BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider the Annual Revenue Requirement Determination of the California Department of Water Resources and Related Issues.	)))))	Rulemaking No. 11-03-006 (Filed March 10, 2011)

REPLY COMMENTS OF SAN DIEGO GAS & ELECTRIC COMPANY (U-902-E)

Alvin S. Pak
San Diego Gas & Electric Company
101 Ash Street, HQ12B
San Diego, California 92101
Direct Telephone Line: 619.696.2190
Facsimile: 619.699.5027
Electronic Mail: APak@SempraUtilities.com

Attorney for San Diego Gas & Electric Company

San Diego, California
January 18, 2013

#274429

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider the Annual Revenue Requirement Determination of the California Department of Water Resources and Related Issues.	)	Rulemaking No. 11-03-006 (Filed March 10, 2011)

REPLY COMMENTS OF SAN DIEGO GAS & ELECTRIC COMPANY (U-902-E)

Pursuant to the ruling of Administrative Law Judge Seaneen Wilson sent by electronic mail on or about November 20, 2012, San Diego Gas & Electric Company ("SDG&E") submits these Reply Comments regarding the proper interutility allocation of certain revenue requirements of the California Department of Water Resources ('the Department"). Specifically, the Department is incurring, and expects to incur in the future, costs related to a transportation services agreement ("TSA 1724") executed by and between the Department and Kern River Gas Transmission Company ("Kern River"). As stated in its *Opening Comments*, SDG&E submits there are substantial grounds upon which the Commission can and should find that (1) the allocation of 100 percent of these costs to SDG&E would be contrary to applicable cost-allocation principles previously adopted by the Commission and/or (2) the allocation of 100 percent of these costs to SDG&E would be grossly inequitable.[1] In these *Reply Comments*, SDG&E asserts that neither Southern California Edison Company ("Edison") nor Pacific Gas & Electric Company ("PG&E") have raised good or substantial grounds upon which to reject SDG&E's arguments and recommendations in this proceeding.[2]

---

[1] See *Opening Comments of San Diego Gas & Electric Company (U-902-E) [Revised]* ("*SDG&E Opening Comments*"), Rulemaking 11-03-006, January 8, 2013.

[2] See *Opening Brief of Southern California Edison Company (U 338-E)*, Rulemaking 11-03-006, January 4, 2013 ("*Edison Opening Brief*"); and, *Pacific Gas & Electric Company Opening Comments on Assignment of Costs Under Transportation Services Agreement Between DWR and the Kern River Gas Transmission Company*, Rulemaking 11-03-006, January 4, 2013 ("*PG&E Opening Comments*").

SB_GT&S_0534815

A. The Commission's Prior Decisions Simply Do Not, As a Matter of Law, Require SDG&E to Bear 100 Percent of the Costs of TSA 1724 Incurred After the Expiry of the Department's Overlying Sunrise Power Purchase Agreement.

The essential position asserted by both Edison and PG&E is that the assignment of management responsibilities for the power purchase agreement between the Department and Sunrise Power LLC ("Sunrise") to SDG&E conclusively settles the matter of cost responsibilities related to TSA 1724.[3] Edison and PG&E argue that, as the utility responsible for managing the Sunrise power purchase agreement, SDG&E is simply stuck with *all* costs associated with the Sunrise agreement and, concomitantly, with all of the costs, past, present and future, arising from TSA 1724. Edison and PG&E further argue that continuing the allocation of TSA 1724 costs to SDG&E "is consistent with a long line of Commission decisions, including *Decision 08-11-056*, which established a fixed indifference payment schedule for each investor-owned utility as a component of transitioning to a 'cost-follows-contract' allocation."[4] Edison and PG&E go so far as to assert that Decision 08-11-056 settled, "once and for all," the interutility allocations of costs between utilities according to the Commission-determined assignment of management responsibilities for each of the Department's contracts.[5] PG&E adds that SDG&E's failure to include the costs of TSA 1724 incurred after the expiration of the Sunrise power purchase agreement within the 2008 utility agreement establishing indifference payments was tantamount to a waiver of any future claims, whether in law or equity.[6]

Edison and PG&E here assert a Justinian clarity in the Commission's orders regarding the interutility allocation of the Department's revenue requirements that simply does not exist.[7] As SDG&E has consistently argued during this rulemaking, the Commission's decisions have repeatedly invoked principles of "fairness" to allocate specific costs included in the Department's annual determination of revenue requirements – the Commission has always considered the salient facts and circumstances relevant to

---

[3] See, *PG&E Opening Comments*, at pp.1 to 2; also, *Edison Opening Brief,* at p.9.

[4] *Edison Opening Brief*, at pp.1, 4 to 5; similarly, *PG&E Opening Comments*, at p.9.

[5] *Edison Opening Brief*, at p.5; also, *PG&E Opening Comments*, at p.2.

[6] *PG&E Opening Comments*, at pp.8 to 9.

