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 10-05-006 (VSK) (Filed May 6, 2010)

OPENING BRIEF OF SIERRA CLUB CALIFORNIA ON TRACK I AND TRACK III ISSUES

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SUMMARY OF RECOMMENDATIONS

I. The Commission should deny San Diego Gas & Electric"s ("SDG&E") request for authorization of 415 megawatts ("MW") of additional resource need to meet local capacity requirements ("LCR") in SDG&E"s service area.

II. The Commission should deny the requests of all three utilities for authorization to purchase offsets as AB32 compliance instruments. The Commission should direct the utilities to prepare an analysis of the environmental impacts of these offset projects and the ability of utilities to achieve these same emission reductions at utility sources through preferred alternatives under the Energy Action Plan.

III. The Commission should require that Procurement Review Group meetings comply with the Bagley-Keene Open Meeting Act.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This proceeding was instituted to consider the Commission"s electric resource procurement policies and programs. *See* Order Instituting Rulemaking ("OIR"), at 1 (May 13, 2010). The OIR organized issues into three "tracks": Track I was to identify the need for new resources to meet system and local resource adequacy needs of investor-owned utilities ("IOUs") within the Commission"s jurisdiction; Track II was to address the bundled procurement plans for the IOUs; and Track III was to consider rule and policy changes with respect to procurement policy. *Id.* at 9. In the June 13, 2011 ruling, the Administrative Law Judge ("ALJ") defined the schedule and scope of Track I and III issues to be considered together. *See* "Administrative Law Judge"s Ruling Addressing Motion for Reconsideration, Motion Regarding Track I Schedule, and Rules Track III Issues," at 8 (June 13, 2011). The ALJ subsequently amended the briefing schedule during the evidentiary hearings on these issues. *See* Transcript of Evidentiary Hearings, R.10-05-006 (hereinafter "Trans."), at 892 (Aug. 19, 2011). Sierra Club California ("Sierra Club") respectfully submits this Opening Brief on Track I and Track III Issues in accordance with this schedule and pursuant to Rule 13.11 of the Rules of Practice and Procedure.

As the Commission explained in the 2006 Long-Term Procurement Proceeding ("LTPP"), the Commission"s primary focus in reviewing the LTPPs is "whether the utilities are

procuring preferred resources as set forth in the Energy Action Plan (EAP), in the order of energy efficiency, demand response, renewables, distributed generation, and clean fossil-fuel." Decision ("D.") 07-12-052 at 2 (Dec. 20, 2007). While much progress has been made in this proceeding to improve the analysis related to renewable integration and procurement decisions, Sierra Club continues to see requests and processes that will allow the IOUs to fill positions with conventional resources without analyzing preferred resources under the EAP loading order. Specifically, San Diego Gas & Electric ("SDG&E") has prepared a tortured analysis to support a local capacity requirement ("LCR") "needs" request that conveniently mirrors the capacity of proposed new conventional resources currently under consideration by the Commission. In addition, the IOUs have requested authority to procure offsets to comply with California"s Global Warming Solutions Act of 2006 ("AB32") without ever analyzing whether such procurement is consistent with this Commission"s goals regarding preferred resources and greenhouse gas emission reductions and without analyzing the environmental impacts of this request. Sierra Club urges the Commission to reject both SDG&E"s request for new capacity and the three IOU requests for authority to purchase AB32 offsets. Sierra Club further contends that procurement recommendations in general, as prepared by the Procurement Review Groups ("PRGs"), are not subject to the public review required under State law and the Commission should require that PRG meetings comply with the Bagley-Keene Open Meeting Act.

ARGUMENT

I. The Commission Should Reject SDG&E's Request For Authority To Procure Additional Capacity To Meet Local Capacity Requirements.

Sierra Club opposes any authorization in this proceeding of IOU need for new generating capacity. Sierra Club supports the Settlement Agreement proposed in this proceeding, which acknowledges that the Commission should not, at this time, authorize additional capacity for

renewable integration purposes and that "[t]he Commission does not need to authorize procurement authority relating to local capacity requirements for SCE"s and PG&E"s service areas . . . ." *See* Settlement Agreement at 8 and 11 (sections III.B and D) (Aug. 3, 2011). SDG&E, however, asks the Commission to authorize 415 megawatts ("MW") of additional resource need in order to meet local capacity requirements ("LCR") in SDG&E"s service area. *See* Ex. 310, Prepared Track I Testimony of SDG&E, at 11-12 (May 6, 2010). The method and assumptions used to support SDG&E"s request are not legitimate. As such, SDG&E"s request should be denied.

