Clay Faber
Regulatory Affairs
8330 Century Park Court
San Diego, CA 92123-1548

Tel: 858-654-3563
Fax: 858-654-1788
CFaber@semprautilities.com

August 8, 2011

Honesto Gatchalian
Maria Salinas
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: **Comments of San Diego Gas & Electric Company on Draft Resolution E-4335**

Dear Mr. Gatchalian and Ms. Salinas:

Pursuant to Rule 14.5 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), San Diego Gas & Electric Company ("SDG&E") submits the following comments regarding Draft Resolution E-4335 (the "DR"), which approves two Green Attribute Purchase and Sale Agreement ("GAPSAs") between SDG&E and Cabazon Wind Partners, LLC ("Cabazon") and Whitewater Hill Wind Partners, LLC (Whitewater"), respectively. As discussed below, the DR errs in classifying the transaction involving the GAPSAs as being "renewable energy credit ("REC")-only" rather than "bundled" procurement, under the definitions adopted in Decision ("D.") 10-03-021, *et seq.*[1/] In addition, the DR must be modified to make clear that payments made by SDG&E under the GAPSAs are fully recoverable in rates over the life of the GAPSAs, subject to Commission review of SDG&E's administration of the GAPSAs, even if the RECs conveyed in the transaction cannot ultimately be used by SDG&E for compliance with Renewable Portfolio Standard ("RPS") procurement obligations.

A. The Classification of the Transaction as "REC-Only" is Legal Error

Cabazon and Whitewater are renewable wind facilities located in Southern California that have been certified by the California Energy Commission ("CEC") as RPS-eligible. SDG&E currently receives the generation produced by the Cabazon and Whitewater wind generation facilities pursuant to two contracts administered by SDG&E on behalf of the California Department of Water Resources ("CDWR"). The CDWR contracts with Cabazon and Whitewater expressly provide that all rights and interests in the renewable attributes, emissions reductions or credit (offsets) associated with the wind generation delivered under these CDWR contracts is retained by the Seller. Accordingly, SDG&E currently receives the

[1/] SDG&E notes that the DR purports to make "no determination in this resolution regarding the [GAPSAs'] classification for the purposes of their contribution towards SDG&E's RPS compliance obligation." DR, p. 1. The DR explains further, however, that it does in fact adopt a classification of the GAPSAs pursuant to current RPS program rules; it defers only the issue of classification of the GAPSAs under Senate Bill ("SB") 2 (1x). DR, p. 13.

power generated by these wind projects, but not the RECs. Thus, it is not able to use the wind generation received under the CDWR contracts for RPS compliance purposes.

The GAPSAs are designed to reverse the disaggregation of RECs from the associated wind generation currently received by SDG&E pursuant to the CDWR contracts and to reunite the generation with its associated RECs. The GAPSAs operate to unite generation received by SDG&E under the CDWR contracts with the associated RECs for 2009, 2010 and 2011. In other words, the GAPSAs are an integral component of a larger transaction involving the CDWR contracts which, viewed holistically, results in conveyance to SDG&E of both renewable wind generation and associated RECs.

In D.10-03-021, the Commission established a framework for distinguishing between "bundled" (*i.e.,* renewable energy plus RECs) transactions and "REC-only" (*i.e.*, conventional energy plus RECs or RECs plus no energy) transactions.[2/] The Commission noted that "the distinction between bundled and REC-only RPS-eligible procurement should turn on the availability of the energy in the transaction to serve California load."[3/] It explained that "[t]his approach grows out of our concern that California customers should not have to pay for RPS-eligible energy that they do not receive."[4/]

The Commission declared in the decision that "we seek to include as bundled RPS procurement all those transactions that can be demonstrated to serve California customer load."[5/] It explained further that "bundled transactions with renewable energy – or those which serve California load – are those where:

- The RPS-eligible generator's first point of interconnection with the Western Electricity Coordinating Council (WECC) interconnected transmission system is with a California balancing authority; or

- The RPS-eligible energy from the transaction is dynamically transferred to a California balancing authority."[6/]

By contrast, the decision generally defines a REC-only transaction as one in which "an entity procures only a REC (and not the underlying energy) from another entity."[7/] The Decision further finds that a REC-only transaction is one that:

- Expressly conveys RECs and not energy; or

- Transfers both energy and RECs, but the energy associated with the RECs cannot serve California load.[8/]

[2/] D.10-03-021, *mimeo*, p. 2.
[3/] *Id.* at p. 27; *see also*, pp. 2-3, 26.
[4/] *Id.* at p. 27.
[5/] *Id.* at p. 36.
[6/] *Id.* at p. 3; *see also, id.* at p. 35.
[7/] D.10-03-021, *mimeo*, Appendix D, p. D-1.
[8/] *Id.* at p. 26.

