BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Integrate and Refine Procurement Policies and Consider Long-Term Procurement Plans	Rulemaking 12-03-014 (Filed March 22, 2012)

JOINT COMMENTS TO PROPOSED DECISION DENYING PETITIONS FOR MODIFICATION

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Dated August 4, 2014

SUBJECT INDEX

1. The Proposed Decision should recognize that greater transparency and public process is needed in review of SDG&E's proposed procurement plans submitted under D.14-03-004.

2. The Proposed Decision should require a Tier III Advice letter for review and approval of SDG&E's procurement plans or, in the alternative, require a 15 day formal notice and comment period prior to Energy Division approval.

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Pursuant to Article 14 of the Commission's Rules of Practice and Procedure, Sierra Club, California Environmental Justice Alliance ("CEJA"), Center for Energy Efficiency and Renewable Technologies ("CEERT"), Vote Solar Initiative ("Vote Solar"), Natural Resources Defense Council ("NRDC"), and the Clean Coalition ("Joint Parties") timely file these comments on Administrative Law Judge David M. Gamson's Proposed Decision Denying Petitions for Modification ("Proposed Decision" or "PD"). Rule 14.3(c) of the Commission's Rules of Practice and Procedure provides that comments "shall focus on factual, legal or technical errors" in the Proposed Decision. The Proposed Decision erred by denying the Petition for Modification of Sierra Club, CEJA and Vote Solar Initiative seeking formal notice and comment ("Sierra Club Petition") and the Petition for Modification of NRDC, CEERT, the Environmental Defense Fund, and the Clean Coalition seeking an advice letter process ("NRDC Petition").

Recent events have only served to underscore the need to grant the NRDC Petition or, alternatively, the Sierra Club Petition, and correct the error in the Proposed Decision's assertion that "[t]here is no basis for speculation that Energy Division will not perform its duty."[1] Since the Proposed Decision was issued, Energy Division approved SDG&E's proposed procurement plans with a handful of cosmetic revisions. The plans' significant violations with the requirements of D.14-03-004 cited by consumer and environmental advocates were dismissed without explanation. With the ink barely dry on Energy Division's three-sentence letter of approval, SDG&E submitted its Application for approval of a PPA for a 600 MW gas plant to fill

[1] PD at p. 10.

the entirety of its any resource authorization. In direct contravention of D.14-03-004, there will be no all-source RFO that legitimately allows clean energy to compete against polluting fossil-fuel generation to meet any of the any resource authorization, no compliance with the Loading Order, and no consideration of how approximately $1 billion in recently approved transmission upgrades reduce the need for local generation to minimum authorized levels.[2]

This rapidly unfolding disgrace has at least two possible explanations. Either the Commission was disingenuous in purporting to require good-faith consideration of clean energy in meeting the any resource authorization in D.14-03-004 or Energy Division is incapable of standing up to utility disregard for Commission mandates.

Granting the NRDC or the Sierra Club Petition would restore Commission integrity, enable legitimate implementation of D.14-03-004, and require adherence to state climate and clean energy policy. As we enter an era of runaway climate disruption, the Joint Parties ask only that the Commission uphold D.14-03-004 by requiring SDG&E to give clean energy the opportunity to compete against fossil fuels and accounting for the approvals of costly new transmission upgrades that minimize the need for new carbon-intensive generation. In light of Energy Division's recent conduct and the significant implications of the procurement plans on SDG&E's energy development for the foreseeable future, the Proposed Decision should be revised to approve the NRDC Petition and elevate plan approval to the full Commission. In the alternative, granting the Sierra Club Petition would at least serve to void plan approval and

[2] While the PD notes that SDG&E may file a separate, earlier application for gas-fired generation (PD at p. 11, n.10), this does not change the clear language of the Decision requiring that part of SDG&E's any resource authorization be subject to an all-source RFO. An earlier application seeking approval to meet the entirety of the any resource authorization with fossil fuels cannot be reconciled with D.14-03-004's other requirements.

SDG&E's recently filed application and signal to Energy Division that a more robust review of SDG&E's procurement plan is required.

DISCUSSION

I. Energy Division's Approval of SDG&E's Modified Plan Demonstrates That There Has Been No Meaningful Review and Raises Serious Questions About the Integrity of the Decision-making Process.

