
[Counsel for City of Kansas City]

Lawrence M. Jacobson
Baker and Jacobson
11377 West Olympic Boulevard, Suite 500
Los Angeles, California 90064
[Counsel for Tishman Construction Corp. of California]

Lawrence P. Ebner
H. Mark Mersel
Morrison & Foerster
19900 MacArthur Boulevard
Irvine, California 92612

Lillian G. Stenfeldt
Fred Hjelmeset
Gray Cary Ware & Freidenrich LLP
1755 Embarcadero
Palo Alto, California 94303
[Counsel for International Brotherhood of Electrical Workers, Local 47 and Local 1245]

Linda Boyle
Time Warner Telecom Inc
10475 Park Meadows Drive, Suite 400
Littleton, CO 80124

Lori J Scott
Shasta County Treasurer – Tax Collector
P O. Box 991830
Redding, California 96099

Lynne Richardson
Air Products and Chemicals Inc.
Business Services A6328
7201 Hamilton Boulevard
Allentown, PA 18195

M. David Minnick
Pillsbury Winthrop LLP
50 Fremont Street
San Francisco, California 94105
[Counsel for ThermoEcotek Corporation]

M. Freddie Reiss
PricewaterhouseCoopers LLP
400 South Hope Street
Los Angeles, California 90071
[Proposed Financial Advisor to Committee]

M.O Sigal Jr
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, NY 10017
[Counsel for Duke Energy Trading and Marketing]

Madison S Spach, Jr
Spach & Associates, P C.
4675 MacArthur Court, Suite 550
Newport Beach, California 92660
[Counsel for William Lyon Homes, Inc.]

Mairi V Luce
Duane Morris & Heckscher LLP
4200 One Liberty Place
Philadelphia PA 19103
[Counsel for Santa Clara Valley Water District]

Marc Barreca
John R. Knall, Jr
Preston Gates & Ellis LLP
701 Fifth Avenue, Suite 5000
Seattle, WA 98104
[Counsel for PPL Montana, LLC, Utility Tree Service, Fabre Company]

Marc Hirschfield
Benjamin Hoch
Dewey Ballantine LLP
1301 Avenue of the Americas
New York, New York 10019-6092

Marc S. Cohen
Ashleigh A. Danker
Kaye Scholer LLP
1999 Avenue of the Stars, Suite 1700
Los Angeles, California 90067
[Counsel for Official Committee of Participants' Creditors Claims]

Marmargaret Webdell
Sacramento County Department of Finance
700 H Street, Room 1710
Sacramento, California 95814
[Creditor County of Sacramento]

Mark A. Speiser
Stroock & Stroock & Lavan LLP
180 Maiden Lane
New York, NY 10038
[Counsel for J Aron & Company]

Mark C. Ellenberg
Cadwalader, Wickersham & Taft
1201 F Street N W , Suite 1100
Washington, D.C. 20004
[Counsel for MBIA]

Mark Finnemore
Internal Revenue Service
Small Business/Self-Employed Division Counsel
160 Spear Street, 9th Floor
San Francisco, California 94105
[Counsel for the United States of America]

Mark Gorton
Mary E. Olden
Todd M. Bailey
McDonough, Holland & Allen
555 Capitol Mall, Ninth Floor
Sacramento, California 95814
[Counsel for Northern California Power Agency]

Martha E. Romero
Law Offices of Martha E. Romero
7743 South Painter Avenue, Suite A
Whittier, California 90602
[Counsel for Secured Creditors Various California Counties in California]

Martin A. Mattes
Castle Companies
12885 Alcosta Boulevard, Suite A
San Ramon, California 94583

Martin G Bunin
Craig E. Freeman
Thelen, Reid & Priest LLP
40 W 57th Street, 26th Floor
New York, NY 10019
[Counsel for Calpine Corporation]

Martin L. Fineman
David Wright Tremaine LLP
One Embarcadero Center, Suite 600
San Francisco, California 94111
[Counsel for Wheelabrator Shasta Energy Co.]

