BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Integrate and Refine Procurement Policies and Consider Long-Term Procurement Plans	Rulemaking 12-03-014 (Filed March 22, 2012)

JOINT REPLY TO RESPONSES TO PETITION FOR MODIFICATION OF DECISION 14-03-004 SEEKING NOTICE AND COMMENT OF SDG&E's PROPOSED PROCUREMENT PLANS

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JOINT REPLY TO RESPONSES TO PETITION FOR MODIFICATION OF DECISION 14-03-004 SEEKING NOTICE AND COMMENT OF SDG&E's PROPOSED PROCUREMENT PLANS

Pursuant to Rule 16.4(g) of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure and an email from Administrative Law Judge David Gamson dated June 24, 2014 granting the request of Sierra Club, California Environmental Justice Alliance ("CEJA") and Vote Solar Initiative (collectively "Joint Parties") to reply to responses to the Joint Parties' Petition for Modification of Decision 14-03-004 ("Petition") by June 26, 2014, the Joint Parties timely file the following reply to the responses filed on June 23, 2014.

DISCUSSION

I. Deferral of Robust and Transparent Public Review of SDG&E's Proposed Procurement Plans to a Subsequent Application Proceeding is Contrary to the OIR in this Rulemaking and Ignores the Critical Role of Procurement Plans in Determining Future Procurement Outcomes.

As discussed in the Petition, SDG&E's proposed procurement plans do not meet the plain requirements of the Commission's Track 4 Decision, D.14-03-014. Rather than respond to the numerous inconsistencies that Joint Parties identified, SDG&E urges rejection of the Petition on the grounds that parties will have an opportunity to object when "proposed contracts with specific resources will be submitted for Commission approval through a formal application filing."[1] SDG&E's contention that parties need not be afforded transparent and formal review now because there will be a later opportunity to respond to a separate procurement application fails for several reasons. First, as the Commission stated in the Order Instituting Rulemaking ("OIR") for this proceeding, the appropriate forum to address procurement plan consistency is within the Long Term Procurement Plan proceeding, not a subsequent utility procurement application. Second, a future proceeding is unlikely to provide parties with a meaningful opportunity to contest SDG&E's proposed plan or impact the outcome of the specific procurement proposal because the plans would already have been approved by Energy Division. Especially because SDG&E's procurement plan seeks approval to bilaterally procure a single

[1] SDG&E Response at p. 3.

specific fossil-fuel facility, failure to address inconsistencies at this juncture will undeniably prejudice other potential providers who are kept from competing to fill authorized procurement amounts as well as advocates seeking optimal outcomes for ratepayers and the environment.

The review of procurement plans falls squarely in the scope of the Long Term Procurement Proceeding, and disputes should transparently and formally be considered and resolved here. Importantly, as summarized by the Order Instituting Rulemaking, the purpose of this Proceeding is to do precisely what the Petition is requesting:

> establish[] up-front standards for the IOUs' procurement activities and cost recovery **by reviewing and approving procurement plans**. This obviates the need for the Commission to conduct after-the-fact reasonableness reviews for the resulting utility procurement transactions that are **in compliance** with the upfront standards established in the approved procurement plans.[2]

Consistent with the purpose of this Proceeding and the requirements of Section 454.5 of the Public Utilities Code, the Petition is requesting a process to ensure that the procurement plans are consistent with the "up-front standards" the Commission established in D.14-03-004. The concerns raised in the Petition, such as the requirement for an all-source RFO, Loading Order compliance, and consideration of transmission upgrades that avoid the need to procure at maximum authorized levels, are fundamental to defining the nature and scope of future procurement and cannot be legitimately be postponed to a subsequent proceeding. SDG&E's effort to punt formal review of plan consistency with D.14-03-004 to a separate procurement application should be rejected because it would result in the very "after-the-fact reasonableness reviews" the Long Term Procurement Proceeding is expressly designed to avoid.

SDG&E's assertion that parties will have a meaningful opportunity to participate and impact a future procurement application is also not credible given that SDG&E now seeks Energy Division approval to fill its maximum "any resource" procurement authorization though a bilateral contract with a single specific gas plant, the Carlsbad Energy Center.[3] Were SDG&E

[2] Order Instituting Rulemaking, R.12-03-014 (Mar. 22, 2012) at p. 3 (emphasis added).
[3] See SDG&E Conventional Procurement Plan at pp. 2-3.

to already have received Energy Division approval to procure only the Carlsbad facility to meet its entire any resource authorization, efforts by stakeholders to require SDG&E to consider other procurement options at the application stage could be foreclosed. Where the procurement of a specific resource is already predetermined and approved, participation at the time of a procurement application is illusory. The utility application stage therefore offers little potential relief to parties. It is the procurement plans that dictate future procurement outcomes and the procurement plans – not after-the-fact applications seeking approval of an already negotiated contract with a preselected facility – that must be subject to transparency and the opportunity for formal stakeholder input.[4] The only meaningful opportunity to remedy the deficiencies in SDG&E's procurement plans is now.

