BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.	)	Rulemaking 11-05-005 (Filed May 5, 2011)

COMMENTS OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E) ON SECOND ASSIGNED COMMISSIONER'S RULING ISSUING PROCUREMENT REFORM PROPOSALS AND ESTABLISHING A SCHEDULE FOR COMMENTS ON PROPOSALS

AIMEE M. SMITH
101 Ash Street, HQ-12
San Diego, California 92101
Telephone: (619) 699-5042
Facsimile: (619) 699-5027
Email: amsmith@semprautilities.com

Attorney for
SAN DIEGO GAS & ELECTRIC COMPANY

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I. INTRODUCTION

Pursuant to the Rules of Practice and Procedure of the California Public Utilities Commission (the "Commission") and the *Second Assigned Commissioner's Ruling Issuing Procurement Reform Proposals and Establishing a Schedule for Comments on Proposals* (the "ACR"), San Diego Gas & Electric Company ("SDG&E") submits these comments concerning the proposals set forth in the ACR intended to refine the Renewables Portfolio Program ("RPS") procurement process.

The proposals included in the ACR are intended to streamline the RPS contract review process, increase the transparency of the Commission's review of RPS procurement, establish clear standards for this review process, issue Commission determinations on contract reasonableness on a defined timeline and support market certainty in RPS procurement.[1/] While SDG&E supports the Commission's effort to streamline the process for procurement of new RPS generation, it notes that as the investor-owned utilities ("IOUs") approach compliance with RPS targets, the need to

[1/] ACR, p. 2.

optimize the IOUs' *existing* RPS portfolios will become increasingly important. Accordingly, SDG&E encourages the Commission to consider in future rulings how it can best support the IOUs' ability to optimize their existing RPS positions by selling excess generation or negotiating buy/sell swaps that can reduce RPS costs for ratepayers. SDG&E offers below general comments regarding certain ACR proposals, as well as specific responses to the questions set forth in the ACR.

II.
RESPONSES TO ACR PROPOSALS

PROPOSAL 4.1: STANDARDS OF REVIEW FOR IOUs' SHORTLISTS

- **Submit the shortlists via a Tier 3 Advice Letter instead of a Tier 2**
- **Proposed contracts on the shortlist cannot be executed until the CPUC adopts the shortlist in a resolution**
- **Standards of review**
  - **Consistency with an IOU's procurement plan (e.g. approved net short and LCBF methodology)**
  - **Determination by the IE that the shortlist was fairly selected**
  - **Assessment of the viability of shortlisted projects relative to all bids**
  - **Consistency with the IOU's procurement expenditure limitation (once adopted)**

1. ***Provide comments on the strengths and weaknesses of increasing the level of review of IOUs' shortlists. If an alternative review process or review standards are proposed, include justification for the proposal.***

RESPONSE: SDG&E does not support the proposal to establish an increased level of review of IOU shortlists, and questions the practicality and utility of this proposal. Adoption of the proposal would greatly undermine the Commission's stated goal of streamlining the RPS contract review process; it would extend the approval timeline without improving the quality of the overall review process.[2/] As a practical matter, there are very few aspects of a project that *can* reasonably be reviewed by the

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[2/] *See* ACR, p. 9.

Commission prior to final submission of the contract for approval. At the time they are shortlisted, projects are typically at a very early stage of development and the contract between the parties is yet to be negotiated. A final, negotiated contract submitted for Commission approval generally differs in several material respects from the IOU's pro forma contract. Thus, an overall, qualitative review of a proposed transaction to determine whether the negotiated terms and conditions, on balance, provide ratepayer benefit cannot be undertaken until contract negotiations are final.

Moreover, the proposal to conduct an increased level of review on all shortlisted projects is inefficient and would result in waste of Commission and IOU resources. The IOUs would be required to prepare, and the Commission would be required to review, a detailed analysis of *all* shortlisted projects rather than just those that succeed in reaching agreement with the IOUs. As discussed in its RPS plan, SDG&E shortlists more projects than would be required to meet its need in order to account for the fact that some projects may drop off the shortlist.[3/] Projects can drop off the shortlist for many reasons, including development delays or inability to agree on contract terms. Spending time and resources on the evaluation of the shortlisted bids that do not ultimately result in a contract submitted for Commission approval would increase administrative burden, particularly for Commission staff, and would slow the approval process.

Accordingly, the Commission should continue its current practice of reviewing the shortlist pursuant to a Tier 2 advice letter, after such projects have been vetted with the IOU's Procurement Review Group ("PRG"), to ensure that bids were evaluated and

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[3/] SDG&E Amended 2012 Draft Renewable Procurement Plan filed August 15, 2012, Appendix C – Evaluation Methodology, Section 7.

shortlisted consistent with the approved least-cost, best fit ("LCBF") methodology and RPS need assessment. The more detailed Tier 3 advice letter analysis should be performed only for those projects that succeed in executing a contract, at the time such contracts are submitted for approval.

To the extent the Commission elects, notwithstanding the above concerns, to increase the level of review undertaken at the time the shortlist is filed, the review should be limited in scope and should be subject to a Tier 2 advice letter process. The aspects of a proposed transaction that can reasonably be evaluated at the time the shortlist and accompanying IE report are submitted to the Commission are only the most general, high level characteristics of the shortlist, which relate primarily to whether the shortlisted project is consistent with RPS statutory goals and the IOU's approved RPS Procurement Plan, as well as to whether the IOU's solicitation process and LCBF evaluation were conducted fairly and in conformity with the Commission's rules (*i.e.*, Section II A, B and C of the Commission's current RPS contract advice letter template). This is a factual analysis that will not change as the result of subsequent contract negotiations. Thus, these aspects of the transaction could theoretically be reviewed by the Commission prior to the time the final contract is submitted for approval, although it is not clear that there is much to be gained by engaging in such review at an earlier point and, as noted above, review at an this early stage would involve consideration of several projects that will not ultimately be submitted for Commission approval.