A. SDG&E's Local Capacity Requirement Analysis.

SDG&E"s LCR analysis includes two Load and Resources ("L&R") tables – one based on the Commission"s approved Standardized Planning Assumptions for System Resource Plans and the other based on SDG&E adjustments to these standardized assumptions regarding projected combined heat and power ("CHP"), uncommitted energy efficiency ("EE") and demand response ("DR") resources. *See* Ex. 310 at 3-8. Using the Standardized Planning Assumptions, SDG&E projects a capacity surplus in 2020 of 393 MW. *See id.* at 5 (Table 1). Using its adjusted assumptions, SDG&E projects a capacity shortfall of 180 MW by 2020. *See id.* at 8 (Table 2). In the IOU Joint Analysis, SDG&E "add[ed] a slight cushion" and rounded this 180 MW shortfall to assume a shortfall of 300 MW. *See id.* at 8. This 300 MW shortfall, however, is less than the capacity SDG&E has already requested in Application ("A.") 11-05-023, so SDG&E decided it was "prudent to plan for a bit more of cushion" based on "load and resource uncertainty." *Id.* at 11. In the end, SDG&E requests authorization of 415 MW of need for additional capacity in its service area, which represents a "cushion" of 230 percent above the 180 MW shortfall SDG&E calculated.

B. SDG&E's Request Should Be Denied For Failing To Comply With The Scoping Memo and Ruling.

SDG&E"s analysis comes nowhere close to complying with the ALJ"s rulings in this proceeding. In directing the IOUs to conduct a needs analysis for locally constrained areas, the Scoping Memo and Ruling explained:

> The needs analysis shall include a methodology for the most appropriate and cost effective way to address the shortages. As part of this analysis, we expect that the IOUs will not use simple L&R spreadsheets, instead they shall use modeling techniques such as power flow analyses to demonstrate the results of their methodology.

"Assigned Commissioner and Administrative Law Judge"s Joint Scoping Memo and Ruling," at 21 (Dec. 3, 2010) (hereinafter "Scoping Memo and Ruling"). Despite these explicit instructions, SDG&E conducted no power flow analysis and instead relies exclusively on L&R spreadsheets. *See* Cross Examination of Mr. Anderson, SDG&E, at 233; *see also id.* at 232 (acknowledging that CAISO"s L&R tool is only considered a screening device).

In addition to ignoring the directive on the modeling analysis to be performed, SDG&E also fails to include any discussion of the most appropriate and cost-effective way to address the alleged shortages, including any analysis of preferred resources under the EAP loading order, such as improved energy efficiency and demand response. *See* Cross-Examination of Mr. Anderson, SDG&E, Trans. at 237 ("This is a need analysis that really shows how many megawatts we need. It wasn"t an analysis to meet that need."). To the contrary, the request is a transparent effort to justify procurement of new fossil fuel generation capacity currently under application before the Commission. Rather than explore alternatives to addressing LCR, SDG&E uses the analysis to justify alternatives that have been predetermined. Again, SDG&E"s refusal to conduct the required power flow analysis seems particularly troubling because without such an analysis it does not seem possible to determine how the predetermined new generation in

the proposed locations will satisfy local capacity issues, let alone satisfy them in the most appropriate and cost-effective way.

C. SDG&E's Analysis Should Be Rejected Because It Is Based On Flawed Assumptions.

Even if the Commission were to excuse SDG&E"s failure to comply with the ALJ"s instructions on the method for determining LCR, the Commission should still reject SDG&E"s request because it is based upon unreasonable adjustments to the standardized assumptions adopted in the Scoping Memo and Ruling. SDG&E"s assumptions regarding EE are particularly indefensible and are based on arguments that have already been considered and rejected in the earlier stages of this proceeding. The differences between the Standardized Planning Assumptions and SDG&E"s assumptions for the year 2020 are shown in the table below.

Table 1: EE Assumptions in SDG&E LCR Analysis[1]

	CPUC Assumption	SDG&E Assumption	Difference
IOU EE Programs	270	137	-143
Huffman Bill	23	23	0
Title 24 and Fed Standards	75	75	0
Big Bold Energy Efficiency Strategies	114	0	-114
Decay Replacement	14	0	-14
Line Loss Savings	48	23	-25
Total	544	258	-286

In calculating LCR, SDG&E adjusts these total numbers further and assumes 598 MW of EE resources under the CPUC assumptions and 284 MW under SDG&E"s assumptions. *See* Ex. 310 at 5 and 8. This represents a reduction in assumed EE resources of 314 MW, which more than accounts for the 180 MW of need that SDG&E calculates.

[1] *See* Ex. 310 Spreadsheet #4 ("2010 LTPP SDG&E Savings for Load").

All of SDG&E"s adjustments (*i.e.*, the reduced realization rate for IOU EE programs, the elimination of savings from Big Bold Energy Efficiency Strategies ("BBEES"), and the zeroing of decay replacement) are adjustments that SDG&E advocated for in the ruling on the standardized planning assumptions, and all were rejected by the Commission because SDG&E failed to meet its burden of proof. SDG&E testimony repeats the same arguments and offers no new support for these adjustments. As a result, SDG&E still fails to meet its burden of proof, and the Commission should reject these adjustments again.

In its June 22, 2010 ruling on energy efficiency planning assumptions, the ALJ explained:

> Currently, it is the Commission"s policy to use one hundred percent of [Total Market Gross energy savings goals (TMG)] as the base case scenario, and parties bear the burden of proof to demonstrate if the Commission should deviate from that position. Further, Commission policies require that utilities replace fifty percent of measure decay, affecting the long-term impact of TMG goals.