II. SDG&E's Disregard for the Decision's Requirements Justify the Petition's Request for Increased Oversight and Transparency.

SDG&E's assertion that the Petition should be rejected because D.14-03-004 does not currently require formal notice and comment ignores both the purpose of a Petition for Modification and the severe shortcomings in SDG&E's own procurement plans. A Petition for Modification is intended to change a decision and can be justified based on new or changed facts.[5] "Any resource" procurement authorizations and implementing procurement plans that ensure fair treatment of different types of resources are relatively new to the Commission. At the time D.14-03-004 was decided, the Commission may have assumed that procurement plans would be non-controversial, would not foreclose outcomes in subsequent formal processes, and that SDG&E would make a good-faith effort to comply with the clear terms of the Decision. None of this has come to pass. The numerous and fatal inconsistencies of SDG&E's procurement plans with D.14-03-004, which SDG&E makes no effort to rebut, coupled with the

[4] Similarly, by seeking approval for "up to" rather than "at least" 200 MW of preferred resources and to count existing programs toward its preferred resource procurement requirements, Energy Division approval of the proposed preferred resource plan will dictate the extent of future preferred resource procurement.
[5] Commission Rules of Practice and Procedure, Rule 16.4(a) & (b).

significance of Energy Division plan approval in determining future procurement outcomes, now make clear that transparency and formal stakeholder input must be provided at this critical juncture.

III. Joint Parties Agree That Review of All Future Procurement Plans Should Be Subject to Additional Transparency.

SDG&E's complaints that "[t]he Joint Parties envision a more stringent process for SDG&E than for SCE" are incorrect.[6] As noted in the Petition, "[t]he Joint Parties have not requested review of SCE's procurement plan because its Track 1 procurement plan, which it will follow for Track 4 procurement, was previously approved."[7] In fact, the Joint Parties agree with the response of Terra-Gen Power, which generally calls for "greater transparency in the procurement process, including the Procurement Plan and the conduct of the RFOs."[8]

Procurement plans are not confidential and due to their importance should be subject to greater transparency. In Decision 06-06-066, the Commission specifically determined that evaluation guidelines for competitive solicitation should be public.[9] The Decision also provides that "[g]eneral discussions of RFO procurement, products being sought through RFO and criteria used to evaluate RFO" should be public.[10] Despite the non-confidential character of procurement plans, Joint Parties were forced to repeatedly request the plans and file a Public Records Act request before finally being provided the plans by Energy Division. In the future, proposed procurement plans should be served to all interested parties at the time they are provided to Energy Division by the IOUs.

The Joint Parties also note that unlike SDG&E's procurement plan, SCE's includes an all-source RFO. To the extent SDG&E's procurement plans are currently the focus of Joint Parties' concern, this is because SDG&E's disregard for the basic requirements of D.14-03-004

[6] SDG&E Response at p. 4.
[7] Joint Petition at p. 1, n. 1.
[8] Response of Terra-Gen Power at 2.
[9] D.06-06-066, Appendix 1 at p. 18.
[10] D.06-06-066, Appendix 1 at p. 20.

and effort to overprocure fossil fuels at significant ratepayer and environmental expense has highlighted the need for additional transparency and formal public review at this stage of the procurement process.

IV. Energy Division's Eleventh Hour Informal, Truncated Comment Process Does Not Moot the Petition.

After Joint Parties filed their June 12, 2014 Petition to Modify, on June 17, 2014, Energy Division sent SDG&E's proposed procurement plans to the service list and requested that stakeholders submit comments by June 24, 2014 to only to Ms. Chow and Mr. Randolph at Energy Division.[11] Energy Division rejected multiple requests to extend the informal comment period to July 1, 2014.[12] SDG&E's assertion that this truncated, informal comment process moots the Joint Petition does not withstand scrutiny.