Given the high-level nature of the information and analysis that would be involved in such a review, a Tier 3 filing would be inappropriate. Requiring a Tier 3 advice letter process to evaluate these aspects of the shortlist would add months to the

approval process, which is inconsistent with the ACR's stated goal of streamlining the RPS contracting process. Plainly, replacing the current requirement that RPS contracts be subject to one Tier 3 Advice Letter process with a requirement that such contracts be subject to *two* Tier 3 Advice Letter processes cannot under any analysis be viewed as increasing efficiency. All stakeholders – the Commission, the IOUs and market participants – would be negatively impacted by the administrative burden and inherent delay that would result from an RPS contract review process that required two separate Tier 3 Advice Letter filings.

Accordingly, SDG&E supports retention of the current Tier 2 advice letter filing requirement. Indeed, the Tier 2 advice letter process is appropriate even if the Commission increases the level of project review at the time of the shortlist filing. Commission General Order ("G.O.") 96-B provides that "[i]ndustry Division disposition is appropriate where statutes or Commission orders have required the action proposed in the advice letter, or have authorized the action with sufficient specificity, that the Industry Division need only determine as a technical matter whether the proposed action is within the scope of what has already been authorized by statutes or Commission orders."[4/] Given the objective, factual nature of the proposed expanded review, which would examine consistency with certain well-defined requirements set forth in the RPS statute, the Commission's rules and the IOUs' Commission-approved RPS Plans, the existing Tier 2 Advice Letter process would remain appropriate even if the Commission elected to increase the level of shortlist review.

[4/] G.O. 96-B, § 7.6.1.

PROPOSAL 4.2: ESTABLISH DATE CERTAIN FOR REQUEST FOR COMMISSION APPROVAL OF CONTRACTS

- **RPS contracts must be executed within one year after the approval of an IOU's shortlist and filed with the Commission for approval within one month from the execution date of the contract**

2. ***Discuss the strengths and weaknesses of the proposal to set a time requirement for requesting Commission approval of an RPS contract. What impact will it have on the market, ratepayer, and regulator? If an alternative time requirement is proposed, include a justification for the proposal.***

RESPONSE: The requirement that IOUs file RPS contracts for Commission approval within one month of execution of the contract is unworkable given the amount of supporting analysis that is required in the current RPS advice letter template. Absent significant streamlining and major reduction in the analysis and documentation required by the Commission, it would not be possible to prepare the advice letter filing within the 30-day period proposed. Moreover, it is not clear what purpose is served by imposition of a contract filing deadline – once a contract is executed, the IOU is motivated to submit the contract for approval at the earliest possible date and is contractually obligated to pursue approval in a commercially reasonable manner. In short, once a contract has been executed by the counterparty, there is no benefit to the IOU in in delaying submission of the contract for Commission approval. To the extent the IOUs have delayed filing of advice letters in the past, the cause has often been the Commission's directive that only one advice letter may be filed during each calendar month.

Accordingly, SDG&E questions the need for the proposed filing deadline and submits that rather than conferring any benefit, it would create the potential for contracts that offer ratepayer value being barred due to the inherent difficulty in complying with the filing requirement. This would harm IOUs, counterparties and, ultimately,

ratepayers. If the Commission, nevertheless, elects to adopt a contract filing deadline, it should ensure that the deadline adopted provides sufficient time for the IOU to prepare the advice letter (keeping in mind that multiple advice letters for multiple contracts may be in progress simultaneously). To that end, SDG&E recommends a period of no less than 90 days.

With regard to the proposed requirement that RPS contracts be executed within one year after the approval of an IOU's shortlist, SDG&E supports this requirement in concept to the extent that it will help to ensure that contract terms and conditions reflect the current market. SDG&E is concerned, however, that rigid application of this requirement could have negative unintended consequences that would be harmful to ratepayers. Despite the best efforts of the IOUs and counterparties, it is possible that in some instances, final contract execution might not occur within the contemplated 12-month period. This could be the result of delays that are outside the control of the developer or the IOU, or where negotiations between the parties do not commence immediately after shortlisting, either because the project was part of SDG&E's contingent shortlist, for which negotiations will not begin until another shortlisted project drops off, or due to resource constraints experience by the IOU and/or the counterparty (as a practical matter, there is a limit to the number of contracts that SDG&E is able to simultaneously negotiation at any given time). In such cases of reasonable delay – *i.e.*, where a delay in contract execution is due to an outside event and/or is not the result of unreasonable delay by the IOU or the project developer – the IOU should be permitted to seek a reasonable extension of the 12-month deadline. This will prevent a situation in which an opportunity that provides significant benefit to ratepayers is lost.

PROPOSAL 4.3: EXPEDITED REVIEW OF RPS PURCHASE AND SALES CONTRACTS

A. Purchase & Sales Contracts Less than Five Years in Term Length

- **Request CPUC approval of eligible contracts <5 years in length by Tier 1 instead of Tier 3 if the prerequisites are met**

B. Purchase Contracts of Five Years or Greater in Term Length

- **Request CPUC approval of eligible contracts ≥5 years in length by Tier 2 instead of Tier 3 if the prerequisites are met**
- **Since IOUs generally sell excess RPS generation through short-term agreements, sales contracts are not included in this proposal**

4.3.A&B

GENERAL COMMENTS: As a threshold matter, SDG&E notes that while it is generally possible to adhere to pro forma contracts with smaller projects such as those that bid into the feed-in tariff ("FiT") and Renewable Auction Mechanism ("RAM") programs, most transactions involving larger RPS projects will require negotiation of contract terms and conditions. Thus, as a practical matter, the requirement that there be no modification to the Commission approved pro forma contract in order to proceed under the proposed expedited review process would almost certainly result in very limited applicability of the expedited review process.

To better align the proposed expedited review process with the commercial realities of RPS contracting, SDG&E recommends that the criteria for expedited review be modified to require that the pro forma contract be non-modifiable except for a limited number of terms that address the issues that most typically require modification based on the type of project involved. These include: (i) project development (not applicable to existing facilities); (ii) scheduling (varies based on which party serves this role and based on the location of the facility); (iii) security requirements (varies based on type of project

involved); (iv) allocation of risk for California Independent System Operator ('CAISO") charges and penalties (varies based on type of project involved); (v) delivery point (varies based on whether the project interconnects at the transmission or distribution level); (vi) resource adequacy (varies based on whether the project is energy only or fully deliverable); and (vii) energy payment (formula varies based on whether the project is energy only or fully deliverable). Modification of contract terms other than those specified up front would make an RPS contract ineligible for expedited review.