"Administration Law Judge"s Ruling on Resource Planning Assumptions – Part 3 (Energy Efficiency) – Track 1," at 5 (June 22, 2010) (VSK) (citing D.09-09-047, at 38-39).

SDG&E submitted comments on this ruling advocating for mid-case adjustments assuming (1) no savings from BBEES, (2) a 30 percent reduction in IOU programs to reflect a 70 percent realization rate, and (3) no addition of benefits from decay replacement. *See* "Comments of San Diego Gas and Electric Company (U 902 E) Regarding Administration Law Judge"s Ruling on Resource Planning Assumptions – Part 3 (Energy Efficiency) – Track 1," at 7 (July 2, 2010). To justify elimination of BBEES savings, SDG&E argued that "[t]he BBEES have **not** been subjected to rigorous analysis to determine feasibility, reliability and cost-effectiveness." *Id.* at 13 (emphasis in original); *see also id.* at 3-4. Similarly, SDG&E questioned whether assuming that the TMG goals would be met satisfied the "cost effective, realistic and feasible"

test, and also noted the potential impacts resulting from uncertainty over load forecasts. *See id.* at 4-6. Finally, SDG&E advocated for eliminating any decay replacement citing to the Commission"s decision in D.09-09-047. *See id.* at 10-11.

In the Scoping Memo and Ruling, all of these arguments were rejected. With respect to the benefits of BBEES, the Commission determined:

> The IOUs, [sic] recommended against including any savings from BBEES in the analysis. However, the IOUs already have programmatic designs in place for the 2010 – 2012 EE program cycle which will provide savings in this category. . . . Given the uncertainties raised by parties over BBEES in particular, we have decremented the savings attributed by BBEES by employing the low case values from the CEC"s final Committee Report on Incremental Uncommitted Energy Efficiency . . . .

Scoping Memo and Ruling, at 36. With respect to the IOU programs, the Commission made adjustments to the TMG goal assumptions to account for uncertainty and assure that the projected savings were reasonable:

> Decision 08-07-047 states that "energy utilities shall use one hundred percent of the interim Total Market Gross [TMG] energy savings goals for 2012 through 2020 in future [LTPP] proceedings, until superseded by permanent goals." However, the Commission has deferred to the CEC"s IEPR process to generate load forecasting information necessary to interpret the impacts of TMG energy savings goals on procurement. Specifically, CEC and Commission Staffs collaborated in the 2009 IEPR proceeding to develop forecasts of uncommitted EE (i.e., TMG energy savings not embedded in the forecast.) [sic.]
>
> In this proceeding, common value assumptions for EE reflect the sum of (1) utility EE program savings embedded in the most recent IEPR demand forecast including savings decay, and (2) incremental EE savings reasonably expected to occur from implementing the IOUs" EE goals, relative to the most recent IEPR load forecast. For this proceeding, this value is the mid-case results for all values except Big Bold EE Strategies, for which the low-case results shall be used.

Id., Attachment 1, at 10. For the decay replacement assumption, the Commission noted that CEC had performed additional analysis based on the Commission policy regarding decay replacement and that the standardized assumptions reflected CEC"s recommended decrement for EE measure savings decay. *Id.* at 36-37.

In its testimony supporting its LCR need determination, SDG&E makes no attempt to respond to the Commission"s findings on these adjustments. Instead, SDG&E merely repeats the same argument – that the assumptions need to be adjusted to "take into account what is reasonably expected to occur." Ex. 310 at 6. The testimony, however, includes no support for its predictions of what is and is not reasonably expected to occur. There is no breakdown of the various measures or strategies and the reasonableness of each. SDG&E eliminates all BBEES without even acknowledging, as the Commission did, that the IOUs already have programs designed for some of these strategies. There is no explanation as to why the Commission"s "low-case" assumption does not conservatively account for the alleged uncertainty.

Similarly, there is no analysis supporting the application of the 70 percent realization rate to the IOU programs going forward or any explanation as to why the Commission"s adjustments to the TMG goals were not sufficiently conservative. SDG&E explained that the 70 percent value was derived from an evaluation of the 2006 to 2008 EE programs, but then acknowledged that SDG&E advocated for assuming a 100 percent realization rate in its 2009 to 2011 EE plans. *See* Cross-Examination of Mr. Anderson, SDG&E, Trans. at 218-19 and 222-23. SDG&E tried to defend this discrepancy by explaining:

> You could have one set of programs that you"re endorsing in this case that you think you"ll get a hundred percent realization, You"ve got another case that"s got a whole big other forecast of energy efficiency that you may think you"re only going to get 70 percent realization in. And it doesn"t mean you"re being inconsistent because there can be a different mix of programs.

Id. at 224. Yet even after acknowledging that the realization rate depends on the mix of programs, SDG&E admits that it did not do any analysis to determine whether the mix of programs going forward is more comparable to the 2006-2008 mix or the 2009-2011 mix. Such

blanket, unsupported adjustments simply do not meet any reasonable burden of proof for rejecting the standardized assumptions adopted by the Commission.