Martin L. Nelson
Kawana Springs, Inc.
2880 Cleveland Avenue, Suite 8
Santa Rosa, California 95403

Martin Marz
BP Amoco
P O. Box 3092
Houston, Texas 77079

Mary Ann Kilgore
General Attorney
Union Pacific Railroad Company
1416 Dodge Street, Room 830
Omaha, Nebraska 68179

Mary B Holland
Financial Consultant
Salomon Smith Barney
1111 Superior Ave. Suite 1800
Cleveland, Ohio 44114-2507
[Trustee for the account of St. Edward's High School]

Matt Holley
Lodestar Corporation
Two Corporation Way
Peabody, MA 01960

MBIA Insurance Corporation
Attn. IPM-PCF
113 King Street
Armonk, NY 10504

Melanie Fannin
General Counsel
Senior Vice President & Secretary
2500 Camino Ramon Room 4CS100
San Ramon, California 94583

Mellon Bank, N.A.
Attn. L. Scott Sommers
400 So. Hope Street, 5th Floor
Los Angeles, CA 90071-2806

Merle C. Meyers
Katherine D Ray
Goldberg, Stinnett, Meyers & Davis
44 Montgomery Street, Suite 2900
San Francisco, California 94104
[Counsel for Modesto Irrigation District]

Merrill Lynch
Attn. Abi Aharon
World Financial Ctr., North Tower
250 Vesey Street, 10th Floor
New York, NY 10281-1310

Michael A. Berman
Securities and Exchange Commission
450 Fifth Street, N.W. (Mail Stop 0606)
Washington, D C. 20549

Michael A. Rosenthal
Keith D Ross
Gibson Dunn & Crutcher LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201
[Counsel for NRG Energy, Inc.]

Michael B Lubic
Bingham, McCutchen LLP
355 South Grand Avenue, Suite 4400
Los Angeles, California 90071
[Counsel for Reliant Energy, Inc.]

Michael F O'Friel
Wheelabrator Technologies, Inc.
4 Liberty Lane West
Hampton, NH 03842
Michael Friedman
Richard Spears Kibbe & Orbe
One Chase Manhattan Plaza
New York, NY 10005
[Counsel for DK Acquisition Partners]

Michael H. Ahrens
Terrence V Ponsford
Kimberly S. Fineman
Orr Katz
Sheppar, Mullin, Richter & Hampton
Four Embarcadero Center, 17th Floor
San Francisco, California 94111
[Counsel for GWF Power Systems L.P., Hanford L.P., and Thermal Energy Development Partnership., L.P.]

Michael Hamilton
PricewaterhouseCoopers LLP
1301 Avenue of the Americas
New York, NY 10019
[Proposed Financial Advisor to Committee]

Michael J. Blumenfeld
One Kaiser Plaza, Suite 1675
The Ordway Building
Oakland, California 94612
[Counsel for Hypower Incorporated]

Michael L. Tuchin
David M. Stern
Michelle C. Campbell
Klee, Tuchin, Bogdanoff & Stern LLP
1880 Century Park East, Suite 200
Los Angeles, California 90067
[Counsel for Cathness Energy, LLC and FPL Energy Inc.]

Michael Morris
Hennigan, Bennet & Dorman
601 South Figueroa Street, Suite 3300
Los Angeles, California 90017
[Counsel for Southern California Gas Company]

Michael P Shuster, Esq
Lawrence E. Oscar, Esq
Hahn Loeser & Parks LLP
3300 BP Tower, 200 Public Square
Cleveland, OH 44114-2301

Michael R. Enright
Robinson & Cole LLP
280 Trumbull Street
Hartford CT 06103
[Counsel for General Electric Company]

Michael Rochman
School Project for Utility Rate Reduction
1430 Willow Pass Road, Suite 240
Concord, California 94520

Michael V McIntire
McIntire Law Corporation
Post Office Box 1647
41191 Big Bear Boulevard
Big Bear Lake, California 92315
[Counsel for Ladies of the Grand Army of the Republic, Inc.]

Mike K. Nakagawa
Nakagawa & Rico
2335 Capitol Oaks Drive, Suite 130
Sacramento, California 95833
[Counsel for Kimball Hill Homes, Inc.]

Mike R. Jaske
California Energy Commission
1516 Ninth Street, MS-22
Sacramento, California 95814

Mitchell A. Hardwood
David Fitton
P Schoenfeld Asset Management, LLC
1330 Avenue of the Americas, 34th Floor
New York, NY 10019

Mitchell I. Sonkin
Lawrence A. Larose
King & Spalding
1185 Avenue of the Americas
New York, NY 10036
[Counsel for MBIA]

Mitchell Seider
Kramer Levin Naftalis & Frankel LLP
919 Third Avenue
New York, NY 10022

Morgan Guaranty Trust Company of New York
Attn. Carl J Mehldau
60 Wall Street
New York, NY 10260

Mr David Boergers, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1-A
Washington, DC 20246

Nancy Hotchkiss
Tramor Robertson
701 University Avenue, Suite 200
Sacramento, California 95825
[Counsel for Prodigy Development, Inc. – Empire Ranch]

Nancy Hotchkiss
Tramor Robertson
701 University Avenue, Suite 200
Sacramento, California 95825
[Counsel for 929 L Street, Inc.]