SDG&E also notes that the proposal does not address a scenario in which a contract meets the criteria outlined in Table 1 and is approved under an expedited process, but subsequently requires amendment. SDG&E proposes that amendments to contracts approved under the proposed expedited process be subject to the same process or rules that apply to amendments to RPS contracts approved via Tier 3 advice letter or application.

3. ***The above proposal defines expedited review prerequisites differently for contracts <5 years and those ≥5 years in term length. Comment on the appropriateness of the 5 year term length distinction. If an alternative is proposed, include a justification for the proposal.***

RESPONSE: The 5-year demarcation appears to be working effectively and SDG&E does not perceive a need to change it.

4. ***The above proposal allows for contracts that meet all of the prerequisites to be submitted with Tier 1 and Tier 2 Advice Letters for contracts <5 years in term length and contracts ≥5 years in term length, respectively. Comment on the appropriateness of the designated Advice Letter Tier. If an alternative is proposed, include a justification for the proposal.***

RESPONSE: SDG&E supports the proposal to require the Tier 1 process for contracts < 5 years in term length. The pre-defined nature of the short-term transactions eligible for expedited review make Tier 1 review appropriate under § 5.1 of Commission General

Order ("G.O.") 96-B, which provides that "[a] Contract that conforms to a Commission order authorizing the Contract, and that requests no deviation from the authorizing order" should be afforded Tier 1 treatment. Moreover, short-term contracts are typically entered into in order to meet a near-term need. Due to the short timeframe involved, the necessity to expedite the review process is greatest and the risk to ratepayers is lowest. Accordingly, the Tier 1 Advice Letter process is reasonable. It affords the Commission and other parties the opportunity to review the contract while enhancing an IOU's ability to respond to and effectively manage changes in portfolio need.

SDG&E also supports application of the Tier 2 process to contracts ≥5 years in term length that meet the eligibility criteria proposed herein by SDG&E. Long-term contracts are typically signed in order to fulfill a longer term need, and SDG&E agrees that a Tier 2 Advice Letter process is the most suitable in this scenario. SDG&E further recommends that proposed expedited review process apply to bilateral RPS transactions entered into by the IOUs. As discussed in more detail in the response to Question 12 below, the public interest does not support treating bilateral contracts differently from contracts entered into via a solicitation.

5. ***The above proposals do not apply to sales contracts five years or greater in term length. Is there a market need to extend an expedited approval process to sales contracts five years or greater in term length?***

RESPONSE: SDG&E does not perceive a need for such a process.

6. ***The above proposal requires contracts using the expedited review process to be selected from competitive solicitations but it also allows bilateral contracts <5 years in term length if they are of equivalent or better net market value than offers from a prior solicitation for similar products. Would a solicitation for short-term transactions be robust enough to adequately benchmark short-term bilateral transaction if the contract is negotiated bilaterally?***

RESPONSE: Solicitations for short-term transactions would not be robust enough to adequately benchmark short-term bilateral transactions under existing RPS procurement rules. At present, the most simple and straightforward solicitation has been the RAM process, and this typically requires at least six months to conduct from beginning (RAM opening/bidders' conference) to end (filing of closing solicitation advice letter). Short-term transactions generally have pricing points that are based upon market conditions at specific points in time; the basis of these pricing points can shift significantly over a six-month period, rendering the original solicitation ineffective for the purposes of benchmarking. Furthermore, the proposed 5 bid minimum requirement would create a significant obstacle to the IOUs' ability to proceed under the proposed expedited review process inasmuch as solicitations for short-term contracts are generally not expected to yield more than one or two contracts for shortlisting.

7. ***The above proposal extends the expedited approval process to contracts greater than five years in term length. Because long-term contracts are primarily for generation from facilities that are not yet operating, viability screens are proposed as prerequisites to reduce RPS portfolio risk for the IOUs and ratepayers. Comment on the strengths and weaknesses of the proposed viability screens.***

RESPONSE: The proposed viability screens are appropriate except for the requirement that an application or advice letter must have been filed for any necessary transmission system upgrades. While SDG&E agrees that expedited approval should be applied only to those projects that are in a sufficiently advanced stage of development that they can provide reasonable assurances that the project's commercial operation date ("COD") will occur within a near-term time frame, the proposed site control, permitting and Phase II interconnection study screens will accomplish this goal. The additional requirement regarding the status of permitting the necessary transmission upgrades is impractical

because participating transmission owners do not typically submit requests for building required upgrades until the project has executed an interconnection agreement. Without requiring a completed interconnection study, the requirement to have submitted an application or advice letter for necessary upgrades is impractical.

PROPOSAL 4.4: IMPROVE RPS POWER PURCHASE AGREEMENT STANDARDS OF REVIEW

- **RPS Standards of Review (SOR) for contracts**

A. PPAs from Solicitations

8. ***The above proposal requires contracts to be consistent with an IOU's net short approved in the most recent Procurement Plan. Propose how this criterion could be applied to an individual contract.***

RESPONSE: Contract approval should be conditioned on the contract's ability to meet the RPS net short in a least-cost, best-fit manner. Any contract that due to the volume and schedule of deliveries would result in the IOU being substantially over-procured in a given compliance period, would be rejected regardless of net market value ("NMV"). In this context, "over-procured" would mean substantially exceeding the IOU's RPS net short position, taking into account margins of over-procurement and any other mechanisms stated by the IOU in its procurement plan to account for risks of project failure and other potential impacts to the RPS net short position such as retail sales fluctuations. To do otherwise would require that the RPS net short position be disregarded (rendering it meaningless), or would require the IOU to terminate existing contracts (which could expose the IOU to liability for breach of contract or accusations of bad-faith negotiation).

9. ***Are the proposed cohorts to be used to evaluate the reasonableness of a contract's price, net market value, and viability appropriate? If not, provide an alternative proposal and justification for the alternatives.***

RESPONSE: SDG&E agrees that the cohorts proposed to evaluate the reasonableness of a contract's price, net market value, and viability are appropriate. This varied list of projects can be compared on an equal footing as the least-cost-best-fit evaluation methodology normalizes diverse project attributes. However, SDG&E requests that the review process applied by the Commission account for extenuating circumstances that may render some data irrelevant (*e.g.*, significant yet brief market fluctuations that may impact pricing for a certain period) when using the proposed set of peer groups. In the event of a market irregularity, the Commission should exclude the affected data set from the comparison.