SDG&E"s LCR testimony offers no explanation whatsoever about removing the decay replacement benefit. As the Commission noted, as well as several commenters, this is Commission policy. SCE"s original comments on the June 22, 2010 EE ruling summed up the issue most succinctly:

> The decay of IOU program-measured savings is a moot point, other than for attribution purposes. It is current Commission policy that the IOUs are responsible for making up for any measure savings decay. Specifically, the IOUs must account for 50% of measure savings that decay over time and SCE is committed to do so.

"Post Workshop Comments of Southern California Edison Company (U-338-E) on Proposed Energy Efficiency Planning Standards and Assumption," at 10 (July 2, 2010). SDG&E should be held to the same standard.

Repeatedly, the Commission"s standardized planning assumptions incorporated adjustments for uncertainty. SDG&E offers no case for why these adjustments are not adequately conservative. Indeed, testimony by NRDC and others reveal the significant EE savings that are not reflected in these standardized planning assumptions including savings from new Title 20 standards and accelerated federal appliance standards. *See, e.g.*, Ex. 1600, Opening Testimony of Sierra Martinez on Behalf of NRDC, at 3-4 (Aug. 4, 2011). If anything, the standardized planning assumptions are likely to be conservative. As noted above, using these standardized planning assumptions shows that SDG&E has no need for additional LCR capacity (and demonstrates that surplus with a healthy "cushion"). Because SDG&E has not supported its decision to reject these standardized planning assumptions, the Commission should rely on its original planning assumptions and reject SDG&E"s flawed request for procurement authority to address LCR need.

II. The Commission Should Reject All Three Utilities' Requests For Authority To Purchase Offsets To Comply With AB32.

A. The IOUs Have Requested Authority To Procure Offsets To Comply With AB32.

The California Air Resources Board ("CARB") has adopted regulations to implement a cap and trade program as a central component of CARB"s plan to comply with the State"s Global Warming Solutions Act of 2006 ("AB32"), Health & Safety Code § 38500 *et seq.* *See* CARB, "Proposed Regulation to Implement the California Cap-and-Trade Program" (Oct. 28, 2010) (available at http://www.arb.ca.gov/regact/2010/capandtrade10/capisor.pdf). In this proceeding, the IOUs have requested authority to purchase instruments to be created under CARB"s regulations in order to comply with the new cap and trade program. Specifically, the IOUs have asked for authority to purchase both allowances, which represent authorization to emit a specified amount of pollution during the compliance period, and offsets, which represent emission reductions from projects not covered by the cap and trade program. *See* Ex. 210. Testimony of SCE on Track III Issues – GHG Procurement Plan (public version), at 6-7 (July 1, 2011); Ex. 313, Prepared Track III Testimony of SDG&E (public version), at 16 (July 1, 2011); Ex. 107 (PG&E Procurement Rules Testimony (public version)) at 3-9 (Table 3-1).

The request for authority to purchase offsets as a compliance instrument under AB32 has the potential to cause significant adverse environmental impacts. Commission policy and State law both mandate full analysis, public disclosure, and appropriate mitigation for these potentially significant impacts. The Commission should consider whether and how the authority to purchase such offsets should be limited to avoid environmental concerns. Until that consideration is complete and an environmental review has been prepared in accordance with the California Environmental Quality Act ("CEQA"), Public Resources Code § 21000 *et seq.*, the Commission must not approve the IOUs" request to purchase offsets.

B. The Commission Should Reject The Request To Purchase Offsets On Policy Grounds.

In the last LTPP proceeding, this Commission expressed frustration over the fact that procurement decisions were being made without consideration of whether superior environmental solutions might be available:

> [W]e will require that subsequent LTPP filings for our regulated utilities not only conform to the energy and environmental policies in place, but aim for even higher levels of performance. We expect the utilities to show a commitment to not only meet the targets set by the Legislature and this Commission but to try on their own to integrate research and technology to strive to improve the environment, without compromising reliability or our obligation to ratepayers.

D.07-12-052, at 4 (Dec. 20, 2007). The current IOU request for authority to purchase offsets suffers from these same problems. In addition to the potential impacts of offset projects discussed below, the use of offsets also has environmental consequences by lowering the cost of compliance with the cap and trade program under AB32, thereby undermining the incentive to pursue emission reduction projects at the IOUs" capped sources. Without an environmental review of the approval requested in this LTPP proceeding, the Commission cannot fulfill its promise to assure that achievable "higher levels of performance" are being pursued.

The concept of offsets is to allow capped sources to compensate for their emissions, or "offset" them, by investing in projects at sources that are not covered by the cap. The theory is that these other projects may offer opportunities to reduce greenhouse gas emissions that are more cost-effective than emission reduction opportunities at the capped sources. As PG&E explained under cross-examination, "CARB"s cap and trade regulation has allowed for the use of offsets with the theory that offsets would be cheaper than allowances for compliance. So it"s a cost containment tool in the sense that it can help lower the cost of complying with cap and trade." Cross-Examination of Ms. Brandt, PG&E, Trans. at 754; *see also* Ex. 313 at 15 (noting

SDG&E"s expectation that offsets will trade at a discount to allowances). While lowering the cost of compliance is a boon to regulated sources, it also affects the environmental outcomes of the AB32 program. As all of the IOUs recognized, the carbon price signal created by the cap and trade program influences the emission reduction projects that the IOUs will consider. *See, e.g.*, Cross-Examination of Mr. Buerkle, SCE, Trans. at 501 (explaining, "if the price is high enough, . . . that would have us procure . . . less resources that emit carbon versus low carbon-emitting resources and nonemitting resources"); Cross-Examination of Ms. Brandt, PG&E, Trans. at 751 (agreeing that as the price of compliance increases, the more desirable it might become to reduce emissions).

