

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Application of the California
Commission for Approval of Electric
Program Investment Charge Proposed
2012 through 2014 Triennial
Investment Plan.

And Related Matters.

Application 12-11-001
(Filed November 1, 2012)

Application 12-11-002
Application 12-11-003
Application 12-11-004

**REPLY BRIEF
OF THE DIVISION OF RATEPAYER ADVOCATES**

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I. INTRODUCTION

In accordance with *Administrative Law Judge's Ruling Cancelling Evidentiary Hearings and Amending Proceeding Schedule* ("Ruling"), the Division of Ratepayer Advocates ("DRA") hereby submits this reply brief in response to the California Energy Commission ("CEC"), Pacific Gas and Electric Company ("PG&E), San Diego Gas & Electric Company ("SDG&E"), and Southern California Edison Company's ("SCE") (collectively referred to herein as "Administrators") opening briefs filed on March 15, 2013.

Specifically, DRA provides responses to the following issues raised in opening briefs:

- DRA does not oppose certain in-house funding as long as the funds are built into project business cases and all funds are used for Electric Program Investment Charge ("EPIC") activities.
- The EPIC Administrators should refund unspent funds that are not encumbered at the end of each triennial investment cycle to ratepayers.
- The Commission should adopt and incorporate the annual report outline and standardized template provided in the investor-owned utilities ("IOU") Administrators' opening briefs.¹
- The Commission should allow the Administrators the flexibility to choose metrics on a project-by-project basis. However, the Administrators must identify those metrics in the annual report for each project.
- The Commission should require competitive bids whenever possible.
- The Commission should Commission grant the Commission's Energy Division Director ("Director") the ability to temporarily suspend or terminate any future IOU EPIC project if he/she determines that a project is inappropriate and contrary to the public interest.

¹ PG&E Opening Brief, Ex. 1; SDG&E Opening Brief, Att. A; SCE Opening Brief, Ex A- B; CEC Opening Brief, Att. A.

- The Commission should require the CEC modify its approach to intellectual property (“IP”) so that ratepayers receive the benefits of any IP created from EPIC funds.

II. DISCUSSION

A. Expenditures for certain in-house purposes should be limited to work necessary to execute specific EPIC projects.

In the February 11, 2013 opening comments, DRA recommended that the “Commission deny any request that is earmarked for an administrator’s internal use outside the 10% administrative cap,”² as provided for in Decision (“D.”) 12-05-037. DRA’s recommendation was primarily directed at PG&E’s Triennial Investment Plan Project No. 4: Expand lab to test and pilot facilities for new energy storage systems. As DRA noted, PG&E’s project description made it clear that the funds would not be used for a specific project, but rather as a general funding source for future, unknown needs.³ DRA argued that if PG&E anticipates it may need “new hardware [that] cannot be identified until the new storage technologies are closer to being available for testing”⁴ then the appropriate course of action is for PG&E to build those expenditures into its EPIC project business cases.⁵

Following opening comments, DRA and PG&E had the opportunity to further discuss the issue, and PG&E agreed that it would withdraw Project No. 4 “as a separate project and instead integrate its scope and costs into other specific EPIC energy storage projects, either in this investment plan and cycle or in subsequent cycles.”⁶ PG&E confirmed its withdrawal of Project No. 4 in its reply comments filed February 19, 2013. DRA also had the chance to discuss in-house work with the other Administrators on a more general level at a meeting on March 12, 2013. As SCE notes in its opening brief,

² DRA Opening Comments, p. 5.

³ DRA Opening Comments, p. 5.

⁴ PG&E Response to ALJ January 28, 2013 Ruling, Attachment 1, pp. 4-5.

⁵ DRA Opening Comments, p. 6.

⁶ PG&E Reply Comments, p. 5.

“DRA clarified that it has no objection to the IOUs using EPIC funds for in-house work as long as the funds may be traced to EPIC projects and do not duplicate funding received from other sources, such as a general rate case.”⁷ DRA generally agrees with SCE’s characterization of the discussion and provides further clarification.