B. <u>Bilateral PPAs</u>

- **Minimum development milestones will be required because the rationale for a bilateral transaction is that the transaction represents a unique fleeting procurement opportunity and that it would be detrimental to ratepayers to wait until a solicitation is held**

10. Are there additional reasons for executing bilateral power purchase agreements outside of the solicitation process other than those stated above (e.g. fleeting opportunity, very high viability, near-term commercial operation date, etc.)? If yes, provide the additional reasons and the justifications for bilateral contacts outside of a solicitation.

RESPONSE: SDG&E acknowledges the benefits inherent in the request-for-offer ("RFO") procurement mechanism, but notes that not all products are well-suited for the RFO process due to, for example, deal timing and/or complexity. The ability to contract bilaterally is a valuable tool in maximizing value to ratepayers – it is useful in addressing an unforeseen need in a timely manner and also allows an IOU to take advantage of opportunities that are too complex to solicit through an RFO, such as tax equity or buy/sell transactions.

In addition, the ability to engage in bilateral deals is necessary from a practical perspective; bilateral deals assist market development by offering an additional sales option, making project development less dependent on RPS solicitation cycles. To address any concerns regarding continuity between the bilateral and solicitation contracting processes, SDG&E proposes that any project seeking a bilateral contract in the future be required to complete the same set of documents that would be required in an RPS solicitation (bid forms, project description forms, etc.) and be evaluated in the same manner as project solicited through an RFO.

11. Are the proposed cohorts to be used to evaluate the reasonableness of a contract's price, net market value, and viability appropriate? If not, provide an alternative proposal and justification for the alternatives.

RESPONSE: As discussed in the response to Question 9 above, SDG&E agrees that the cohorts proposed to evaluate the reasonableness of a contract's price, net market value, and viability are appropriate. This varied list of projects can be compared on an equal footing as the least-cost-best-fit evaluation methodology normalizes diverse project attributes. As noted above, however, the review process applied by the Commission must account for extenuating circumstances that may render some data irrelevant when using the proposed set of peer groups. In the event of a market irregularity, the Commission should exclude the affected data set from the comparison.

In addition to the proposed cohorts, the uniqueness of a bilateral contract must also be taken into consideration when the Commission conducts its evaluation. This will ensure that the characteristics that make a bilateral contract unique and compelling, including the reasons mentioned by the proposal itself (fleeting opportunity, very high viability, and near-term COD) are recognized in the analysis of the transaction.

Excluding these unique attributes from contract analysis would yield inaccurate and incomplete results, to the detriment of ratepayers.

12. Are the proposed criteria and standards within the minimum viability requirements appropriate for bilaterally offered projects? If not, provide alternative criteria and standards and justification for the proposal.

RESPONSE: There is no public interest justification for requiring additional "Minimum Development Milestones" criteria for bilateral contracts. Although the execution of a bilateral contract may not directly coincide with a solicitation cycle, its value can be accurately assessed by considering the same criteria proposed for similar projects procured through a solicitation, along with the unique attributes the bilateral contract provides, as discussed above in the response to Question 11.

C. <u>Amended PPAs</u>

- **Amendments/modifications that substantially change the contract, or modify an explicit term of contract approval should be filed by a Tier 3 AL, such as**
  - **Technology Change**
  - **Price change**
  - **Increase or decrease in capacity not previously approved by CPUC**
  - **Change in COD by more than 3 months**
  - **Change in location**
  - **Change in Point of Interconnection ("POI")**

GENERAL COMMENTS: SDG&E acknowledges the need for greater clarity regarding the circumstances under which a contract amendment triggers an advice letter filing requirement, but submits that the proposal to establish a defined list of modifications that would in every instance require an advice letter filing is a misguided approach. The need for an advice letter filing, and the attendant review process, should be tied to the materiality of the contract amendment proposed. Indeed, the ACR acknowledges that the energy resource recovery account ("ERRA") exists to address non-material contract modifications included in general contract administration. It is not

the case that the circumstances that would trigger an advice letter filing under the ACR proposal will categorically have a "material" impact on ratepayers. A change in project location or commercial online date, for example, may have an appreciable impact in terms of the cost of the contract or the value of the contract to ratepayers, or may not. Commission approval should be required only where ratepayer value is negatively impacted.

Applying this logic, a "material" contract amendment should be defined as a modification that would result in a material decrease in value to utility ratepayers or an increase in cost. A useful measure in this analysis would be whether the proposed amendment would have removed the project from the shortlist – it the proposed amendment would not result in the project's removal from the shortlist, it would be an indication that the amendment would not result in a material decrease in ratepayer value, and thus should not require an advice letter filing. As a practical matter, the ability to occasionally amend RPS contracts has proven to be a commercial necessity. In many cases, the amendments have little or no impact on the value of the contract to ratepayers.

Requiring an advice letter filing in *every* case of a change in the commercial online date or other circumstance defined in the ACR – regardless of the degree of impact on ratepayers – would multiply the number of RPS advice letter filings the IOUs must make, which would increase the burden placed on the Commission and greatly undermine the ACR's stated goal of increasing administrative efficiency. In short, the public interest is not served by applying limited Commission resources to review of contract changes that have minimal to no impact on ratepayers. Accordingly, the ACR proposal should not be adopted. Instead, the Commission should clarify that approval of

a contract amendment must be sought only when the modification in question would result in a material decrease in value to utility ratepayers or an increase in cost. All other contract amendments should be reviewed in the ERRA proceeding.

SDG&E also notes that the Commission should clarify that a request for approval of a contract amendment does not open the contract up for *de novo* review by the Commission. The proposed process for review of contract amendments illustrated in Figure 2 and Table 4 of the ACR appears to require an analysis of RPS need in connection with *every* contract amendment proposed – even those that do not relate to increased deliveries. Where a contract has previously been approved by the Commission, review of a proposed contract amendment should focus *solely* on the proposed amendment. Effectively withdrawing the previously granted approval and subjecting the contract to a second wholesale review would violate principles of regulatory certainly and would greatly destabilize the RPS market. Accordingly, the Commission's review of proposed contract amendments should not involve a re-look at provisions unrelated to the proposed amendment.