Although the PD admits that the Sierra Club Petition's comments on the procurement plan "support the argument that a comment period is necessary,"[3] the PD justifies its denial of the Petitions by asserting that "[t]here is no basis for speculation that Energy Division will not perform its duty" to assure that the proposed procurement plan is consistent with D.14-03-004.[4] The events that have transpired since Joint Parties filed their Petitions validate Joint Parties' concerns and demonstrate why the significant issues raised about the proposed procurement plans' inconsistency with the Decision should be subject to a transparent, meaningful decision-making process.

On June 30, 2014, SDG&E filed comments stating that it was "working with Energy Division staff to ensure that its Track 4 Procurement Plan is consistent with the Track 4 Decision."[5] On July 18, 2014, some of the Joint Parties received an email from Lily Chow from Energy Division with an attached letter indicating approval of a "modified" conventional procurement plan, though the plan itself was not attached.[6] Next, SDG&E filed an application for approval of a 600-MW Carlsbad facility on July 21, 2014.[7] Then, only after several of the

[3] PD at p. 4, n.2.

[4] PD at p. 10.

[5] SDG&E Response to NRDC Petition at p. 6 (June 30, 2014).

[6] *See* July 18 Email from Lily Chow, Energy Division to Matt Vespa, Sara Steck Myers, Sierra Martinez, et. al. No one from CEJA was included on this email.

[7] *See* Application 14-07-009.

Joint Parties protested nondisclosure of the document, Energy Division produced the modified plan.[8]

A review of the purportedly "modified" procurement plans reveals superficial revisions that do nothing to remedy the underlying defects Joint Parties and many others raised in the Petitions and informal comments submitted to Energy Division.[9] Instead, the revisions merely paper over the plans' substantive deficiencies. Rather than legitimately require an all-source RFO to meet at least some of its any resource authorization as required under D.14-03-004,[10] SDG&E's "Conventional Procurement" Plan still calls for meeting the entirety of its any resource authorization through the immediate filing of an application to bilaterally procure the 600 MW Carlsbad Energy Center "with a decision approving the agreement by year-end, 2014."[11] The Preferred Resources Plan, for which SDG&E does not expect to file a procurement application until "year-end, 2015" was redlined to state:

> SDG&E will issue an all-source Request for Offers ("RFO") ~~for preferred resources in~~ in the third quarter of 2014 (~~the "Preferred Resources~~ to solicit a minimum of 500 MW and up to 800 MW of local capacity (the "All Source RFO). SDG&E will target at least 175 MW of preferred resources and 25 MW of energy storage as specified in D.14-03-004. Bilateral contracting may reduce the total procured through the All Source RFO.[12]

In other words, the preceding bilateral procurement of Carlsbad under the "Conventional Plan" will reduce the purported "all-source RFO" by 600 MW to only 200 MW. Under D.14-03-004

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[8] *See* July 21 and July 22 Email from Lily Chow, Energy Division to Matt Vespa, Sara Steck Myers, Sierra Martinez, et. al. The first email attaching a SDG&E procurement plan was sent at 4:29pm – hours after Joint Parties had received SDG&E's application.

[9] *See, e.g.,* Sierra Club Petition, NRDC Petition.

[10] *See* D.14-03-004 at Ordering Paragraph 6 ("San Diego Gas & Electric Company (SDG&E) shall issue an all-source Request for Offers (RFO) for some or all capacity authorized by this decision in Ordering Paragraph 2.")

[11] SDG&E LTTP/Track 4 Procurement Plan (Conventional Procurement), July 16, 2014 at 6.

[12] SDG&E Modified All-Source Procurement Plan (called the Preferred Resource plan before the modification) redline version at pp. 2, 3.

this remaining 200 MW must be met by preferred resources and energy storage. Therefore, under the process contemplated by the Procurement Plans approved by Energy Division, there is no possibility of a solicitation that allows clean and fossil fuel resources to actually compete for any megawatts of authorized procurement. Accordingly, the facial revisions to SDG&E's procurement plans do not remedy the plans' fundamental failure to require an all-source RFO as mandated under D.14-03-004.

