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December 2, 2003

## MEMORANDUM

**TO:** Council Members

**FROM:** Dick Watson, Tom Eckman, and Bill Hannaford

**SUBJECT:** Appliance Efficiency Data Collection Litigation

**ISSUE:** Should the Council participate as amicus curiae in the Ninth Circuit in an appeal of an adverse ruling in a lawsuit challenging California's authority to collect appliance efficiency data?

**STAFF RECOMMENDATION:** Staff recommends that the Council join the States of Oregon, Washington and New York, several national organizations, including the Natural Resources Defense Council, the National Association of Regulatory Utility Commissioners, the National Association of State Energy Officials, as well as Pacific Gas & Electric and others as an amicus.

**BACKGROUND:** Four national trade organizations representing manufacturers of residential and commercial appliances and equipment have sued California's Energy Resources Conservation and Development Commission, arguing that the Commission's appliance efficiency data collection regulations are preempted by federal law. *Air-Conditioning and Refrigeration Institute; Gas Appliance Manufacturers Association; Association of Home Appliance Manufacturers; and National Electrical Manufacturers Association v. Energy Resources Conservation and Development Commission*, No. Civ. S-02-2437 WBS PAN, United States District Court, Eastern District of California. This case is not one in which the states are seeking to impose energy efficiency standards on the manufacturers. It is, rather, one in which they want to require manufacturers to submit data regarding the sales of energy efficient appliances and equipment. Ruling in favor of the plaintiffs, the district court has enjoined the Commission from enforcing the allegedly preempted regulations.

The Commission has petitioned the Ninth Circuit to stay the injunction and to expedite consideration of the merits of the appeal. The Court, however, has not ruled. Consequently the original briefing schedule will require the Commission to file its opening brief early in December. Those who wish to participate as amici will have until mid-December to file. If the Council wishes to file its own brief or to join with another amicus, it should make a decision at the December meeting.

Staff will report to the Council the interests of the various parties as they will have been enunciated in a conference call later this week. The Council's interest, of course, is in facilitating the development of the conservation resource. Conservation is the resource of first choice both in the Act and in the 20-year power plan developed to guide the Bonneville Power Administration. If the states and others who manage conservation programs are unable to rely on the database gathered by California, a serious blow will be dealt to state and utility programs that effectively implement the conservation resource.

For this reason, the staff recommends that the Council join as an amicus. It is more likely we would join the brief that someone else produces and not write our own.