Finally, the proposal that a previously approved contract be effectively terminated if the project requires a "technology change," and that the project be required to re-bid into the next RPS solicitation, is highly problematic. First, the term "technology change" is overbroad – it could refer to a change from one wind turbine manufacturer to another, or from thin film to polycrystalline – *i.e.*, non-material changes that would have no impact on ratepayers and certainly would not justify termination of the contract. A more narrowly-defined amendment category would be a change in fuel type (*e.g.*, a change from solar to wind, or vice versa); a change of this nature would be more likely to have a

material impact on ratepayers. As discussed above, however, attempting to pre-define "material" contract changes necessitating specific action is ill-advised; the analysis must be undertaken on an *ad hoc* basis.

With regard to the proposal to require such contracts to be re-bid into the next RPS solicitation, the requirement would put the utility and the counterparty in an untenable position. The contract originally approved by the Commission would appear unviable, but the project developer would be required to continue to pursue the project until the utility's next RPS solicitation. Depending on the timing of the amendment vis-à-vis the next RPS solicitation, it could be close to a year that the parties are working with a defunct contract and a dead project, with no ability to work toward a more viable project. Both the existing and proposed processes for dealing with contract amendments involve safeguards such as requiring that the proposed amendment be compared against the most recent solicitation. Proposed technology changes should be handled in a manner consistent with other proposed contract changes; where the change is material (*i.e.*, the modification would result in a material decrease in value to utility ratepayers or an increase in cost) it should be submitted for Commission approval via the advice letter process.

13. The proposed SOR are for contract amendments that substantially modify a contract. Are additional SOR needed for other types of contract amendments (i.e., contract amendments that do not substantially modify approved contracts) or does review of "contract administration" within the IOUs' Energy Resource and Recovery Account filings encompass all other contract amendment types? If additional SOR are needed, propose alternative or additional SOR and describe the type of contract amendment that they would apply to.

RESPONSE: SDG&E does not perceive a need for additional SORs for amendments that do not impact the cost or value of, and therefore do not materially modify, a contract.

Since such amendments are, by definition, not material, they are properly deemed to be "contract administration" matters that are routinely reviewed in the IOUs' respective ERRA and Quarterly Compliance Report ("QCRs") filings.

14. ***Are the proposed cohorts to be used to evaluate the reasonableness of a contract's price, net market value, and viability appropriate? If not, provide an alternative proposal and justification for the alternatives.***

RESPONSE: Where a proposed contract amendment requires an evaluation of a price change or impacts project viability, SDG&E agrees that evaluation of the reasonableness of a contract's price, net market value, and viability based on the cohorts proposed is appropriate. As noted in the response to Question 9 above, however, the review process applied by the Commission must account for extenuating circumstances that may render some data irrelevant when using the proposed set of peer groups. In the event of a market irregularity, the Commission should exclude the affected data set from the comparison.

15. ***Should minimum project development milestones (as proposed for the SOR for bilateral contracts) be incorporated into the SOR for amended contracts as a way to ensure only viable projects proceed with contracts, thus decreasing the amount of risk in the IOUs' RPS portfolios? If not, provide alternative SOR that would reduce the risk of IOUs' RPS portfolios.***

RESPONSE: It is not uniformly the case that contract amendments impact project development or viability. Accordingly, it would not be necessary in every case of a contract amendment to impose additional minimum project development milestones. Where a proposed contract amendment *would* potentially impact schedule, however, it might be reasonable, depending on the circumstances, to establish minimum project development milestones.

D. PPAs Beyond the Scope of AL Process

- **For contracts that may have a worse NMV than comparison contracts, but that have other attributes that merit a review, for unproven technologies, or contracts representing >1% of an IOU's bundled retail sales in its first year of operations**

GENERAL COMMENTS: The ACR proposes that an application filing be required if a project has "a worse net market value than the contracts it is being compared to, but [has] other attributes that merit Commission review" or the project utilizes an unproven technology. SDG&E does not object to this proposal in concept, but notes the importance of precisely defining the term "a worse net market value" and establishing a clear standard for making that determination. In addition, SDG&E suggests rounding the NMV values to the nearest $0.50 when making the comparison; in other words, contracts with an NMV above $0.50 of the proposed cohort would be processed via application.

In addition, the ACR proposes to disclose contract terms and conditions, including pricing provisions. Disclosure of the contract pricing and certain other contract terms would run afoul of well-settled Commission rules and would directly violate applicable statutory provisions. The confidentiality of contract pricing and certain other contract terms is *expressly* protected pursuant to the confidentiality matrix adopted in D.06-06-066 (the "Matrix"). Section VII.G of the Matrix makes clear that contract terms other than counterparty, resource type, location, capacity, expected deliveries, delivery point, length of contract and online date must be protected from disclosure. The Matrix is derived from the statutory protections extended to non-public market sensitive and trade secret information.[5/] Thus, the analysis of protection afforded under the Matrix

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[5/] *See* D.06-06-066, *mimeo*, note 1, Ordering Paragraph 1.

must always produce a result that is consistent with the relevant underlying statutes; if information is eligible for statutory protection, it must be protected under the Matrix.[6/]

The Commission is statutorily obligated to protect information that constitutes material, market sensitive, electric procurement-related information under §§ 454.5(g) and 583, as well as trade secret information under Govt. Code § 6254(k). Public Utilities Code § 583 establishes a right to confidential treatment of information otherwise protected by law.[7/] Public Utilities Code § 454.5(g) provides:

> The commission shall adopt appropriate procedures to ensure the confidentiality of any market sensitive information submitted in an electrical corporation's proposed procurement plan or resulting from or related to its approved procurement plan, including, but not limited to, proposed or executed power purchase agreements, data request responses, or consultant reports, or any combination, provided that the Office of Ratepayer Advocates and other consumer groups that are nonmarket participants shall be provided access to this information under confidentiality procedures authorized by the commission.

Under the Public Records Act, Govt. Code § 6254(k), records subject to the privileges established in the Evidence Code are not required to be disclosed.[8/] Evidence Code § 1060 provides a privilege for trade secrets, which Civil Code § 3426.1 defines, in pertinent part, as information that derives independent economic value from not being generally known to the public or to other persons who could obtain value from its disclosure.