By reducing the cost of compliance, offsets have environmental impacts by making emission reduction projects at capped IOU sources less desirable. Every ton of offsets claimed is a ton of emission reductions that IOUs do not have to achieve. There will be less incentive to explore alternatives that reduce demand (*e.g.*, energy efficiency, demand response) or reduce emissions (*e.g.*, increased renewable generation or repowering or replacement of inefficient generators). Before approving the authority requested, the Commission should evaluate how the use of offsets might impact the desirability of these environmentally superior alternatives. Such an exploration of alternatives not only supports informed policy making, but it also supports the Commission"s loading order preferences by forcing consideration of these alternatives before authorizing continued fossil-fuel generated emissions. Without such an analysis, the Commission cannot fulfill its promise in the 2006 LTPP to ensure that IOUs are aiming for higher levels of performance.

C. The Commission Must Require An Environmental Analysis Before Authorizing Procurement of Offsets.

1. Legal Test For Determining CEQA Applicability.

Under Rule 2.4 of the Rules of Practice and Procedure, "[a]pplications for authority to undertake any projects that are subject to the California Environmental Quality Act of 1970, Public Resources Code Sections 21000 et seq. (CEQA) and the guidelines for implementation of CEQA, California Administrative Code Sections 15000 et seq., shall be consistent with these codes and this rule." CEQA is a comprehensive statute designed to provide long-term protection to the environment. In enacting CEQA, the Legislature declared its intention that all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties. Pub. Res. Code § 21000(g). CEQA requires public agencies to consider and document the environmental implications of their actions to "[e]nsure that long term protection of the environment . . . shall be the guiding criterion in public decisions." *Id.* § 21001(d).

CEQA applies to all "discretionary projects proposed to be carried out or approved by public agencies." Pub. Res. Code § 21080(a). A "project" within the meaning of CEQA is defined as any activity that may cause a direct or reasonably foreseeable indirect physical change to the environment, including activities involving the issuance of a lease, permit, license, certificate, or other entitlement. Pub. Res. Code § 21065; 14 Cal. Code Regs. § 15378. By defining "project" broadly, CEQA ensures that the action reviewed is not just the approval itself, but also the activity resulting from the approval. 14 Cal. Code Regs. § 15378(c). The only projects that are categorically exempt from CEQA are those that do not have a significant effect on the environment. Pub. Res. Code § 21084; *see also* 14 Cal. Code Regs. §15300.2(c); *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205-206 (holding that "[w]here there is any reasonable

possibility that a project or activity may have a significant effect on the environment, an exemption would be improper"); *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644, 656 (reiterating that "a project is only exempt from CEQA where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment") (internal quotation omitted).

CEQA Guidelines define discretionary projects as actions requiring "the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations." 14 Cal. Code Regs. § 15357; *see also id.* § 15002(i). Courts have found that discretion exists where the approving agency can impose "reasonable conditions" based on "professional judgment." *Natural Res. Def. Council v. Arcata Nat'l Corp.* (1976) 59 Cal.App.3d 959, 971; *see also People v. Dept. of Housing & Community Develop.* (1975) 45 Cal.App.3d 185, 192-94 (issuance of a conditional permit held to be discretionary in view of its containing both fixed design and construction specifications and generalized standards requiring the use of judgment); *see also Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 272 ("[W]here the agency possesses enough authority (that is discretion) to deny or modify the proposed project on the basis of environment (sic.) consequences the EIR might conceivably uncover, the permit process is „discretionary" within the meaning of CEQA.").

"Significant effect on the environment" is defined as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." 14 Cal. Code Regs. § 15382. The determination of whether an activity

that is potentially subject to an exemption may have a significant effect on the environment is made and reviewed under the "fair argument standard." *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1202; *Dunn-Edwards*, 9 Cal.App.4th at 656. Under this standard, if an agency is presented with a fair argument, supported by substantial evidence, that the project may have a significant effect on the environment, it must prepare an environmental impact review ("EIR") even where it is presented with other substantial evidence indicating that the project will have no significant effect. *See Azusa*, 52 Cal.App.4th at 1202-03; *see also, No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75; 14 Cal. Code Regs. § 15064(f)(1).

The "fair argument" standard creates a "low threshold" favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928. The courts have explained that whether a fair argument exists is a question of law, not fact, and "[r]eview is de novo, with a preference for resolving doubts in favor of environmental review." *Id.*; *see also Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318. Under this standard, the court does not weigh evidence, but only determines whether there is any substantial evidence of a possibility of environmental harm. *Dunn-Edwards*, 9 Cal.App.4th at 655.