Further, just because SDG&E's revised plan renamed an RFO limited to preferred resources an "all-source" RFO does not make it so. The record and the Decision make this distinction clear. For example, the Decision states that "[b]oth utilities may also procure energy storage as part of their preferred resources requirements *or* all-source authorizations, subject to any other conditions in this decision."[13] The Decision thus delineated between the preferred resource and all-source requirements. Witnesses in the proceeding also discussed the difference between an all-source RFO and a preferred resource RFO. For instance, Mr. Cushnie from SCE explained:

> The way our current Track 1 authorization is established, there's buckets of resources that Edison must acquire, so. And we have a 1400-megawatt minimum requirement that we have to meet. A thousand of it has to be gas-fired generation, 150 megawatts has to be preferred resources, and 50 megawatts has to be energy storage. And the remaining 200 can be from any technology. If we go beyond that 200 megawatts, it can only be sourced from preferred resources and energy storage. And so that 200-megawatt block[,] that is really the only component that [is] truly all-source[, and that] is a very small block.[14]

[13] D.14-03-014 at p. 100 (emphasis added).

[14] RT 1968:19-1970:4*; see also* IEP Track 4 Testimony ("I believe that procurement should take place through an all-source solicitation. This would allow project proponents to propose a range of resources, including EE, DR, DG, storage, and grid-connected generation (both renewable and clean gas-fired").

All means all in the truest sense of the word. An all-source RFO must, by definition, allow *all* resources to compete. The revised plans do not provide this opportunity and therefore continue to violate D.14-03-004.

The modified procurement plans also fail to consider the loading order and the recently approved transmission projects, which are projected to significantly reduce local needs by hundreds of MW.[15] The modified plan further unjustifiably asserts a reliability need for 2018 when the record for the Decision is based on need in 2022. Indeed, SDG&E's own testimony in this proceeding only identified a need for 2022 and proposed an "RFO be open to all supply side technologies" to meet that need.[16]

Energy Division's approval of procurement plans with this multitude of fatal inconsistencies with D.14-03-004 flouts the Decision and stakeholder participation in the LTPP proceeding. The full Commission, not Energy Division, needs to ensure the integrity of its decision-making. The PD's assurance that its delegation to the Energy Division was proper has now been proven factually and legally incorrect. The PD needs to be revised to allow for the review necessary to ensure that the Commission properly adheres to its Decision.

II. The PD's Deferral of a Transparent Public Review of SDG&E's Proposed Procurement Plans to a Subsequent Application Proceeding Ignores the Scope of This Proceeding and the Critical Role of the Procurement Plan Approval Process.

As the Petitions discuss, SDG&E's proposed procurement plans do not meet the plain requirements of the Commission's Track 4 Decision, D.14-03-014. Rather than create a transparent process to review the significant inconsistencies that parties identified, which are

[15] *See* Sierra Club Petition (discussing how CAISO has projected that the transmission projects are expected to reduce local need by at least 400 MW).

[16] R.12-03-014, Robert B. Anderson, Prepared Track 4 Direct Testiomony of San Diego Gas & Electric (Aug. 25, 2013) at 12.

still present in the recently approved modified plans, the PD asserts that "[p]arties will have ample opportunity to review and litigate any forthcoming SDG&E procurement applications arising out of D.14-03-004."[17] The PD's contention that parties need not be afforded transparent and meaningful review now because there will be a later opportunity to participate in a subsequent procurement application proceeding stage fails for several reasons.

The appropriate forum to ensure procurement plan consistency with D.14-03-004 is this proceeding, not a subsequent one. The review of procurement plans falls squarely in the scope of the Long Term Procurement Proceeding, and disputes should be transparently and formally considered and resolved here. Importantly, as summarized by the Order Instituting Rulemaking, the purpose of this Proceeding is to do precisely what the Petitions requested:

> establish[] up-front standards for the IOUs' procurement activities and cost recovery **by reviewing and approving procurement plans**. This obviates the need for the Commission to conduct after-the-fact reasonableness reviews for the resulting utility procurement transactions that are **in compliance** with the upfront standards established in the approved procurement plans.[18]

Consistent with the purpose of this Proceeding and the requirements of Section 454.5 of the Public Utilities Code, the Petitions requested a process to ensure that the procurement plans are consistent with the "up-front standards" the Commission established in D.14-03-004. The concerns raised in the Petitions, such as the requirement for an all-source RFO, compliance with the loading order, and consideration of transmission upgrades that avoid the need to procure at maximum authorized levels, are fundamental to defining the nature and scope of future procurement and cannot legitimately be postponed to a subsequent proceeding. The PD's effort to punt formal review of plan consistency with D.14-03-004 to a separate procurement

[17] PD at pp. 11-12.