The Commission has declared that information is "market sensitive" if it has "the potential to materially affect an electricity buyer's market price for electricity."[9/] Plainly,

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6/ *See Southern California Edison Co. v. Public Utilities Comm.* 2000 Cal. App. LEXIS 995, *38-39.
7/ *See*, D.06-06-066, *mimeo*, pp. 26-28.
8/ *See also* Govt. Code § 6254.7(d).
9/ *See*, D.06-06-066, *mimeo*, pp. 2-3, 41-42, 46-47.

disclosure of specific contract pricing terms has the potential to materially affect the market price for electricity. Thus, pricing information is "market sensitive" information that must be protected from disclosure. Indeed, the Commission reached this conclusion in D.06-06-066 in deeming contract pricing provisions to be protected under § VII.G of the Matrix. Pricing information is also protected under the Public Records Act, Govt. Code § 6254(k), where it is information that derives independent economic value from not being generally known to the public or to other persons who could obtain value from its disclosure.

Finally, disclosure of this information would place SDG&E at an unfair business disadvantage, thus triggering the protection of General Order ("G.O.") 66-C, which protects "[r]eports, records and information requested or required by the Commission which, if revealed, would place the regulated company at an unfair business disadvantage." Disclosure of pricing information and other contract terms would place the IOUs (and ultimately, utility ratepayers) at an unfair business disadvantage in negotiation of RPS contract. Accordingly, this information is protected under G.O. 66-C.

It is clear that pricing information and other contract terms must be protected from disclosure, and that the ACR proposal to disclose all contract terms, including price, must be rejected. The Commission should continue to apply its well-settled rules regarding confidentiality of RPS contract information established in D.06-06-066, *et seq.*, and to the extent it seeks to change those rules, should do so in the context of the Commission's confidentiality proceeding rather than through a collateral effort in the instant proceeding. SDG&E discusses the applicability of the Matrix and statutory provisions to other contract-related information in the response to Question 18 below.

16. ***The above proposal proposes that the process by which IOUs must seek Commission approval of RPS contracts be based, in part, on the contracted amount of expected annual generation. Comment on how projects with multiple contracts for total facility capacity and projects with contracts for multiple phases should be treated under the proposal or propose an alternative delineation and justification.***

RESPONSE: For multiple contracts for a single facility, the evaluation should be performed as if the contract covered the entire capacity of the facility, with provisions made in the event different attributes are already contracted for (such as resource adequacy). Contracts for projects with multiple phases should be considered on the basis of the ability of the developer to complete all phases of the contract, and the contract should be approved or rejected based upon the viability and cost of the entire completed project. No single contract should be evaluated in isolation if the viability of the contract is dependent upon the success of other preceding contracts.

17. ***Comment on the appropriateness of the requirement that contracts that are expected to provide annually more than one percent of the IOU's total bundled sales in the first full year of deliveries should be filed by application. Provide justification for any alternative proposals.***

RESPONSE: Requiring an application filing for contracts that are expected to provide more than one percent of total bundled retail sales is an unworkable metric for SDG&E. An analysis of SDG&E's approved portfolio (both operating and developing) shows that nearly half of its approved contracts would have required an application had this proposal been in effect at the time approval was sought. Many utility-scale renewables contracts will provide more than one percent of SDG&E's retail sales. To illustrate this point, if one assumes 17,000 GWh of retail sales per year, the one percent threshold would be exceeded by a wind project of 60 MW generating at a 33% capacity factor or a solar project of 80 MW generating at a 25% capacity factor. Most proposals for wind and

solar projects exceed these amounts. For SDG&E, five percent is a more practical threshold - this would be a 300 MW wind project generating at a 33% capacity factor or a 390 MW solar project generating at a 25% capacity factor.

Adoption of the one percent threshold would directly contravene the stated goal of the ACR to streamline the RPS contract review process and increase efficiency, and would have serious unintended negative consequences. Requiring SDG&E to file multiple applications would significantly and unnecessarily burden Commission staff, would create a major obstacle to SDG&E's ability to comply with RPS requirements, and would increase the cost to ratepayers for complying with RPS program mandates.

Requiring application filings for the bulk of SDG&E contracts would severely compromise SDG&E's ability to obtain approval of contracts in a timely manner, which would place SDG&E at an unfair business disadvantage vis-à-vis other RPS-obligated load-serving entities ("LSEs"). Moreover, to the extent the Commission elected to require full disclosure of the contract terms (which would be improper and highly detrimental, as discussed above), developers would be further discouraged from bidding into SDG&E's RPS solicitations or contracting bilaterally with SDG&E. Instead, developers would likely take their projects to the other two IOUs (who would not face the same problem and could pursue approval via the advice letter process) or RPS-obligated LSEs, as they would be better able to provide the certainty necessary to proceed with development and earn project financing, and to protect their confidential and proprietary information.

The inherent delay and likely reduction in procurement options resulting from adoption of the proposed requirement would significantly hamper SDG&E's procurement

effort, while at the same time driving up administrative costs and providing zero benefit to ratepayers. A one-size-fits-all approach in this context is unreasonable – IOUs have different load profiles, yet generally contract with similarly sized facilities. Simple math proves the inequity this requirement would create. For these reasons, SDG&E recommends that the threshold for requiring an application be set at no less than five percent of total bundled retail sales for SDG&E.

18. Are there additional circumstances for which RPS contracts should be submitted by application for Commission approval? For example, if the contract exceeds a certain capacity or it would cause a rate impact above a certain amount the IOU would be required to seek approval with an application. In the proposal, provide a justification and include not only the circumstance(s) but also any limits (e.g., all contracts that cause more than a 0.05 cents/kWh rate increase must be filed by application because that would cause a statistically significant rate increase to the average electric rate in California).

RESPONSE: Additional circumstances justifying mandatory submittal of RPS contracts via application do not exist. SDG&E notes that under the current rules, the Commission and the IOU have the discretion to determine on an *ad hoc* basis that individual RPS contracts require an application filing. This approach is reasonable and sufficient.

19. Are there any items (e.g., contract's net market value or viability score) in addition to the contract terms and conditions that should be part of the public record? Provide a justification.

RESPONSE: The IOU Matrix adopted in D.06-06-066 expressly prohibits the disclosure of score sheets, analyses, and evaluations of proposed RPS projects for three years.[10/] Thus, under the Commission's rules, LCBF evaluation data, such as NMV, viability score, and more broadly, any project valuations and their results, cannot be released to the public until the three-year period of confidentiality has elapsed.