2. Approval Of the IOUs' Requests For Authority To Purchase Offsets Requires CEQA Review.

There is a fair argument that a Commission decision to authorize the procurement of offsets will have a significant adverse effect on the environment. As such the Commission cannot approve the IOUs" requests for authorization to procure offsets until an environmental review has been completed.

The action for which the IOUs seek approval constitutes a "project" because it would allow the IOUs to engage in an activity that may cause a direct or reasonably foreseeable indirect physical change to the environment. Offsets in the AB32 cap and trade program not only impact the environment by allowing covered sources to avoid making greenhouse gas emission reductions, but they represent projects that themselves can have environmental impacts. Currently, CARB has identified four categories of projects that can generate offsets: livestock manure (digester) projects; urban forest projects; ozone depleting substances projects; and U.S. forest projects. *See, e.g.*, Ex. 313 at 7. These offset projects will undeniably effect the environment in ways that are different than reducing emissions from capped sources. The two forestry offset options do not involve controlling emissions at all, but instead give credit to the creation of emission "sinks" that have the potential to absorb the increased greenhouse gas emissions that would be allowed. *See* CARB, "Functional Equivalent Document Prepared for the California Cap and Trade Regulation," Appendix O, at 271-337 (Oct. 28, 2010) (available at: http://www.arb.ca.gov/regact/2010/capandtrade10/capv5appo.pdf). It is also beyond dispute that the environmental impacts of reducing emissions from livestock manure operations will be different than the impacts of reducing emissions at capped IOU sources. *Id.* at 235-270. Cross-examination of IOU experts affirmed the differing environmental impacts of reducing capped emissions and using offsets instead. *See, e.g.*, Cross-Examination of Mr. Miller, SDG&E, Trans. at 805 (agreeing that "[i]t would make sense" that the environmental impacts would be different).

The action requested here is also discretionary. The IOUs acknowledge that nothing compels the Commission to approve the requested authority and the IOUs would be able to comply with AB32 even if they were not allowed to purchase offsets. *See, e.g.*, Cross-

Examination of Mr. Buerkle, SCE, Trans. at 515-516 (noting that the Commission could limit an IOU"s procurement of offsets and change the mix of offsets and allowances); Cross-Examination of Ms. Brandt, PG&E, Trans. at 756 (agreeing that compliance with AB32 does not require the use of offsets); Cross-Examination of Mr. Miller, SDG&E, Trans. at 806 (same). The discretionary nature of the project is further evidenced by the fact that the Commission is free to condition its approval or impose restrictions on the IOUs" authority to purchase such offsets in order to ensure that environmental or other goals are obtained.

The significance of the environmental impacts of this action has never been assessed because the IOUs have prepared no environmental analysis to support the requests for approval of this new authority. *See, e.g.*, Cross-Examination of Ms. Brandt, PG&E, Trans. at 755-56; Cross-Examination of Mr. Miller, SDG&E, Trans. at 805; Cross-Examination of Mr. Buerkle, SCE, Trans. at 506-08. Nevertheless, there is a fair argument that a Commission decision to authorize the procurement of offsets will have a significant effect on the environment, thus triggering CEQA"s environmental review requirements. CARB has already identified several categories of potentially significant adverse environmental impacts including localized air impacts, land use impacts and noise impacts. *See* CARB, "Final Supplement to the AB 32 Scoping Plan Functional Equivalent Document," at 34 and 36 (Aug. 19, 2011) (available at: http://www.arb.ca.gov/cc/scopingplan/document/final_supplement_to_sp_fed.pdf). The air quality impacts of these offset projects include the increased operation of plants destroying ozone depleting substances, which includes increased transport of these substances to the plants and increased emissions of toxic air contaminants, particulate matter, and nitrogen oxides that result from the incineration operations. Manure digesters, while destroying methane, can increase nitrogen oxide emissions as a result of on-site methane combustion. CARB

acknowledges these potential impacts but attempts to minimize the concern by assuming that compliance with permitting requirements will be sufficient to avoid localized impacts. *See* CARB, "Functional Equivalent Document Prepared for the California Cap and Trade Regulation," Appendix O, at 215-220 and 235-240. This bare conclusion does not pass legal muster. "Compliance with the law is not enough to support a finding of no significant impact under the CEQA." *Californians for Alternatives to Toxics v. Dep't. of Food and Agriculture* (2005) 136 Cal.App.4th 1, 17. Furthermore, such compliance, can only limit, not prevent, emissions increases, and does not assure that individual communities will not be significantly impacted.

In terms of the scale of these impacts, the IOUs acknowledge that they are likely to use offsets to the maximum degree allowed, which means that they may be allowed to forgo up to at least 8 percent of the emissions reductions that would otherwise be required under the cap. *See, e.g.*, Ex. 313 at 15. As long as offsets are cheaper than allowances, there is no reason to expect that the IOUs will not maximize the use of offsets. *See id.* (noting expectation that offsets will trade at a discount to allowances and that SDG&E will likely purchase offsets up to the maximum allowed); *see also* Cross-Examination of Ms. Brandt, PG&E, Trans. at 754 ("CARB"s cap and trade regulation has allowed for the use of offsets with the theory that offsets would be cheaper than allowances for compliance."). The Commission must assess the cumulative impact that these multiple offset projects might have and explore whether limitations are warranted.