Nancy Newman
Sternhart & Falconer LLP
333 Market Street, 32nd Floor
San Francisco, California 94105
[Counsel for Regency Centers, L.P.]

Nanette D Sanders
Sarah E. Petty
Snell & Wilmer LLP
1920 Main Street, Suite 1200
Irvine, California 92614
[Counsel for Arizona Public Service Co.]

Yolanda Cisneros
909 Meyer Street, No. 24
Arvin, California 93203

Neil J Rubenstein
Holly R. Shilliday
Arter & Hadden LLP
Two Embarcadero Center, 5th Floor
San Francisco, California 94111
[Counsel for Association of Bay Area Governments and ALCAN Alum. Corp.]

Neil W Rust
White & Case LLP
633 West Fifth Street, Suite 1900
Los Angeles, California 90071
[Counsel for Deutch Bank AG, New York Branch]

Office of the Treasurer and Tax Collector
County of Merced
2222 M Street
Merced, CA 95340

Office of the U S. Trustee
Attn. Patricia Cutler
250 Montgomery Street, Suite 1000
San Francisco CA 94104-3401

Oscar R. Cantu
Weil, Gotshal & Manges LLP
701 Brickell Avenue, Suite 2100
Miami, Florida 33131
[Counsel for PG&E Corporation]

Pancanadian Energy Services Inc.
1200 Smith Street, Suite 900
Houston, TX 77002
Attn. Brian Redd

Patricia S. Mar
Morrison & Foerster LLP
425 Market Street, 33rd Floor
San Francisco, CA 94105-2482
[Counsel for AES New Energy, Inc.]

Patricia S. Mar, Esq
Morrison & Foerster LLP
425 Market Street, 33rd Floor
San Francisco, California 94105-2482
[Counsel for Avista Energy, Inc. and GWF Power Systems Company, Inc.]

Paul C. Lacourciere
Thelen, Reid & Priest LLP
101 Second Street, Suite 1800
San Francisco, California 94105
[Counsel for Burney Forest Products]

Paul J Pantano, Jr
McDermott, Will & Emery
600 13th Street, N W
Washington, D C. 20005
[Counsel for Morgan Stanley Capital Group Inc.]

Paul M. Barthkewicz
Joshua M. Horowitz
Barthkewicz, Kronick & Shanahan
1011 Twenty Second Street #100
Sacramento California 95816
[Counsel for Browns Valley Irrigation District and Yolo County Flood Control and Water Conservation District]

Peter J Benvenutti
Heller Ehrman White & McAuliffe LLP
333 Bush Street
San Francisco, California 94104

Peter J. Gurfein
Jeffrey C. Krause
Gregory K. Jones
Akin, Gump, Strauss, Hauer & Feld
2029 Century Park East, Suite 2600
Los Angeles, California 90067

Peter S Clark II
Derek J Baker
Reed Smith, LLP
2500 Liberty Place
1650 Market Street
Philadelphia, PA 19103-7301

ATTORNEYS AT LAW
GREYSTONE PLAZA BUILDING
841 MOHAWK STREET, SUITE 200
BAKERSFIELD, CALIFORNIA 93309-1500
(661) 322-2400

Peter S. Munoz
Gregg M. Ficks
Crosby, Heafy, Roach & May
Two Embarcadero Center
San Francisco, California 94111
[Counsel for Placer County Water Agency, Oroville-Wyandotte Irrigation District, Yuba County Water Agency, Nevada Irrigation District Oakdale and South San Joaquin Irrigation Districts, Merced Irrigation District, Humboldt Bay Municipal Water District, Merrit Community Capital Corporation]

Philip S. Warden
Andrea S Wirum
Pillsbury Winthrop LLP
P O. Box 7880
San Francisco, California 94120-7880
[Counsel for Texaco, Inc.]

Philip S. Warden
Andrea S. Wirum
Pillsbury Winthrop LLP
P.O Box 7880
San Francisco, California 94120-7880
[Counsel for Chevron U S.A. Production Co.]