[10/] D.06-06-066, *mimeo*, Appendix 1, § VII.G.

Moreover, while it is plain that the Matrix *does* apply to NMV, viability score, and general project valuations and their results, assuming, *arguendo*, that the Matrix did not apply to such information, it is clear under a statutory analysis that the information must be protected from disclosure. This information is protected under §§ 454.5(g) and 583, as well as Govt. Code § 6254(k). As explained above, Section 583 establishes a right to confidential treatment of information otherwise protected by law.[11/] Section 454.5(g) and Govt. Code § 6254(k) provide the substantive basis for protecting NMV, viability score, and other project evaluation data.[12/]

Disclosure of analysis based on an IOU's assessment of individual RPS projects could impact a developer's reputation, invite interference by competitors and potentially impede project development. Disclosure of this information would likely create a perception among developers that California is not committed to assisting their renewables projects or protecting their commercially-sensitive project information. This could deter developers from siting projects in California and reduce the number of available projects, thereby increasing the difficulty and cost associated with achieving RPS compliance. This reduced competition would also reduce the IOUs' negotiation leverage which would further contribute to higher priced contracts and an increase in costs to ratepayers. Accordingly, LCBF evaluation data must be protected under Public Utilities Code §§ 454.5(g) and 583, as well as Govt. Code § 6254(k).

[11/] *See id.* at pp. 27-30.

[12/] *See id.* at p. 29 (noting that in determining whether information is confidential, the Commission does not look to § 583, which sets forth the process for handling confidential information, to determine confidentiality. It looks, instead, to other statutory provision that provide "the substantive theories for asserting confidentiality.").

This data is also protected under G.O. 66-C since disclosure of specific LCBF evaluation information would give counterparties insight into SDG&E's procurement needs, which would place SDG&E at an unfair business disadvantage in negotiating RPS procurement contracts.

The Commission must adopt policies that encourage renewable development in the state and foster competition in order to protect the interests of ratepayers – disclosing RPS project valuations and their results is clearly at odds with this objective and would run afoul of the Commission's obligations under the law. This information is protected and must continue to be treated as such.

PROPOSAL 4.5: PROPOSED STANDARDS OF REVIEW FOR UNBUNDLED RENEWABLE ENERGY CREDITS

- **Unbundled REC purchase contracts or PSAs (from solicitations and bilaterally negotiated) that do not qualify for expedited approval must be reviewed for consistency**

20. Are there any other cohorts that unbundled REC contracts should be compared to? If yes, propose additional appropriate cohorts and the justification for their appropriateness.

RESPONSE: A distinction should be drawn between unbundled renewable energy credit ("REC") purchases for past generation and REC purchases from future generation. In cases where REC purchases are to be made from future generation, and the project is not presently completed and operating, the standards should be the same as for bundled RPS agreements, as stated previously. For RECs from past generation, the above standards are appropriate. Unbundled RECs from past generation should be compared to other offers for Category 3 products. Contracts for "rebundled" RECs sold to in-state customers from a portfolio of presently operating renewable assets should be compared to a REC "premium" imputed to bundled RPS purchases, wherein the premium is based

upon the cost of the renewable asset above the value provided by the asset (to include energy values and capacity attribute values provided by the assets).

21. Are there any criteria in addition to need authorization, consistency with an IOU's renewable net short, consistency with Commission decisions, and price that should be considered by the Energy Division and the Commission when reviewing unbundled REC contracts for reasonableness?

RESPONSE: Unbundled REC purchases are the most expedient method available for IOUs to meet last-minute shortfalls in procurement and to meet regulatory compliance deadlines. In cases where the IOU is unable to meet compliance standards due to unpredictable aberrations in existing renewable generation quantities, changes in law, or due to extraordinary conditions not presently contemplated, these factors should also be considered in a reasonableness review. The Commission should also consider whether the REC purchase was associated with the sale of a similar volume of excess Category 1 product, the result of which would be a reduction in overall rates. Analysis of REC purchases that are associated with this type of buy/sell swap should include this ratepayer benefit.

22. Is there a methodology that would accurately allow the comparison of unbundled REC contracts to bundled procurement? Please provide a quantitative example.

RESPONSE: SDG&E has no comment regarding this issue at this time, but reserves the right to address it in the future.

PROPOSAL 4.6: RPS INDEPENDENT EVALUATOR REPORTS

- **Specific evaluation requirements to be included in RPS IE Reports**

23. Comment on the strengths and weaknesses of the IE providing supplemental calculations.

RESPONSE: As the ACR notes, the Commission established in D.06-05-039 the requirement that each IOU use an Independent Evaluator ("IE") to "evaluate and report on the IOU's entire solicitation, evaluation and selection process."[13/] The focus of the IE's analysis is on determining whether the IOU's procurement process is "open, fair and transparent . . ."[14/] The ACR proposal to require the IE to provide supplemental calculations for capacity value and ancillary service value, and to make findings regarding the reasonableness of the IOU's calculations, fits within the scope outlined in D.06-05-039 to the extent the additional analysis relates to the reasonableness and accuracy of the values used in the LCBF evaluation. SDG&E's current pool of IEs already typically perform such supplemental calculations. Accordingly SDG&E does not perceive any downside to the proposal, but notes that the supplemental calculations involve market sensitive procurement information, which must be treated as confidential when reported.

24. Are there additional evaluation criteria or requirements for IEs assigned to RPS solicitations that the Commission should adopt?

RESPONSE: SDG&E does not perceive a need for additional evaluation criteria or requirements for IEs assigned to RPS solicitations.

PROPOSAL 5.1: IMPLEMENTATION OF NEW LEAST-COST BEST-FIT REQUIREMENTS

- **399.13(a)(4) requires that the LCBF rank projects on a total cost basis and take into account the following:**
  - **Estimates of indirect costs associated with needed transmission investments and ongoing electrical corporation expenses resulting from integrating and operating eligible renewable energy resources**
  - **The cost impact of procuring the eligible renewable energy resources on the electrical corporation's electricity portfolio**

13/ D.06-05-039, *mimeo*, p. 45 (emphasis added).
14/ *Id*. (emphasis added).