[18] Order Instituting Rulemaking, R.12-03-014 (Mar. 22, 2012) at p. 3 (emphasis added).

application is erroneous because it would result in the very "after-the-fact reasonableness reviews" the Long Term Procurement Proceeding is expressly designed to avoid.

Moreover, the PD's assertion that parties will have ample opportunity to participate and impact a future procurement application is not credible given that SDG&E sought Energy Division approval to fill its maximum "any resource" procurement authorization through a bilateral contract with a single specific gas plant, the Carlsbad Energy Center.[19] Had SDG&E already received Energy Division approval to procure only the Carlsbad facility to meet its entire any resource authorization, efforts by stakeholders to require SDG&E to consider other procurement options at the application stage could be foreclosed. In addition, failure to consider inconsistencies with the Decision at this juncture will undeniably prejudice other potential providers who will be unable to compete to fill authorized need and advocates seeking optimal outcomes for ratepayers and the environment.[20] In fact, prior Commission decisions have rejected arguments that other resources should have been considered at the application stage as collateral attacks of a prior Commission decision.[21]

Where the procurement of a specific resource is already predetermined and approved, participation at the time of a procurement application is illusory. The utility application stage therefore offers little potential relief to parties. Prior Commission decisions have demonstrated that procurement plans that dictate future procurement outcomes – not after-the-fact applications seeking approval of an already negotiated contract with a preselected facility –

[19] *See* SDG&E Conventional Procurement Plan at pp. 2-3.

[20] *See, e.g.,* CESA Informal Comments on SDG&E's Procurement Plans; Nevada Hydro Informal Comments on SDG&E's Procurement Plans.

[21] *See, e.g.,* D.14-02-016 (rejecting arguments that preferred resources and energy storage should have been allowed to compete to fill need as a collateral attack on a prior Commission decision).

must be subject to transparency and the opportunity for formal stakeholder input.[22] The only meaningful opportunity to remedy the deficiencies in SDG&E's procurement plans is now.

III. An Advice Letter Process Is More Efficient Than Punting the Issues of Inconsistency with the Decision to a Subsequent Application.

The Proposed Decision also errs in concluding that granting the NRDC Petition for an Advice Letter process would "unnecessarily slow the review process."[23] Awaiting resolution of a proceeding intended to address the reasonableness of contract terms before reaching a determination on the fundamental legitimacy of the contract itself is inefficient and poses far greater risk of significant delay in procurement. Were the application ultimately denied by the Commission for failure to comply with D.14-03-004 or rejected by a court in the event of a challenge to application approval, procurement implementation would return to square one. The Advice Letter process would provide greater certainty and clarity on procurement plan parameters to enable more efficient and focused review of any subsequent procurement application.

IV. Energy Division's Truncated Comment Period Does Not Moot the Sierra Club Petition.

On June 17, 2014, after Joint Parties filed their June 12, 2014 Petition to Modify, Energy Division sent SDG&E's proposed procurement plans to the service list and requested that stakeholders submit comments by June 24, 2014 to Energy Division staff Ms. Chow and Mr. Randolph.[24] Energy Division rejected several requests by parties to extend the informal comment period to July 1, 2014.[25] In its June 20, 2014 email, Ms. Chow stated that "Energy

[22] *See, e.g.,* D.14-02-016.

[23] PD at p. 11.

[24] *See* June 17 Email from Lily Chow, Energy Division to Service List, R.12-03-014.

[25] *See* June 20 Email from Lily Chow, Energy Division to Service List, R.12-03-014.

Division's review is limited to determining whether SDG&E has met the requisite conditions to submit a procurement application."[26] The PD states that this truncated, informal comment process moots the Sierra Club Petition.[27]

Contrary to the PD's assertion, Energy Division's informal process fails to provide the relief requested by the Petition and therefore is not moot. First, Energy Division has not provided a formal process by which parties submit comments on the record, and it has failed to require that comments are served on the service list. There is no comparison between informal comments submitted to only two Energy Division personnel and formal comments or responses that are fully noticed, publicly filed, and considered in a Commission decision vetted and voted on in a public meeting.[28] Second, Energy Division provided only five business days to parties to submit informal comments and made clear that comments submitted after this date "will not be reviewed by Energy Division."[29] This brief and inflexible comment period falls far short of the minimum of 15 days requested in the Joint Petition and analogous Commission deadlines for comments on proposed decisions, advice letters, and motions.[30] Indeed, Energy Division's rejection of multiple requests for additional time to comment demonstrates the inadequacy of Energy Division's rushed process and its failure to meaningfully address the transparency and process concerns raised in the Petition. The PD's attempt to minimize this issue by stating that

[26] *See* June 20 Email from Lily Chow, Energy Division to Service List, R.12-03-014

[27] PD at p. 8.