DRA does not object to the IOUs using EPIC funds for certain in-house purposes that are necessary to execute specific EPIC projects. In fact, DRA stated that the IOUs should “build those expenditures into its EPIC project business cases.”⁸ However, it is DRA’s position that all EPIC funds must be spent on EPIC activities, and consistent with the policies and guidelines established in D.12-05-037. The Commission granted the IOUs 20% of the EPIC funds for the explicit purpose of conducting technology demonstration and deployment activities; any attempt to use the funds for other purposes should clearly be prohibited. Therefore, DRA agrees with and supports SCE’s assurance that “any charges to its EPIC account may be traced to work performed on an EPIC project. SCE will not allocate any EPIC funds to capital or operational purposes that are not part of an EPIC project. In addition, SCE will not allocate general rate case funds to work that it charges to its EPIC account.”⁹ DRA urges the Commission to apply this same standard to the other IOU Administrators.

B. Unencumbered Funds Should Be Refunded to Ratepayers at the End of Each Triennial Investment Cycle.

Contrary to DRA and SCE’s position,¹⁰ SDG&E argues that both encumbered and unencumbered funds should roll over into the subsequent investment cycle. And, after the third triennial investment cycle, if any unspent, unencumbered funds remain only then would SDG&E return funds to ratepayers.¹¹ DRA disagrees with this approach. Under

⁷ SCE Opening Brief, p. 9.

⁸ DRA Opening Comments, p. 6.

⁹ SCE Opening Brief, p. 9.

¹⁰ DRA Reply Comments, p. 2; SCE Opening Brief, p. 18.

¹¹ SDG&E Opening Brief, p. 25.

SDG&E's proposal, any one Administrator could hypothetically sit on a large amount of unspent funds that are not encumbered until the EPIC program had concluded.

The Commission should order the Administrators to refund unencumbered funds to ratepayers at the end of each triennial investment cycle. For funds that are encumbered but remain unspent at the end of each triennial investment cycle, the Commission should allow the Administrators to roll over those funds to the subsequent triennial investment cycle. As SCE states, "[this] would ensure that ratepayers receive timely benefits while recognizing that research, development, and demonstration projects require flexible schedules. It would also protect the Administrators from making decisions solely due to the impending end of cycle."¹² In reply comments, DRA similarly argued that allowing certain unspent funds to roll over "abates the incentive to exhaust all EPIC funds each cycle regardless of need."¹³ Ratepayers are providing a substantial investment into the Commission's EPIC program. To the extent unspent funds are not encumbered, ratepayers should have those unencumbered investments returned to them.

C. The Commission Should Adopt an Annual Report Outline and Template.

In accordance with Ordering Paragraph ("OP") 16 of D. 12-05-037, the Commission requires the Administrators to file an annual report on February 28th of each year starting in 2013 and ending in 2020. The annual reports shall be filed with the Commission's Energy Division Director and served on all parties in the most recent EPIC proceeding and IOU general rate cases.¹⁴ In opening comments, DRA stressed the need to draft and adopt a standardized template for the EPIC annual report.¹⁵ The annual reports will be the primary document for the Commission and stakeholders to review to make sure the Administrators' projects are achieving the intended ratepayer benefits. Thus, the Commission needs the document to be informative, yet not so burdensome that

¹² SCE Opening Brief, p. 18

¹³ DRA Reply Comments, p. 2.

¹⁴ D.12-05-037, pp. 105-106.

¹⁵ DRA Opening Comments, p. 14.

it makes the review process difficult. SCE previously stated that “[t]he Administrators agree and have collaboratively drafted a common outlines for the annual report and template for discussing individual projects.”¹⁶

However, SCE¹⁷ as well as SDG&E, now do “not believe it is necessary for the Commission to order the exact form of the annual report; nevertheless, if the Commission decides [to] issue such an order, SDG&E [and SCE] requests that it adopt the outline and template developed by the EPIC Administrators.”¹⁸ DRA disagrees that it is unnecessary for the Commission to adopt an exact form of the annual report. DRA participated in the collaborative process to develop an annual report outline and standardized template, continues to support them, and recommends that the Commission adopt them in its final decision on this proceeding. As PG&E states, “[a] common template will facilitate consistency across the program administrators in reporting out on their EPIC investments while providing the Commission with information on project results.”¹⁹ Further, as previously explained, adjustments to the standardized template can be made through the course of the EPIC program, if necessary.²⁰

D. Metrics Should be Established at the Beginning of Each Project, and Results Shown in the Annual Report for Each Project.