Contrary to SDG&E's assertion, Energy Division's informal process fails to provide the relief requested by the Petition and therefore does not render the Petition moot. First, Energy Division has not provided a formal process by which parties submit comments on the record. As recognized in NRDC and CEERT's response, "there is *no* comparison between 'informal' comments submitted to only two Energy Division personnel and 'formal' comments or responses that are fully noticed, publicly filed, and considered in a Commission decision vetted and voted out in a public meeting."[13] Second, Energy Division provided only five business days to parties to submit informal comments and made clear that comments submitted after this date "will not be reviewed by Energy Division."[14] This brief and inflexible comment period falls far short of the minimum of 15 days requested in the Joint Petition and analogous Commission deadlines for comments on proposed decisions, advice letters, and motions.[15]

[11] See June 17 Email from Lily Chow, Energy Division to Service List, R.12-03-014.
[12] See June 20 Email from Lily Chow, Energy Division to Service List, R.12-03-014.
[13] Joint Response of NRDC and CEERT at pp. 7-8.
[14] See June 17, June 20 Emails from Lily Chow, Energy Division to Service List, R.12-03-014.
[15] See, e.g., Commission Rules of Practice and Procedure, Rule 2.6 (allowing 30 days to protest an application); Rule 11.1 (allowing 15 days to respond to a motion).

Indeed, Energy Division's rejection of multiple requests for additional time to comment demonstrates the inadequacy of Energy Division's rushed process and its failure to meet the transparency and process concerns raised in the Petition.

Third, the Petition was filed with the justification that SDG&E's procurement plans are fatally inconsistent with D.14-03-004 such that formal notice and comment is required "to facilitate procurement plan compliance, provide transparency in procurement plan approval, and restore public confidence in the approval process for plans with significant implications for ratepayers and the environment."[16] Energy Division's email is silent as to the basis for providing truncated informal comment and improperly suggests that stakeholders will have "full" participation opportunities at the utility application stage. Accordingly, the Petition is also not moot because reliance on Energy Division's informal process deprives Joint Parties of the benefit of Commission reasoning, clarification and a final determination on the serious substantive and procedural concerns that justify the basis for the requested relief.

V. As Recommended by NRDC and CEERT, the Commission Should Hold an All-Party Meeting and Subject Procurement Plan Approval to a Tier 3 Advice Letter.

In addition to requiring a public, on-the-record formal comment process as requested in the Petition, the Joint Parties strongly support NRDC and CEERT's recommendations for a Tier III advice letter and all-party meeting. In emails following filing of this Petition, Energy Division appears to have minimized the significance of procurement plan approval and its own obligations under D.14-03-004. In providing a curtailed informal review process, Energy Division incorrectly characterized its scope of review as "limited to determining whether SDG&E has met the requisite conditions to submit a procurement application."[17] Review is not limited to "conditions to submit," such as whether submission is timely or includes "information

[16] Joint Petition at p. 1.
[17] See June 20 Email from Lily Chow, Energy Division to Service List, R.12-03-014.

listed in Appendix B of the decision," but rather whether the substance of the procurement plan is "consistent" with the requirements of D.14-03-004, including the requirement that SDG&E "shall issue an all-source Request for Offers (RFO) for some or all capacity authorized by this decision."[18] Like SDG&E, it appears that Energy Division also fails to appreciate the limited role of post-hoc utility procurement applications, where, as here, the underlying procurement plan informing the utility application already dictates the specific resource to be procured and the OIR explicitly recognizes the disputes over procurement plan standards must be resolved within the Long Term Procurement Plan proceeding.[19]

Based on the limited response provided in the June 20themail, it is unclear w hat Energy Division understands to be both its obligations under D.14-03-004 and the requirements of the Decision itself. A notice and comment process alone does not require Energy Division to provide reasoning for its approval nor provide parties an avenue to seek redress before the Commission. Accordingly, there will be no transparency or explanation for the basis of Energy Division's resolution of the many defects in the procurement plans identified by parties. Direct Commission oversight and approval of proposed procurement plans is needed. A Tier III advice letter remedies these significant process concerns by requiring Energy Division to provide a draft resolution explaining the basis for plan approval, the opportunity for party comment, and ultimate approval, denial, or alteration by the Commission in a publicly noticed meeting.

[18] D.14-03-014, Ordering Paragraph 7. *See also id.* at p. 113 ("The SDG&E procurement plan **shall** meet the procurement plan requirements as required for SCE in D.13-02-015, and **be consistent with this decision**.") (emphasis added).

[19] Email dated June 20, 2014 from Lily Chow, Energy Division to parties to R.12-03-014 service list (stating that "Parties will have the opportunity to fully participate in the Commission's formal process once SDG&E's procurement application is submitted.").

CONCLUSION

For the reasons stated above and in the Joint Parties' Petition, the Joint Parties request that the Commission grant the Petition for Modification of D.14-03-004 and further require the plans be approved through a Tier 3 advice letter as recommended by NRDC and CEERT.

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Respectfully submitted,

/s/

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