The DR takes a narrow view of the CDWR/GAPSA transaction that entirely ignores the renewable wind generation delivered to meet California customer load under the CDWR component of the deal. The DR finds that "under current rules, the [GAPSAs] are REC-only contracts because they are for the procurement of only RECs."[9/] It notes further that "D.10-03-021, as modified by D.11-01-025, does not contain rules about 'rebundled' transactions."[10/]

With regard to this latter point – *i.e.*, the suggestion that the GAPSAs must be treated as "REC-only" because D.10-03-021 does not specifically address "rebundled" transactions – the logic applied in the DR is plainly flawed. As noted above, D.10-03-021 adopted a comprehensive framework for delineating between "bundled" and "REC-only" transactions that turns on the bright line "availability of the energy in the transaction to serve California load."[11/] The decision makes clear that all those transactions that can be demonstrated to serve California customer load are intended to be classified as bundled RPS procurement.[12/] The fact that D.10-03-021 does not specifically address classification of the unique circumstance where two separate contracts convey one bundled product, does not prevent common-sense application of the existing framework established in D.10-03-021 to determine the appropriate classification of the CDWR/GAPSA transaction.

The Commission has recognized that administrative regulations are subject to the same rules that govern the interpretation of statutes; the Commission must interpret the rules it adopts in a reasonable, common-sense manner.[13/] Thus, in interpreting the rules adopted in D.10-03-021, the Commission must consider the outcome realized through the transaction as a whole, along with the intent of the adopted rules, and apply its rules in a reasonable, common sense manner that effectuates this intent. Specifically, in the context of a bundled transaction split into two contracts, such as that presented here, the Commission must examine: (i) whether the transaction as a whole fits more closely with the "bundled" classification (renewable energy plus RECs) or the REC-only classification (RECS with no energy or RECs with substitute conventional energy); (ii) whether the prerequisites for the "bundled" designation set forth above are satisfied (*i.e.*, first point of interconnection in a California balancing authority or dynamic transfer); (iii) whether the transaction can be demonstrated to serve California customer load;[14/] and (iv) whether California customers are paying for RPS-eligible energy that they receive.[15/]

Applying this analysis, it is clear that the CDWR/GAPSA transaction should be approved as a "bundled" transaction. In characterizing the CDWR/GAPSA transaction as conveying only RECs, the DR takes a view of the transaction that is overly restricted.[16/] The DR focuses solely on the REC transfer portion of the overall transaction and entirely ignores the energy-transfer element of the deal. D.10-03-021 makes clear that the distinction between "bundled" and "REC-only" does not rest on contract structure.[17/] Rather, as noted above, "the

---

[9/] *Id.* at pp. 12-13.
[10/] *Id.* at p. 13.
[11/] *Id.* at p. 27; *see also*, pp. 2-3, 26.
[12/] D.10-03-021, *mimeo* p. 36.
[13/] *See, e.g.,* D.03-04-058, *mimeo*, p. 6.
[14/] *See* D.10-03-021, *mimeo*, p. 27.
[15/] *See id.*
[16/] *Id.* at pp. 12-13.
[17/] *Id.* at p. 31.

distinction between bundled and REC-only RPS-eligible procurement should turn on the availability of the energy in the transaction to serve California load."[18/] In the instant case, it is plain that the energy conveyed under the CDWR/GAPSA transaction has served and will continue to serve California load, and that California ratepayers are paying for RPS-eligible energy that they receive. Moreover, the prerequisites for "bundled" classification are met where both Whitewater and Cabazon satisfy the requirement that "the RPS-eligible generator's first point of interconnection with the WECC interconnected transmission system is with a California balancing authority."[19/]

Finally, it is clear that the transaction as a whole fits more closely with the "bundled" classification (renewable energy plus RECs) than with the REC-only classification (RECs with no energy or RECs with substitute conventional energy) adopted in D.10-03-021. As noted above, D.10-03-021 generally defines an unbundled REC transaction as one in which an entity procures only a REC ***and not the underlying energy*** from another entity. In the instant case, upon approval of the GAPSAs, SDG&E would receive ***both*** the REC and the associated underlying renewable energy from the generator. Accordingly, viewed holistically, the transaction would not involve SDG&E procuring only RECs without the underlying energy. Rather, both the renewable attributes and the RPS-eligible renewable energy would be transferred to the same party, in this case SDG&E. Thus, the transaction is properly viewed as "bundled" for RPS compliance purposes and the DR should be modified to reflect this finding.

