

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of Resolution E-4471 ) Resolution E-4471  
 ) (January 17, 2012)  
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**Opening Comments of San Diego Gas & Electric Company (U-902-E)**

Pursuant to the request of the Energy Division for comments related to the Draft Resolution E-4471 (“Draft Resolution”) served by the Division on or about January 17, 2012, San Diego Gas & Electric Company (“SDG&E”) files these opening comments. SDG&E identifies several oversights in the Draft Resolution that should and must be cured prior to the issuance of any final resolution by the full Commission. Addressing these omissions will provide greater clarity to the utilities and the Calpine Sutter Energy Center (“Sutter”) as to the nature of the contract that will be the subject of the Commission-directed negotiations described in the Draft Resolution, as well as the terms and conditions necessary to ensure the products and services procured will be delivered in the manner contemplated by the Commission at reasonable cost.

After having fulfilled its obligations to procure resources under the Commission’s and California Independent System Operator’s (“ISO’s”) coordinated resource-adequacy program for the upcoming 2012 compliance period, SDG&E is strongly predisposed to object to the imposition of additional obligations to procure even more resources, particularly where, as here, the obligation involves a specific resource remote to the SDG&E system and of questionable value to SDG&E’s system and customers.<sup>1</sup> Nevertheless, SDG&E is also sympathetic to the broader public interests entrusted to the protection of the Commission and cited by the Draft Resolution in justifying the actions proposed in the Draft Resolution. It has been SDG&E’s longstanding position California should implement an organized forward capacity market in order to assure long-term resource adequacy, market security and stability, and system reliability. Our view is borne of an abiding belief discontinuities will predictably and repeatedly occur under a market structure where long-term needs are addressed through serial, short-term bilateral contracts. Although SDG&E was, frankly, surprised to learn a newer, highly efficient resource such as Sutter fell victim to the lack of California’s progress in establishing forward solutions for the capacity-oriented services and products needed to maintain system reliability, SDG&E is not surprised by the market anomaly Sutter represents.

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<sup>1</sup> In an earlier forum, SDG&E expressed to the California ISO our dissatisfaction with the opaque evaluation and limited proofs upon which that agency relied in determining the nature and legitimacy of the economic distress alleged by Sutter. SDG&E does not raise these doubts with the Commission at this time under the presumption the Energy Division, and ultimately the Commission, has conducted fact-finding pursuant to its extensive and applicable regulatory authorities and satisfied itself that the nature of Sutter’s economic distress is in fact real, immediate and not the result of Sutter’s refusal to accept reasonable offers to provide resource-adequacy services to a Commission-jurisdictional load-serving entity.

In anticipation of an order of the Commission instructing SDG&E to participate in negotiations with Sutter (and jointly with Pacific Gas & Electric and Southern California Edison) for a “readiness” services contract pursuant to General Order 167, SDG&E urges the Commission to commit itself to reopening the evaluation of structural reforms that would obviate the need to craft creative *ad hoc* solutions to chronic, anomalous, but nonetheless predictable market discontinuities of the type represented by the threat of Sutter’s premature retirement. For the moment, SDG&E concedes the Commission may require the utilities to procure resources beyond those necessary to meet resource-adequacy requirements, although SDG&E must say the procurement ordered by the Draft Resolution will increase costs to customers it would not incur of its own accord. Before making this order, SDG&E submits the Commission should cure various omissions in the Draft Resolution as a precursor to SDG&E’s entry into good faith negotiations with Sutter as described in the order below.

First, in adopting the Draft Resolution, the Commission should clearly specify whether the utility-Sutter contracts, described by the Draft Resolution as the “regulatory mechanism” by which Sutter is to remain in service pursuant to Operating Standard 24 of General Order 167, are within or beyond the scope of the Commission’s resource-adequacy program. The Draft Resolution makes several references to the cause of Sutter’s economic distress as its failure to obtain a 2012 resource-adequacy contract, but the Draft Resolution also suggests the contracts to be negotiated by the utilities are principally intended to serve the purpose of assuring Sutter’s readiness to provide “full available power” and/or providing valuable information regarding the effect of pending changes to the California ISO’s tariffs governing dynamic transfers via pseudo-ties.<sup>2</sup> A clear specification of the purposes of the contracts would be instructive as to the terms and conditions SDG&E would include in its offers to and negotiations with Sutter.<sup>3</sup> Further, if the Commission is contemplating the utilities will execute system resource-adequacy contracts additional to those previously procured by the utilities, the Draft Resolution omits findings that will be necessary in the future to support findings related to the reasonableness of the negotiated contracts. In this regard, SDG&E notes the omission of at least two important critical findings of fact addressing the reasonableness of the contracts to be negotiated if they are to serve resource-adequacy requirements, to wit:

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<sup>2</sup> SDG&E finds the repeated allusions to the Commission’s need for information regarding dynamic transfers involving pseudo-ties to be a thin reed by which to hang the requirement that the utilities should procure the entirety of Sutter’s generating capacity. These references raise considerable uncertainty as to the nature of the information sought by the Commission. SDG&E is, however, willing to accept the Commission’s interest in having this additional information, but avers it would be helpful for the Commission to specify the nature of the regulatory, technical and/or performance information it seeks clearly. These specifications would be useful to SDG&E as it develops its agenda of terms and conditions that will be proposed to Sutter in the upcoming contract negotiations.

<sup>3</sup> For instance, the Draft Resolution at page 8 references the Commission’s authority to approve the utilities’ procurement of “energy” under Public Utilities Code Section 454.4. If the Commission intends for the utilities to procure “energy” via dynamic transfers and/or capacity related to the “state of ‘readiness’ to provide full available power” as indicated at page 6, the Commission should clarify its intentions in its final orders.

Finding 6A. Although the California ISO did not find deficiencies in the 2012 resource-adequacy plans, the procurement of additional resource-adequacy capacity from Calpine Sutter is necessary and prudent in order to allow the study of dynamic transfers via pseudo-ties under proposed CAISO tariff changes and, additionally, to provide a regulatory mechanism by which to compensate Calpine Sutter to provide readiness services as required under Operating Standard 24 of General Order 167.

Finding 6B. Pending the issuance of a final order in this Commission's R.10-05-006, it is reasonable to require Calpine Sutter to provide readiness services as an incremental requirement over and above the 2012 resource-adequacy requirements imposed upon Pacific Gas & Electric, Southern California Edison and San Diego Gas & Electric under the prior orders of this Commission.

The requested clarification as to the principal purpose(s) of the contracts will, in turn, clarify the terms and conditions that might be found to be just and reasonable as those contracts are negotiated and executed, *i.e.*, whether energy deliveries are or are not an essential element of the contracts encouraged by the Draft Resolution.<sup>4</sup> On the other hand, if the Commission contemplates the utilities will be executing agreements for resource-adequacy capacity, the Commission should preclude potential complaints these contracts are not just and reasonable due to the fact the contracts would provide capacity in excess of the resource-adequacy requirements previously determined by the Commission's prior orders. The findings proposed above would resolve these important issues.

Second, SDG&E raises a factual matter it believes may be unique to its own circumstances. In the Commission's prior orders related to the resource-adequacy program, the amount of system resource-adequacy capacity SDG&E may procure from northern California has been limited under the so-called "Path 26 Counting Constraint".<sup>5</sup> For the 2012 compliance period, SDG&E has procured capacity to the full extent of the limitations imposed under the Path 26 Counting Constraint. Absent a material change in circumstances, any capacity acquired by SDG&E from Sutter would exceed not only our generally applicable system resource-adequacy requirement, but would also exceed the constraints placed on SDG&E under the Path 26 Counting Constraint. As noted previously, if the Draft Resolution intends to require SDG&E and the other utilities to procure services separate and distinct from the resource-adequacy program, SDG&E would consider itself freed from these limitations as it participates in any negotiations with Sutter. On the other hand, if the Commission intends for the utilities to procure resource-adequacy capacity from Sutter but is not inclined to modify the Path 26 Counting Constraint, the Commission should exempt SDG&E from the scope of its final order and relieve it from any responsibility to procure capacity from Sutter. Finally, if the Commission would prefer SDG&E to join with the other

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<sup>4</sup> See footnote 3, *supra*.

<sup>5</sup> See *Opinion on Phase 2 – Track 1 Issues, in Order Instituting Rulemaking to Consider Refinements to and Further Development of the Commission's Resource Adequacy Requirements Program*; Decision 07-06-029 in Rulemaking 05-12-013 (June 21, 2007), printed opinion at pp.12 to 19, Findings of Fact 4 through 7 at pp.54 to 55, and Conclusions of Law 1 and 2 at pp.57 to 58.

utilities in procuring resource-adequacy capacity from Sutter, the Draft Resolution should be modified to include the following additional findings so as to address potential future objections regarding the reasonableness of any final contract executed by SDG&E with Sutter related to the Path 26 Counting Constraint:

Finding 6C. Notwithstanding any prior order of the Commission, it is in the public interest for San Diego Gas & Electric to join Pacific Gas & Electric and Southern California Edison in joint negotiations with Calpine Sutter to address the system wide need described by this Resolution.