[7] Earlier in the instant rulemaking, PG&E and Edison asserted the existence of this same legal clarity, but interestingly argued diametrically opposed interpretations of the Commission's orders to reach results favorable to their positions. Compare *Opening Brief of Southern California Edison Company (U 338-E),* Rulemaking 11-03-006, September 22, 2011, at pp.13 to 14, with *Pacific Gas & Electric Company Opening Brief,* Rulemaking 11-03-006, September 22, 2011, at pp.7 to 8. The utilities there present capable and credible arguments placing in high relief vastly different, but unflinchingly adamant, interpretations of the Commission's prior orders regarding "fair" cost allocations and the "intended" effect of the indifference payments agreed upon by the utilities in 2008.

SB_GT&S_0534816

those costs in testing whether the result is or is not "fair."[8] As recently as the Commission's order related to the allocation of the Department's 2012 annual revenue requirement, the Commission accepted a settlement among the three utilities related to the allocation of certain substantial benefits associated with a power contract managed by Edison.[9] That order is the latest in the series of Commission decisions, which taken together, establish the proposition that the utilities have frequently found sympathy and ambiguities in the Commission's prior orders related to the allocation of the Department's revenue requirements and asserted, in good faith, competing claims as to the meaning of "fairness." In the present case, two independent factual grounds command taking a fresh look at the appropriate and fair allocation of the costs incurred under TSA 1724 after the expiration of the overlying Sunrise power purchase agreement.

First and foremost, the Commission must consider the fact that the Sunrise power purchase agreement has expired. The application of the principles upon which the Commission has separated costs which follow contract (avoidable and variable costs) from those which are allocated among all three utilities (nonavoidable and fixed costs) was materially disturbed when the Sunrise contract expired. The Commission's logic behind its cost-allocation principles is that avoidable/variable costs can be managed by the utility to which a Department contract was assigned as part of the utility's resource-dispatch decisionmaking process. Upon the expiration of the Sunrise contract, the operational nexus between the ongoing costs of TSA 1724 and SDG&E's ability to manage the costs of TSA 1724 under least-cost dispatch protocols was utterly destroyed, wholly eviscerating the basis upon which PG&E and Edison argue SDG&E should be solely responsible for those costs. None of the Commission's decisions address how costs associated with an expired contract should be allocated. But under the logic of the Commission's orders, to the extent the Department's contract costs are not tied to the utility's decision to take or manage energy deliveries, those costs are characterized as nonavoidable and apportioned among all three utilities. Additionally, the Commission has frequently described certain of the Department's costs as "above-market" and allocated these costs to all three utilities. As SDG&E has pointed out, there is no better example of "above-market costs" than costs unattached to any corresponding energy.[10] Thus, it is hardly a matter of law, but rather solely a matter of naked self-interest, which drives Edison and PG&E to assert that the allocation of the costs of TSA 1724 has been, "once and for all," settled by the Commission's decisions.

---

[8] This "fairness principle" has been the rule of first order since the very first decisions issued by the Commission related to the allocation of the Department's annual revenue requirement. See *Interim Opinion on Procurement Issues: DWR Contract Allocation,* Decision 02-09-053 in Rulemaking 01-10-024 (September 19, 2002), printed opinion at pp.33 to 35, 64; accord, *Order Granting, In Part, the Petition to Modify Decision 05-06-060,* Decision 08-04-025 in Application 00-11-038, *et al.,* (April 10, 2008).
[9] See *Decision Adopting Settlement on Allocation of the Continental Forge Settlement Discount and the Sempra Long-Term Contract Refund,* Decision 12-05-006 in Rulemaking 11-03-006 (May 10, 2012).
[10] See *SDG&E Opening Comments*, at p.8.

SB_GT&S_0534817

The second fact the Commission should take into consideration is that the Department is incurring costs under TSA 1724 as a result of what the Department considers a breach of contract.[11] The Commission has not, to the best of SDG&E's knowledge, addressed the assignment of cost responsibilities associated with a contractual breach. The circumstances giving rise to the TSA 1724 costs, the absence of which would have relieved the Department of any responsibility for them, further attenuates the nexus between the Commission's cost-allocation principles and a unique SDG&E duty to bear those costs.

The salience of these changes in the material facts is unaffected by the schedule of interutility indifference payments adopted in 2008 and the Commission should wholly reject the notion that the adoption of indifference payments renders changes to the factual landscape irrelevant. The Commission's order adopting the two-step allocation process, of which indifference payments were a part, explicitly stated that it was not intending to replace or undermine the cost-allocation principles adopted in its prior decisions, most notably the seminal June 2005 order establishing the "permanent methodology" under which the Department's revenue requirement was to be allocated among the utilities.[12] Thus, the concept of indifference payments did not affect the Commission's reliance on principles of fairness, the bifurcation of the Department's costs into variable and nonvariable components, or the methodological reasoning upon which each species of costs is allocated. This is made even clearer by comparing the two-step cost-allocation process adopted in *Decision 08-11-056* with the "permanent cost-allocation methodology" adopted in *Decision 05-06-060*.