[28] Joint Response of NRDC and CEERT at pp. 7-8.

[29] *See* June 17 Email from Lily Chow, Energy Division to Service List, R.12-03-014.

[30] *See, e.g.,* Commission Rules of Practice and Procedure, Rule 2.6 (allowing 30 days to protest an application); Rule 11.1 (allowing 15 days to respond to a motion).

a number of parties provided comments misses the point.[31] Just because some parties provided comments does not mean that the process provided an opportunity for all parties to comment.

Third, the Sierra Club Petition was filed with the justification that SDG&E's procurement plans are fatally inconsistent with D.14-03-004 such that formal notice and comment is required "to facilitate procurement plan compliance, provide transparency in procurement plan approval, and restore public confidence in the approval process for plans with significant implications for ratepayers and the environment."[32] Indeed, even the PD admits that comments on the proposed procurement plans "support that a comment period is necessary."[33] Accordingly, the Sierra Club Petition is not moot because reliance on Energy Division's informal process deprives Joint Parties of the benefit of Commission reasoning, clarification and a final determination on the serious substantive and procedural concerns raised in the Petition.

CONCLUSION

For the reasons stated above, the Joint Parties request that the Proposed Decision be modified to grant the Petitions and ensure that SDG&E's procurement plans are reviewed in a transparent decision-making process.

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Respectfully submitted,

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[31] *See* PD at p. 7.

[32] Sierra Club Petition at p. 1.

[33] PD at p. 4, n.2.

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APPENDIX A
PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW, AND PROPOSED ORDERING PARAGRAPHS

The Joint Parties recommend that the following modifications be made to the Findings of Fact, Conclusions of Laws, and Ordering Paragraphs of the Decision Denying Petitions for Modification (Proposed Decision). Please note the following:

- A page citation to that Proposed Decision is provided in brackets for each Finding of Fact, Conclusion of Law, and Ordering Paragraph in the Proposed Decision for which a modification is proposed.
- Any proposed additional Finding of Fact, Conclusion of Law, or Ordering Paragraph is not numbered, but is identified as a "**ADDED FINDING OF FACT**," "**ADDED CONCLUSION OF LAW**," or "**ADDED ORDERING PARAGRAPH**."
- Added language is indicated by **bold type**; removed language is indicated by **bold strike-through**.

PROPOSED FININGS OF FACT

5. ~~**It is the function of Energy Division to determine if the SDG&E procurement plans are in compliance with D.14-03-004.**~~ **Pursuant to Public Utilities Code Section 454.5, the Commission should have a formal process to approve long term procurement plans and assure compliance with D.14-03-004.**

7. Providing an Advice Letter and Resolution process for review of the SDG&E procurement plans would ~~**slow down**~~ **efficiently allow for Commission** ~~**the**~~ review ~~**process**~~ of the procurement plans and ~~**delay**~~ **enhance transparency in the process of** subsequent procurement applications.

PROPOSED CONCLUSIONS OF LAW

2. The Sierra Club Petition is **not** moot. ~~**and should be denied**~~.

3. The Commission's application approval process **is not sufficient for assuring that the procurement plan meets the requirements of the Commission decision in this proceeding.** ~~**entails careful review by the Commission and stakeholders of any proposed contracts and the procurement method.**~~

4. Approval of SDG&E's procurement plans by the Director of the Energy Division, once they are deemed to be consistent with D.14-03-004, ~~**does not**~~ infringe**s** on the due process rights of parties to contest any specific procurement contracts or methods proposed by SDG&E in subsequent applications **especially where, as here, the plan contemplates bilateral contracting to meet the maximum any resource authorization in D.14-03-004**.

5. The NRDC Petition should be ~~**denied**~~ **granted. Because a Tier 3 Advice Letter provides greater transparency and process than the 15 day formal comment period sought in the Sierra Club Petition, the Sierra Club Petition is denied.**

PROPOSED ORDERING PARAGRAPHS

3. The June 23, 2014 Joint Petition for Modification of Decision 14-03-014 is **granted** ~~**denied.**~~