Philip Warden
Pillsbury, Winthrop LLP
50 Fremont Street
San Francisco, California 94105
[Counsel for Southern California Gas Company]

Phillip E. Tatoian
Asplundh Tree Expert Co.
708 Blair Mill Road
Willow Grove, Pennsylvania 19090

Phillip S. Warden
Pillsbury Winthrop LLP
50 Fremont Street
San Francisco, California 94105
[Counsel for Dynergy Power Marketing, Inc. El Segundo Power LLC; Long Beach Generation LLC; Cabrillo Power I LLC; Cabrillo Power II, LLC; Dynergy Marketing & Trade LLC; West Coast LLC]

R. Dale Ginter
Downey, Brand, Seymour & Rohwer LLP
555 Capitol Mall, 10th Floor
Sacramento, California 95814
[Counsel for Merced Irrigation District, Occidental of Elk Hills,
Diamond Walnut Growers, and Hertz Corporation]

R. Paul Yetter
Yetter & Warden LLP
600 Travis, Suite 3800
Houston, Texas 77002
[Counsel for The Board of Directors of Local Governments Investment Cooperative]

Rabobank International
Attn. Gladys Montes
Four Embarcadero Center
Suite 3200
San Francisco, CA 94111

Rabobank Nederland
New York Branch
Attn. Brett Delfino
245 Park Avenue
New York, NY 10167-0062

Randolph L. Wu
TURN
711 Van Ness Avenue, Suite 350
San Francisco, CA 94102
[Attorney for Utility Reform Network]

Ray Foianini
Foianini Law Offices
109 Division Avenue West
Post Office Box 98823
Ephrata, WA 98823

Region IV
U.S. Nuclear Regulatory Commission
Ellis W Merschoff
Regional Administrator
611 Ryan Plaza Drive, Suite 400
Arlington, TX 76011-8064

Richard A. Lapping
Louis J Cisz, III
Thelen Reid & Priest LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3601
[Counsel for Creditor, Calpine Corporation and its Affiliated Entities]

Richard Blackstone Webber II
320 Maitland Avenue
Altamonte Springs, Florida 32701
[Counsel for Blue Cross and Blue Shield of Florida, Inc.]

Richard C. Josephson
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
[Counsel for PacifiCorp and Crockett Cogen.]

Richard Hopp
14416 Victory Boulevard, Suite 108
Van Nuys, California 91401
[Richard Hopp in Propria Persona]

Richard J Reynolds
Turner, Cooper & Reynolds
16485 Laguna Canyon Road #250
Irvine, California 92618
[Counsel for Robert D Prior, executor of the Estate of Jalmer Throlvald Berg]

ATTORNEYS AT LAW
GREYSTONE PLAZA BUILDING
841 MOHAWK STREET SUITE 200
BAKERSFIELD CALIFORNIA 93309 1500
(661) 322-2400

Richard Purcell
Attn. Energy Supply
Conectiv
800 Kings Street
P O. Box 231
Wilmington, DE 19899

Richard Stevens
Avista Corp.
P O Box 3727
Spokane, WA 99220

Richard T Peters
Sidley Austin Brown & Wood
555 West Fifth Street, Suite 4000
Los Angeles, California 90013
[Counsel for Sierra Pacific Power Company and Nevada Power Company]

Richard W Esterkin
Morgan, Lewis & Bockius LLP
300 South Grand Avenue
Los Angeles, California 90071
[Counsel for Fuji Bank, Limited]

Richard Wyron
Swidler Berlin Shereff Friedman LLP
3000 K Street, NW, Suite 300
Washington, DC 20007
[Attorney for California Independent System Operator]

Robert A. Greenfield, Esq.
Stutman, Treister & Glatt
3699 Wilshire Blvd., #900
Los Angeles, CA 90010-2766

Robert Blodgett, Jr
c/o H. Ana Liroff, Esq
Hannig Law Firm LLP
2991 El Camino Real
Readwood City, California 94061
[Counsel for Creditor Robert Blodgett, Jr]

Robert C. Stokes
5851 San Felipe, Suite 950
Houston, Texas 77057
[Counsel for BP AMOCO]

Robert D. Albergotti
Stacey Jernigan
Scott W Everett
Haynes and Boone LLP
901 Main Street, Suite 3100
Dallas, Texas 75202

Robert Darby
Corestaff Services (California), Inc.
Fulbright & Jaworski LLP
865 South Figueroa, 29th Floor
Los Angeles, California 90017
[Counsel for Corestaff Services (California), Inc.]

Robert E Izmirian
Aaron M. Oliner
Buchalter, Nemer, Fields & Younger
333 Market Street
San Francisco, California 94105
[Counsel for MBIA]

Robert G. Harris
Corestaff Services (California), Inc.
Binder & Malter
2775 Park Avenue
Santa Clara, California 95050

Robert Jay Moore
Paul S Aronzon
Milbank, Tweed, Hadley & McCloy LLP
601 South Figueroa Street
Los Angeles, California 90017
[Counsel for Official Committee of Unsecured Creditors]

Robert M Blum
Thelen Reid & Priest LLP
101 Second Street, Suite 1800
San Francisco California 94105
[Counsel for Davey Tree Surgery Company]