Thus, there is more than a fair argument that the approval of offsets will have significant environmental impacts. 14 Cal. Code Regs. § 15064(f)(5). As such, an environmental analysis of the proposed action as well as consideration of alternatives and mitigation measures must be prepared before making any decisions. This analysis is not only compelled under CEQA and this

Commission"s rules, it is necessary for informed decisionmaking and meaningful public participation. The Commission has the discretion to prohibit or limit the use of these offsets. In exercising this discretion, it should consider whether certain offset projects should be disallowed. The IOUs" request for permission to purchase offsets represents a "blank check" request in that it is not limited to the four offset categories currently approved, but would also allow purchase of undetermined offset projects approved by CARB in the future. *See, e.g.*, Ex. 210 at 6-7 (requesting authority to purchase "CARB-certified offsets" and "offsets that SCE reasonably believes will be certified by CARB"); *see also* Ex. 313 at 7 (noting without identifying them, that "SDG&E anticipates that ARB may develop at least four additional protocols before commencement of the Cap-and-Trade Program"). The environmental impacts of these future alternatives could be even more significant. Such open-ended approval should be denied under any circumstances.

Immediate approval of the IOUs" requests for authority to purchase offsets is not required. IOUs can comply with AB32 through the purchase of allowances alone. Before approving the IOUs" request for authority to purchase offsets as a compliance option under AB32, the Commission must evaluate the environmental implications of the requested authority and explore the available alternatives.

III. The Commission Should Require the Procurement Review Groups to Comply With California's Open Meeting Law.

A. The Bagley-Keene Act Applies to PRG Meetings.

The meetings of each Procurement Review Group ("PRG") are subject to the Bagley-Keene Open Meeting Act, Gov. Code §§ 11120-11132 ("Bagley-Keene Act" or "Act"). The Act requires that "[a]ll meetings of a state body" be "open and public and all persons . . . be permitted to attend any meeting," unless the agency is specifically authorized to meet in closed

session. Gov. Code § 11123; *see also id.* §§ 11126, 11132. The Bagley-Keene Act defines "state body" to mean a "multimember body that exercises any authority of a state body delegated to it by that state body," or a "multimember advisory body of a state body, if created by formal action of the state body" consisting of more than three members. Gov. Code §§ 11121(b) and (c). Under the Public Utilities Code, the Commission has the authority to "supervise and regulate every public utility in the State and may do all things . . . necessary and convenient in the exercise of such power and jurisdiction." Pub. Util. Code § 701.

The Commission delegated to PRGs the authority to review procurement activities including procurement strategy, proposed procurement contracts prior to Commission expedited review, and proposed procurement processes. D.02-08-071, at 24-25, 39 (Aug. 22, 2002); *see also* D.07-12-052 at 130 and n.136 (Dec. 21, 2007). For example, PRGs review the IOUs" participation in the Renewable Portfolio Program. D.03-06-071 (June 19, 2003).

PRGs were created by formal action of the Commission and play an advisory role. In its 2002 decision, the Commission allowed each utility to establish a Commission-authorized PRG. D.02-08-071 at 24-25. The Commission continued relying on PRGs to assess up-front reasonableness standards of procurement activities and recognized that the PRG role is advisory. *See, e.g.*, D.03-12-062 at 44-48 (Dec. 18, 2003). The IOUs also recognize that PRGs are advisory bodies. *See, e.g.*, Cross-Examination of Mr. Dagli, SCE, Trans. at 556; Cross-Examination of Mr. Eeekhout, SDG&E, Trans. at 719, 721.

Each PRG is a multimember body, generally made up of at least individuals representing Energy Division, Division of Ratepayer Advocates ("DRA), The Utility Reform Network ("TURN"), California Department of Water Resources, the Coalition of Utility Employees and the Union of Concerned Scientists. Cross-Examination of Mr. Dagli, SCE, Trans. at 544-45;

Cross-Examination of Mr. Eeekhout, SDG&E, Trans. at 708-09; Cross-Examination of Ms. Everidge, PG&E, Trans. at 768 (PG&E"s PRG also includes Coast Economic Consulting); *see also* D.07-12-052 at 120 (discussing PRG participants).

Each PRG fits the definition of a "state body" because each PRG is a multimember body that exercises the authority of the Commission to supervise public utilities, as delegated to it by the Commission. *See* Gov. Code § 11121(b). The PRG also meets the definition of "state body" because it is a "multimember advisory body of a state body" with more than three members "created by formal action of the state body." *See* Gov. Code § 11121(c); *see also* 85 Ops.Cal.Atty.Gen. 145 (2002) at *3 ("Even advisory committees created by state bodies, rather than by statute, are subject to the Act"s [open meeting] requirements."). Under both definitions, the Bagley-Keene Act applies to PRG meetings.