In the first step described by *Decision 08-11-056*, both variable (avoidable) and fixed (nonavoidable) costs from a Department power purchase contract are fully allocated to the utility responsible for managing the Department contract. But, in the important second step, the difference between (a) the fully allocated costs determined in the first step and (b) the costs as would otherwise be allocated under *Decision 05-06-060* is identified and then charged back to the other utilities through a utility-to-utility indifference payment. In effect, the second step rendered the effects of *Decision 08-11-056*

---

[11] As discussed below, PG&E asserts there is no breach of which the Department may complain while Edison argues that SDG&E should find other market and legal remedies to mitigate the costs of the alleged breach.

[12] With respect to the implementation of interutility indifference payments, see *Decision Authorizing Measures to Facilitate Removal of Department of Water Resources from the Role of Supplying Electric Power,* Decision 08-11-056 in Rulemaking 07-05-025 (November 21, 2008), printed opinion at pp.54 to 60, 88 to 89 (Findings of Fact 31 to 34), 90 to 91 (Conclusions of Law 9 and 10), and Appendix 2. Also, *Joint Advice Letter 2051-E (SDG&E), 3384-E (PG&E) and 2304-E (Edison)*, filed December 22, 2008, which provides, "The indifference payments made by [a utility], or received by [a utility], will equal the amount necessary to allocate the same amount of unavoidable [Department] contract costs to the [utility's] customers that would have been allocated under [Decision] 05-06-060." With respect to the adoption of a permanent cost-allocation methodology, see the Commission's seminal decision in *Order Granting, In Part, Petition for Modification of Decision 04-12-014, on the Permanent Allocation of the Department of Water Resources' Annual Revenue Requirement,* Decision 05-06-060 in Application 00-11-038, *et al.*, (June 30, 2005).

SB_GT&S_0534818

inconsequential as to any specific utility's cost burdens. More importantly and as explicitly acknowledged by the utilities at the time, the adoption of indifference payments did not redefine the basis for distinguishing the costs for which a single utility would be responsible from those which would be allocated to all three utilities: fixed/nonavoidable (*a.k.a.*, "above-market") and variable/avoidable remained the determining characteristics upon which the bifurcation of costs and the resulting allocation of specific costs would be based.

Notwithstanding the limited purpose of indifference payments, Edison and PG&E assert SDG&E has never previously complained about the allocation of TSA 1724 costs to SDG&E and its customers (not for almost ten years, adds Edison) and, further, that SDG&E has never, ever argued that the costs of TSA 1724 were "nonavoidable." By omitting the post-Sunrise costs of TSA 1724 from the SDG&E indifference-payment schedule, Edison and PG&E argue SDG&E tacitly, if not explicitly, agreed to waive, in perpetuity, any claim that SDG&E could otherwise raise before the Commission with respect to those costs.[13] In a bit of regulatory alchemy, Edison and PG&E would convert SDG&E's prior silence to gold and have the Commission dismiss SDG&E's request for relief from the unfair allocation of the entire remaining cost burdens of TSA 1724.

SDG&E concedes it has not previously complained about the allocation of the costs from either the Sunrise agreement or TSA 1724 to SDG&E.[14] SDG&E further concedes it had never previously characterized the costs of TSA 1724 as "nonavoidable" and that it never attempted to offset those costs through the 2008 agreement related to indifference payments.[15] But this is rather simple to explain: under the Commission's decisions and applicable cost-allocation principles, SDG&E simply had no reason to complain, until now. SDG&E's proposal is prompted not by the facts known and extant at the time of the 2008 agreement, but by the significant changes in the salient facts and circumstances relevant to the allocation of the Department's revenue requirement occurring since that time, specifically in late 2012.

As SDG&E has repeatedly and clearly asserted, once the flow of energy from the Sunrise power purchase agreement ceased, the costs of TSA 1724 were stranded, effectively transmuting those costs from avoidable into nonavoidable costs and from variable costs subject to SDG&E's dispatch decisionmaking into fixed costs borne by the Department without regard to whether the Department

---

[13] See, *Edison Opening Brief,* at pp. 10 to 11; similarly, PG&E Opening Comments at pp.7 to 8.

[14] SDG&E reminds the parties, however, that it originally objected to the assignment of the Sunrise power purchase agreement to it on the grounds that the contract saddled it with disproportionately high costs and energy burdens relative to the other utilities but, having lost that battle, concedes it has since suffered in silence. *Decision 02-09-053, supra,* printed opinion at p.27.

[15] SDG&E notes that the capacity payments included in the Sunrise power purchase agreement constituted a part of the costs SDG&E nominated to the indifference-payment pool as nonavoidable costs.

SB_GT&S_0534819

received any *quid pro quo* in the form of energy or other contractual benefit. The Department is in exact agreement with this assessment and has asserted this view in the back-and-forth with Sunrise.[16] Additionally, the Department, in light of the facts known to it and the claims it was asserting against its counterparties, classified the costs of TSA 1724 incurred after June 2012 as nonavoidable due to the expiration of the Sunrise power purchase agreement.[17] Thus, SDG&E's responsibility for the post-Sunrise costs of TSA 1724 could not have been anticipated until very recently, coincident with the material change in circumstances, and it was not until this change in circumstances that SDG&E's claims could have been effectively raised with the Commission.