SDG&E points out that Ordering Paragraph (“OP”) 12(c) identifies metrics against which the Administrators’ investment plans success should be judged.²¹ SDG&E goes on to state, “the word ‘success’ in this context is misleading because there are no ‘successful’ or ‘unsuccessful’ EPIC plans or EPIC demonstration projects. Instead, an EPIC Plan (or demonstration project) should be deemed ‘successful’ as long as it

¹⁶ SCE Opening Briefs, p. 20.

¹⁷ SCE Opening Brief, p. 20.

¹⁸ SDG&E Opening Brief, p. 27.

¹⁹ PG&E Opening Brief, p. 8.

²⁰ DRA Opening Comments, pp. 14-15.

²¹ D.12-05-037, OP 12, pp. 103-104.

produces useful knowledge to support smart grid development.”²² SDG&E further argues that the Commission should not “order exact metrics that EPIC Administrators must include in their annual report because not every metric will apply to all EPIC Plans or projects.”²³ PG&E similarly notes that “not all metrics are applicable to each project.”²⁴ While DRA generally agrees that the Commission should not be overly prescriptive in applying generic metrics to such a broad array of projects, merely deeming an EPIC plan and/or project “successful” based on a qualitative determination of “useful knowledge” is inadequate. To allow for meaningful evaluation of projects, Administrators should be required to report on the applicable metrics ordered in OP 12 of D.12-05-037.²⁵ However, the Commission has additional metrics that it uses to monitor progress in specific areas such Smart Grid, demand response, energy efficiency, etc. In fact, SDG&E notes that the Administrators have “collaborated to create... [a] list of metrics, which may be used to evaluate EPIC Plans or programs” and which “are the same or similar to metrics used in other Commission proceedings,” for simplicity.²⁶

As a balance between the need for metrics to measure success, and the risk of adopting overly prescriptive metrics that do necessarily apply to particular projects, DRA recommends that the Administrators be given the flexibility to select metrics on a project-by-project basis. However, the Commission should require the Administrators to establish metrics for each individual project at the beginning of each project, and present their selected metrics in their annual reports along with results that detail how the projects are meeting those metrics. If the Commission finds it necessary to order the IOUs to present a formalized list of metrics, then DRA agrees with SDG&E that “it use the

²² SDG&E Opening Briefs, p. 15.

²³ SDG&E Opening Briefs, p. 28.

²⁴ PG&E Opening Brief, p. 9.

²⁵ D.12-05-037, OP 12, pp. 103-104.

²⁶ SDG&E Opening Brief, p. 27.

nonexclusive ‘grab bag’ list of metrics as an illustrative example of the various metrics that EPIC Administrators may draw from when drafting their annual report.”²⁷

E. The Commission Should Require Competitive Bids Whenever Possible.

SDG&E’s opening brief states, “[c]ontrary to suggestions made by DRA, it is unnecessary for the Commission to involve itself in each of the dozens of EPIC RFP [request for proposals] solicitations and evaluations. In addition, it is not necessary for the Commission to order the IOUs to conduct their RFPs in a specific manner.”²⁸

SDG&E’s comments are unfounded and misplaced. DRA’s recommendations are not new suggestions, but reiterations of the Commission’s orders outlined in D.12-05-037, where the Commission plainly stated, “on the issue of competitive bidding, this is generally our selection process of choice in all areas.”²⁹

PG&E similarly states that “the utilities need the flexibility to sole-source where the new technologies are unique and available only from a single vendor or supplier.”³⁰ While the IOU Administrators may need some flexibility to enter into sole-source contracts, the Commission already identified the need for flexibility when it stated:

Projects should be selected for award of EPIC funding on a competitive basis unless the administrators have specifically detailed and justified exceptions to this in their approved investment plans.³¹

DRA supports the degree of flexibility outlined in D.12-05-037, which allows the Administrators to award some EPIC funds outside a competitive solicitation process for specific and justified purposes. The Commission made it clear that “[t]hese exceptions to competitive bidding should be justified separately and clearly for a specific purpose.”³²

²⁷ SDG&E Opening Brief, p. 28.

²⁸ SDG&E Opening Brief, p. 21.

²⁹ D.12-05-037, p. 36.

³⁰ PG&E Opening Brief, p. 4.