B. The DR Must be Revised to Clarify Approved Rate Recovery

The DR finds that payments made by SDG&E under the GAPSAs are fully recoverable in rates over the life of the GAPSA, subject to continued compliance with Standard Term and Condition 6, as well as the Commission's review of SDG&E's administration of the GAPSAs.[20/]

In the event the Commission elects to retain the "REC-only" classification for the GAPSAs proposed in the DR, SDG&E respectfully requests that the DR be modified to make clear that payments made by SDG&E under the GAPSAs are fully recoverable, subject to the conditions noted above, even if the RECs conveyed in the transaction cannot ultimately be used by SDG&E for RPS compliance. The need for this modification arises as the result of the flawed characterization of the GAPSAs as "REC-only" in the context of the REC-only usage cap adopted in D.10-03-021, as well as the uncertainty surrounding implementation SB 2 (1x).

In D.10-03-021, *et seq.*, the Commission adopted a temporary usage cap that prohibits SDG&E from meeting more than 25% of its annual procurement target ("APT") with tradable RECs ("TRECs"). If the CDWR/GAPSA transaction is deemed to be REC-only, the RECs derived from the transaction will be TRECs subject to the 25% cap. This would have practical implications for SDG&E's RPS compliance. Specifically, while SDG&E would not exceed its 25% TREC usage cap in 2011, it would likely exceed the usage cap in 2012 and 2013. Accordingly, it would not be permitted to use all of the RECs conveyed under the CDWR/GAPSA transaction for RPS compliance.

[18/] *See id.* at p. 27.
[19/] *See* D.10-03-021, *mimeo*, p. 26.
[20/] DR, p. 17, Finding and Conclusion 6.

The DR appears to contemplate that the existing TREC rules may be eliminated upon implementation of the SB 2 (1x) framework.[21/] This outcome may alleviate the concerns described above regarding exceeding the TREC usage cap. It will not be known until the Commission issues implementing decisions in the current RPS rulemaking, however, whether SDG&E will be able to count TRECs procured under the CDWR/GAPSAs (assuming the transaction is classified as REC-only) for RPS compliance under the SB 2 (1x) framework.[22/]

Absent the assurance of rate recovery, even taking into account the possibility that SB 2 (1x) will eliminate the concerns related to counting RECs in 2012 and 2013, SDG&E will be forced to consider termination of the GAPSAs. This would represent a significant loss for SDG&E ratepayers, who stand to benefit from the CDWR/GAPSA transaction, and would have a material negative impact on SDG&E's RPS compliance effort, particularly for the first RPS Compliance Period in 2011-2013.

Finally, SDG&E notes that if the CDWR/GAPSA transaction is classified as a "bundled" transaction under the existing rules adopted in D.10-03-021, the current rate recovery language in the DR does not require modification. The concern described above arises only where the GAPSAs are deemed to be "REC-only" and subject to the 25% usage cap.

Under the Commission's current guidelines for the use of RECs in RPS compliance, it is plain that the GAPSAs should be approved as bundled RPS-eligible procurement since SDG&E will be taking delivery of both the underlying energy, which serves SDG&E customers, and the RECs. Modifying the DR to make this finding is consistent with common sense, reasonable implementation of the RPS statute and existing rules, and is a fair outcome. Failure to recognize this simple fact will put SDG&E in a perilous position with regard to its short term RPS compliance and frustrate SDG&E's efforts to overcome any resulting deficit. In addition, the rate recovery language in the DR should be clarified to provide that SDG&E can recover in rates the cost of the REC purchases under the GAPSAs even if the rules ultimately prevent SDG&E from fully utilizing them for compliance purposes.

Respectfully Submitted,

_____

Clay Faber
Director, Regulatory Affairs

21/ *Id.* at p. 10 ("SDG&E's position relative to the TREC usage limit is dependent on actual generation delivered, its actual retail sales, *as well as applicable RPS rules at the time of its RPS compliance filings and determinations*.") (emphasis added).

22/ Under SB 2 (1x), SDG&E expects that the GAPSA contracts will be grandfathered (since both were executed prior to June 1, 2010) or considered a Category 1 product (since they would qualify as in-State RECs). However, if neither of these assumptions are correct, SDG&E notes that it would already be at its Category 3 limits.

cc: President Michael R. Peevey
Commissioner Mark J. Ferron
Commissioner Timothy A. Simon
Commissioner Michel P. Florio
Commissioner Catherine J.K. Sandoval
Julie Fitch, Director of Energy Division
Cheryl Lee, Energy Division
Karen Clopton, Chief Administrative Law Judge
Frank Lindh, General Counsel
Service List attached to DR E-4335