Even so, argue Edison and PG&E, SDG&E should have known, and/or conducted sufficient due diligence to discover, that the Department had placed itself at substantial risk that the Department would bear the costs of TSA 1724 after the expiry of the overlying Sunrise power purchase agreement.[18] The fundamentals of this assertion are that SDG&E should have known, in 2008 when the three utilities nominated the nonavoidable costs each would seek to recover through indifference payments, that TSA 1724 and the collateral agreements executed by the Department with Sunrise and Kern River would result in the Department continuing to bear the costs of TSA 1724 well beyond the term of the Sunrise contract and into 2018.

In the first place, the Department, as the contracting party with sole and direct knowledge of the intentions of Sunrise, Sunrise's direct and indirect corporate parents and affiliates, and Kern River, did not

---

[16] See *Letter dated June 28, 2012, from John Pacheco, Acting Deputy Director, California Department of Water Resources, to Kelly S. Lucas, Executive Director, Sunrise Power Company, LLC*, at pp.1, 2, where the Department states, "After [June 30, 2012], [the Department] has no further obligation with regard to the operation of the Sunrise power plant or the provision of natural gas to the plant," and further, "[t]he TSA is not necessary for continuing operations and it provides no benefit to California ratepayers, which is a primary directive under [the Department's] enabling legislation, Water Code section 80000, *et seq.*" This letter is attached to these *Reply Comments* as Appendix A. The document included in Appendix A is a true and correct copy of an electronic "carbon copy" of this letter. The letter was prepared and issued by the Department and thereafter received by SDG&E in the ordinary course of business. SDG&E submits this correspondence may be considered as evidence in this proceeding insofar as it constitutes an official record of the State of California as to the Department and otherwise constitutes a business record of SDG&E. See Evidence Code Sections 1280, 1270, 1271, 1560(a); also, Evidence Code Section 1550.

[17] The post-Sunrise costs related to TSA 1724 are shown at Appendix A, page 2, Line 24 ("Non Avoidable Costs") in the SDG&E column, of *Decision 12-11-040.* The Department believed the Commission would determine the allocation of those costs among the utilities, although it preliminarily allocated those costs to SDG&E in their entirety. See the Department's Response to Question 2, 2.a and 2.b of *SDG&E Data Request No. 1*, at p.3, appended to *SDG&E Opening Comments* as Appendix A.

[18] See, e.g., *Edison Opening Brief,* at p.11, where Edison declares these costs to have been "foreseeable" and unseen only because SDG&E failed "to exercise due diligence."

SB_GT&S_0534820

itself determine until October 2012 that the contractual commitments upon which the Department was relying would be failed.[19] SDG&E cannot and should not be charged with greater prescience and foreknowledge than the Department, which had considerably more information than did SDG&E. SDG&E is simply not as gifted in the preternatural as the other utilities would have the Commission believe.[20] SDG&E could not have anticipated that Sunrise, after ten years of successful operation as an energy supplier to the Department under a contract bearing significant fixed capacity costs[21] and passing through virtually all variable costs of production to the buyer, would be so financially disabled that it would fail the shipper credit requirements imposed by Kern River. Clearly, the Department did not anticipate these circumstances when it executed the agreements under which it agreed to assume the shipper responsibilities under TSA 1724. Even as late as October 2012, the Department did not expect Sunrise and/or the host of Sunrise's corporate affiliates to fail to honor the contractual commitments and representations which had been made to the Department in 2003. SDG&E did not know, could not have known and should not be charged with greater knowledge than might have been held by the Department regarding the likelihood of impasse and the potential for contractual breach in the administration of a contract ancillary to and independent of the overlying power contract assigned to and managed by SDG&E.

If SDG&E were to claim any predictive pretensions, SDG&E absolutely believes that, if in 2008 it had included any costs of TSA 1724 for the period following the expiration of the Sunrise power purchase agreement as part of the SDG&E indifference-payment schedule, Edison and PG&E would have roundly rejected the inclusion of such a speculative cost. Thus, regardless of whether SDG&E could have predicted as long ago as 2008 that the Department would have any difficulty in returning the TSA 1724 shipper obligations to Sunrise, SDG&E cannot believe the other utilities would have, without strenuous objection, allowed SDG&E to allocate TSA 1724 costs incurred after the expiration of the Sunrise contract to them. More likely, Edison and PG&E would have argued such an allocation required the Commission to

---

[19] See *State of California Department of Water Resources Proposed Revision to the Determination of Revenue Requirement for the Period January 1, 2013, Through December 31, 2013*, filed on or about October 4, 2012. During the review of the Department's 2012 revenue requirement in this rulemaking, the Department omitted any costs of TSA 1724 for any period following the expiration of the Sunrise power purchase contract on June 30, 2012. It was not until the Department filed its proposed revision to its 2013 revenue requirement on October 4, 2012, that the Department provided the Commission and SDG&E with notice that the Department believed TSA 1724 costs would be incurred after the expiration of the Sunrise power purchase agreement.