Robert S. Mueller
United States Attorney
Jocelyn Burton
Assistant United States Attorney
Douglas K. Chang
450 Golden Gate Avenue, 10th Floor
San Francisco, California 94102
[Counsel for United States of America]

Robert S Mueller, III
United States Attorney
Jay R. Weill
Assistant United States Attorney
Thomas MacKinson
160 Spear Street, Ninth Floor
San Francisco, California 94105
[Counsel for the United States of America]

Rock S. Koebbe
5356 North Cattail Way
Boise, ID 83703

Roger L. Efremsky
Austin P Nagel
Law Offices of Efremsky & Nagel
5776 Stoneridge Mall Road, Suite 360
Pleasanton, California 94588
[Counsel for Toyota Motor Credit Corp.]

Roi Chandy
Teachers Insurance and Annuity Assoc of America
730 Third Avenue
New York, NY 10017

Roland Pfeifer
Office of the City Attorney
1500 Warburton Avenue
Santa Clara, California 95050

ATTORNEYS AT LAW
GREYSTONE PLAZA BUILDING
841 MOHAWK STREET SUITE 200
BAKERSFIELD, CALIFORNIA 93309-1500
(661) 322-2400

Ronald L. Miller
Rogers and Miller
720 Southpoint Boulevard, Suite 205
Petaluma, California 94954
[Counsel for Fire Insurance Exchange]

Rosanne Thomas Matzat
Hahn & Hessen LLP
350 Fifth Avenue, Suite 3700
New York, NY 10118
[Counsel for Metropolitan Life Insurance Co]

S. Jack Chevlen
Law Offices of S. Jack Chevlen
5902 Deerland Court
San Jose, California 95124
[Counsel for Swart Industries Corporation dba Precision Plastics]

Sandra W Lavigna
Sarah D. Moyed
Securities Exchange Commission
5670 Wilshire Blvd., 11th Fl.
Los Angeles, CA 90036

Scott C. Clarkson
Eve A. Marsella
Clarkson, Gore & Marsella
3424 Carson Street, Suite 350
Torrance, California 90503
[Counsel for Utilisource]

Scott O. Smith
Buchalter, Nemer Fields & Younger
601 South Figueroa Street, Suite 2400
Los Angeles, California 90017
[Counsel for Quanta Services, Inc]

Secretary of Treasury
15th & Pennsylvania Avenue
Washington, D C. 20549

Sempra Energy Trading Corp
Tony Ferrajina
58 Commerce Drive
Stamford, CT 06902

Sertling Koch
TransAlta Energy Marketing (U.S) Inc.
Box 1900 Station "M"
110-12th Avenue, SW
Calgary, Alberta T2P 2MI

Seth A. Ribner
Simpson Thatcher & Bartlett
10 Universal City Plaza, Suite 1850
Universal City, California 91608
[Counsel for Duke Energy Trading and Marketing]

Sharyn B Zuch
Wiggin & Dana
One CityPlace, 34th Floor
185 Asylum Street

Hartford, CT 06103
[Counsel for American Payment Systems]

Sheryl Gussett
Reliant Energy, Inc.
1111 Louisiana, 43rd Floor
Houston, TX 77002
[Counsel for Reliant Energy, Inc]

Sierra Pacific Industries
File #51950
San Francisco, California 94160

Southern California Gas Company
555 W Fifth St.,
GT24E1
Los Angeles, CA 90013-1000

Stan T Yamamoto
Eileen M Teichert
City of Riverside
City Attorney's Office
City Hall, 3900 Main Street
Riverside, California 92522
[Counsel for City of Riverside]

Stanley B. Pond
Winchell & Pond
1700 South El Camino Real, Suite 506
San Mateo, California 94402
[Counsel for General Capital Corporation]

State of California EDD
PO Box 826880
Sacramento, CA 94280

State of California
Dept. of Water Resources
c/o Chief – Energy Division
Attn. Dan Herdocia
1416 9th Street, Room 1640
Sacramento, CA 95814

Margarita Padilla
Office of the Attorney General
P O Box 70550
1515 Clay Street, 20th Floor
Oakland, CA 94612

State of California
Office of the Attorney General
PO Box 94255
Sacramento, CA 94244-2550

Stephanie Nolan Deviney
Brown & Connery LLP
360 Haddon Avenue
P O. Box 539
Westmont, NJ 08108
[Counsel for SAP America, Inc.]

ATTORNEYS AT LAW
GREYSTONE PLAZA BUILDING
841 MOHAWK STREET SUITE 200
BAKERSFIELD CALIFORNIA 93309 1500
(661) 322-2400

Stephen C. Becker
Becker Law Office
P O Box 192991
San Francisco, California 94119
[Attorneys for Stafco Personnel Management, Inc.]