Finding 6D. Certain prior limitations placed on San Diego Gas & Electric's ability to execute resource-adequacy contracts with resources north of Path 26 would undermine the possibility that contracts with Calpine Sutter to provide readiness services could be executed by San Diego Gas & Electric and, so as to address and abate this possibility, any such limitations shall not apply to any services and/or products procured by San Diego Gas & Electric from Calpine Sutter pursuant to this Resolution.

Third, in the ordinary course of managing resources under contract to it, SDG&E from time to time enters the market to procure or sell resources as circumstances warrant. Because SDG&E is almost fully resourced for the 2012 compliance period, SDG&E anticipates, if it procures resource-adequacy services from Sutter, it would have the opportunity to sell any contract entitlements it might procure from Sutter to another load-serving entity in need of additional resources during the coming year. In the event such an opportunity presents itself, SDG&E should be encouraged to seize that opportunity. In this vein, the Draft Resolution should be drafted so as to preclude any allegation that sales demonstrate any SDG&E-Sutter agreement was unreasonable in whole or in part. SDG&E submits consideration of the sale of such contractual interests as the utilities, and particularly SDG&E given its physical remoteness from Sutter, might negotiate with respect to Sutter is ignored in the Draft Resolution. SDG&E proposes, in order to facilitate economic transactions related to any contractual interests it might negotiate in and with Sutter, the Draft Resolution should be modified to include the following Order:

2A. If Pacific Gas & Electric, Southern California Edison, and/or San Diego Gas & Electric file a Tier 3 advice letter seeking approval of any contract executed with Calpine Sutter pursuant to this Resolution, neither the contract nor the approval of the advice letter shall be construed to preclude the sale of the contractual rights negotiated by the procuring utility to a third party, nor shall any sale of the contractual rights negotiated by the procuring utility be construed to indicate the terms and conditions related to those contractual rights are not just and reasonable or are otherwise imprudent.

Fourth, as the Commission is well aware, participation by more than one utility in the commercial setting described by the Draft Resolution poses some risk to the utilities that claims may be brought by third parties related to alleged violations of the antitrust laws. Where the Commission has directed or encouraged joint commercial activities involving more than one regulated utility, the Commission has addressed these concerns by carefully articulating the state policies supporting the joint activity and providing for the full and direct supervision of the

activity by the Commission.<sup>6</sup> By articulating the state policies being served and specifying the regulatory oversight the Commission intends to exercise over joint utility activities, the Commission provides the utilities with the essential *prima facie* elements allowing them to assert a state-action immunity defense against antitrust claims. The Draft Resolution suggests several policies that would be served through the joint negotiation of the contemplated limited term contract with Sutter, e.g., studying the effect of dynamic transfers via a pseudo-tie under the California ISO's proposed tariff changes, assuring Sutter's readiness to perform under General Order 167, and meeting the reliability objectives of the resource-adequacy program. By providing further guidance as to the objectives of the contract as requested by SDG&E in these comments, the state policy(ies) being served by the utilities will be brought into clearer focus. As to evidencing the requisite level of state supervision required under the state-action doctrine, the various directions regarding the contract terms the Commission expects to result from the Sutter-utility negotiations and the process by which the Commission would review and approve any final contract, i.e., the filing of a Tier 3 advice letter that requires formal Commission approval, are helpful. SDG&E believes the Commission should increase the level of its oversight, however, by providing an Independent Evaluator who would attend the negotiations on behalf of the Commission and report on those negotiations to the Commission when the negotiations conclude. This additional step would clearly bring the Commission's supervision into the heart of the joint activity required under the Draft Resolution, providing additional evidence that the utilities are acting under the direction of the State.

Subject to the Commission first resolving the deficiencies noted in these Opening Comments, SDG&E is prepared to pursue the contract negotiations described by the Draft Resolution. Following the conclusion of this immediate activity, however, SDG&E strongly recommends the Commission consider longer-term structural reforms that would obviate the need for any future regulatory interventions of the type addressed by the Draft Resolution.

Respectfully submitted,

/s/ Alvin S. Pak

Alvin S. Pak

Attorney for San Diego Gas & Electric Company

101 Ash Street, HQ12C

San Diego, California 92101

Telephone: 619.696.2190

Facsimile: 619.699.5027

Electronic Mail: [Apak@SempraUtilities.com](mailto:Apak@SempraUtilities.com)

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<sup>6</sup> See, e.g., *Decision on Petition to Modify Decision 09-12-014*, in *Application of Southern California Edison Company (U338E) for Authorization to Recover Costs Necessary to Co-Fund a Feasibility Study of a California IGCC with Carbon Capture and Storage*; Decision 10-06-009 in Application 09-04-008 (June 8, 2010).