[20] Interestingly, Edison cites a statement of SDG&E's counsel at the September 4, 2012, prehearing conference that the instant proceeding was issue-free for the proposition that this recent missed guess is somehow dispositive of SDG&E's rights, notwithstanding Edison's explicit acknowledgment in virtually the next sentence that the Department first included TSA 1724 costs a month later. See *Edison Opening Brief*, at p.7.

[21] SDG&E again notes that these capacity payments included in the Sunrise power purchase agreement constituted a part of the costs SDG&E nominated to the indifference-payment pool as nonavoidable costs.

SB_GT&S_0534821

assume, without any basis in fact or law, either that Sunrise had no contractual obligations to accept the return of shipper obligations under TSA 1724 or, if it did, that Sunrise would breach that obligation and face the pursuit of claims by the State of California, or both. SDG&E submits the arguments of Edison and PG&E as to what SDG&E should have known or done in 2008 in establishing the SDG&E indifference-payment schedule are both disingenuous and specious and should be disregarded.

For the foregoing reasons, SDG&E submits that the legal arguments posed by Edison and PG&E, to wit, that SDG&E's proposal for the interutility allocation of the costs of TSA 1724 incurred after the expiration of the overlying Sunrise power purchase agreement is foreclosed as a matter of law, ring hollow and should be rejected. To the contrary, SDG&E's proposal fully comports with the cost-allocation principles and methodologies established by the Commission's prior orders and should be adopted as being consistent with those precedents.

B. The Various Grounds Asserted by Edison and PG&E for Denying SDG&E Equitable Relief Should Be Rejected.

Edison and PG&E assert various equitable and factual grounds upon which they would hope to deny SDG&E the equitable relief it seeks in this matter. SDG&E submits none of these grounds have merit and each should be rejected.

1. The Putative "Free Option" and the "No-Lose Coin Toss"

Edison argues that SDG&E is attempting to create what Edison describes as a "free option" under which SDG&E would enjoy the benefits of the Sunrise power contract but avoid the downsides from that contract.[22] Using somewhat different terms, PG&E raises the same claim, arguing that SDG&E is attempting to enjoy the benefits and avoid all of the downside risks of the Sunrise contract in a "heads I win, tails you lose" strategy, although PG&E admits this is so much speculation since PG&E is unaware of whether the Sunrise contract was of any benefit or advantage to SDG&E's customers.[23] In pursuing this argument, Edison accuses SDG&E of having "created an opportunity to amass significant benefits for its customers, in the event the post-2012 Kern TSA were profitable."[24] SDG&E is confident the Commission will dismiss these speculations and accusations as mere rhetorical hyperbole, but SDG&E must take issue with the ascription of such malfeasance and deceit to its position and categorically denies each and every unfounded charge asserted by Edison and PG&E in these regards.

---

[22] *Edison Opening Brief,* at pp.2, 10.
[23] See *PG&E Opening Comments*, at p.6.
[24] *Edison Opening Brief,* at p.10.

SB_GT&S_0534822

While Edison in particular attempts to paint SDG&E as an unethical actor, SDG&E's position is based upon a material change in facts and circumstances justifying a reconsideration of the allocation of the costs of TSA 1724. The expiration of the overlying Sunrise power purchase agreement and the more recent breach of promises described to the Commission, not by SDG&E but by the Department, wholly eviscerate any basis for allocating 100 percent of the costs of TSA 1724 incurred after the expiration of the Sunrise power purchase agreement to SDG&E. That the Department would bear costs under TSA 1724 for any month after the expiry of the Sunrise power purchase agreement was simply and completely unknown by any party, *including the Department*, until very recently. The Department's initial 2013 determination of revenue requirement did not mention or include any costs related to TSA 1724 nor did the 2012 revenue requirement approved by the Commission include any costs related to TSA 1724 beyond the expiration of the Sunrise power purchase agreement.[25] Further, the Department's August 2012 filing completely omitted any mention of the Sunrise default the Department was actively addressing at the time. Upon the Department's disclosure to the Commission that such costs would be incurred, such disclosure being made first in the Department's October 2012 proposed revision,[26] SDG&E raised the issue with the Commission. When SDG&E did so, no party objected to SDG&E's reservation of the issue for further consideration, the Presiding Administrative Law Judge appropriately proposed granting SDG&E leave to present its case, and the Commission in its December 2012 order affirmed the Judge's procedural disposition of the matter. For Edison to now assert that SDG&E had, for ten years, been lying in wait to see first if it could profit from the shipper's rights and responsibilities provided under TSA 1724 during the period after the expiration of the Sunrise contract, and to assert further that SDG&E is only now raising the issue because no profits can be made, is wholly inconsistent with and rebutted by the facts before the Commission.

---

[25] See *State of California Department of Water Resources: Determination of Revenue Requirement for the Period January 1, 2013, through December 31, 2013,* filed August 2, 2012.
[26] See *State of California Department of Water Resources: Proposed Revision to the Determination of Revenue Requirement for the Period January 1, 2013, through December 31, 2013,* filed October 4, 2012; at pp.7, 30.