Stephen Shane Stark, County Counsel
Enrique R. Sanchez, Sr
County of Santa Barbara
105 E. Anapamu Street, Suite 201
Santa Barbara, California 93101
[Counsel for Santa Barbara County and Santa Barbara County Treasurer – Tax Collector]

Steve G F Polard
Perkins Coie LLP
1620-26th Street, Sixth Floor
Santa Monica, California 90404
[Counsel for Creditor Puget Sound Energy, Inc.]

Steve J Reisman
Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, NY 10178

Steven H. Felderstein, Esq.
Felderstein, Willoughby & Pascuzzi
400 Capital Mall, Suite 1450
Sacramento, CA 95814-4434
[Attorney for State of California]

Steven J Stanwyck, Esq.
Barry Fischer
The Stanwyck Firm, APC
1925 Century Park East, Suite 500
Los Angeles, California 90067

Steven M Abramowitz
Vinson & Elkins LLP
666 Fifth Avenue, 26th Floor
New York, NY 10103
[Counsel for TransAlta Energy]

Steven M. Basha
County Counsel
Attn: Stephen B. Nocita, Senior Deputy
625 Court Street, Room 201
Woodland, California 95695
[Counsel for County of Yolo]

Steven M. Bunkin
J Aron & Company
85 Broad Street
New York, NY 10004

Steven M. Olson
Geary, Shea, O Donnell & Grattan, P C.
37 Old Courthouse Square, 4th Floor
Santa Rosa, California 95404
[Counsel for ABB Power T&D Company, Inc.]

STS Hydropower Ltd (Kanaka)
Mr Mike Grahn
300 West Washington Street, Suite 801
Chicago, IL 60606

Terence J Keeley
1289 Lincoln Road
P O Box 1850
Yuba City, California 95992
[Counsel for James Bowsher]

Terrance L. Stinnett
Miriam Khatiblou
Goldberg, Stinnett, Meyers & Davis
44 Montgomery Street, Suite 2900
San Francisco, California 94104
[Counsel for Pacific Bell Telephone Company Pacific Telesis Group,
SBC Global Services, Inc., SBC Communications, Inc.]

Texaco Canada Petroleum Inc.
400 3 Avenue SW, #2034
Calgary, Alberta
Canada T2P 4H2
Attn. Bill Collier

Texaco Natural Gas Inc.
1111 Bagby Street
Houston, Texas 77002
Attn. Bill Collier

The Bank of New York
Michael Pitfick, Corporate Trust Ad
101 Barclay Street-21W
New York, NY 10286

The Fuji Bank, Limited
Attn. Jonathan Bigelow
333 So. Hope Street, 39th Floor
Los Angeles, CA 90071

The Sumitomo Bank Ltd.
Attn Al Galluzzo
777 South Figueroa Street, Suite 2600
Los Angeles, California 90017

The Toronto Dominion Bank
Attn. F.B Hawley
909 Fannin, Suite 1700
Houston, TX 77010

Theodor C. Albert, Esq
Michael J Weiland, Esq.
Albert, Weiland & Golden, LLP
650 Town Center Drive, Suite 950
Costa Mesa, CA 92626
[Attorneys for Commonwealth Energy Corporation]

Thomas B Walper Esq.
Munger, Tolles & Olson LLP
355 South Grand Ave., Suite 3500
Los Angeles, CA 90071-1560
[Counsel for Southern California Edison]

Thomas C. Walsh
BTM Capital Corporation
125 Summer Street
Boston, MA 02110

Thomas E. Lauria
Jerry R. Bloom
Brian L. Holman
White & Case LLP
633 West Fifth Street, 19th Floor
Los Angeles, California 90071
[Counsel for Oildale Energy LLC]

Thomas E. Lauria
Jerry R. Bloom
Brian L. Holman
White & Case LLP
633 West Fifth Street, 19th Floor
Los Angeles, California 90071
[Counsel for Ripon Cogeneration, Inc.]