- **The viability of the project to construct and reliably operate the eligible renewable energy resource, including the developer's experience, the feasibility of the technology used to generate electricity, and the risk that the facility will not be built, or that construction will be delayed, with the result that electricity will not be supplied as required by the contract**
- **Workforce recruitment, training, and retention efforts, including the employment growth associated with the construction and operation of eligible renewable energy resources and goals for recruitment and training of women, minorities, and disabled veterans**

25. Please describe how the Commission should implement each of the four specific topics listed in Section 399.13(a)(4)(A). Please include quantitative examples where relevant.

RESPONSE: The Commission has already put into place measures designed to implement indirect transmission investment costs (through transmission cost adders), to determine the cost impacts of renewable procurement (rate impact projections are required with the filing of all advice letters) and to score projects based on viability (viability calculators are presently required with all advice letter filings). Women/minority/disabled veteran recruitment is a qualitative factor; workforce recruitment should similarly be considered as a qualitative factor in the LCBF evaluation and applied as a tie-breaker, when necessary.

26. For each of these four topics, please compare your implementation proposal with the existing LCBF methodology as set out in D.04-07-029 and applied in the 2011 RPS Procurement Plans approved in D.11-04-030.

RESPONSE: SDG&E's current LCBF process takes into account estimates of indirect costs from needed transmission investments (through TRCR and Phase I/II cost estimates), cost impacts of procuring individual resources on the company's portfolio (projected rate impacts are provided in each advice letter filing), and viability scoring (also provided with each advice letter filing). Women/minority/disabled veteran recruitment is considered as a qualitative factor in the LCBF analysis. Workforce

recruitment is not currently evaluated as a factor in the LCBF analysis.

27. For each of these four topics, and for your LCBF proposal as a whole, please explain how your proposal would affect costs ultimately paid by ratepayers for RPS-eligible energy, using quantitative examples where relevant.

RESPONSE: The LCBF proposals would likely shorten the length of contract negotiations, which will tie final contract pricing more closely to the market conditions in existence at the time of shortlisting. It is not possible, however, to determine the *directional* cost impact of proposed changes to the LCBF proposals since the costs borne by ratepayers will fluctuate with the market.

28. For each of the four topics, and for your LCBF proposal as a whole, please explain how your proposed criteria would contribute to the efficiency of the RPS procurement process.

RESPONSE: SDG&E's LCBF proposals would improve the efficiency of the RPS procurement process by providing greater incentives for IOUs and developers to reach mutually agreeable terms in negotiation in a timely manner, which will shorten the time needed to bring a project to COD (or prevent projects from reaching COD if pricing terms remain above other market offers).

28. What additional topics, if any, should be part of the LCBF process? Please provide a detailed discussion of each topic, using quantitative examples where relevant.

RESPONSE: SDG&E does not believe that additional topics should be included in the LCBF process.

PROPOSAL 5.2: GREEN ATTRIBUTES STANDARD TERM AND CONDITION

- **RPS procurement contracts now contain a non-modifiable standard term and condition (STC) 2 regarding "green attributes."**

29. In view of the adoption of RECs as the basis for RPS compliance, is STC 2 still necessary in its entirety? Please explain in detail, with reference to: 1) current commercial practice; 2) the regulatory requirements of the Commission and any other relevant agencies (e.g., the California Energy Commission (CEC) and the

California Air Resources Board (CARB)); and 3) recent legislation related to biofuels (Assembly Bill (AB) 1900 (Gatto); AB 2196 (Chesbro); and SB 1122 (Rubio)).

RESPONSE: SDG&E submits that STC 2 is still necessary and useful because it defines precisely what is and (more importantly) is not conveyed from the seller to the buyer in the transaction. In its absence, and given the varying and evolving state policies regarding climate change and biofuels,[15/] and the spreading of regulatory authority among multiple agencies, elimination of the standardization currently provided by STC 2 could result in confusion and inconsistency regarding what benefits/attributes are conveyed to whom from which facilities. This would increase the complexity of negotiations and could invite litigation over what attributes are conveyed in a contract. It would also make it more difficult for the Commission (and potentially other state agencies) to compare proposed transactions and to assess the ratepayer benefit and market value that attach to individual contracts. Accordingly, the Commission should not eliminate STC 2 at this time.

30. Are specific elements of STC 2 still necessary? If so, which ones? Please explain in detail, with reference to: 1) current commercial practice; 2) the regulatory requirements of the Commission and any other relevant agencies (e.g., CEC and CARB); and 3) recent legislation related to biofuels (AB 1900 (Gatto); AB 2196 (Chesbro); and Senate Bill (SB) 1122 (Rubio)).

RESPONSE: Please see response to Question 29

31. Even if not necessary, is STC 2, or are some elements of STC 2, still useful in RPS procurement contracts? Please explain in detail, with reference to: 1) current commercial practice; 2) the regulatory requirements of the Commission and any other relevant agencies (e.g., the CEC and CARB); and 3) recent legislation related to biofuels (AB 1900 (Gatto); AB 2196 (Chesbro); and SB 1122 (Rubio)).

[15/] SDG&E notes, for example, that Assembly Bill ("AB") 2196 requires a tracking system for attributes of pipeline biomethane and that "sufficient" attributes are transferred to buyer to ensure zero net emissions.

RESPONSE: Please see response to Question 29

Respectfully submitted this 20th day of November, 2012.

/s/ *Aimee M. Smith*
AIMEE M. SMITH
101 Ash Street, HQ-12
San Diego, CA 92101
Phone: (619) 699-5042
Fax: (619) 699-5027
E-mail: amsmith@semprautilites.com

Attorney for
SAN DIEGO GAS & ELECTRIC COMPANY

AFFIDAVIT

I am an employee of the respondent corporation herein, and am authorized to make this verification on its behalf. The matters stated in the foregoing **COMMENTS OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E) ON SECOND ASSIGNED COMMISSIONER'S RULING ISSUING PROCUREMENT REFORM PROPOSALS AND ESTABLISHING A SCHEDULE FOR COMMENTS ON PROPOSALS** are true of my own knowledge, except as to matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed this 20th day of November, 2012, at San Diego, California

/s/ Hillary Hebert
Hillary Hebert
Partnerships and Programs Manager
Origination and Portfolio Design Department