B. PRG Meetings Fail to Comply with the Commission's Open Meeting Mandates.

1. The Current Practices of Each PRG violate the Bagley-Keane Act.

The confidential nature, content, and results of PRG meetings violate the Bagley-Keene Act. *Cf.* Gov. Code §§ 11123, 11126, 11132. All three IOUs prohibit public participation in PRG meetings. Cross-Examination of Mr. Dagli, SCE, Trans. at 547, 549, 554; Cross-Examination of Mr. Eeekhout, SDG&E, Trans. at 710-11; Cross-Examination of Ms. Everidge, PG&E, Trans. at 768. Although SCE and SDG&E use the confidentiality matrix to identify privileged and non-privileged information that will be discussed at their PRG meetings, both IOUs claim that the discussions during the PRG meetings are confidential. Cross-Examination of Mr. Dagli, SCE, Trans. at 547-49; Cross-Examination of Mr. Eeekhout, SDG&E, Trans. at 711-12. SCE and SDG&E recognize that the non-confidential material related to the their procurement activity will become public in a future Commission process. Cross-Examination of

Mr. Dagli, SCE, Trans. at 555; Cross-Examination of Mr. Eeekhout, SDG&E, Trans. at 720. PG&E claims that all information discussed at the PRG meetings is confidential. Cross-Examination of Ms. Everidge, PG&E, Trans. at 769.

Since a PRG meeting is a state body pursuant to the Bagley-Keene Act, it can only conduct closed sessions in a method similar to the Commission. A state body, such as the PRG, may conduct closed sessions on "any matter that properly could be considered in a closed session by the state body whose authority it exercises" or matters properly "considered in a closed session by the state body whose authority it exercises." Gov. Code §§ 11126(f)(4) and (6). The Commission must generally open all meetings to the public pursuant to the Bagley-Keene Act, but it may meet in closed session "to deliberate on the institution of proceedings, or disciplinary actions against any person or entity," or to discuss pending legal action with legal counsel. Gov. Code § 11126(d)(2). Since the Commission is not expressly authorized to conduct closed sessions for reviewing IOU procurement activities, neither may a PRG.

Each PRG is an exclusive group of non-market participants and is in effect a substitute for an open and transparent procurement review process as required by law. While PRG members may have sufficient access and dialogue with the utilities, members of the public do not. By holding confidential PRG meetings, the public is "denied the opportunity to learn about ongoing activities and challenges in real-time and instead [is] forced to review materials underlying the Advice Letter filings for the first time after the decisions ha[ve] been made and submitted for approval." D.03-12-062, at 47 (quotation omitted). Although Commission meetings are open to the public, the dialogue between the PRG and IOUs, in combination with the expedited review process, removes important decision making components of the IOUs' procurement activity from the public realm.

2. Existing Mechanisms for Protecting Confidential Information May Be Applied in the PRG Context to Eliminate the Need for Closed Meetings.

The Public Utilities Code protects as confidential certain utility procurement information. Pub. Util. Code § 454.5(g) (the Commission shall "ensure the confidentiality of any market sensitive information"). In addition, California's trade secret statute provides protection to additional information. *See, e.g.*, Evid. Code § 1060. Yet, not all procurement plan and related data is "market sensitive" or trade secret. Rather, "market sensitive" information is limited to "[o]nly information that would have a material impact on a procuring party's market price for electricity." D.06-06-066, at 43 (June 29, 2006). The Commission created a confidentiality matrix to explain the confidentiality rules for procurement records, and established procedures for responding to requests for confidential treatment of documents. *See generally id.* A utility seeking to protect information that falls within the matrix has the burden to prove that its data matches the matrix category. *Id.* at 77 (Conclusion of Law No. 6). In balancing the need to protect confidential information provided by the utilities while satisfying the mandates requiring public disclosure, the Commission, unlike the PRGs, "start[s] with a presumption that information should be publicly disclosed and that any party seeking confidentiality bears a strong burden of proof." *Id.* at 2.

Because the Commission has already established a mechanism particular to IOUs for identifying and protecting confidential information, it is improper for the PRG to hold meetings completely closed to the public. The Commission's confidentiality procedures and matrix represent the balance the agency found sufficient for protecting confidential information while satisfying the public's right of access. Disallowing any public access to PRG meetings upsets this balance and creates excessive boundaries. As the Commission itself noted, "[p]art of what gives our processes legitimacy is participation from outside groups in our decision making

process." D.06-06-066 at 58. Just as the Commission is able to open meetings to the public in accordance with the Bagley-Keene Act while still protecting confidential information, the PRG should not have a problem with doing the same. *Cf.* Cross-Examination of Mr. Dagli, SCE, Trans. at 550 (agreeing that SCE provides confidential and non-confidential information to the Commission); *id.* at 716 (ALJ Allen taking administrative notice that SDG&E does the same).

CONCLUSION

For the foregoing reasons, Sierra Club respectfully requests that the Commission:

(1) deny SDG&E"s request for additional procurement authority;

(2) deny the requests by SCE, SDG&E and PG&E for authority to procure offsets in order to comply with AB32; and

(3) require that PRG meetings comply with the Bagley-Keene Act.

Respectfully submitted,

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