Thomas E. Lauria
White & Case LLP
First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131
[Counsel for Oildale Energy LLC, Wadham Energy LP, Marsnez
Cogen LP, KES-Kingsburg LP]

Thomas E. Lumsden
Rocky Ho
PricewaterhouseCoopers LLP
199 Fremont Street
San Francisco, California 94105
[Proposed Financial Advisor to Committee]

Thomas M. Berliner
Duane Morris & Heckscher LLP
100 Spear Street, Suite 1500
San Francisco California 94105
[Counsel for Santa Clara Valley Water District]

Thomas MacKinson
Internal Revenue Service
Small Business/Self-Employed Division
1301 Clay Street, Room 1400-S
Oakland, California 94105
[Counsel for the United States of America]

Timothy F Hodgdon
Teachers Insurance and Annuity Assoc. of America
730 Third Avenue
New York, NY 10017

Tony O Hemming
Texaco Legal Department
1111 Bagby Street
Houston, TX 77002

TXU Energy Trading Canada Limited
1717 Main Street
Dallas, Texas 75201

Attn. Jeff Shorter
TXU Energy Trading Company
1717 Main Street
Dallas, Texas 75201

Attn Jim Macredie
U.S. Bank
Corporate Trust Services
Attn. LaDonna Morrison
180 East Fifth St., 3rd Floor
St. Paul, MN 55101

U.S Nuclear Regulatory Commission
Attn. Document Control Desk
Washington, DC 20555-0001

U.S. Trust Company National Association
One Embarcadero Center, Suite 2050
San Francisco, CA 94111-3709

US Bank, Corporate Trust Services
Ladonna Morrison
P O. Box 64111
St. Paul, MN 55164-0111

Victor Waid
Law Office of Victor Waid
2625 Fair Oaks Boulevard, Suite 1
Sacramento, California 95864
[Counsel for Kim Creedon]

Victoria Lang
AT&T Corp.
795 Folsom Street, 2nd Floor
San Francisco, California 94107
[Counsel for AT&T Corp]

W Austin Cooper
James M. Gardener
Cooper & Gardener
2535 Capitol Oaks Drive, Suite 100
Sacramento, California 95833
[Counsel for Larry Shiba]
Walter P McArdle Esq
Spain & Gillon, LLC
The Zinszer Building
2117 Second Avenue North
Birmingham, Alabama 35203
[Attorneys for Dresser Industries, Inc.]

Walter J Lack
Engstrom, Lipscomp & Lack
10100 Santa Monica Blvd., Floor 16
Los Angeles, California 90067
[Counsel for Cheryl Ann Acosta]

Wendy L. Hagenau
Powell, Goldstein, Frazer & Murphy
16th Floor
191 Peachtree Street, N.E.
Atlanta, GA 30303
[Counsel for Intecom Inc]

Wheelabrator Shasta Energy Co. Inc
20811 Industry Rd.
Anderson, CA 96007

White & Case, LLP
Attn. Neil Millard
633 West Fifth St., Suite 1900
Los Angeles, CA 90071-2007
[Attorney for BNY Western Trust Company]

White & Case, LLP
Attn. Neil Millard/C. Randolph Fishburn
633 West Fifth St., Suite 1900
Los Angeles, CA 90071 2007
[Attorney for Bank of New York]

William Bates III
McCutchen, Doyle, Brown & Enersen, LLP
1900 University Avenue
East Palo Alto, California 94303-2223
[Counsel for Reliant Energy, Inc.]

William C. Morison-Knox
Michael D Prough
Robert M. Forni, Jr
Morison-Knox Holden Melendez & Prough, LLP
500 Ygnacio Valley Road, Suite 450
Walnut Creek, California 94596
[Counsel for National Union Fire Insurance Company of Pittsburgh, PA]

William H. Kiekhofer III
Yale K. Kim
Steven E. Rich
Kelley Drye & Warren LLP
777 South Figueroa Street, Suite 2700
Los Angeles, CA 90017
[Counsel for BP Energy Company, BP AMOCO]

William J. Flynn
Neyhart, Anderson, Freitas, Flynn & Grosboll
44 Montgomery Street, Suite 2080
San Francisco, California 94104
[Counsel for IBEW Local #1245]

William M. Goodman
Ligi C. Yee
Topel & Goodman
832 Sansome Street, Fourth Floor
San Francisco, California 94111
William M. Rossi-Hawkins
Phillips, Lytle, Hitchcock, Blaine & Huber
437 Madison Avenue, 34th Floor
New York, NY 10022
[Counsel for HSBC Bank USA]

William P Wentraub
Pachulski Stang Ziehl Young & Jones
Three Embarcadero Center, Suite 1020
San Francisco California 94111
[Counsel for PG&E Corp.]