SB_GT&S_0534823

2. The Mitigation and Litigation Options

Edison asserts that "SDG&E can recover costs related to any purported breach through mitigation and/or litigation."[27] In addition, Edison speculates that the costs of TSA 1724 could have either been mitigated or avoided, presumably by SDG&E all along or, had it known it might be responsible for a share of the costs, by Edison.[28]

Although Edison asserts that SDG&E may seek to recover damages through litigation, Edison does not provide the Commission, or SDG&E, with any guidance as to how this might be accomplished. As SDG&E noted in its Opening Comments, it is not in contractual privity with any of the parties involved in the agreements upon which the Department might rely in bringing its own actions. At best, SDG&E might be considered a third-party beneficiary under some of those agreements, although SDG&E does not at present believe it qualifies as a third-party beneficiary under the Department's agreements as a matter of law. Even assuming SDG&E were persuaded by Edison's legal analyses on this question at some later point in time, SDG&E would expect any defendant to respond by arguing SDG&E's alleged "damages" more directly result from an intervening Commission decision to allocate to SDG&E some or all of the costs from a breach of those agreements. Given SDG&E's tenuous legal rights as a non-party to the agreements, the intervening, lawful exercise of the Commission's authority which more directly places SDG&E "in harm's way" complicates SDG&E's ability to prosecute contract-based causes of action successfully.[29] In any event, if SDG&E has valuable legal rights Edison is encouraging SDG&E to pursue, the assertion of those rights could only be made more powerful if the Nation's largest and second-largest electric utilities were to join with SDG&E in a shoulder-to-shoulder effort benefiting the greater majority of California energy consumers.

Next, Edison asserts SDG&E could act to mitigate its damages, presumably through the skillful management of the shipper's rights afforded under TSA 1724. SDG&E agrees that such mitigation should

---

[27] *Edison Opening Brief*, at pp.2, 11, 13.

[28] *Edison Opening Brief,* at pp.11, 13. Edison here speculates that "[the Department] and SDG&E may be able to recover more through remarketing than they would under the Sunrise [power purchase agreement] and in that event, [Edison's] customers would have no claim to the excess revenue." SDG&E has no opinion on the potential future value of the transportation rights provided under TSA 1724, but does agree that the realized value of those rights should be allocated in the same manner as the costs of TSA 1724 are allocated.

[29] Assuming SDG&E has a cause of action it might pursue as a third-party beneficiary to the Department's agreements, SDG&E believes it must preserve its rights by first asserting its position before the Commission so as to exhaust its administrative remedies as a precursor to pursuing such a cause of action. That is, before seeking relief in other forums with jurisdiction, SDG&E believes it must first raise its potential damages before the Commission since the Commission is positioned to grant SDG&E substantial relief from the alleged breach of contract. In addressing SDG&E's cost-allocation proposal in this proceeding, SDG&E respectfully requests the Commission do so in such a manner as to preserve SDG&E's, and the other utiilties', potential claims in other forums.

SB_GT&S_0534824

be pursued. To the best of SDG&E's knowledge, the Department is in fact attempting to mitigate the damages it is suffering from Sunrise's failure to accept shipper responsibilities under TSA 1724.[30] Here again, the mitigation of the Department's costs would only be enhanced if all three utilities had a vested interest in reducing the net costs of TSA 1724, rather than SDG&E attempting to do so on its own.[31]

3. Breach or Not

While Edison asserts that SDG&E should seek or mitigate its damages arising from any breach of contract, PG&E takes a different approach, arguing that Sunrise had no obligation to reassume shipper responsibilities under TSA 1724 and that no breach in fact has occurred.[32] Essentially, PG&E alleges that the execution of the Reassignment Agreement was an idle act on the Department's part and SDG&E may not seek relief from the Commission for the Department's participation in an exchange of meaningless representations and promises.

PG&E's position is indicative of the issues SDG&E might confront in any attempt to seek damages from any losses resulting from a violation of the Department's contractual rights, adding to SDG&E's skepticism regarding Edison's arguments that SDG&E can simply pursue the breaching parties to reduce its allocable liabilities under TSA 1724. Contrary to PG&E, SDG&E refuses to assert that the Department cannot successfully prosecute any claims under its agreements related to TSA 1724. If the Department pursues any such claims, SDG&E is committed to supporting the Department, and the Commission and the other utilities should prepare to do the same. In any event, the Department believes it has a valid claim and neither SDG&E nor the Commission should be required to second-guess the Department, particularly in the narrow context of determining the manner in which the costs of the alleged breach should be allocated among the three utilities. Here, the Commission needs only to address and make provision for the reimbursement of the Department's costs. If, in the future, the Department brings a successful claim against any of its TSA 1724 counterparties, those benefits can be brought into a future iteration of the Department's annual revenue requirement determination and, further, should be allocated in a manner consistent with the Commission's cost-allocation methodology. And, as SDG&E has previously noted, lining up three utilities as co-claimants or *amici curiae* in support of any claim pursued by the Department can only add weight to such a claim.