³¹ D.12-05-037, Finding of Fact 18, p. 93.

³² D.12-05-037, p. 37.

The Commission goes on to state “we will also consider whether there should be a separate approval process required for any contract or grant not awarded through a competitive process, to set a higher standard for the use of a non-competitive process.”³³ DRA urges the Commission to reaffirm, in its final decision, that competitive bids should be the selection processes of choice in all EPIC areas, and that justification must be shown for any exceptions.

F. Clarification of DRA Opening Brief Regarding Allowing the Energy Division Director to Temporarily Suspend or Terminate Projects.

On March 17, 2013, DRA and the CEC held a brief teleconference concerning DRA’s opening brief recommendation to allow the Energy Division Director or Energy Division to temporarily suspend or terminate projects.³⁴ After further discussion with the CEC, DRA clarifies its recommendation to read: “DRA recommends that the Commission grant the Commission’s Energy Division Director (“Director”) the ability to temporarily suspend or terminate any future IOU EPIC project if he/she determines that a project is inappropriate and contrary to the public interest.”

G. The Commission Should Ensure Ratepayers Will Benefit from Any Intellectual Property Developed.

DRA previously explained that the CEC should be required to protect ratepayer funded intellectual property in all situations including “market facilitation-related activities or general energy research.”³⁵ DRA’s comments called for the CEC to use its proposed modified California Solar Initiative (“CSI”) Intellectual Property (“IP”) terms in all EPIC projects.³⁶ The CEC says that “a problem with [DRA’s] approach is that the Energy Commission may execute a few work-for-hire contracts to assist the Energy

³³ D.12-05-037, p. 37.

³⁴ DRA Opening Brief, p. 5.

³⁵ DRA Reply Comments, p.4.

³⁶ Id.

Commission in administering the program.”³⁷ The CEC has apparently overlooked the fact that one of the modifications to the CSI IP terms it proposed was to cover such work-for-hire contracts.³⁸ DRA agreed with the CEC’s general approach and proposed modifications to the CSI IP language, including the modification to retain IP ownership in work-for-hire contracts,³⁹ and thus the issue of work-for-hire contracts for administration purposes has been resolved.

DRA’s concern was not that the CSI IP language should be used in all CEC EPIC awards/contracts.⁴⁰ The problem with the CEC’s proposed approach is that it would exempt far more than work-for-hire contracts. The CEC stated: “[t]hese provisions should not be applied in market facilitation-related activities or general energy research geared toward new knowledge.”⁴¹ Such a broad exception defeats the purpose of IP protection. Absent a compelling reason the Commission should resist the CEC’s call for allowing broad exceptions to the applicability of its proposed IP protections. The CEC fails to explain what “activities” might be market facilitation or what distinguishes “general energy research” from “EPIC-funded R&D projects.” The line between “EPIC-funded R&D projects” and “general energy research” is not clear from the CEC’s proposal. However, it is clear that an outside party will want its project to be defined as “general energy research” if it gets to keep the IP rights. The Commission should not allow such ambiguity.

The Commission should order the CEC to modify its approach so that ratepayers receive the benefits of any IP created from EPIC funds. The CEC’s modifications to the CSI IP language should cover most reasonable exceptions and maintain this simple principle. DRA does not see a need to constrain the CEC in its ability to flexibly apply

³⁷ CEC Opening Brief, pp. 9-10.

³⁸ The California Energy Commission’s Clarifying Responses to Its Electric Program Investment Charge Proposed 2012 Through 2014 Triennial Investment Plan (“CEC Clarifying Responses”), February 4, 2013, p. 55.

³⁹ DRA Reply Comments, p. 4; CEC Clarifying Responses, p. 56.

⁴⁰ DRA Reply Comments, p. 4.

⁴¹ CEC Clarifying Responses, p. 55.

the CSI IP language to the individual work or projects. The CEC should be allowed flexibility as long as the CEC's application of the modified CSI IP language is in keeping with the basic principle that ratepayers will benefit from any IP developed.

III. CONCLUSION

Although DRA and the EPIC Administrators could not come to consensus on all issues, DRA applauds the Administrators for the collaboration shown in this proceeding. For the reasons stated above, DRA urges the Commission to adopt the recommendations made herein.

Respectfully submitted,

/s/

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