Williams Energy Marketing & Trading Co. (Canada)
One Williams Center, 19th Floor
Department 558
P O Box 2848
Tulsa, Oklahoma 74101
Attn. Kelly Knowlton

Zack Starburd
Mirant Corporation
1155 Perimeter Center West
Atlanta, GA 30338

Zuckerman-Mandeville, Inc.
P O. Box 487
Stockton, California 95201

Lawrence M. Jacobson
Glickfeld, Fields & Jacobson LLP
9460 Wilshire Boulevard, Fifth Floor
Beverly Hills, California 90212
[Counsel for Tishman Construction Corporation of California]

W Kelsea Eckert
Eckert, Benson & Associates
4711 Highway 17 South, Suite 3
Orange Park, Florida 32073
[Counsel for Creditor Landstar Ranger]

Kennedy Stroh
Potter Valley Irrigation District
Post Office Box 186
Potter Valley, California 95496

Arocles Aguilar
Gary Cohen
Michael Edson
California Public Utilities Commission
Legal Division
505 Van Ness Avenue
San Francisco CA 94102

Joseph W Carcione, Jr
Law Offices of Joseph W Carcione, Jr
601 Bewster Avenue
P O Box 3389
Redwood City, California 94064
[Counsel for Craig Hyman]

David E. Kahn
Ann Miller Ravel
Deputy Counsel
County Government Center, East Wing
70 West Hedding Street, Ninth Floor
San Jose, California 95110
[Counsel for County of Santa Clara]

Kimberly S Winick
Mayer, Brown, Rowe & Maw
350 South Grand Avenue, 25th Floor
Los Angeles, California 90071
[Counsel for Aera Energy LLC]

Ann P Bienstock
Pryor Cashman Sherman & Flynn LLP
410 Park Avenue
New York, New York 10022
[Counsel for Wilmington Trust]

Jerry Carroll
Charleen Carroll
21701 Big Bend Road
Montgomery Creek, California 96065

Richard Levy, Jr
Ann P Bienstock
Pryor Cashman Sherman & Flynn LLP
410 Park Avenue
New York, NY 10022
[Counsel for Wilmington Trust]

Eugene K. Yamamoto
Law Offices of Eugene K. Yamamoto
160 Franklin Street, Suite 206
Oakland, CA 94607

Sean P O'Brien
Madeleine C. Wanslee
Gust Rosenfeld, PLC
201 N. Central Avenue, Suite 3300
Phoenix, AZ 95073-3300

William A. Bramley
Anne-Marie E. Tubao
Law Offices of William A. Bramley
550 West C Street, 19th Floor
San Diego, California 92101
[Counsel for Movants Francisco Matamoros and Laura Matamoros]

Bear, Stearns & Co. Inc.
383 Madison Avenue
New York, NY 10179
Attention. Thomas Boyce

Sheri M.Schwartz
Robert C. Shenfeld
Kelley Drye & Warren LLP
777 South Figueroa Street, Suite 2700
Los Angeles, California 90017
[Counsel for Deutsche Bank Trust Company Americas]

Warren Martin Jr
Riker, Danzig, Scherer, Hyland & Perretti LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
[Counsel for Computer Horizons Corp.]

John R. Paliga
Abdra M. Wong
Pension Benefit Guaranty Corporation
Office of the General Counsel
1200 K Street, N W
Washington, DC 20005

Joel K. Belway
The Law Office of Joel K. Belway
235 Montgomery Street, Suite 715
San Francisco, California 94104
[Counsel for Denny's Inc.]

The Diabetes Trust Fund, Inc.
1222 14th Avenue South, Suite 204
Birmingham, AL 35205

Matthew P Lewis
White & Case LLP
633 West Fifth Street Suite 1900
Los Angeles, California 90017
[Counsel for KBC Bank]

Andew P Denatale
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
[Counsel for KBC Bank]

Andrew Silverstein
Seward & Kissel LLP
One Battery Park Plaza
New York, NY 10004
[Counsel for Bankers Trust Company of California]

Robert F Frier
Peter Morse
Bankers Trust Company
Four Albany Street
New York, NY 10006

Brian M. Kandel
Book & Book LLP
1414 Soquel Avenue, Suite 203
Santa Cruz, California 95062
[Counsel for Ken Lindsay et al.]

Eric Wilson
Robert C. Shenfeld
Kelley Drye & Warren LLP
777 South Figueroa Street, Suite 2700
Los Angeles, California 90017
[Counsel for Satellite Senior Income Fund]

Avila Valley Advisory Council
c/o Neil Tardiff
Smith Tardiff & Crandall
Post Office Box 1446
San Luis Obispo, California 93406
[Counsel for Avila Valley Advisory Council]

Patric J Kelly
Andleson Hess & Kelly
577 Salmar Avenue, 2nd Floor
Campbell, California 95008
[Counsel for Miles Rankin]

Paul G. Kerkorian
726 W Barstow Avenue, Suite 108
Fresno, California 93704

Tom Milne
State of Tennessee
11th Floor, Andrew Jackson Bldg.
Nashville, Tennessee 37243