---

[30] The Department has in the past consistently and independently pursued its rights under all of its contracts. In the case of TSA 1724, the Department has sought and received refunds from Kern River for various overcharges and returned these proceeds to the three utilities and their customers. See *SDG&E Opening Comments*, at p.9 and Note 26. SDG&E is also informed the Department continues to make the capacity rights provided under TSA 1724 available to third parties under the Kern River capacity-brokering tariffs in an effort to mitigate the Department's damages.

[31] See, *e.g.*, *SDG&E Opening Comments*, at p.8, Note 25.

[32] *PG&E Opening Comments*, at pp.2 to 3.

SB_GT&S_0534825

4. Opening Pandora's Box

Edison asserts it has itself been on the short end of the equity stick and that its customers would suffer from any dispensation granted to SDG&E's customers in the present proceeding, exacerbating the unfair burdens already borne by Edison and its customers.[33] In supporting this assertion, Edison repeats its allegation that SDG&E knew as long as nine years ago that TSA 1724 would outrun the Sunrise power purchase agreement and that Edison has previously lost issues related to the equitable allocation of the Department's revenue requirement although it had raised its claims more immediately than does SDG&E here.[34] Edison goes on to warn that the Commission must hear all equitable claims if it grants SDG&E relief in the instant case.[35]

The Commission can assess for itself whether the issues raised by SDG&E on the narrow factual grounds presented would open the floodgates to new or, in Edison's case, old and previously rejected claims based in equity. SDG&E believes its claims and proposed allocation are just and reasonable and raise issues not previously considered by the Commission. Furthermore, the Commission can control the extent to which similar or additional claims could be brought by the other utilities by carefully crafting its order in this proceeding. But more importantly, SDG&E agrees with Edison that if a utility can bring a justiciable, equitable claim on valid grounds, the Commission should indeed consider that claim and dispose of it fairly. In this very docket, SDG&E has previously resisted "its natural and strong predisposition to take positions that would result in the highest short-term allocations" of greatest benefit to SDG&E and its customers.[36] SDG&E continues to believe that matters related to the allocation of the Department's revenue requirement among the three utilities are governed by the Commission's cost-allocation principles, which above all else consider the fairness of the results to be of paramount importance. It is in that light SDG&E brings its proposal to the Commission. Edison's threat to bring its own claims, including one the Commission has rejected over and over again, should not be allowed to affect the rights of SDG&E or the equitable interests of SDG&E's customers.

---

[33] *Edison Opening Brief*, at pp.2 to 3, 8. Edison accuses SDG&E of "cherry-picking" the single issue of the costs of TSA 1724 and somehow of attempting to foreclose the other utilities from raising "their own issues." *Id.*, at p.3. As noted above, SDG&E has made no proposals regarding the rights of the other utilities to make any just and reasonable claims for cost relief. To the contrary, the Commission is well aware from its recent consideration of the Sempra and Continental Forge settlements that SDG&E has supported other utilities' request for equitable relief, even to SDG&E's own disadvantage.

[34] *Edison Opening Brief*, at pp.13 to 14.

[35] *Ibid.*

[36] See *Opening Brief of Respondent San Diego Gas & Electric Company (U-902-E)*, Rulemaking 11-03-006, September 22, 2012, at pp.2 to 3.

SB_GT&S_0534826

C. Summary and Relief Requested

For the reasons set forth above, SDG&E submits the Commission should reject the arguments of Edison and PG&E in opposition to SDG&E's proposed allocation of the costs incurred by the Department under TSA 1724 beginning on and after July 1, 2012. SDG&E's proposals are supported by the full weight of the Commission's prior precedents and none of the arguments submitted by the other utilities compel a different result.

Respectfully submitted,

/s/ Alvin S. Pak

Alvin S. Pak
San Diego Gas & Electric Company
101 Ash Street, HQ12B
San Diego, California 92101
Direct Telephone Line: 619.696.2190
Facsimile: 619.699.5027
Electronic Mail: APak@SempraUtilities.com

Attorney for San Diego Gas & Electric Company

San Diego, California
January 18, 2013

SB_GT&S_0534827

APPENDIX A

Letter dated June 28, 2012, from John Pacheco, Acting Deputy Director, California Department of Water Resources, to Kelly S. Lucas, Executive Director, Sunrise Power Company, LLC

STATE OF CALIFORNIA – CALIFORNIA NATURAL RESOURCES AGENCY

EDMUND G. BROWN JR., *Governor*

DEPARTMENT OF WATER RESOURCES
CALIFORNIA ENERGY RESOURCES SCHEDULING
P.O. BOX 219001
SACRAMENTO, CA 95821-9001
(916) 574-1291

June 28, 2012

Mr. Kelly S. Lucas, Executive Director
Sunrise Power Company, LLC
Post Office Box 81617
Bakersfield, California 93380

Dear Mr. Lucas:

The California Department of Water Resources ("CDWR") references the Amended and Restated Master Power Purchase and Sale Agreement (the "Master Agreement"), the Amended and Restated Cover Sheet (the "Cover Sheet"), and the Amended and Restated Confirmation Agreement (the "Confirmation") between CDWR and Sunrise Power Company, LLC ("Sunrise") dated December 31, 2002, the Assignment and Consent to Assignment of Firm Transportation Service Agreement dated August 28, 2003, (the "Consent to Assignment") wherein Sunrise assigned all of its rights, interests, and obligations in the Second TSA to CDWR, Contract No. 1724 (the "TSA") and the Agreement on Reassignment of Firm Transportation Service Agreement dated September 1, 2003, wherein CDWR agreed to re-assign the TSA to Sunrise at the termination of the PPA (the "Reassignment Agreement"). Collectively, the Master Agreement, the Cover Sheet, and the Confirmation shall be referred to hereinafter as the "PPA."

This is in response to your letter dated June 26, 2012. As you are aware, the PPA between Sunrise and CDWR expires June 30, 2012. After that date, CDWR has no further obligation with regard to the operation of the Sunrise power plant or the provision of natural gas to the plant. CDWR has, however, a continuing obligation to the Kern River Gas Transportation Company ("KRGT") under the TSA which by now Sunrise should have arranged to take back effective July 1, 2012 pursuant to the Reassignment Agreement.

Contrary to the assertions in your letter, as a credit-worthy party, CDWR was never required to provide and has never provided any form of "written guarantee" or any other type of financial security to KRGT for the term of the TSA through 2018. The TSA was a fifteen-year agreement that CDWR took over under the Consent to Assignment and Reassignment Agreement. As you have acknowledged, it was always the intent of CDWR and Sunrise that any obligation of CDWR related to the TSA ended with the termination of the PPA and that Sunrise would take over all capacity and natural gas obligations thereafter. In fact, the Reassignment Agreement specifically states: "WHEREAS, the term of the Third TSA is longer than the term of the Power Contract and it is the intent of the Parties that CDWR's rights to firm transportation under the Third TSA extend only to the term of the Power Contract." The fact that Sunrise has not satisfied the creditworthiness requirements of KRGT prevents CDWR from being relieved of the obligations arising under the TSA.

CDWR has diligently attempted to meet with both KRGT and Sunrise to facilitate the release of the capacity back to Sunrise and has taken no action which prevented or impaired Sunrise's ability to comply with the terms of the Reassignment Agreement.
CDWR has no ability to affect the creditworthiness of Sunrise, nor does CDWR have any ability or legal obligation to secure the approval of Sunrise by KRGT so that Sunrise can

assume the TSA, as you assert. Sunrise must make its own arrangements with KRGT in order to effect the reassignment of the TSA and permanently take over the capacity obligation.

CDWR has no authority to provide credit backing for Sunrise under a short term or temporary capacity release as proposed by you in the June 26, 2012 letter. Sunrise has access to financial institutions, business partners or affiliates that can provide whatever credit assurances are necessary. Your assertion that if CDWR were to agree to this offer, Sunrise "would use its best efforts to cause KRGT to consent to a permanent assignment of the TSA to Sunrise," does not instill confidence since it is apparent to CDWR that Sunrise has made no effort to do that to date.

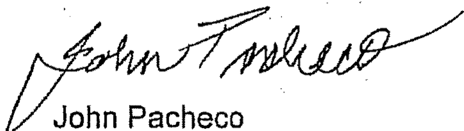
Your offer to accept a pre-arranged temporary release for thirteen months does not relieve CDWR from its capacity obligation under the TSA, which is the intent of the Reassignment Agreement. CDWR is a state governmental entity and after June 30, 2012, has only three remaining power contracts, two of which are wind generators. The TSA is not necessary for continuing operations and it provides no benefit to California ratepayers, which is a primary directive under CDWR's enabling legislation, Water Code section 80000, *et seq*.

As stated in CDWR's letter to you dated June 22, 2012, the failure of Sunrise to permanently take over the TSA effective July 1, 2012, is a breach of the Reassignment Agreement and has left CDWR with an unintended but continuing financial obligation to KRGT through 2018. CDWR will take reasonable action to mitigate its losses which, at this point, include the limited options of offering the capacity for temporary or permanent release. To that end, the TSA has been placed up for temporary release on the KRGT RAPIDS portal. CDWR will look to Sunrise for any shortfall between CDWR's financial obligation to KRGT and the bid price received for the released capacity.

Nothing herein constitutes a waiver of CDWR's rights under the PPA, TSA and Reassignment Agreement and CDWR expressly reserves all rights, objections, and claims it may otherwise have.

If you have any questions, please contact me at (916) 574-1288.

Sincerely,



John Pacheco
Acting Deputy Director

cc: (See attached page)

Mr. Ryan Miller
San Diego Gas and Electric
8306 Century Park Court
San Diego, CA 92123

Ms. Sue Garcia
San Diego Gas and Electric
8306 Century Park Court
San Diego, CA 92123